

**DISTRICT OF COLUMBIA  
BOARD OF ELECTIONS**

In Re:

Elissa for DC, and  
Elissa Silverman,

Petitioners.

Administrative Hearing  
Order No. 22-028  
Review of OCF Order  
In 2022 FI-006

**MEMORANDUM OPINION AND ORDER**

This matter came before the Board of Elections (“Board”) on November 4, 2022 and December 12, 2022 at meetings convened to address a request by At-Large Councilmember Elissa Silverman and the Elissa for DC Principal Campaign Committee (“Elissa for DC”) (collectively, “Petitioner(s)”) for Board review of an October 27, 2022 order (“Order”) issued by the Office of Campaign Finance (“OCF”). Board Chair Gary Thompson and Members Mike Gill and Karyn Greenfield presided over the hearing. The Petitioners were represented by Jason Downs, Esq., and OCF was represented by its General Counsel, William SanFord, Esq. This Opinion and Order memorializes our November 4, 2022 ruling on procedural matters and our December 12, 2022 decisions ruling on an evidentiary issue and reversing OCF’s findings of a campaign finance violation.

**Background**

***Proceedings Before OCF***

On March 18, 2022, Petitioner Silverman, an At-Large Member of the Council of the District of Columbia, registered Elissa for DC with OCF in support of her re-election to her At-Large Council seat. As an independent candidate, Petitioner Silverman would not be a candidate

in any June 21, 2022 Primary Election contest, but rather would only appear as a candidate in the At-Large Council contest in the November 8, 2022 General Election.

The Petitioners submitted the Elissa for DC registration for processing in OCF's Fair Elections Program ("FEP").<sup>1</sup> Candidates or committees certified by OCF under the FEP are eligible to receive public funds to supplement other funding.<sup>2</sup> Elissa for DC was subsequently granted FEP certification by OCF and began receiving public funding.

All campaign funds are subject to expenditure restrictions set forth at 3 DCMR § 3013.1 *et seq.* Additional limitations reflecting other FEP statutory spending restrictions are described in 3 DCMR § 4209.1 *et seq.* While both sets of expenditure restrictions broadly state that campaign funds must be used for campaign purposes, they specify certain categories and types of impermissible expenses, such as the use of campaign funds for personal needs (*e.g.*, medical expenses other than campaign employee health care benefits) and gifts (other than printed campaign materials such as signs, brochures, buttons, or clothing). As discussed below, the FEP regulations include limitations on the use of funds from one campaign to benefit another through, *inter alia*, coordination between campaigns. In addition, in-kind contributions are subject to limits on contributions from one source and reporting requirements.

On August 23, 2022, Karim Marshall, an opponent of Petitioner Silverman in the At-Large Council race, sent OCF an "Investigation Request," alleging that the Petitioners committed certain campaign finance violations. OCF deemed Mr. Marshall's submission a complaint ("Complaint").<sup>3</sup>

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<sup>1</sup> See <https://fairelections.ocf.dc.gov/public/regisrantDisclosureDetails/97> for information on the registration. The FEP can be contrasted with OCF's "Traditional Program" that, although it also serves to monitor and enforce campaign finance compliance, does not offer candidates any public funding.

<sup>2</sup> D.C. Official Code § 1-1163.32a *et seq.*

<sup>3</sup> See Petitioners' *Request For Hearing De Novo Under 3 D.C. Mun. Regs. § 3709.11* ("Petitioners' Review Request"), Exhibit ("Exh.") 2.

Under the campaign finance statutes and regulations, OCF, through its Director, is authorized to investigate complaints such as the one submitted by Mr. Marshall through a two-step process.<sup>4</sup> First, OCF initiates a preliminary investigation. The campaign finance regulations require that, within ten (10) days of its commencement of a preliminary investigation into a violation, OCF must provide the target of the investigation with the complaint and an offer of “*an opportunity*” to respond to its allegations. The regulations also require that the target of the investigation must receive notice of the investigation’s existence and “*the general nature of the alleged violation[.]*”<sup>5</sup> The regulations further specify that the purpose of the preliminary investigation is to determine whether there is “reasonable cause” to bring a full investigation.<sup>6</sup> Such reasonable cause determination must be made within 30 days of the initiation of the preliminary investigation.<sup>7</sup> In other words, a prompt response to a complaint contending a lack of “reasonable cause” allows the target of an investigation to attempt to head off further proceedings.

Second, if OCF determines, based on its preliminary investigation, that there is “reasonable cause” to launch a full investigation, OCF is then authorized to utilize a wide range of investigatory tools to gather evidence, including subpoena power and the authority to issue questions to be answered in seven (7) days to “any person.”<sup>8</sup> Unless the Board grants it an extension, OCF must complete its investigation within ninety (90) days of the filing of a complaint.<sup>9</sup> At the end of the investigation, OCF must make a determination as to whether there is sufficient evidence of a

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<sup>4</sup> Violations of the FEP are subject to the same investigation and enforcement provisions as are applied to suspected violations of Traditional Program requirements. *See* 3 DCMR § 4216.1.

<sup>5</sup> 3 DCMR § 3703.6 (emphasis added).

<sup>6</sup> *See generally* 3 DCMR §§ 3703.1 and 3704.1.

<sup>7</sup> 3 DCMR § 3703.4.

<sup>8</sup> 3 DCMR § 3704.2-4.

<sup>9</sup> D.C. Official Code §1-1163.03(c)(5) and 3 DCMR § 3704.7.

violation of the campaign finance laws. If there is a violation, OCF takes enforcement action; if not, it dismisses the matter.<sup>10</sup>

In this case, Mr. Marshall's Complaint stated that

SILVERMAN conducted a telephonic push poll of Ward 3 voters. Among the questions asked was a ranked preference poll regarding candidates in the race for the Ward 3 Councilmember. A race in which SILVERMAN was not a candidate.

*Id.* at p. 3, ¶ 18. The Complaint alleges that Petitioners used the poll results to encourage two unnamed Ward 3 Primary Election candidates (later identified as Tricia Duncan and Benjamin Bergmann) to withdraw and to endorse a third unnamed Ward 3 candidate (later identified as Matthew Frumin).<sup>11</sup>

The Complaint claims that Elissa for DC's use of the poll violated FEP statutory requirements regarding the use of one campaign's funds for another campaign that provide, in relevant part, that a "participating candidate shall not make expenditures for ... contributions, loans, or transfers to another candidate's political committee[.]"<sup>12</sup> The Complaint also asserted

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<sup>10</sup> Specifically, OCF must do one of the following:

- (a) Cause evidence to be presented to the Board, if sufficient evidence exists constituting an apparent violation, pursuant to § 3706;
- (b) Dismiss the complaint, if insufficient evidence exists to present the matter, pursuant to § 3705; or
- (c) Impose civil penalties, pursuant to § 3711, upon a determination that a violation of the reporting and disclosure requirements prescribed by the Act and/or Chapters 30-42 of this title has occurred.

