



enclosed several documents supporting her belief that Ms. Leonard-Chambers may have violated the District of Columbia Campaign Finance and Conflict of Interest Act and several provisions of District Personnel Manual.

Specifically in her request for an interpretive opinion, Ms. Padou made the following allegations:

1. Councilmember Thomas created the Ward 5 Business Council (“the organization”), a non-profit corporation. Ms. Leonard-Chambers, a member of Councilmember Thomas’ staff, was appointed as one of the organization’s board members and also served as the treasurer.
2. Ms. Leonard-Chambers used her official position with the D.C. government to conduct business for the organization, including securing a \$55,000 payment to the organization from a developer identified as EYA. In exchange for EYA’s promise to pay the \$55,000, Councilmember Thomas wrote a letter to the D.C. Zoning Commission in support of the EYA project approval.
3. Ms. Leonard-Chambers testified on Councilmember Thomas’ behalf at a D.C. Zoning Commission hearing in support of the EYA project. Ms. Leonard-Chambers did not disclose her relationship with the organization which was to benefit from a \$55,000 payment from EYA.
4. Ms. Leonard-Chambers also directed other D.C. government employees to assist with and conduct business for the organization while on government time.

On June 17, 2009, OCF advised Ms. Padou that her request for an interpretive opinion would be reviewed to determine whether an investigation was warranted. Ultimately, Ms. Padou’s request for an interpretive opinion was converted into a complaint (“the Complaint”) which established reasonable cause for an investigation pursuant to D.C. Mun. Regs., tit. 3, § 3704.1. On June 26, 2009, OCF issued a letter to Ms. Leonard-Chambers, as the Respondent, advising her that a full investigation had been initiated to determine whether any violations of the Act had occurred. In this letter, Ms. Padou was identified as the Complainant.

The investigation was concluded on November 30, 2009, and the Order that is the subject of the request for review now before the Board was issued on December 11, 2009. In the Order, OCF dismissed the Complaint which made allegations of violations of the Act. The Order held that there was no evidence presented to support allegations that Victoria Leonard-Chambers used her position as a staff member to Councilmember Harry Thomas Jr. for personal gain, in contravention of D.C. Official Code § 1-1106.01(b). Secondly, the Order held that there was no evidence presented that Ms. Leonard-Chambers assisted Councilmember Thomas in facilitating a \$55,000 contribution to the Ward 5 Business Council in exchange for Mr. Thomas’ support for a matter that EYA was pursuing before the D.C. Zoning Commission, in contravention of D.C. Official Code §§ 1-1106 (c), (d), and (g).

Although the Order held that no evidence was presented to support the allegations of violations of the Act, in the same Order, OCF held that Ms. Leonard-Chambers violated DPM §§ 1804.1 (b) and (c) when she engaged in activity, and authorized office interns to engage in activity, on behalf of the Ward 5 Business Council during regular business hours. As a result of its findings, OCF admonished Ms. Leonard-Chambers for her violations of the standards of conduct in the DPM, and further ordered her to review the standards of conduct to ensure that she remain vigilant in her duty to maintain the public's confidence in the D.C. government.

On December 24, 2009, Ms. Padou filed with the Board a request for review of the Order. A pre-hearing conference on the matter was held on Friday, March 12, 2010 at the Board's Offices. At the March 12 pre-hearing conference, OCF and Ms. Padou agreed to hold the matter in abeyance pending an additional interpretive opinion to be issued by OCF regarding the ancillary issue of an advisory opinion written by Mr. Brian Flowers, Counsel to the D.C. Council. Another pre-hearing conference was held on Friday, May 7, 2010. During this proceeding, OCF moved the Board to dismiss this request for review for lack of standing. The Office of the General Counsel requested that Ms. Padou and OCF file briefs addressing the issue of standing.

On Thursday, May 20, 2010, the Board heard the parties' arguments with respect to the question of standing, and now issues its order reflecting its determination that, as Ms. Padou has not demonstrated that she satisfies standing for review of the Order, her request for review of the same is denied.

### **III. Relevant Statutory and Regulatory Provisions**

"Each employee of the District government must at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government." D.C. Official Code § 1-618.01 (a) (2001).

"A full investigation regarding any alleged violation of the Act, and Chapters 30 - 37 of this title, shall commence upon a finding of reasonable cause by the Director." D.C. Mun. Regs. tit. 3, § 3704.1.

