

**DISRTICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS**

Terrance Lynch
Complainant,

v.

D.C. Office of
Campaign Finance,
Respondent.

Jerrily Kress, Anthony Hood,
Angel Clarens
Intervenors

Administrative Hearing
No. 00-020B

Re: Appeal of OCF Order
Docket No. 1999-105

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

A. Statement of Proceedings

This appeal arises out of an Office of Campaign Finance (OCF) complaint filed by Mr. Terrance Lynch on July 8, 1999. In his capacity as Executive Director of the Downtown Cluster of Congregations, Mr. Lynch asserts a violation of D.C. CODE §1-1461(b) of the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974, and §1803.1(b) of the D.C. Personnel Regulations, which falls within the ambit of the Board's review by virtue of the Employee Conduct provisions of the D.C. CODE §1-619.3(e) Comprehensive Merit Personnel Act of 1999.

Essentially, Mr. Lynch's objections are two-fold: whether Ms Kress—as chairperson of the D.C. Zoning Commission (DCZC)—or any of the other commissioners used their official position to realize any “financial gain” during the process of being hired as Executive Director of the Office of Zoning, and whether she exerted any influence over her colleagues to obtain preferential treatment.

In its initial order dated November 3, 1999, the OCF primarily focused its inquiry on whether Ms. Kress or the other commissioners used their position for personal financial gain. The issues raised under the Employee Conduct provisions concerning whether any improper influence existed in the DCZC dealings evincing actual or an appearance of preferential treatment were more amorphous and thus difficult to substantiate and address. Consequently, the OCF found no evidence of financial gain and accordingly dismissed the matter on November 3, 1999.

Mr. Lynch sought appeal of the OCF decision on November 15, 1999. Mr. Julyan, acting as counsel for all of the Intervenor, submitted a motion to dismiss Mr. Lynch's appeal for lack of standing immediately thereafter. A pre-hearing conference was scheduled pursuant to 3 DCMR 415 for Tuesday, December 21, 1999 in an attempt to resolve the issues raised by the appeal. During the pre-hearing conference, the Board's General Counsel requested OCF consider amending its order to address and reflect a decision on the issue of whether there was an appearance of or actual preferential treatment given to Ms. Kress in the consideration of her candidacy and eventual appointment to the position of Director DCZC.

The OCF adhered to the General Counsel's suggestion and issued a March 7, 2000 OCF Order-Addendum concluding that Commissioner Clarens and Hood did not violate the Standards of Conduct in their handling of the Kress candidacy.

The Board held hearings for two days in order to hear all relevant information concerning this case. On March 9, 2000 the Board convened to hear the merits of this case for the first time. During that meeting, the Board ferreted out the relevant points of contention and concluded further testimony in the form of affidavits was necessary for resolution. The Board instructed the Intervenor to secure affidavits from the parties who actively advised the DCZC on how to proceed in this matter. The Intervenor complied, and on March 24, 2000, the Board re-convened to hear the full merits of the case, which included testimony from the following witnesses:

Jerrily Kress – served as Chairperson of the Zoning Commission and is currently the Director of the Office of Zoning.

Angel Clarens – Member of the Board of Zoning

Anthony Hood – Member of the Board of Zoning

Madeleine H. Dobbins – Former director of the Office of zoning and served on the Zoning Advisory Committee (ZAC) for the purpose of screening for candidates.

Tersh Boasberg – Served on ZAC screening committee.

Lindsley Williams – Candidate for director.

Polly Rich – Attorney with Office of Corporation Counsel who served as the Ethics Counselor for the Board of Zoning

B. Statement of Facts

On May 11, 1998, the DCZC authorized the formation of the Zoning Advisory Commission (ZAC) to offer recommendations on matters sanctioned by the Commission including recommendations to the DCZC for filling the position of Director. The ZAC

proceeded by seeking and screening a pool of qualified candidates through interviews, and then making recommendations to the Commission. The D.C. Office of Personnel (DCOP) posted the position on August 20, 1998—thereby appearing to fill the position competitively. During the DCZC meeting of October 28, 1998, DCZC decided to re-advertise the position at the higher salary potential to Grade 17 on March 1, 1999 due to the low initial response. However, in an unexplained departure from the first announcement, the DCOP did not list the full salary range of Grade 17 to include all ten steps of the grade. Thus the public was unaware of the full salary potential of the position. Notwithstanding the omission, the DCOP received a relatively improved response totaling fourteen applications.

