

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

Michael Tacosky
Complainant,

v.
John F. Settles II,
Respondent.

Administrative Hearing
No. 13-003

Re: Challenge to the Nominating Petition of
John F. Settles II,
Candidate for At-Large Member of the
District of Columbia Council

MEMORANDUM OPINION AND ORDER

INTRODUCTION

This matter came before the District of Columbia Board of Elections (“the Board”) on Wednesday, February 20, 2013. It is a challenge to the nominating petition of John F. Settles II (“Mr. Settles” or “Respondent”) for the office of At-Large Member of the District of Columbia Council. The challenge was filed by Michael Tacosky (“Mr. Tacosky” or “Complainant”) pursuant to D.C. CODE § 1-1001.08 (o)(1) (2011). The Complainant asserted that his petition challenges, if valid, would leave Mr. Settles’ nominating petition below the statutory minimum of 3,000 duly registered voters, and thus disqualify Mr. Settles from ballot access in the April 23, 2013 special election.

Chairman Deborah K. Nichols and Board member Stephen I. Danzansky presided over the hearing. The Complainant was represented by Mr. Thorn Pozen, Esq., and the Respondent was represented by Mr. Reginald J. Richter, Esq.

PROCEDURAL BACKGROUND

On January 23, 2013, Mr. Settles submitted a Nominating Petition to qualify for ballot access for the office of At-Large Member of the District of Columbia Council pursuant to D.C. CODE §1-1001.08 (j)(1)(B) (2011). The Nominating Petition contained four thousand, one hundred twenty-four (4,124) signatures. On January 26, 2013, the petition was posted for inspection pursuant to D.C. CODE §1-1001.08(o)(1) (2011).¹

Challenge to Settles Petitions

On February 4, 2013, Mr. Tacelosky filed a challenge to the Settles petition, objecting or taking exception to one thousand, four hundred eighty-two (1,482) names and/or signatures. In conformity with the Board's regulations title 3 D.C. Municipal Regulation ("DCMR") § 1609.2, each signature/name was challenged on a specific ground or grounds. Mr. Settles was given a true copy of the challenge by electronic mail at the close of business on February 4, 2013.

Initial Pre-Hearing Conferences

On Wednesday, February 13, 2013, the Board of Elections Office of the General Counsel held a Pre-Hearing Conference on this matter pursuant to 3 DCMR § 415. Both parties had representation during the Pre-Hearing Conference: Mr. Tacelosky was represented by Mr. Pozen, and Mr. Settles was represented by Mr. George Gates IV, Esq.² The Registrar of Voters ("Registrar"), having reviewed Mr. Settles' petitions and the Complainant's challenges,

¹ D.C. CODE § 1-1001.08(o)(1) (2011) states in relevant part:

The Board is authorized to accept any nominating petition for a candidate for any office as bona fide with respect to the qualifications of the signatures thereto if the original or facsimile thereof has been posted in a suitable public place for a 10-day period beginning on the third day after the filing deadline for nominating petitions for the office. Any registered qualified elector may within the 10-day period challenge the validity of any petition by written statement signed by the challenger and filed with the Board and specifying concisely the alleged defects in the petition.

² Mr., Gates could not attend the hearing before the Board due to a scheduling conflict, and Mr. Settles accordingly retained Mr. Richter for the hearing.

presented her preliminary findings during this conference as follows: one thousand, two hundred seventy-five (1,275) of the one thousand, four hundred eighty-two (1,482) challenges raised were determined to be valid challenges, and the signatures should not be counted for purposes of ballot access. This left Mr. Settles' nominating petition with two thousand, eight hundred forty-nine (2,849) signatures—one hundred fifty-one (151) signatures below the number required for ballot access.