3 DCMR § 3704.7. Given that OCF ultimately found sufficient evidence of certain campaign finance violations and there is no allegation here of a reporting or disclosure violation, subsection (a) is arguably the operable provision. Subsection (a) may be read as reserving to the Board the imposition of any penalty. *Mallof v. D.C. Bd. of Elections & Ethics*, 1 A.3d 383, 386 (D.C. 2010) (describing the procedure followed in cases where OCF finds sufficient evidence); *but see* D.C. Official Code § 1-1163.35(d)(4) (providing the "Board may issue a schedule of fines that may be imposed administratively by the Director") and 3 DCMR § 3711.1 and § 3711.4(aa) (authorizing OCF to impose fines identified in such schedule including a fine "for making expenditures for any purposes prohibited under [FEP expenditure limitations]"). Assuming that OCF's role here should have been limited to issuing a sufficient-evidence-of-violation finding followed by referral to the Board, our ultimate review of this matter suffices procedurally.

<sup>11</sup> While omitting the names of these other candidates, the Complaint notes the dates that the two unnamed withdrawing candidates suspended their campaigns thereby effectively identifying them. *Id.* at p. 4, ¶¶ 20-24.

<sup>12</sup> *Id.* at p. 3, ¶ 16 and D.C. Official Code § 1-1163.32f(d)(5).

that the Petitioners “engaged in unauthorized coordination between campaign committees in violation of District law” and “made an unauthorized in-kind contribution through the use of a telephonic push poll to attempt to influence the composition and result of a Ward 3 primary election.”<sup>13</sup>

After docketing the Complaint, OCF commenced an investigation. On August 26, 2022, through authority delegated by OCF’s Director, Mr. SanFord provided the required notice.<sup>14</sup> As per the applicable regulations, OCF sent the Petitioners the Complaint, which put them on notice of the facts at issue; namely, that Petitioners had used campaign funds to pay for a poll of voter candidate preferences in the Ward 3 Democratic Primary Election Council race even though Petitioner Silverman was not a candidate in either that race or that election. While the Complaint alleged that this activity violated campaign finance laws that concerned impermissible coordination between political campaigns and impermissible in-kind contributions,<sup>15</sup> OCF notified Petitioners that it was investigating “*any* violations” of the campaign finance laws related to Petitioners’ expenditures on the poll.<sup>16</sup>

On August 31, 2022, Mr. Downs (who had entered an appearance in the matter on behalf of the Petitioners) spoke on the telephone with Mr. SanFord. It is undisputed that, during this initial telephone conversation, Mr. Downs stated that Petitioners could file their answer to the Complaint by September 30, 2022.<sup>17</sup> Following this phone call, Mr. Downs emailed Mr. SanFord to confirm

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<sup>13</sup> *Id.* at. 3, ¶¶ 12-13.

<sup>14</sup> Petitioners’ Review Request, Exh. 3.

<sup>15</sup> Petitioners’ Review Request Exh. 2 citing provisions codified at D.C. Official Code § 1-1163.32f(d)(5).

<sup>16</sup> Petitioners’ Review Request Exh. 3 (emphasis added).

<sup>17</sup> Petitioners’ Review Request, Exh. 4, p. 1 (Mr. Downs’ statement: “I noted that Ms. Silverman could respond by September 30, and asked OCF not to issue a decision before Ms. Silverman responds.”). By this representation, Petitioners forfeited their opportunity to persuade OCF against finding “reasonable cause” and their chance to make a case for preliminary dismissal.

his understanding of their conversation. In that email, Mr. Downs stated that he understood that “OCF will not issue a decision until [Petitioners] have a chance to respond in writing within the 90-day window.” Mr. SanFord responded via email that Mr. Downs was correct that OCF “will not issue a decision (order) regarding the ... investigation prior to receipt of a response from [Petitioners] as long as the response is received within the 90 day investigative period.”<sup>18</sup> Mr. SanFord continued by noting that OCF would be submitting questions to the Petitioners and that “we trust that you will comply with all specified deadlines.”<sup>19</sup>

On September 23, 2022, as the 30-day preliminary investigation period drew to a close, the Complaint’s allegations stood unanswered and OCF moved to the next full investigatory level. OCF exercised its investigative authority by sending Mr. Downs a list of 20 questions related to the Complaint’s allegations. The questions inquired into whether Petitioners did in fact pay for polling for races in which Petitioner Silverman was not a candidate and, if so, why such expenditures were made, how the poll results were used, and with whom the results were shared.

On or about September 28, 2022, OCF established October 7, 2022 as the deadline for Petitioners to respond to OCF’s twenty (20) questions and October 14, 2022 as the deadline for them to answer the Complaint.

On October 7, 2022, Mr. Downs submitted eight single-spaced pages of responses to OCF’s questions.<sup>20</sup> By those responses, Petitioners acknowledged that Petitioner Silverman’s campaign had paid for two polls: one seeking voter preferences for candidates in the Democratic Primary Election for various city-wide offices (including the At-Large Council seat and the Ward

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<sup>18</sup> Petitioners’ Review Request, Exh. 4, Attachment 2.

<sup>19</sup> There were a few other communications between Downs and SanFord that are not discussed here as they, at most, are marginally relevant.

<sup>20</sup> Petitioners’ Review Request, Exh. 1.

3 Councilmember position), and one seeking voter preferences in the then nine-way Ward 3 Councilmember race. The polls were conducted through electronic applications offered by two different vendors, Amplify and TargetSmart.

Petitioners' responses to OCF's questions explained that two of the nine Ward 3 Council Democratic Primary Election candidates, Ms. Duncan and Mr. Bergmann, had reached out to Petitioner Silverman and sought her endorsement, and that Petitioner Silverman used the poll results of voter preferences as to Ward 3 Councilmember candidates to help her decide what to do. As further explained in Petitioners' answers to OCF's questions, the polls showed that the leading Ward 3 Council candidates were Eric Goulet (who had received funding from Democrats For Education Reform ("DFER"), an organization that had supported Petitioner Silverman's opponent in the prior 2020 election) and Mr. Frumin, a candidate whose policies aligned with Silverman's, and that Ms. Duncan and Mr. Bergmann were well behind and not likely to win.<sup>21</sup> Based on the poll results, Petitioner Silverman decided not to endorse either Ms. Duncan or Mr. Bergmann, and she subsequently informed them of this decision. Petitioner Silverman ultimately endorsed Mr. Frumin.