"Within ninety (90) days of receipt of any complaint, the Director shall perform one (1) of the following acts:

- (a) Cause evidence to be presented to the Board, if sufficient evidence exists constituting an apparent violation, pursuant to § 3706; or
- (b) Dismiss the complaint, if insufficient evidence exists to present the matter, pursuant to § 3705."

D.C. Mun. Regs. tit. 3, § 3704.8.

“The Director may seek, upon a showing of good cause, an extension of time as reasonably necessary to complete an investigation.” D.C. Mun. Regs. tit. 3, § 3704.9.

“The Director may dismiss any case administratively under the following circumstances:

- (a) If insufficient evidence exists to support a violation; or
- (b) Upon stipulations of the parties.”

D.C. Mun. Regs. tit. 3, § 3705.1.

“The Director shall report to the Board any dismissal, pursuant to § 3705.1, by order with written findings of facts and conclusions of law.” D.C. Mun. Regs. tit. 3, § 3705.2.

“Any party adversely affected by any order of the Director, pursuant to § 3705.2, may obtain review of the order by filing, with the Board of Elections and Ethics, a request, pursuant to § 3709.12.” D.C. Mun. Regs. tit. 3, § 3705.4.

“When, after consideration of the explanation of the employee, the Board of Elections and Ethics or the agency head decides that remedial action is required regarding any matter covered under this chapter, appropriate action shall be immediately taken or ordered. Remedial action may include, but shall not be limited to, the following:

- (a) Changes in assigned duties;
- (b) Divestment by the employee of his or her conflicting interest;
- (c) Corrective or adverse action pursuant to D.C. Code §1-617.1(d) (1981); or
- (d) Disqualification for a particular assignment.”

D.C. Mun. Regs. tit. 6-B, § 1801.2.

“The provisions of this chapter shall apply to all District employees. In accordance with D.C. Code § 1-619.3(e) (1981), enforcement of this chapter shall, consistent with the regulations set forth herein, be the responsibility of each agency head, except that enforcement for the following persons shall be the responsibility of the D.C. Board of Elections and Ethics:

- (a) The Mayor, the Chairman and each Member of the Council, the President and each Member of the Board of Education, members of boards and commissions as provided in subsection (a) of Section 602 of the District of Columbia Campaign Finance Reform and Conflict of Interest Act, as amended (D.C. Code §1-1462(a) (1981)); and
- (b) Employees in the Executive Service, and persons appointed under the authority of D.C. Code §§ 1-610.1 through 1-610.3 (1981) (and paid at a rate of DS-13 or above in the District Schedule or comparable compensation), or designated in D.C. Code § 1-610.8 (1981).”

D.C. Mun. Regs. tit. 6-B, § 1802.1.

#### **IV. Discussion**

The Order addresses two separate matters: (a) allegations of violations of the Act; and (b) allegations of violations of the standards of conduct in the DPM. Discussion of the standing issue must similarly be bifurcated because each matter is governed by different procedures and rules. The Board's rules with respect to standing to appeal OCF dismissals of complaints which contain allegations of violations of the Act are contained in Chapter 37. Standing requirements and the procedures for handling allegations of violations of the standards of conduct in the DPM, however, are not included in Chapter 37. Instead, for reasons discussed, *infra*, the DPM and the D.C. government's personnel practices more appropriately inform who has standing to appeal employment-related matters.

##### **A. Standing to Appeal the Dismissal of Allegations of Violations of the Act**

When the Director of the Office of Campaign Finance administratively dismisses a complaint alleging violations of the Act or Chapters 30-37, "any party adversely affected by any order of the Director may obtain review...with the Board of Elections and Ethics[.]" D.C. Mun. Regs. tit. 3, § 3705.4. Thus, as a general requirement, in order for the Board to grant the request for review, the entity filing the request must be both: (1) *a party* to the proceeding which generated the order at issue; and (2) *adversely affected* by the order at issue.

Here, Ms. Padou satisfies the first requirement of being a party. Ms. Padou filed the Complaint which lead to an investigation, was identified in a letter from OCF on June 26, 2009 as the Complainant in this matter, and received copies of the Order after it was issued on December 11, 2009. All evidence suggests that OCF had consistently treated Ms. Padou as Complainant, and therefore, a party, to this matter involving allegations of violations of the Act.

