

Council stationery, for campaign-related purposes, on August 18, 2008, to solicit of Kathy E. Hollinger, Comcast Director of Government Relations and Public Affairs ... monies from Comcast for the District of Columbia delegation at the Democratic national Convention[.]”

Board Chairman Togo D. West, Jr. and Member Charles R. Lowery, Jr. presided over the matter. The DCRC and Kabel were represented by Charles R. Spies, Esq. of Clark Hill PLC, and OCF was represented by its General Counsel, William SanFord, Esq.

I. Background

A. The D.C. Democratic State Committee Audit

In response to complaints it received from Philip E. Pannell in April 2009, OCF’s Reports Analysis and Audit Division (“RAAD”) undertook a field audit of the District of Columbia Democratic State Committee (“DCDSC”) in April of 2009 (“the Audit”). The purpose of the Audit was to determine whether the DCDSC had complied with reporting requirements set forth in the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974, as amended, (2001 Edition) (“the Act”).

During the course of the Audit, RAAD discovered that the DCDSC had issued a check in the amount of \$12,000 to an entity called “D.C. Denver Convention 2008” for “convention activities”. Further examination revealed that the bank account associated with that entity had been established by Marilyn Tyler Brown (“Brown”) and Anita Bonds (“Bonds”) at Industrial Bank of Washington, and was named “D.C. Democratic State Committee Denver 2008 Convention” (“the Account”). The purpose of the Account, according to Brown, was to “serv[e] as the repository for contributions in support of the activities of the District of Columbia Delegation to the 2008 Denver National Convention.” [Brown Affidavit]. Numerous contributions were deposited into the Account, several of which were earmarked for the DCDSC.

Based upon its review of relevant documentation, RAAD staff believed that D.C. Denver Convention 2008 was soliciting money for activities relating to the DCDSC. In fact, RAAD staff concluded that D.C. Denver Convention 2008 could not be properly viewed as an entity that was separate and distinct from the DCDSC. Accordingly, RAAD recommended in its Preliminary Audit Report that all contributions and expenditures

⁴ D.C. MUN. REGS. tit. 3, § 1806.1(c) reads, “A District employee shall not use or permit the use of government property, equipment, or material of any kind, including that acquired through lease, for other than officially approved purposes. An employee has a positive duty to protect and conserve government property, including such equipment, supplies, materials, and other items as may be issued or entrusted to him or her. Nothing in this subsection, however, shall serve to prohibit the following: ...

(c) The use of government facilities or equipment under circumstances which do not increase the maintenance cost of such resources; for example, the use of existing library materials or government-purchased books is not prohibited[.]”

associated with D.C. Denver Convention 2008 should be combined and reported along with those of the DCDSC. RAAD further advised that, in light of a statutorily-prescribed ceiling on contributions to political committees,⁵ D.C. Denver Convention 2008 should issue refunds of appropriate amounts to all donors whose contributions to that entity exceeded that ceiling.

On September 11, 2009, the DCDSC issued a response to the Preliminary Audit Report. In this response, the DCDSC expressed its disagreement with RAAD's assessment that D.C. Denver Convention 2008 was not separate and distinct from the DCDSC. In support of its position that D.C. Denver Convention 2008 was, in fact, a separate and distinct entity, the DCDSC asserted, *inter alia*, that

[t]he sole purpose of the [Account] was to support the cost/expenses of D.C. Denver Convention 2008. The account was established ... to support the costs associated with the Democratic National Convention held in Denver, Colorado in August, 2008. ... These activities were primarily in support of the D.C. delegation to the convention, the members of which were chosen in accordance with the D.C. Delegate Selection Plan approved by the Democratic National Committee. This delegate selection process included the Democratic Primary held in February, 2008. Most of the members of the delegation were not members of the DCDSC.⁶

Additionally, the DCDSC noted fundraiser disclaimer language on the donor sheet that was given to potential contributors to D.C. Denver Convention 2008 ("the Donor Sheet").

Essentially any domestic corporation may contribute to a host committee ... and may also earmark donations for a particular event. State party officials may solicit unlimited contributions payable to host committees. The host committee may fully cooperate with a state party in staging receptions and similar events. And state party members may be members of the host committee. Additionally, the state party may raise the money necessary to defray delegation costs provided the money is contributed to and expended by the host committee. The host committee for the DC delegation expenses is: Denver Convention 2008.⁷

According to the DCDSC, this language "made clear the purpose of the funds solicited and how they were to be used," and "made it clear that the funds were " "for the D.C.