Petitioners' responses to OCF's questions elaborated on Petitioner Silverman's rationale for commissioning the polls:

First, and most critically, [the polls] informed Councilmember Silverman's endorsement in Ward 3 ... [and] making the correct endorsement was directly related to her own electoral chances because it was imperative that she aligned herself with the winning candidate in Ward 3—an important Ward to her at-large electoral success. Thus, polling the Ward 3 race allowed her to gain valuable electoral information on a decision that was critical to her own at-large race. Second, in selecting the right Ward 3 candidate to endorse, Councilmember Silverman also wanted to back the candidate with the best chance of beating the DFER-backed candidate. This served Council member Silverman's own electoral interests because losing in Ward 3 would significantly weaken DFER as a political influencer for the November general election in which Councilmember Silverman

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<sup>21</sup> Petitioners' Review Request, Exh. 1, Question 14 at p. 7.

was a candidate. Third, Councilmember Silverman took the opportunity to explore the benefits of a less expensive, automated polling system before she would do polling in the general election. Amplify offered a robust poll of five primary races in Ward 3 at a fraction of the cost of more traditional polling services. For example, TargetSmart would have charged up to \$25,000 for the five primary elections polled through Amplify, which charged just \$1,200. Thus, in conducting a poll with Amplify, Councilmember Silverman received the benefit of sampling a new low-cost polling service offering data in five primary elections which, in turn, allowed her to compare Amplify's low-cost model with more traditional polling agencies, and on races that were of critical importance to her own electoral success in the general election in November.

Order at p. 8 (quoting Petitioners' responses to OCF's questions). The responses allege that the polls "were conducted at Councilmember Silverman's sole direction and for her own electoral benefit."<sup>22</sup>

Petitioners denied sharing the poll results with Mr. Frumin and claimed that Petitioner Silverman shared only the polls' ultimate finding of the voter rankings with Ms. Duncan and Mr. Bergmann to explain to them why she decided not to endorse either of them. The responses also revealed that Petitioner Silverman shared the poll results with a group of "trusted advisors" and listed who those persons were.

OCF did not question or otherwise investigate Ms. Duncan, Mr. Bergmann, or Mr. Frumin, in connection with this matter.<sup>23</sup> Nor did OCF investigate Silverman's "trusted advisors" as to their knowledge of the purpose for conducting the polls.

On the October 14, 2022 deadline for answering the Complaint (which again was imposed in late September), Petitioners' counsel, instead of submitting an answer, sent Mr. SanFord a letter complaining about that deadline.<sup>24</sup> The letter set forth Mr. Downs' view that the August 31, 2022 email correspondence discussed above amounted to an irrevocable commitment to give Petitioners

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<sup>22</sup> Order at p. 9.

<sup>23</sup> But *see* discussion *infra* regarding OCF's separate investigations against Bergmann and Duncan regarding the polls.

<sup>24</sup> Petitioners' Review Request, Exh. 4.



up until the end of the 90-day investigatory period to answer the Complaint (which, in this case, meant Petitioners' response would not be due until on or before November 21, 2022, *i.e.*, after the November 8, 2022 General Election). The letter stated that, on September 28, "for reasons that are unknown," OCF changed its position and insisted that the Complaint be answered by October 14.<sup>25</sup> The letter alleged that OCF's renegeing on its supposed promise of a 90-day response period was politically motivated and constituted a due process violation. The letter claimed that Petitioners relied on the offer of the full 90-day investigatory period to submit their answer to the detriment of Petitioner Silverman's "ability to timely investigate, research, and respond to the allegations in the Complaint."<sup>26</sup> The letter did not elaborate as to how Petitioner Silverman's ability to answer was compromised by having been given two more weeks to provide her answer - after over a month's notice of the Complaint - or what additional investigation and research Petitioner Silverman needed to conduct of her own campaign's activities.

On October 27, 2022, just shy of two weeks after the October 14, 2022 deadline for Petitioners' answer, OCF issued the Order. The Order advised that, while Petitioners' counsel wanted additional time to address the matter, OCF viewed the record as sufficient to support its findings. Based on the available information, the Order concluded that even with additional investigation "it is unlikely that ... it would be established ... that there was coordination between the campaigns[.]"<sup>27</sup> While indicating that there was insufficient evidence to support the Complaint's allegation of a "coordination" violation under D.C. Official Code § 1-1163.32f(d)(5) or of an improper in-kind contribution,<sup>28</sup> OCF noted that its investigation "also focused on whether

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<sup>25</sup> *Id.* at p. 2.

<sup>26</sup> *Id.* at p. 3.

<sup>27</sup> Order at p. 11.

<sup>28</sup> The Order has citation errors in that the "f" is in parenthesis or omitted altogether.

[Petitioners] violated provisions of the Fair Elections Act by using Fair Election funds to commission and finance two Polls in connection with the Ward 3 Council Primary Election in which the Councilmember was not on the ballot or otherwise competing.”<sup>29</sup> The Order then found that Petitioners violated campaign finance provisions other than those identified in the Complaint, namely unauthorized coordination and in-kind contribution. Specifically, OCF held that Petitioners had violated 3 DCMR §§ 3013.1 and 4209.6. Those provisions are similar; the former states that “[c]ampaign funds shall be used solely for the purpose of financing, directly or indirectly, the election campaign of a candidate.”<sup>30</sup> The latter states that “Fair Elections Program funds may not be used for ... any purpose other than the furtherance of the participating candidate’s nomination or election[.]”<sup>31</sup> The Order then directed Respondents to “reimburse” the Fair Elections Fund the amount invoiced to the campaign by the polling vendors of \$6,277.52 and all other poll-associated costs.<sup>32</sup>

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<sup>29</sup> *Id.* at 11.

<sup>30</sup> Order at p. 4 citing 3 DCMR § 3013.1. The penultimate paragraph of the Order erroneously refers to 3 DCMR Section 3033.1.

<sup>31</sup> Order at pp. 4 and 12 citing 3 DCMR § 4209.6. *See also* 3 DCMR § 3013.4 (subjecting the use of FEP funds to the requirements of 3 DCMR § 4209).

<sup>32</sup> Order at p. 14. Elsewhere, the Order quotes statutory language that provides for the imposition of fines (at pp. 3-4) and appends a Notice that also refers to a fine. At the December 12, 2022 argument, however, OCF’s General Counsel confirmed that the penalty imposed was a reimbursement, and not a fine. The campaign finance laws contemplate that no penalty be imposed absent hearing proceedings (*see* D.C. Official Code § 1-1163.35(a)(3)) and provide:

The [Board] may issue a schedule of fines that may be imposed administratively by the Director of Campaign Finance for violations of Parts A through E of this subchapter. A civil penalty imposed under the authority of this paragraph may be reviewed by the [Board] ... The aggregate amount of penalties imposed under the authority of this paragraph may not exceed \$4,000.