The Registrar informed the parties that Mr. Settles had a total of six hundred seventy-four (674) signatories that were registered at a different address than the one given on the nominating petition. Mr. Settles could have potentially cured these defects by filing change of address forms for each challenged signatory with the Board during the first ten (10) days of the period designated for resolving the challenge that culminated on February 14, 2013 pursuant to D.C. CODE § 1-1001.08(o)(3).³ Mr. Settles took exception to one hundred and eighty-four (184) of these challenged signatories because Mr. Tacelosky categorized them as not being registered as evidenced by the discrepancy in the categorical totals he tabulated and attached to his challenge as a reference.⁴ The Registrar explained that there was no discrepancy; rather, the 184 signatures were challenged as not being registered. During the course of verifying the challenged

³ D.C. CODE § 1-1001.08(o)(3) (2011) states in relevant part:

(3) For the purpose of verifying a signature on any petition filed pursuant to this section, the Board shall first determine if the address on the petition is the same as the address shown of the signer's voter registration record. If the address is different than the address which appears on the signer's registration record, the address shall be deemed valid if:

(A) The signer's current address is within the single member district for an Advisory Neighborhood Commission election, within the school district for a school board election, within the ward for a ward-wide election, or within the District of Columbia for an at-large election; and

(B) The signer files a change of address form with the Board during the first 10 days of the period designated for resolving challenges to petitions.

⁴ Mr. Tacelosky's own accounting of the signatures he challenged based upon the category of address mismatch totaled 490.

signatures mandated by D.C. CODE § 1-1001.08(o)(3) (2011), she made the determination that the address on the petition was not the same as the address shown on the signer's voter registration record. Accordingly, the Registrar could only deem those particular signatures valid if the signer filed a change of address form with the Board during the first ten days of the challenge. Mr. Settles objected to the Registrar's treatment claiming to not have proper notice of those particular defects nor the allotted time to cure them.

Mr. Tacelosky categorized seventy (70) signatures as being suspicious, and Mr. Settles categorically objected to the specificity of that challenge. The Registrar explained that she took that challenge to mean the signature is not that of the registered voter it purports to be. She compared the signatures with the voter registry and made an independent assessment with respect to each signature finding fifty (50) signatures did not match the Boards records.

Mr. Tacelosky also challenged forty-seven (47) signatures as duplicates; however, he did not cite the corresponding duplicate signatures to support his assertion. Consequentially, the Registrar did not investigate those particular challenges because she did not have evidence to substantiate a determination that the signatures were defective. Mr. Tacelosky offered to indicate the corresponding duplicate signatures in the nominating petition by the close of business on February 14, 2013, the tenth day to resolve the challenge. Mr. Settles objected to this concession categorizing it as another opportunity to amend the challenge after the period for doing so had ended. Mr. Tacelosky was made aware of Mr. Settles' concern, and he was not authorized to raise new signatures as defective. Only the signatures raised in the challenge could be substantiated by notating the line and page number of the duplicative signature. On February 14, 2013, Mr. Tacelosky accordingly submitted the corresponding signatures indicating line and page number of the duplicates.

Mr. Settles took exception to the Preliminary Determination of the Registrar and requested a review by and hearing before the Board of Elections. Mr. Settles submitted an initial list of challenged signatories where he disputed the allegation of them not being registered. During the interim between the Pre-Hearing Conference and the Hearing, Mr. Settles submitted additional lists of disputed signatures that totaled two hundred fifty-five (255) signatures in the aggregate. Mr. Settles also submitted a total of forty-two (42) out of a possible six hundred seventy-four (674) change of address forms.