Next, in order to obtain review by the Board, a party must demonstrate that she has been adversely affected by the OCF Director's Order. The D.C. Administrative Procedure Act ("the DCAPA") is meant to work in harmony with all of the Board's regulations including those specific to OCF, and thus provides guidance as to whether a party has been "adversely affected." See, e.g., 3 DCMR § 400.3. The D.C. Court of Appeals has adopted a three part test to determine whether a party has standing under the DCAPA to challenge an agency order: (1) the petitioner must allege that the [order] has caused her injury in fact; (2) that the interest sought to be protected is arguably within the zone of interests protected under the statute or constitutional guarantee in question; and (3) that no clear legislative intent to withhold judicial review is apparent. *Miller v. D.C. Bd. of Zoning Adjustment*, 948 A.2d 571, 574 (D.C. 2008).

Part one of this three part test most properly describes the inquiry that the Board engages

in when determining whether a party is “adversely affected” under D.C. Mun. Regs., tit.3, § 3705.4. Under this analysis, the petitioner’s “injury in fact” must be an invasion of a legally protected interest which is both (1) concrete and particularized; and (2) actual or imminent, not conjectural or hypothetical. *Miller*, 948 A.2d at 574 (citing *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1207 (D.C. 2002)).

In her request for review of the Order, Ms. Padou argues that she is adversely affected because

“allowing a District employee to simultaneously serve on the staff of the Ward 5 Councilmember while [also] serving as a board member and treasurer of the Ward 5 Business Council is contrary to previous opinions of the Office of Campaign Finance (OCF); adversely affects [her] confidence in the integrity of the District government; and is not compatible with the full and proper discharge of Leonard’s duties and responsibilities as a District government employee.”

Request for Review at 1.

Ms. Padou’s statements about how she is adversely affected do not demonstrate “injury in fact” as interpreted by the Board or the D.C. Court of Appeals. First, none of the “harms” listed by Ms. Padou are concrete and particularized. Ms. Padou has no concrete injury because she has not been denied some personal, pecuniary or property right, nor has she received a burden or obligation as a result of the Order. Additionally, none of the harms suggested by Ms. Padou are particularized. Instead, they are general, amorphous grievances that are not unique to Ms. Padou. Because there is no concrete or particularized injury here, there is no way for the injury to be actual or imminent.

Besides the harm she describes in her request for review, Ms. Padou also argues that she is adversely affected by the Order because OCF failed to conform to its regulations governing investigations. Compl. Br. at 2-4. In summary, Ms. Padou asserts that at the conclusion of the full investigation, “OCF neither presented evidence to the Board of an apparent violation pursuant to § 3706 nor dismissed the complaint due to insufficient evidence pursuant to § 3705,” as was required by 3 DCMR § 3704.8. Compl. Br. at 3. Instead of behaving as it should have, Ms. Padou argues that OCF erroneously convened an informal hearing pursuant to § 3709. Consequently, Ms. Padou argues that her appeal is pursued through § 3709.12.<sup>2</sup>

Despite Ms. Padou’s allegations of procedural harm, nowhere does it appear that OCF failed to act in conformity with its regulations governing dispositions of full investigations. Pursuant to § 3704.1, OCF launched a full investigation because the

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<sup>2</sup> 3 DCMR § 3709.12 states, “Any party adversely affected by any order of the Director may obtain review of the order by filing, with the Board of Elections and Ethics, a request for a hearing de novo.” Substantively, 3 DCMR §§ 3705.4 and 3709.12 are identical. The Board engages in the same analysis on the issue of standing for requests for review brought under either of these provisions.

Director had reasonable cause to believe there was violation of the Act or its implementing regulations. Order at 2. As required by § 3704.2, the Director notified Ms. Leonard-Chambers, the Respondent, of the investigation. Order at 2. OCF gathered evidence during the full investigation pursuant to § 3704.4 when it ordered Ms. Leonard-Chambers to appear on September 28, 2009 for questioning and when it conducted interviews of James Grayton and Andre Tyler, co-incorporators of the Ward 5 Business Council.<sup>3</sup> Additionally, OCF properly requested and received an extension of time to complete its investigation, pursuant to § 3704.9. Order at 3.