D.C. Official Code § 1-1163.35(a)(4). In this instance, OCF imposed the reimbursement without convening a hearing. Further, while a case may be made that the statute necessarily contemplates that the Board has the authority to order the reimbursement of misspent FEP funds, the statute does not specifically authorize such remedy (except perhaps insofar as funds may be returned by a de-certified committee under D.C. Official Code § 1-1163.32c(c)-(e) and § 1-1163.32h(b)) and arguably does not empower OCF to impose any penalty that exceeds \$4,000. By contrast, the Board has authority to assess “a civil penalty ... not to exceed \$4,000, or 3 times the amount of the unlawful contribution, gift, or expenditure, whichever amount is greater” (*see* D.C. Official Code § 1-1163.35(a)(2)(C)) which penalty would far exceed the amount of the reimbursement imposed by OCF. Further, the Board’s hearings in this matter satisfy the statute’s procedural requirements. We also note in this regard that, to the extent that a fine is the appropriate remedy,

### ***Proceedings Before the Board***

Petitioners did not file a motion for reconsideration with respect to the Order. Rather, on November 2, 2022, Petitioners submitted to the Board’s Office of General Counsel a request for *de novo* review of OCF’s Order by the Board.<sup>33</sup> In that pleading, Petitioners alleged that the Order should be immediately vacated because it violated their due process rights. They specifically alleged that OCF improperly denied Petitioners their opportunity to answer the Complaint by renegeing on Mr. Sanford’s August 31, 2022 representation that they had up until November 21, 2022 to submit that answer, and that OCF improperly failed to notify Petitioners that they were under investigation for the campaign finance regulations that prohibited the use of campaign funds for any purposes other than the furtherance of Petitioner Silverman’s election. On the merits, Petitioners also reiterated that the payment for the polls at issue benefited Petitioner Silverman’s campaign and “the record contains *no evidence* that the [p]olls were conducted for any purpose other than furthering Councilmember Silverman’s reelection.”<sup>34</sup> In other words, on the merits, Petitioners’ request for *de novo* review makes the same factual argument reflected in their response to OCF’s questions: that the expenditures were “used solely for the purpose of financing, directly or indirectly, the election campaign of a candidate” and were not for “any purpose other than the furtherance of the participating candidate’s nomination or election.”

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the Order arguably should have relied upon D.C. Official Code § 1-1163.35(a)(2)(C) as opposed to statutory fine language it quoted at D.C. Official Code § 1-1163.35(a)(1)-(2)(A).

<sup>33</sup> Shortly prior to filing this request, Mr. Downs reached out to the Board’s General Counsel for guidance on appealing the Order. Without expressing a view as to the propriety of the procedures cited in a Notice appended to the Order, the Board’s General Counsel referred Mr. Downs to the Order’s assertions as to the procedural posture of the matter. In their *de novo* request, Petitioners relied (justifiably given the authority cited in a Notice appended to OCF’s Order) upon 3 DCMR § 3709.11 as the basis for the Board’s review. That regulation concerns violations of reporting and disclosure requirements and imposes hearing requirements before a fine is imposed. As there is no claim here the Petitioners did not report or failed to disclose the expenditures at issue and OCF did not convene any hearing in this matter or impose a fine, 3 DCMR § 3709.11 arguably does not apply. To the extent, however, that OCF is subject to the authority of the Board, we appropriately hear requests for review of any OCF decisions and the ordinary standard of such review would be *de novo*.

<sup>34</sup> Petitioners’ Review Request at 9 (emphasis in original).

On November 2, 2022, the Board’s Office of General Counsel notified the parties that the Board would convene a hearing on November 4, 2022 (the earliest it could do so under its own notice requirements) on Petitioners’ request that the Order be vacated immediately for procedural reasons. The notification also directed OCF to address Petitioners’ claims that the Order violated their due process rights in writing prior to the hearing. OCF timely filed a response to Petitioners’ allegations of procedural error.

On November 4, 2022, the Board convened and heard from the parties’ counsel.<sup>35</sup> After the parties presented their positions, the Board briefly continued the matter until later that evening so that it could deliberate in executive session. When the Board reconvened on the record, it unanimously denied Petitioners’ request that the Order be vacated immediately for procedural reasons.<sup>36</sup>

Given the resolution of the procedural issues, the Board directed Petitioners to brief by November 14, 2022 the substantive question of whether they had violated 3 DCMR §§ 3013.1 and 4209.6 when they commissioned polls of voter candidate preferences in the Democratic Primary Election and the Ward 3 Council race. The Board also directed OCF to respond to Petitioners’ brief by November 21, 2022.

Petitioners’ brief makes two points. First, Petitioners argue that the plain reading of 3 DCMR §§ 3013.1 and 4209.6 confirms that Petitioners’ polling expenses were permissible. Petitioners read those regulations as “defin[ing] permissible campaign expenditures as those made for the purpose of ‘directly or indirectly’ ‘financing’ or ‘further[ing]’ a candidate’s campaign for office.”<sup>37</sup> In that regard, their brief states that:

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<sup>35</sup> The transcript (“Tr.”) of the November 4 proceedings is posted on the Board’s website at <https://www.dcboe.org/CMSPages/GetFile.aspx?guid=4c50ced6-ea93-407f-8fa4-d80a13d63b82> .

<sup>36</sup> See discussion *infra* for the Board’s findings and conclusions on the procedural issues.

<sup>37</sup> Petitioners’ Brief at 7.

[a]s explained in their written answers to OCF’s questions, Petitioners commissioned the Polls for their own electoral purposes. Ward 3 had historically been a crucial Ward for Councilmember Silverman’s at-large candidacy. A dark money interest group known to be adverse to Councilmember Silverman—DFER—was spending more than Councilmember Silverman could spend under the maximum limit of FEP in the Ward 3 race before Petitioners conducted the Polls. Because a DFER and DFER-backed candidates represented a direct threat to Councilmember Silverman’s candidacy, the Polls directly benefited Councilmember Silverman by allowing her to align herself with the Ward 3 candidate who had the best chance to prevail over a DFER-funded candidate. To be sure, rushing her Ward 3 Endorsement without vetting and polling the candidates risked damaging her own reelection chances.<sup>38</sup>

Second, Petitioners contend that the Order will create untenable results because it represents a departure from the “personal matter” standard applied in earlier decisions, is unconstitutionally vague, will spawn scores of problems, and is fraught with potential abuse.<sup>39</sup> Petitioners ask the Board to reverse the Order and dismiss the Complaint.

In response, OCF contends that the laws for permissible expenditures are “unequivocally clear” and are “unambiguous: campaign funds are to be used solely for the candidate’s campaign and not for any other purpose, or races for other candidates” and that “the expenditure by an Independent candidate in an At-Large race in the General Election under the FEP for the

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<sup>38</sup> Petitioners’ Brief at 8.