Second Pre-Hearing Conference

Anticipating a change in the preliminary determination of the Registrar based upon the evidence submitted by the parties during the Pre-Hearing Conference and thereafter, the Board thought it prudent to conduct a second Pre-Hearing Conference immediately prior to the scheduled Board Hearing held on Wednesday, February 20, 2013. The Registrar credited Mr. Settles with thirteen (13) additional signatures out of the two hundred and fifty-five (255) submitted by the Respondent, which left the candidate's nominating petition with two thousand, eight hundred and sixty-two (2,862) signatures—one hundred and thirty-eight (138) signatures below the number required for ballot access. The Registrar of Voters received forty-two (42) changes of address from Mr. Settles. After validating twenty (20) of the address changes,⁵ Mr. Settles' nominating petition contained two thousand eight hundred and eighty-two (2,882) presumptively valid signatures—one hundred and eighteen (118) signatures below the number required for ballot access. Finally, Mr. Tacelosky was credited with forty-one (41) of the forty-seven (47) alleged duplicative signatures. Mr. Settles' nominating petition was accordingly

⁵ Of the forty-two (42) change of addresses submitted, twenty-two (22) were disallowed for various reasons: 11 were new registrants; 2 signatories were inactive voters; 2 signatures did not match the voter registry; 2 signatures were not on the original nominating petition; 3 change of address forms did not match the address given on the nominating petition; and 2 signatories did not put their birth date on the form.

reduced to two thousand eight hundred and forty-one (2,841) presumptively valid signatures— one hundred and fifty-nine (159) signatures below the number required for ballot access.

Mr. Settles, by and through his counsel Mr. Richter, raised a number of objections to the Registrar's new preliminary determination. First, Mr. Settles was concerned that thirty-one (31) registered voters temporarily residing in a homeless shelter were disallowed because their given address on the nominating petition did not match the Board's records. Second, Mr. Settles took exception to the one hundred eighty-four (184) signatories disallowed due to address changes that were originally categorized on the challenge as not registered. Third, Mr. Settles disputed the Registrar's finding that signatures in his submission did not match the Board's records arguing that signatures can change over time.

Hearing Before the Board

During the hearing before the Board, The Respondent raised all of his objections; however, he posited a new claim for the first time: Mr. Settles, by and through his legal counsel, intimated that the voter registry may be inaccurate. He further argued that if the registry is not complete, then many address changes could have theoretically not been processed notwithstanding being in the Board's possession. The Chairman requested to see any evidence the Respondent had to substantiate the allegation, and Mr. Richter relied on the unsupported assertions of another challenged candidate made through a press release. When pressed by the Board to posit more probative evidence, the Respondent requested and received leave to file evidence with the Board by the close of business on Wednesday, February 20, 2013. The Complainant was given until Thursday, February 21, 2013 to respond to any new evidence introduced by the Respondent. Ultimately, Mr. Settles did not submit any new evidence by the established deadline.

DISCUSSION

The Board of Elections undertakes its solemn duty of conducting elections when it engages in the nominating petition challenge process pursuant to D.C. CODE § 1-1001.05(3) (2011). While the Board has discretion to overlook ministerial errors in the filing of a nominating petition, this administrative agency lacks authority to overlook defects in a nominating petition that would render the petition insufficient for ballot access pursuant to D.C. CODE § 1-1001.08(j)(1)(B) (2011). The Board cannot turn a blind eye when evidence demonstrates that a candidate for the office of at large member of the Council fails to file a petition with the signatures of 3,000 duly registered voters. The Board weighed the arguments and evidence presented both at the hearing and throughout the preparatory process, and for the reasons stated below, has determined that Mr. Settles has not met his burden for ballot access.

Lack of Notice for Address Changes

Mr. Settles is of the opinion that he did not receive proper notice of the Registrar's decision to disallow one hundred eighty-four (184) signatures on the basis that the signatories are not registered at the address on the nominating petition. The Respondent's theory is that he should have the full panoply of ten days to attempt to cure these signatures since he was only made aware of the Registrar's decision to "convert" these challenges on the ninth day of the period designated by law to submit change of addresses. However, Mr. Settles' argument relies on a false premise: the Registrar has no statutory obligation to provide notice of the opportunity to submit address changes as notice comes in the form of the challenge to the nominating petition itself. Once any signature is challenged upon a nominating petition, the Registrar is required to ascertain first and foremost whether the address on the petition is the same as the address shown on the voter's registration record pursuant to D.C. CODE § 1-1001.08(o)(3) (2011). Mr. Settles

had the same meaningful opportunity to ascertain whether the addresses of these signatories matched the voter records because he was made aware of the challenge to their registration status on the same date the challenge was received by the Board. As a courtesy, the Registrar merely pointed out to Mr. Settles at the Pre-Hearing Conference that she could not accept these particular signatures unless a change of address was submitted.