On April 21, 1999 the ZAC reviewed a total of fourteen applications submitted during the re-advertisement period and submitted a total of four applicants to the DCZC. The ZAC did not conduct any interviews with the fourteen applicants; rather, they forwarded to the DCZC comments on four of the applicants based upon personal knowledge of the candidates and the paper before them. The DCZC however expressed an overall disappointment with the caliber of the applicants.

The DCZC reviewed the four recommendations as well as the remaining ten applicants at separate meetings held April 29, 1999 and May 6, 1999 respectively. Ms. Kress actively participated in both these meetings. Despite the number of candidates and the competitive environment the DCZC fostered by choosing to announce the position competitively, no interviews were conducted and no single applicant received the support of more than one Commissioner. All pending applications for the position were rejected by the DCZC on May 6, 1999. This decision was shared with the Associate Director Personnel Operations Michael Ramirez; then Acting Zoning Director Sheri Williams; Deputy Corporate Counsel Polly Rich; and ZAC members Madeline Dobbins and Maybelle Bennett. Consequently, the DCZC began to think of alternative means for filling the position.

Subsequent to the decision made at the May 6th meeting to reject all fourteen applicants, Ms. Kress concluded for the first time that she be considered for the position. Commissioners Hood and Clarens testified that Ms. Kress was instrumental in the development of the reorganization plan for the Office and would naturally be qualified to implement those changes. Ms. Kress testified that she considered her demanding work schedule as a partner in her own architecture firm and the inevitable conflicts presented with her personal life, and felt the position as Executive Director of the DCZC would offer a more stable workload—thereby affording her more time with her family. Ms. Kress testified of her status as the primary caregiver to her daughter who suffers a debilitating medical condition. Ms. Kress further testified she felt the position of Executive Director would provide a stable schedule, but she was ultimately concerned with looming conflict of interest issues.

Ms. Kress revealed her interest to the other Commissioners on May 10, 1999 and recused herself from participation in the decision-making process relating to the Director position. Ms. Kress further offered to resign from the commission, but the other Commissioners

requested her to remain long enough to dispose of a particular case she was handling. Ms. Kress decided to stay; however, she sought advice on how to proceed most notably from the DC Office of Personnel (DCOP), and the DC Office of Corporation Counsel (DCOCC).

In seeking the advice and counsel of DCOP and DCOCC, the DCZC consulted advisors who do not have responsibility for enforcement of the applicable Personnel/Ethics provisions. The District of Columbia Board of Elections and Ethics (Board) has sole responsibility for Personnel Regulation enforcement in this circumstance. Pursuant to D.C. Personnel Regulations §1802.1(a), “The provisions of this chapter shall apply to all District employees...[T]he enforcement for the following persons shall be the responsibility of the D.C. Board of Elections and Ethics: ...members of boards and commissions as provided in subsection (a) of D.C. CODE §1-1462(a) (1981)...” Mr. Ramirez and Ms Peggy French submitted affidavits averring that the DC Office of Personnel informed the Commissioners they could offer the position to Ms. Kress without an announcement, application, or even an interview because of the position’s classification as *excepted service*. Ms. Kress also testified she sought advice from OCC and, in relying on this advice, resigned from her post as chair of the DCZC on June 15, 1999.

Mr. Clarens and Mr. Hood interviewed Ms. Kress to discuss—among other things—her salary and qualifications subsequent to her resignation. However, Ms. Kress was never formally interviewed by ZAC despite a tacit agreement that the committee would screen all candidates. The DCZC also never publicly announced that it was no longer seeking to fill the position through the competitive process that it had initiated. The two remaining Commissioners formally offered Ms. Kress the position on June 16, 1999 at the grade 17 step 4. No written justification was ever submitted to the DCOP to support a starting salary higher than step one (*see* District Personnel Manual pt.2 ch.11B subprt 2.11).

The applicants were not formally notified of their rejection until July 12, 1999—the date Ms. Kress began her position as Director. Mr. Lindsley Williams, one of the candidates, testified having never received written notification of rejection. Peggy French, Personnel Management Specialist assigned to work with DCZC to fill the position, averred through sworn affidavit that DCOP standard operating procedure requires rejection notices be sent out only after the position is filled.

