

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS**

In Re: Board of Elections
and Ethics

v.

John Capozzi

Candidate

Administrative Hearing
No. 00-009

Re: Resolution of Adverse
Determination of Eligibility

MEMORANDUM OPINION AND ORDER

I. **BACKGROUND.**

On February 23, 2000, John Capozzi submitted a nominating petition via facsimile to appear on the ballot for the office of At-Large Member of the Democratic State Committee in the May 2, 2000 Presidential Preference Primary Election as a member of the Action Democrat Slate. Mr. Capozzi was mistakenly under the impression that a Declaration of Candidacy was unnecessary since he was a member of a slate. Upon being told by a fellow member of his slate that the declaration was in fact a mandatory prerequisite for determination of ballot eligibility, Mr. Capozzi faxed his Declaration of Candidacy to the Board of Elections and Ethics on the aforementioned deadline date for submission of such materials. However, Mr. Capozzi was unable to get the submission notarized before a District notary or Board official as required by District of Columbia Municipal Regulation title 3 §601.5.

On February 28, 2000, Ms. Kathryn Fairley—the registrar of voters—notified all the members of the Action Democrat Slate of this adverse determination of eligibility. Notwithstanding her determination, Ms Fairley posted the nominating petition for public inspection during the challenge period. No one challenged Mr. Capozzi's petition on any supplemental grounds. Ms. Fairley further informed slate members of their right to appeal the determination or request the Board waive any formal error, pursuant to District regulations §§ 603.1 and 1705.6(c) respectfully. The slate members requested a waiver of formal error pursuant to §1705.6(c).

On March 9, 2000, The Board convened to decide whether a waiver of formal error was merited in light of the circumstances. Mr. Capozzi, along with the other members of the Action Democrat Slate appeared pro se. The Board proceeded with the hearing pursuant to D.C. Mun. Regs. tit. 3 §403.1.

II. DISCUSSION

Pursuant to District of Columbia Municipal Regulation title 3 §601.5, “[e]ach candidate shall swear or affirm upon oath before a District notary or Board official that the information provided in the Declaration [of Candidacy] is true to the best of the candidate’s knowledge.” Mr. Capozzi failed to swear or affirm under oath that the information in the Declaration was in fact true.

The *Mosley v. Board of Elections of the District of Columbia*, 283 A.2d 210 (D.C. 1971) (per curiam) decision articulated a clear inquiry for the waiver of a “formal error” by the Board of Elections. *Mosley* is akin to the instant case because it concerns a candidate that also submitted their nominating petition with formal errors. Specifically, the Board found that certain of the candidate’s forms omitted the initiation date, which was required to comply with the Board’s regulations at the time, *Mosley* at 210. The court identified the procedural flaw in the petition and ascertained the purpose of the corresponding regulation in an effort to glean the nature of the flaw. The court found that this provision was designed to prevent any candidate from having an unfair advantage in the solicitation of signatures, *Id.* at 211. The court went on to find that “[s]ince the Board found that it did not distribute the forms to potential candidates until after it was legally permissible to obtain signatures, it concluded that the omission of the dates constituted merely a ‘formal error.’” The Court concluded its inquiry with an applicable standard for waiver: “no assertion that the nominating process was obstructed or polluted in any way, nor that substantive harm to any other candidate flowed from the [formal error].” *Id.* at 211

In the instant case, the Board of Elections and Ethics conducted the “formal error” procedure articulated by the District of Columbia Court of Appeals and now codified at D.C. Mun. Regs. tit. 3 §1705.6(c). Specifically, §1705.6(c) grants the Board discretion to waive any formal error. First and foremost the Board was concerned with the underlying purpose of affirming the declaration before a notary or Board official. The Board’s General Counsel explained that the aim of the provision is to ensure the electorate is presented with the nominating petition of people who have evinced the intent to become a candidate. Clearly, Mr. Capozzi, along with his fellow slate members, has evinced an intent to be a candidate as evidenced by his good faith effort to submit the documents by the 5:00pm deadline on February 23, 2000. Even further, Mr. Capozzi has complied with all other procedural matters relating to his candidacy much like the candidate in *Mosley*. The most significant distinction between *Mosley* and the instant case—the lack of a challenger—indubitably raises the strongest argument for waiver.

The aforementioned standard for waiver articulated by *Mosley*, when applied to Mr. Capozzi’s scenario, suggests a waiver in the instant case is appropriate. The *Mosley* standard concentrates on the effect of the error with respect to the integrity of the nominating process as a whole, placing particular emphasis on substantive harm to any other candidate. In this case, the nominating process has been preserved because Mr. Capozzi in fact wants to be a candidate—thereby preserving the aim of the omitted prerequisite. Moreover, the fact that no formal challenges were filed tends to militate against a finding of adverse substantive harm to any other candidate. When faced with

the Hobson's choice of either disqualifying the entire nine-member slate for the ministerial failing of one, or waiving the formal error of Mr. Capozzi, the Board has reluctantly selected to waive the error. However, the Board formally admonishes Mr. Capozzi for his lack luster adherence to its regulations.

The Board's reluctance to waive is deeply rooted in the command of the *Mosley* decision requiring the Board exercise close supervision over the nominating and electoral process to ensure that its regulations are met. *Mosley* at 211. The Board expressed disdain for Mr. Capozzi's lack of due diligence in his efforts to comply with its regulation—coupled with a concern such a waiver would theoretically establish an unwelcome precedent or perception that the Board is willing to overlook infractions of its regulations. However, the Board, in performing the *Mosley* inquiry, concluded a mere technical error that did not affect the process or other candidates did not require a result as harsh as exclusion for the entire slate.

III. CONCLUSION

Accordingly, the Board, having granted the respondent's request for a waiver of formal error pursuant to D.C. Mun. Regs. tit. 3 §1705.6(c), it is hereby

ORDERED, that Mr. Capozzi and the remaining members of the Action Democrat Slate be granted ballot access to the May 2, 2000 Presidential Preference Primary Election.


March 17, 2000



Benjamin F. Wilson, Chairman
D.C. Board of Elections & Ethics

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was mailed via first class mail this 17 day of March, 2000 to: Marie Drissel, 2135 Bancroft Place NW 20008; Pat Elwood, 2740 34th Street NW 20008; Gwendolyn Hemphill, 1919 Yorktown Road NW 20012; Geraldine Washington, 3700 Southern Avenue SE 20020; John Capozzi, 1619 G Street SE 20003; Lenwood Johnson, 627 Columbia Road NW 20001; Andy Litsky, 423 N Street SW 20024; Harry Thomas Jr., 2413 17th Street NE 20018; Victor Wenk, 3803 Huntington Street NW 20015.



Rudolph McGann Jr.
Law Clerk