The Respondent has not pointed the Board to any authority mandating additional notice of signatures with addresses that do not match voter records. Moreover, this courtesy inured to Mr. Settles' benefit: The Registrar actually increased the universe of curable signatures on the petition from 490 to 674. The Board cannot now turn a blind eye to its statutory duty to disallow signatures on the petition where the address does not match voter records and no change of address form has been submitted. If the Board were to indulge Mr. Settles' request, the challenge period could not conceivably be enough time to resolve challenges. Moreover, Mr. Settles has always had access to the voter records and could verify signatories' addresses as far in advance as prior to submission of his nominating petition. Candidates are vested with the singular responsibility to submit the statutory minimum of valid signatures of duly registered voters for ballot access. Accordingly, the Board gave the Respondent notice of the challenge which inured to his benefit, and is without jurisdiction to deem these particular signatures valid because the addresses do not match the voter records.

Homeless Signatories

Mr. Settles' next argument is that thirty-one (31) signatories who signed his petition and used the address of a homeless shelter should not be disallowed because of their displacement from their homes. Again, the facts belie Mr. Settles' argument: the signatures are disallowed because the addresses do not match voter records—not because of their displacement, but they

could have been cured by changing their address on the voting records. While the transitory nature of the homeless population makes it notably difficult to locate signatories to procure change of addresses, this group of signatories accounts for only 33 of the 674 possible changes of addresses that Mr. Settles could procure. By statute, the Board simply cannot provide allowance for this category of signatories, and the Registrar properly disallowed their signatures on the nominating petition.

Voter Registry

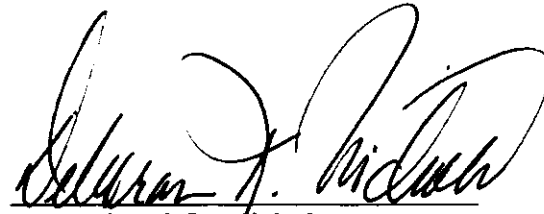
The Respondent baldly challenged the accuracy of the voter registry for the first time during the hearing before the Board. He reasoned that the Board experienced a historical influx of address changes and new voter registrations during the last General Election, and that—to his detriment—the Board may have not completed processing them. The Respondent however submitted no evidence of this, and was given leave to garner something other than assertions from other candidates to substantiate his claims. The Board is vested with the duty to accurately maintain a uniform, computerized voter registration list pursuant to D.C. CODE § 1-1001.05(a)(1). The Board is always acutely sensitive to any accusation of an inaccurate voter record, and was interested to examine any and all evidence of a defective list so that it could be rectified; however, the Board will not abide by aspersions cast without a scintilla of evidence to support them. The Board did not accord any weight to this specious allegation, because no probative evidence was offered by the party raising the issue.

CONCLUSION

In view of the evidence presented and weighed within the categories of challenges presented, the Board upholds the Registrar's determination that the Respondent submitted two thousand eight hundred and forty-one (2,841) presumptively valid signatures—one hundred and fifty-nine (159) signatures below the three thousand (3,000) requisite signatures for ballot access pursuant to D.C. CODE §1-1001.08 (j)(1)(B) (2011). Therefore, the Board grants the challenge and holds that Mr. Settles does not qualify to be placed on the ballot for the forthcoming election.

ORDERED that candidate John Settles is denied access to appear on the ballot for the April 23, 2013, Special Election for the office of At-Large Member of the District of Columbia Council.

February 25, 2013
Date



Ms. Deborah K. Nichols
Chairman,
Board of Elections