<sup>39</sup> Along these lines Petitioners lament that the Order will empower OCF “to decide when expenditures, which are no doubt campaign-related, are *worthy* enough.” *Id.* at pp. 9 and 2 (emphasis in original). The brief contends that the “new, know-it-when-you-see-it standard is vague, will require probing confidential campaign strategy and information, and will be deployed as a sword by opposition groups to flyspeck campaign expenditures and mire candidates in adjudications in the crucial days and weeks before elections.” *Id.* at pp. 9-10 and 2. OCF’s new standard, according to the Petitioners’ brief, is fraught with the potential for abuse and exploitation by political rivals. *Id.* at p. 10. Regarding the last point, the brief explains how the instant OCF violation finding was used by Silverman’s opponents against her. *Id.* According to OCF, its “standards are derived from the four corners of the documented law, which is the letter of the law and are neither vague nor unconstitutional but rather uniform, appropriate, and just,” its decision is not a new standard, and it has consistently applied the law *Id.* at pp. 12-13. In this regard, OCF attributes a free speech argument to Petitioners.

commissioning of polls for candidates in a Democratic Party Primary election in Ward 3 is impermissible.”<sup>40</sup> OCF argues that

[t]hese polls were solely designed to effectively eliminate the stronger competitor. This tactic was employed to influence the outcome of the election by persuading certain candidates to withdraw from the contest in the final days of the campaign, even though they were on the ballot. The use of expenditures from campaign funds under the Fair Elections Act is not designed for this purpose. To allow such a practice will only serve to undermine the purpose of the program and thwart the spirit of competition, the use of which public funds was designed to create. To permit such an expenditure by candidates in unrelated races will have a devastating [sic] and disastrous effect on the competitive viability of candidates participating therein who receive public funds. Such tactics are contrary to the intent and spirit of the Fair Elections Act and the FEP which were established to expand the political arena not to reduce it.

*Id.* OCF claims that it is “clear from [Petitioners’ responses to OCF’s questions] that the polls were used to identify candidates who could be persuaded to withdraw from the Democratic Primary Election without regard to their supporters or the investment of the Fair Elections Funds made in their campaigns” and that the polls were “employed to influence the outcome of the election in Ward 3 by persuading certain candidates to withdraw.”<sup>41</sup> OCF states that “petitioners have failed to specifically state how a Poll in connection with the Ward 3 Democratic Primary Election ... was remotely connected to their Independent At-Large Council campaign ...” and argues that the “purpose of the polls ... was to dissuade certain candidates from continuing their campaigns[.]”<sup>42</sup> OCF maintains that the Order’s finding “that the expenditures for the polls are impermissible should not be disturbed.”<sup>43</sup> OCF concludes by claiming that Petitioners’ arguments “on all issues

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<sup>40</sup> OCF’s Brief at p. 7.

<sup>41</sup> *Id.* at p. 9.

<sup>42</sup> *Id.* at p. 10.

<sup>43</sup> *Id.* at 13.

are specious, lack credibility and are wholly without merit” and requesting that the Order be affirmed.<sup>44</sup>

On December 7, 2022, Mr. Downs sent the Board’s General Counsel and Mr. SanFord four documents that Petitioners sought to have admitted into the record. The documents consisted of Mr. Bergmann’s and Ms. Duncan’s responses to OCF questions in parallel OCF investigations of those candidates, as well as affidavits from Mr. Bergmann and Ms. Duncan that highlighted information provided in their responses to OCF’s questions. The affidavits and responses to OCF’s questions corroborated that Mr. Bergmann and Ms. Duncan had requested that Petitioner Silverman endorse them, that Petitioner Silverman shared only the overall results of the polls with them to explain her reasons for not endorsing them, that she did not encourage them to withdraw, and that, while Petitioner Silverman’s endorsement was important to them, the two ended their campaigns for a variety of independent and personal reasons.

The following day at a pre-hearing conference scheduled before the Board’s General Counsel at which Mr. Downs and Mr. SanFord were present, Mr. SanFord objected to the admission of the documents for the reason that they were not relevant and because, under OCF regulations, the investigations of Bergmann and Duncan were confidential.<sup>45</sup> Given that the parties disagreed as to the admissibility of the affidavits and responses to OCF questions by Mr. Bergmann and Ms. Duncan, the Board’s General Counsel advised the parties that that issue would be addressed at the December 12 hearing.

The Board convened a hearing on the merits issue on December 12, 2022. At the hearing, Mr. Downs sought to enter into the record the affidavits and responses to OCF’s questions by Mr.

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<sup>44</sup> *Id.* at p. 14. While OCF’s brief indicates that the Order was based on a credibility determination, OCF’s General Counsel clarified at the December 12 hearing that the basis for the violation was OCF’s opinion that the admitted conduct constituted a *per se* violation of the campaign finance laws.

<sup>45</sup> 3 DCMR § 3700.4 (addressing confidentiality of OCF investigations).

Bergmann and Ms. Duncan. As he did at the pre-hearing conference, Mr. SanFord objected. After hearing from counsel on the evidentiary issue, the Board Chair found that, although of limited weight, the documents would be admitted.<sup>46</sup>

During the hearing, Mr. SanFord argued that the two polls were not remotely related to Petitioner Silverman's campaign and were conducted in a Democratic Primary in Ward 3 where Petitioner Silverman was not a candidate and noted that, while Petitioner Silverman was an independent candidate, she polled only Democrats. He characterized the polls as having an "abstract connection" to Petitioner Silverman's At-Large campaign that did not equate, as required by the regulations, to directly or indirectly furthering her election. In response to questioning by the Board, Mr. SanFord stated that the violation of the campaign finance laws lies in the conducting of the polls, not the use to which they were put. Further, Mr. SanFord did not dispute that endorsement-related expenditures were permissible. Mr. SanFord also acknowledged that OCF's implicit position was that polling unrelated to issues of concern to voters, of races in which a candidate is not running and in which the spending candidate's name is not mentioned, is a *per se* violation of the campaign finance laws.

Mr. Downs argued that Petitioner Silverman needed to make an informed decision as to which Ward 3 Council candidate to endorse and that that decision was significant to her campaign. He emphasized that the substantive evidence consisting of the three purposes for the polling provided in the responses to OCF's questions was uncontroverted, and that Petitioners' expenditures on the polls were directly related to Petitioner Silverman's campaign. Mr. Downs contended that, in any event, the fact that there was an "abstract connection" between the polls and

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<sup>46</sup> See discussion *infra*. As the parties had agreed to a record consisting of twelve (12) items (*i.e.*, the Order, party submissions, scheduling/procedural directives from OGC and proceeding transcripts), the Chair's ruling brought to sixteen (16) the items in the record.