⁵ D.C. Official Code Section 1-1131.01(d)(1) provides that "[n]o person shall make contributions to any 1 political committee in any one election (including primary and general election, but excluding special elections) that, in the aggregate, exceeds \$5,000."

⁶ Response to Preliminary Audit Report on The D.C. Democratic State Committee (DCDSC State Party Committee), September 2009 at 1 (citations omitted).

⁷ *Id.* at 2 (*citing* Donor Sheet).

Delegation expenses’ and identified the host committee as ‘D.C. Denver Convention 2008.’⁸

The DCDCS further declared that, unlike the DCDCS, “D.C. Denver Convention 2008 did not and does not support candidates for public office.”⁹ Notwithstanding the DCDCS’s protestations, RAAD ultimately determined that “the D.C. Denver Convention 2008 is not a separate entity from the DCDCS.”¹⁰

B. The Comcast Letter

Among the documents received pursuant to the Audit was an August 18, 2008 letter from Council Chairman Gray, on his official D.C. Council stationery, to Kathy E. Hollinger, Comcast’s Director of Government Relations and Public Affairs (“the Comcast Letter”). In the Comcast Letter, Council Chairman Gray requested, on behalf of Councilmember Harry Thomas, Jr. and himself, “Comcast support for the District’s delegation at the Democratic National Convention.” Council Chairman Gray added that “[t]he District’s participation will have a specific focus on [the delegation’s] efforts to promote voting rights for the citizens of the District of Columbia.” Council Chairman Gray further indicated that “the budget for the week of activities [during the Convention] exceeds \$200,000” and requested that Comcast contribute \$20,000 in support of the delegation’s efforts. Finally, Council Chairman Gray wrote that any support granted should be made in the form of a “check ... made payable to ‘D.C. Democratic State Committee-Denver convention.’”

On November 24, 2009, OCF notified Council Chairman Gray that it would be conducting a full investigation concerning the Comcast Letter. The investigation, which included an informal hearing with Council Chairman Gray, was concluded in April of 2010, and the Order that is the subject of the request for reversal was issued on April 7, 2010.

C. Request for Reversal of the Order

On April 22, 2010, the DCRC filed a request for reversal of the Order. The Board’s Office of the General Counsel conducted a pre-hearing conference regarding the request for reversal on May 21, 2010 in the Board’s offices. During this proceeding, the representatives from OCF, General Counsel Kathy Williams and Staff Attorney William SanFord, indicated their intent to file with the Board a motion to dismiss the request for reversal on the grounds that neither the DCRC nor Kabel had standing to request review of the Order. After an extensive discussion, the parties agreed that each would submit briefs that would address not only the threshold issue of standing, but also the substantive

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ OCF Reports Analysis and Audit Division Final Audit Report on the D.C. Democratic State Committee (DCDCS) (State Party Committee) December 2009 at 12.

issues raised in the request for reversal, in the event that the Board determined that the DCRC and Kabel did, in fact, have standing to request review of the Order. To that end, the parties submitted briefs to the Board that addressed the following three issues:

- 1) Does the D.C. Republican Committee or its Chairman, Robert Kabel, have standing to appeal the above-referenced order pursuant to section 3705.4¹¹ of the D.C. Municipal Regulations?
- 2) Did Council Chairman Vincent Gray use government resources to support or oppose either any candidate for elected office, whether partisan or nonpartisan, or an initiative, referendum, recall, or charter amendment referendum measure, or for a campaign-related purpose, when he used District City Council stationery to solicit monies from Comcast to support the District of Columbia delegation at the Democratic National Convention which, according to Gray, was planning to put a “specific focus on [the District’s] efforts to promote voting rights for the citizens of the District of Columbia”?
- 3) Did Council Chairman Vincent Gray engage in activity that is not compatible with the full and proper discharge of his duties and responsibilities as a government employee by using government resources for other than official business when he used District City Council stationery to solicit monies from Comcast to support the District of Columbia delegation at the Democratic National Convention which, according to Gray, was planning to put a “specific focus on [the District’s] efforts to promote voting rights for the citizens of the District of Columbia”?

On June 1, 2010, OCF filed a motion for the dismissal of the DCRC’s request for reversal of the Order and a supporting brief. On June 8, 2010, the DCRC filed a response to OCF’s motion to dismiss. On June 11, 2010, OCF filed a responsive submission. The matter came before the Board on December 1, 2010.¹²

II. Analysis

1. Standing

¹¹ D.C. MUN. REGS. tit. 3, § 3705.4 reads, “Any party adversely affected by any order of the Director [administratively dismissing a complaint due to either insufficient evidence to support a violation of the Act or stipulation of the parties] may obtain review of the order by filing, with the Board of Elections and Ethics, a request [for a *de novo* hearing].”