II. ANALYSIS

A. Standing

In order to have standing to bring a particular suit, a plaintiff must have suffered a legal wrong or been adversely affected or aggrieved by the agency action he objects to, D.C. CODE §1-1510, *Diamond v. District of Columbia*, 797 F.2d 179 (D.C. Cir.); **and** must show there is a causal connection between that concrete injury and the agency action complained of, *National Wildlife Federation v. Babbitt* 835 F.Supp. 654; **and** the injury

must "likely" to be "redressed by a favorable decision." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61.

In the instant case, Mr. Lynch's complaint filed with the OCF alleged no invasion of a legally protected interest. It is noted that Mr. Lynch claimed the Cluster of Congregations had business before the DCZC, and he asserts the selection process adversely affected that business. However, that effect does not rise to the level of a traceable subjective harm.

Mr. Lynch's action lacks requisite standing to challenge OCF's decision because there is no causal connection between Mr. Lynch's alleged injury and Ms. Kress's actions in relieving herself as a zoning commissioner to assume the role of the director of zoning. However, the Board—being the ethics agency charged with the responsibility of enforcing the code for Employee Conduct with respect to D.C. Commissioners—thought it prudent to explore the decision process *sua sponte*.

B. Conflict of Interest

D.C. CODE §1-1461(b) in relevant part states:

No public official shall use his or her official position or office to obtain financial gain for himself or herself, any member of his or her household, or any business, with which he or she or a member of his or her household is associated, other than that compensation provided by law for said public official.

D.C. CODE §1-1461(e) in relevant part states:

No public official shall use or disclose confidential information given in the course of or by any reason of his or her official position or activities in any way that could result in financial gain for himself or herself or for any other person.

D.C. Code §1-1461, generally referred to as the District's Conflict of Interest statute, provides the appropriate guidelines each government employee must adhere to in avoiding potential conflicts of interest. In the instant case, the OCF found that Jerrily Kress did not misuse her official position as chair of the DCZC to influence the other members of the DCZC to obtain the position of Director of the Office of Zoning. Further, the OCF found that Angel Clarens and Anthony Hood did not disclose confidential information to Jerrily Kress about candidates for the position of Director. These findings are attributable to the fact that the conflict of interest statute only concerns conflicts that result in financial gain.

Ms. Kress and the other commissioners did not realize any tangible financial gain within the contemplation of D.C. Code §1-1461; accordingly, the OCF properly found no conflict of interest. On appeal, Mr. Lynch has raised concerns about the other

Commissioners' financial position as a result of Ms. Kress stepping down as chair. Mr. Lynch asserts in his testimony that the modest raise in stipend suggests a financial gain that merits the stigma of raising a conflict of interest. The Board finds no evidence tending to contradict the OCF's finding, and thus affirms the OCF's decision in this regard. However, the law is concerned with more than actual impropriety or even financial gain and this deserves close examination to determine whether the appearance of preferential treatment exists also.

C. Preferential Treatment / Appearance of Preferential Treatment

Although Mr. Lynch submitted no evidence tending to support a finding of actual preferential treatment, his concerns with respect to the abrupt change in the procedure employed during the selection process raised the question of whether there in fact was an appearance of preferential treatment. According to the D.C. Personnel Regulation §1803.1(b), "an employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in, *or create the appearance of*, giving preferential treatment to any person." (emphasis added). The instant scenario presents a chairperson who played a pivotal role in increasing the director position's salary to \$102,000.00, then rejected all fourteen applicants immediately before resigning from her own position as chair, and assumed the position herself. The Board found the sequence of events questionable at the least, and decided to hear the matter despite Mr. Lynch's lack of standing.

The critical factor in this matter remains the *excepted service* status of the position. In the excepted service environment, positions can be filled competitively or non-competitively at the discretion of the appropriate personnel authority, D.C. CODE §1-610.1. In the instant case, the DCZC initially thought it best to employ a competitive process through its contractual relation with the DCOP to administer the selection process. The record evinces two unsuccessful attempts to fill a critical position within the DCZC via a competitive process. The Commissioners consulted a number of ethics and personnel officials; albeit the wrong officials, they nevertheless made a good faith effort in inquiring how to proceed. In fact, the Commission was within its legal authority to hire Ms. Kress non-competitively. The Board however takes issue with the Commission's method of departure from its previously established competitive procedure. Although not legally required to do so, the Commission's conversion to a non-competitive process lacked the notice that would have ensured the general public was aware of its change in position and evinced a sense of fairness in the process. Ultimately, the Board concluded there was neither preferential treatment nor the appearance of preferential treatment. However, at the very least, an appearance of unfairness is raised by the DCZC's hasty actions.