Petitioner Silverman's election was sufficient to establish an indirect connection between the two, which the law permits. He suggested that there was no difference between polling voters as to their candidate preferences and permissible polling of issues, as candidates are essentially proxies for issues. Mr. Downs argued that there is no District law that creates the bright-line, *per se* rule upon which OCF relied, and that the guidance in prior OCF and related federal campaign finance authorities did not support such a rule.

After hearing argument from counsel, the Board continued the meeting so that it could meet in executive session to deliberate. When the Board reconvened on the record, it unanimously reversed the Order on review.<sup>47</sup>

## **Discussion**

### ***Procedural Issues***

As noted above, Petitioners argued in their request for Board review that they were improperly denied the full 90-day investigatory period to answer the Complaint. They also contended that the Order's finding of a campaign finance violation on grounds other than the improper coordination and in-kind contribution allegations stated in the Complaint denied them notice of the charges against them.<sup>48</sup> In addition, the parties disagree as to the admissibility of evidence regarding OCF's separate investigation of Mr. Bergmann and Ms. Duncan. We address each of these procedural issues below.

**Petitioners' opportunity to answer the Complaint** -- As to the first alleged procedural defect, the Board finds Petitioners' position to be without merit for several reasons. First, nothing in the statute or the regulations entitled Petitioners to the full 90-day OCF investigatory period to

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<sup>47</sup> See discussion *infra* for the reasons for the Board's decision.

<sup>48</sup>With respect to both these issues, the Petitioners have the burden. See 3 DCMR § 424.1 (the party asserting a claim carries the burden).

respond to the Complaint; rather, the only procedure due Petitioners as a matter of law was “an opportunity” to answer the Complaint. Second, even granting that there was some reasonable misunderstanding at the outset of the investigatory process as to the allowable time within which Plaintiffs could file an answer, any confusion was cleared-up when OCF communicated the October 14, 2022 deadline on September 28, 2022.<sup>49</sup> Third, the October 14, 2022 deadline afforded a legally sufficient opportunity to submit an answer to the Complaint, given that: (1) Petitioners’ counsel had indicated at one point that he could respond even earlier, namely by September 30, 2022, (2) Petitioners’ counsel also indicated that Petitioners’ case as to the facts was covered by their responses to OCF’s questions, and that the only new terrain that would be covered by an answer would be legal argument, and (3) even assuming they had previously relied on a mistaken belief that the deadline to submit an answer was November 21, 2022 and were suddenly surprised by the October 14, 2022 deadline, Petitioners never offered a plausible explanation for why they were unable to make out their case as to a narrow issue of law in the two weeks provided (in addition to the near month-long period that transpired after the late-September imposition of an answer deadline and before the Order issued). While Petitioners would have undoubtedly preferred to have answered the Complaint as late as November 21, 2022 (or at least, on the eve of the General Election<sup>50</sup>), they were clearly informed at a reasonable time during the OCF investigatory process that that luxury would not be afforded to them, and they simply chose to forgo their opportunity to file an answer.

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<sup>49</sup> Noting that, if Petitioners waited until the end of the 90-day period to respond, OCF would have had no time to conclude its investigation, Board Member Greenfield viewed the discussions between the parties of a maximum possible 90-day period for submitting any answer as establishing no timeframe. She and Board Chair Thompson concurred in their remarks that the timeframe was established when OCF set a specific October 14 deadline.

<sup>50</sup> At the Board’s initial hearing on the procedural issues, Mr. Downs stated that OCF “declined to give us at least until [Friday] November 4” (Tr. at 26) to answer, a response time that would have undoubtedly resulted in OCF addressing the matter too late to influence voters casting their ballots by the Tuesday, November 8, 2022 General Election.

**Notice of charges** -- Petitioners' claim of a due process violation arising from the lack of notice that the scope of OCF's investigation included specifically violations of 3 DCMR §§ 3013.1 and 4209.6 falls short for a number of reasons. First, the law does not, as they essentially assert, entitle them to notice of the precise nature of the alleged violation. Rather, they are entitled under the regulations only to notice of the "*general nature*" of the violation. Second, the actual notice to Petitioners that OCF would be investigating "any" campaign finance violation related to the use of campaign funds for a polls of a race other than Petitioner Silverman's At-Large Council race was sufficient to satisfy the "the general nature of the alleged violation" notice requirement. Third, Petitioners did not establish that they had been prejudiced in any way by the extent of the notice provided to them.

With regard to the issue of prejudice, we indicated at the November 4, 2022 hearing that, because Petitioners never filed a response to the Complaint, we could not say whether the Complaint's allegation of improper spending on another campaign, the scope of OCF's questions, and OCF's notice of an investigation of any violation was insufficient to apprise them of the substance of the misconduct ultimately found. As in other instances where Petitioners could have advanced their case, Petitioners declined to elucidate for us, either in their written request for *de novo* review or at the November 4, 2022 hearing,<sup>51</sup> how they would have answered the Complaint had they been notified specifically of charges of violations of 3 DCMR §§ 3013.1 and 4209.6. Indeed, we would have had to strain to conclude that Petitioners' ability to answer would have

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<sup>51</sup> During the hearing, Petitioners' counsel responded to a request by Board Member Michael Gill as to whether, had OCF cited in the notice to Petitioners of its investigation the specific regulations which OCF eventually found to have been violated, Petitioners' response to the Complaint would have changed. Counsel acknowledged that such information would not have altered Petitioners' factual representations. He stated instead that knowledge of the precise campaign finance noncompliance at issue would have altered Petitioners' legal argument with respect to whether a violation had actually occurred. Counsel did not elaborate as to what that argument would have been. Board Member Gill commented on the lack of a showing that Petitioners' position was or would have been narrowly tailored to the Complaint's allegations.

been unduly prejudiced by the scope of notice in light of Petitioners' responses to OCF's questions. Those responses revealed, at the very least, that the Petitioners intuitively understood the substance of the violation ultimately found insofar as their answers included an explanation as to how expenditures on the polls furthered Silverman's campaign and were made "for her own electoral benefit." In any event, Petitioners were effectively notified of the specific nature of the violations at issue by virtue of the Order, and have now had an opportunity to brief the merits issue. It is evident from the fact of OCF's filing of a brief in opposition that, had Petitioners been given notice of the precise campaign finance violations OCF ultimately found and answered the Complaint, OCF would have been unpersuaded and would still have found against Petitioners. Accordingly, any notice defect has been sufficiently cured, become moot, and rendered harmless error.<sup>52</sup>

**Admissibility of evidence of other OCF investigations** – As mentioned above, OCF opposed the admission of evidence of other OCF investigations directed at Mr. Bergmann and Ms. Duncan.<sup>53</sup> Mr. Sanford argued that the documents should not be admitted because: (1) they were confidential; (2) they were of no value because OCF did not make a factual finding that Petitioner Silverman had persuaded Mr. Bergmann and Ms. Duncan to withdraw; and (3) Mr. Downs should not be allowed to place those witnesses in jeopardy with respect to the OCF investigations against them.