¹² A special Board meeting in the matter was scheduled for July 7, 2010. On June 25, 2010, counsel for the DCRC requested a postponement of the hearing due to a scheduling conflict. Counsel was informed that if the Board was unable to reschedule the hearing during the month of August, the hearing would not be held until the completion of the 2010 election cycle.

The Board's regulations provide that a preliminary OCF investigation into alleged violations of the Act may be initiated either by referral by the Board, or by a complaint generated internally or "by any employee or resident of the District of Columbia."¹³ Each complaint must contain the full name and address of both the complainant and the respondent, a statement of the facts alleged to constitute a violation of the Act, the complainant's signature, and a verification of the complaint under oath.

A preliminary OCF investigation may develop into a full investigation if there is reasonable cause for the OCF Director to believe that a campaign finance violation has occurred.¹⁴ If a full OCF investigation points to "sufficient evidence" of a violation, the OCF Director shall institute an action before the Board, presenting evidence of the violation in "an adversary proceeding and an open hearing."¹⁵ If, on the other hand, OCF's full investigation finds "insufficient evidence" of a violation, the Director may dismiss the case via an "order [to the Board] with written findings of facts and conclusions of law."¹⁶ Any "party" to the investigation who is "adversely affected" by the dismissal order may obtain review of the order by filing a request for a *de novo* hearing with the Board.¹⁷

The term "party" is not defined in either the Act or OCF regulations. However, the Act is modeled after the Federal Election Campaign Act of 1971 ("FECA"),¹⁸ and that statute provides some guidance as to which individuals would be parties to an investigation such that they would have the right to appeal to the Board from the dismissal of a complaint by OCF.

Section 437g(a)(1) of FECA provides that "[a]ny person who believes a violation of [FECA] ... has occurred, may file a complaint with the [Federal Election] Commission."¹⁹ Such complaint must be "in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury[.]"²⁰ Section 437g(a)(8)(A) provides that "[a]ny party aggrieved by an order of the [Federal Election] Commission dismissing a complaint *filed by such party under paragraph (1)* ... may file a petition with the United States District Court for the District of Columbia."²¹

¹³ D.C. MUN. REGS. tit. 3, § 3703.2 (b).

¹⁴ D.C. MUN. REGS. tit. 3, § 3704.1.

¹⁵ D.C. Official Code § 1-1103.02(c).

¹⁶ D.C. MUN. REGS. tit. 3, §§ 3705.1, 3705.2

¹⁷ See note 11 supra.

¹⁸ 2 U.S.C. § 431 *et seq.*

¹⁹ 2 U.S.C. § 437g(a)(1).

²⁰ *Id.*

²¹ 2 U.S.C. § 437g(a)(1) (emphasis added).

This means that an individual who files a written complaint with the Federal Election Commission (“FEC”) is a party to the matter who may appeal from an FEC order dismissing his or her complaint.

3 DCMR § 3705.4 is the District’s version of Section 437g(a)(8)(A); it, too, provides recourse to individuals who have filed written complaints with OCF and have had those complaints dismissed. In order to appeal to the Board from the dismissal of a complaint they have filed with OCF, the complainant must demonstrate that he or she been adversely affected by the dismissal of the complaints. However, by filing the complaint in the first instance, the complainant has achieved the party status required by § 3705.4.

In the instant case, the DCRC admits that it did not file a complaint, written or otherwise, with OCF regarding the Comcast letter. It acknowledges that “the action was initiated by [OCF] due to its audit of the [DCDSC].”²² Nonetheless, the DCRC asserts that, although it did not file a complaint with OCF, it satisfies the party requirement because “many of the actions that contributed to OCF’s review of this matter were initiated by the DCRC and Chairman Kabel.”²³ Specifically,

[t]he DCRC closely communicated with local newspapers regarding the matter, which contributed to the Washington Post publishing an article on November 18, 2009. Furthermore, Chairman Kabel, through the DCRC, contacted D.C. Attorney General Peter J. Nickles requesting that he investigate Chairman Gray regarding the use of Council stationery for campaign-related purposes. In response, D.C. Attorney General Nickles indicated that he had referred the matter to the OCF for their investigation. As a result of the DCRC’s actions, and the Attorney General’s response, it was unnecessary for the DCRC to file a formal complaint with the OCF.²⁴