D. Appearance of Unfairness

The Commission was of the opinion that they could forego the onerous task of interviewing the fourteen applicants that applied during the re-advertisement period. Although the Commissioners claim personal knowledge of the applicants gave way to

actually interviewing these candidates, more pertinent information that could aid in the selection process could have been gleaned from an interview. For instance, the Commission may well have learned about each applicant's managerial skills, or what plan, if any, each applicant had for the reorganization of the Office as a whole. Regrettably, none of that information was discerned because not a single candidate was interviewed. In the future such haphazard tactics should not be employed when weighing in on the selection of a Director to an administrative agency—especially in light of the competitive process the DCZC initiated.

The DCZC also failed to ensure that DCOP listed the full salary potential in the second advertisement. The first advertisement gave the full salary range; whereas, the second advertisement only gave the minimum step of the highest grade available. That omission can conceivably be seen as a contributing factor to the continued low applicant response. The DCZC should have ensured that the advertisement was representative of the full opportunity of the position. That being said, the next area of concern is the DCZC's use of alternate selection procedures to choose their Director.

Vacillating from a competitive to a non-competitive process tends to evince an appearance of impropriety. Even though the excepted service statute is silent about switching between the two extremes, the Personnel Regulations are concerned with *appearances* of preferential treatment as well as actual violations of the law. The DCZC's decision to change its position in the midst of the selection process initially evoked a visceral, negative reaction by the Board; however, the DCZC's intentions were made clear by the urgency with which the DCZC had to fill the position to maintain certain appropriated funds earmarked for management reorganization.

The DCZC's decision to appoint its former chair to the position of director came at the expense of fourteen applicants' expectations that the process was to be competitive. Even further, the approximately 67-day delay in informing the rejected candidates merely heightened those expectations. Although DCOP Standard Operation Procedure dictates informing candidates of their rejection subsequent to a candidate being selected, at a minimum the DCZC should have informed the applicants of their intent to switch to a non-competitive procedure. The DCZC could have avoided all of this confusion had they sought out appropriate advice and counsel from the agency charged with enforcement of applicable regulations.

The District of Columbia Board of Elections is charged with enforcement of the relevant D.C. Personnel Regulations for the excepted service position at issue in this matter by virtue of D.C. Personnel Regulation §1802.1(b). Accordingly, if the DCZC would have referred to the Personnel Manual, they would have discovered who would be most appropriate to consult regarding an ethics matter involving a board or commission. All of these problems could have been resolved with the proper guidance from this Board and the situation would not have been subjected to such scrutiny. However, the Board has been presented with no actual evidence showing actual preferential treatment. Based on the averments of the Commissioners themselves, there was no undue influence on behalf of Ms. Kress. However, there does exist an appearance of unfairness in the selection of

Ms. Kress as the Executive Director—especially with respect to the other candidates who believed they were still participating in a competitive process.

II. CONCLUSION

The Board finds that the complainant has failed to establish standing and that Ms. Kress neither exerted undue influence, nor was she treated preferentially, nor was there an appearance of preferential.

Nonetheless, this case presents a Commission, which appeared unfair in their deliberations. The DCZC was poorly advised by members of other ethical and personnel agencies that lacked the responsibility of enforcement. The Board is profoundly disappointed that the Commission decided to handle this matter as an excepted service manner—not competitively—after initiating this as a competitive manner. In the future the Board expects that this Commission will seek ethical advice from the proper office: the Board of Elections and Ethics.

Accordingly, it is this 7th day of April, 2000,

ORDERED, that Intervenor’s motion to dismiss Mr. Lynch’s appeal for lack of standing be granted. It is

FURTHER ORDERED that the Office of Campaign Finance order dated November 3, 1999 be affirmed. It is

FURTHER ORDERED that the Office of Campaign Finance order dated March 7, 2000 be affirmed. It is

FURTHER ORDERED that the District of Columbia Board of Zoning be admonished and hereby found to have engaged in acts evincing an appearance of unfairness.

April 7th 2000



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