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<sup>52</sup> *Shiflett v. District of Columbia Bd. of Appeals & Review*, 431 A.2d 9, 11 (D.C.1981) (failure to give an Advisory Neighborhood Commission written statutory notice was harmless where it had actual notice and an opportunity to be heard).

<sup>53</sup> Mr. Downs preemptively argued that (1) the statements in those documents rebutted repeated assertions in the Order that the polls were conducted to influence the outcome of the Ward 3 Council race and to encourage candidates Bergmann and Duncan to withdraw and (2) were not confidential because the OCF regulation regarding investigation confidentiality imposed an obligation on OCF and not witnesses to keep information confidential and that the information in those documents had been placed in the public domain by the witnesses. There was an exchange between the Board Chair and Mr. Downs that clarified that Mr. Bergmann and Ms. Duncan were not in attendance and so could not, at that time, be cross-examined and during which Mr. Downs represented that the documents were offered with the consent of Mr. Bergmann (who Mr. Downs stated is an attorney) and Ms. Duncan's counsel.

The Board receives evidence in conformity with the D.C. Administrative Procedure Act, D.C. Official Code § 2-509(b) (noting that immaterial or irrelevant or unduly repetitious evidence is inadmissible).<sup>54</sup> The admission of evidence into the record is subject to the discretion of the Board Chair.<sup>55</sup> In contested cases such as the instant matter, “[a]ll parties have the right to produce evidence and witnesses on their behalf and to rebut or explain testimony or evidence against them.”<sup>56</sup> As the proponent of the admission of evidence from Mr. Bergmann and Ms. Duncan, Petitioners must make a minimally sufficient proffer that the evidence is admissible, which OCF must then rebut.

To begin with, there is no self-incrimination concern here where: (1) the responses to OCF’s questions have already been submitted in the OCF investigations of Ms. Duncan and Mr. Bergmann;<sup>57</sup> (2) the affidavits of Ms. Duncan and Mr. Bergmann that accompany the responses repeat statements made in those prior admissions; and (3) neither potential witness has been compelled to testify in this proceeding. Further, based on the representations of Petitioners’ counsel, the Board Chair found that the disclosure of responses to OCF’s questions in the parallel matters and the related affidavits were knowingly and voluntarily submitted by Ms. Duncan and Mr. Bergman. Finally, there is nothing facially incriminating about the statements; they corroborate that there was no coordination between the campaigns and no in-kind benefit received through Petitioner Silverman’s conducting of polls that were neither helpful to nor wanted by either Ms. Duncan or Mr. Bergmann.

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<sup>54</sup> 3 DCMR § 407.1.

<sup>55</sup> 3 DCMR §§ 419.1(b) and (m), 423.4 and 423.7 (authorizing the Chairperson to rule on evidentiary matters).

<sup>56</sup> 3 DCMR § 423.2.

<sup>57</sup> *Tomlin v. United States*, 680 A.2d 1020, 1022 (D.C. 1996) (a witness’s constitutionally protected interest in avoiding incrimination that leads to prosecution is not jeopardized by merely repeating information previously disclosed under oath).

With regard to confidentiality, 3 DCMR § 3700.4 provides that “[a]ll proceedings and records of the Office of Campaign Finance (OCF) relating to the initiation or conduct of any investigation shall be confidential and closed to the public, except all orders of the Director issued during investigative proceedings shall be made available to the public[.]” This provision was never intended to constrain the free speech rights of the target of an investigation or hamper the ability of an accused party to defend. As Petitioners’ counsel noted, even grand jury proceeding secrecy requirements do not reach that far. As in the case of grand jury proceedings, the self-evident purpose of the secrecy requirement is to protect the accused who is presumed innocent. 1 Fed. Prac. & Proc. Crim. § 106, *Grand Jury Secrecy* (4th ed.) (subjecting the prosecutor, jurors and court to secrecy but omitting from such restriction the accused and witnesses). Accordingly, the accused may waive the protection to his or her reputation afforded by 3 DCMR § 3700.4’s secrecy and voluntarily disclose the existence of the matter and any information the target has regarding OCF’s investigation. Section 3700.4 is properly understood to require only that OCF keep the matter secret.<sup>58</sup> For these reasons, we find without merit OCF’s claims that evidence from Mr. Bergmann and Ms. Duncan is inadmissible for confidentiality reasons.

As to relevance, absent agreement with OCF’s *per se* violation position, the substance of the statements by Ms. Duncan and Mr. Bergmann is inextricably intertwined with the facts at issue here. Statements by others regarding Petitioner Silverman’s use of the poll results are self-evidently relevant to proof of the alleged “furtherance of campaign” purpose for the polls. Nevertheless, while the Board Chair rejected OCF’s position that statements from Mr. Bergmann and Ms. Duncan are irrelevant, we find that those self-serving statements do not add substantially

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<sup>58</sup> That said, we note that OCF’s General Counsel, at a November 30, 2022 regular meeting of the Board, noted the existence of the investigations. See p. 40 of Transcript (Tr.) of November 30, 2022 Board meeting posted at <https://www.dcboe.org/CMSPages/GetFile.aspx?guid=3475056c-0637-4338-ac48-5c0fa4e684b7> (SanFord requesting an extension to conclude investigations of Duncan and Bergmann).

to Petitioner Silverman’s claims given that the witnesses were not offered for examination by the Board or cross-examination by OCF.

### ***Campaign Finance Issues***

As discussed above, our review of the Order is *de novo*; this means that we review the matter afresh and are not bound by OCF’s decision. *MorphoTrust USA, Inc. v. D.C. Contract Appeals Bd.*, 115 A.3d 571, 582 (D.C. 2015) (explaining that “*de novo*” means “anew” and “a non-deferential review”).

While generally the proponent of a position has the burden of proof, our regulations specifically provide that, in campaign finance cases, OCF must prove a violation with “reliable, probative, and substantial evidence.”<sup>59</sup> “Substantial evidence is more than a mere scintilla of evidence; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>60</sup> The substantial evidence standard is satisfied as to factual findings “if on the entire record the determination is rationally supportable and could be arrived at reasonably.”<sup>61</sup>

As was made clear at the December 12, 2022 hearing, OCF’s theory of the case rests on the premise that a poll of voter candidate preferences in an election other than that for which the campaign was organized (and that does not involve campaign issues) constitutes a *per se* violation of the campaign finance laws. Plainly, however, 3 DCMR §§ 3013.1 and 4209.6 do not state on their faces such a *per se* rule. Indeed, Mr. SanFord indicated at the December 12, 2022 hearing that the instant case is a novel and unprecedented one. Accordingly, we are compelled to conclude

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<sup>59</sup> 3 DCMR § 423.5; *see also* D.C. Official Code § 2-509(e) (D.C. Administrative Procedure Act standard for agency action in contested cases). 3 DCMR § 423.5; *see also* D.C. Official Code § 2-509(e) (D.C. Administrative Procedure Act standard for agency action in contested cases).