It is true that it ultimately proved unnecessary for the DCRC to file a complaint regarding the Comcast letter; OCF had itself initiated an internal inquiry (and ultimately launched a full investigation) regarding the correspondence upon discovering it in the course of conducting a full field audit of the DCDSC.²⁵ However, contrary to the DCRC’s argument, it *was*, in fact, necessary for the DCRC to file a complaint regarding the Comcast letter with OCF *if* it wished to be a “party” which could appeal from a dismissal of the resulting case. Because the DCRC did not file a complaint alleging violations of the Act in connection with the Comcast letter, it is not a party to the OCF case that was dismissed by the Order, and it may not appeal to the Board from the Order.

²² DCRC Appellant Brief at 3. *See also* DCRC Request for Review at 2 (“During a field audit of the [DCDSC] last year, [OCF] discovered [the Comcast letter].”).

²³ DCRC Appellant Brief at 4.

²⁴ *Id.* at 3-4.

Assuming *arguendo* that the actions the DCRC took concerning the Comcast letter can be construed as sufficient to satisfy the party requirement, the DCRC has not demonstrated that it is adversely affected by the Order. A party is

“adversely affected [by agency action]’ and hence has standing to sue ... if he alleges (1) that he has or will sustain some actual or threatened injury in fact resulting from the challenged agency action, and (2) that the alleged injury is to an interest ‘arguably within the zone of interests to be protected or regulated by the statute in question.’”²⁶

The Board has interpreted “injury in fact” to mean “a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition of a burden or obligation.”²⁷ This injury in fact must also be “‘certain,’ rather than ‘conjectural or speculative.’”²⁸

In its request for reversal of the Order, the DCRC never asserted that it had suffered an injury in fact. In its brief, however, the DCRC states that “the Order provides the incumbent party with extra avenues of financing campaigns, *provided the incumbent states they want to use the money for ‘voting rights,’* not available to the DCRC and other political parties that may seek to challenge current officeholders.”²⁹ The DCRC is essentially arguing that the Order sets a precedent that will allow Democratic incumbents to misuse government resources in connection with future campaigns. This posited “injury” is “neither concrete nor particularized; it is neither actual nor imminent[.]”³⁰ Moreover, because OCF is “not an agency empowered to take final administrative action,” the Order is “not precedential at all[.]”³¹ Accordingly, the DCRC cannot demonstrate injury in fact.

The DCRC’s argument that Kabel has standing to appeal the Order as a result of his status as a municipal taxpayer status must also fail. As the DCRC states, “[w]hen a municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement is satisfied.”³² In the instant

²⁶ *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29 (3rd Cir. 1976).

²⁷ See Board Memorandum Opinion and Order, “In Re: David Mallof, et al. v. D.C. Office of Campaign Finance , 09-003 (January 28, 2009).

²⁸ *District Intown v. Consumer & Reg. Affairs*, 680 A.2d at 1373, 1377 (D.C. 1996)(“*District Intown*”).

²⁹ DCRC Appellant Brief at 7 (emphasis added).

³⁰ *Mallof v. D.C. Board of Elections and Ethics*, 1 A.3d 383, 400 (D.C. 2010)(rejecting claim that an OCF order caused Petitioners injury in fact by setting a precedent that would allow candidates to misuse government resources to create campaign advertisements in future elections).

³¹ *Id.*

³² DCRC Appellate Brief at 7 (citing *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988)).

matter, the “challenged activity” is the Order finding that Council Chairman Gray did not violate either the Act or DPM provisions. The Order does not “involve[] a measurable appropriation or loss of revenue.” Consequently, the application of the municipal taxpayer standing doctrine is inappropriate.

III. **Conclusion**

OCF regulations provide that “[a]ny party adversely affected by any order of the Director [administratively dismissing a complaint due to either insufficient evidence to support a violation of the Act or stipulation of the parties] may obtain review of the order by filing, with the Board of Elections and Ethics, a request [for a *de novo* hearing].” The DCRC did not file a complaint with OCF regarding the Comcast letter, and was, therefore, not a party to the matter. Moreover, neither the DCRC nor its Chairman, Kabel, are adversely affected by the Order.

In light of the foregoing discussion, it is hereby

ORDERED that the DCRC’s request for review of the Order is hereby DENIED.

December 28, 2010

Date



Togo D. West, Jr.
Chairman, Board of Elections and Ethics

Charles R. Lowery, Jr.
Member, Board of Elections and Ethics