<sup>60</sup> *Pendleton v. D.C. Bd. of Elections and Ethics*, 449 A.2d 301, 307 (D.C. 1982) (quotations and citations omitted).

<sup>61</sup> 3 DCMR § 428.4.

that OCF is asking us to announce in this matter a new rule that polling in elections other than that for which a committee was formed (other than regarding issues) constitutes a *per se* violation, regardless of whether a candidate may, in fact, make out a case that such polling actually furthers the candidate's campaign.

Admittedly, a case might be made in a particular situation that other specific types of expenditures that are expressly prohibited under the regulations (such as, spending on medical care other than for campaign employee health benefits) could, nevertheless, be in furtherance of a campaign. But those expenses are still *per se* prohibited by the regulations, and a connection between the expense and the spending candidate's election is no defense. Conspicuously absent from the *per se* impermissible expenditures identified in the regulations is any mention of any kind of polling expenses. Contrary to OCF's position, we do not herein adopt a *per se* rule prohibiting polling in elections other than that for which a committee was formed (other than regarding issues). In such case, a challenged candidate is free to explain why such polling furthers the candidate's campaign and such a *factual* contention will have to be addressed.

Here, the permissibility of the polling expenses at issue must be evaluated based on 3 DCMR §§ 3013.1's and 4209.6's standards of whether they were "solely for the purpose of financing, directly or indirectly, the election campaign of a candidate" or (similarly) "not ... for ... any purpose other than the furtherance of the participating candidate's nomination or election."

This is a factual inquiry.<sup>62</sup>

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<sup>62</sup> In declining to adopt a new *per se* rule, we note that we are not persuaded by Petitioners' claim at page 10 of their brief that OCF's rule is fraught with the potential for abuse and exploitation by political rivals. That claim is unpersuasive insofar as it fails to mention that OCF is tasked with providing case-by-case campaign finance guidance through interpretative opinions (*see* 3 DCMR § 3305.1 *et seq.*). Indeed, the OCF guidance relied upon by Petitioners' brief underscores the ability of candidates to confirm the permissibility of expenditures not only in advance but in a timely manner as it involved a request to expedite OCF's otherwise applicable 30-day deadline for answering questions about the use of campaign funds. *Id.* Rather than risk attacks by political rivals, prudence would counsel in favor of candidates seeking OCF guidance before using public funds to pay for polls of races and elections that are not the focus of the campaign for which such funding was provided. Had Petitioners availed themselves of that



Applying 3 DCMR §§ 3013.1's and 4209.6's standards, we note that the facts are undisputed. Petitioners have acknowledged that they expended a determined amount of campaign funds, including FEP monies, on the two polls; have disclosed the questions that were on the polls and the population surveyed; and have shared the poll results, the extent of the distribution of those results, and the use of those results. OCF does not question these facts. In fact, OCF concluded that these facts are *not* sufficient evidence of an in-kind contribution by Petitioners to another campaign and are *not* sufficient evidence of any coordination by Petitioners with another campaign.

We have difficulty concluding, on a *de novo* basis, that there is “substantial evidence” that Petitioner Silverman did not conduct the poll to further her campaign, as she explains she did in three respects.<sup>63</sup> This is not a case where the candidate was running unopposed or was so otherwise well-assured of her success that a reasonable inference might be drawn that the motivations for such polling *must* have been unrelated to Petitioners’ campaign. While Petitioner Silverman’s decision not to endorse either Ms. Duncan or Ms. Bergmann may have had the collateral effect of encouraging their withdrawal, that collateral effect does not disprove that Petitioner Silverman still had three legitimate purposes in conducting the polling: primarily, because the campaign needed to be best informed as to which Ward 3 Council candidate to endorse (as this related directly to advancing her re-election to an At-Large seat); secondarily, to track the influence of DFER in the Ward 3 race (as DFER was expected to also influence the At-Large race); and thirdly, to test two different polling methods (to decide which one to use in more extensive citywide polling).

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opportunity here, they likely would have received guidance from OCF which might have dissuaded them from conducting the polls or caused them to rethink the polls’ questions, thus avoiding the Complaint.

<sup>63</sup> While OCF, in its brief, claims the polls were “solely designed” to knock out candidates from the Ward 3 Council race, “employed to influence” the outcome of that race, and used to dissuade and for the purpose of dissuading candidates from running and that Petitioners have failed to state how the poll expenses were connected to Silverman’s election, there is no direct evidence to support OCF’s opinions as to the purpose of the polls. OCF’s determinations are based on inferences drawn from the facts. OCF, however, has not demonstrated why those inferences should be credited over Petitioners’ statements as to her purposes (which are consistent with the additional evidence admitted).

There is no evidence in the record that rebuts Petitioners' claims regarding the three proffered At-Large campaign-furthering purposes of the Ward 3 polling. There is no evidence impeaching Petitioners' responses to OCF's questions such as prior inconsistent statements by Petitioners or contradictory statements by others. Indeed, Petitioner Silverman was present at the December 12, 2022 hearing and OCF did not seek to examine her and perhaps call into question her credibility or the validity of the three purposes. On this record, our Board accepts the three purposes as valid purposes relating directly to Petitioner Silverman's At-Large campaign.

While we appreciate OCF's concern that expenditures for polling in races and of an election other than the race and election for which the campaign committee was organized may be suspect, here Petitioners offered sufficient explanation as to why the polling costs related directly to the At-Large campaign. Accordingly, we cannot say that there is "substantial evidence" of a violation of 3 DCMR §§ 3013.1's and 4209.6's limitations on the use of campaign funds.

Nor do we think that reversing the Order will have an improper effect on the competitive viability of FEP candidates where, as here, the use of FEP funds is in furtherance of the election of the candidate. While polling of another race may be rare, there could be other instances where a candidate for a citywide office (such as Mayor) may wish to poll a Ward-level race for purposes that relate, directly or indirectly, to the citywide campaign. Future campaigns are free to reach out to OCF in advance for advisory guidance when needed. Finally, OCF is free to propose regulations, consistent with applicable statutes, that set clear parameters on the use of campaign funds for polling purposes.

Accordingly, consistent with the Board's ruling at its December 12, 2022 hearing, it is this 6<sup>th</sup> day of January, 2023,

**ORDERED** that the October 27, 2022 OCF Order in OCF docket 2022 FI-006 is hereby **REVERSED**.

The Board issues this written order today, which is consistent with its oral ruling rendered on December 12, 2022.

Date: January 6, 2023



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Gary Thompson  
Chair  
Board of Elections