Lastly, contrary to Ms. Padou's description of the procedural facts, OCF also acted in conformity with its regulations governing full investigations by dismissing the Complaint pursuant to § 3704.8 (b). Although OCF failed to specifically state in the Order that the complaint was dismissed with respect to the allegations of violations of the Act, the Director's proper dismissal can be implied because the Order twice states that "no evidence was presented to support complainant's allegation[s]," further supported by the four conclusions of law which find that Ms. Leonard-Chambers did not violate provisions of the Act. Order at 8. Because the Director must dismiss "if insufficient evidence exists" pursuant to § 3704.8 (b), it follows then that the Director dismissed the Complaint here when "no evidence was presented." Accordingly, the Director reported the dismissal of the complaint to the Board "by order with written findings of facts and conclusions of law." 3 DCMR § 3705.2. Because OCF acted in conformity with its regulations governing full investigations and dismissal of allegations of violations of the Act, no procedural harm occurred to provide Ms. Padou with standing to appeal the Order dismissing the Complaint.

In summary, Ms. Padou has failed to demonstrate that she has been adversely affected by the Order dismissing the Complaint alleging violations of the Act. Ms. Padou has not been injured in fact because the harms suggested in her appeal are not concrete and particular. Further, no procedural harm has occurred because OCF followed the Board's regulations with respect to full investigations and dismissals of complaints. Therefore, because Ms. Padou has not been adversely affected by the Order, she lacks standing to appeal.

#### **B. Standing to Appeal Remedial Action Taken Against a D.C. Government Employee and OCF Findings Related to Suspected Violations of the DPM**

D.C. Municipal Regulations Title 3, Chapter 37 establishes the procedures for the conduct of all investigations as related to violations of the District of Columbia Campaign Finance and Conflict of Interest Act (codified at D.C. Official Code § 1-1101.01 *et seq.*) and Chapters 30-37 of the Board's regulations. Although the Board's

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<sup>3</sup> In her brief, Ms. Padou stated that "OCF apparently held an informal hearing pursuant to § 3709." No evidence was presented to support this argument. Presumably Ms. Padou confused the evidence gathering aspect of the full investigation, as described in § 3704.4, for an informal hearing. Ms. Padou is correct in her statement that informal hearings are only permitted for alleged violations of reporting and disclosure requirements, and thus would have been inappropriate here, had an informal hearing occurred.

regulations contain the ethics rules embodied in the Campaign Finance and Conflict of Interest Act,<sup>4</sup> the “standards of conduct” at issue in the Order refer to those created out of the passage of the District of Columbia Comprehensive Merit Personnel Act of 1978 (“D.C. Merit Personnel Act”) (codified at D.C. Official Code § 1-601.01 *et seq.*), as implemented by the Mayor through the District Personnel Manual (“DPM”) (codified at D.C. Mun. Regs., tit. 6-B).

The standards of conduct contained in the DPM apply to all District government employees. 6-B D.C.M.R. § 1800. Responsibility for enforcement of the DPM is divided between agency heads and the D.C. Board of Elections and Ethics, as delegated to the Office of Campaign Finance.<sup>5</sup> Agency heads have enforcement authority over their respective subordinate employees; the Board, through OCF, has enforcement authority over the Mayor, the Chairman and each Member of the Council, the President and each Member of the Board of Education, members of boards and commissions, and employees of the Executive Service (grade 13 and above). 6-B D.C.M.R. § 1802.1 (a)-(b).

Despite the DPM’s extensive detail about which behaviors are prohibited, the DPM is virtually silent about the enforcement procedures an agency head or the Board must follow with respect to that prohibited activity, if any.<sup>6</sup> The only hint at procedure appears in DPM §1801:

*When, after consideration of the explanation of the employee, the Board of Elections and Ethics or the agency head decides that remedial action is required regarding any matter covered under this chapter, appropriate action shall be immediately taken or ordered. Remedial action may include, but shall not be limited to, the following:*

- (a) Changes in assigned duties;
- (b) Divestment by the employee of his or her conflicting interest;
- (c) Corrective or adverse action pursuant to DC Code § 1-617.1(d) (1981); or

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<sup>4</sup> For instance, “Chapter 33, Conflict of Interest and Use of Government Resources for Campaign-Related Purposes” serves to implement the correlating provisions of the Act which prohibit certain unethical conduct. *See* D.C. Mun. Regs., tit. 3, ch. 33.

<sup>5</sup> The Board delegated this enforcement authority to OCF early after the passage of the D.C. Merit Personnel Act because of OCF’s investigatory and ethics expertise, and also because these same officials that the Board had DPM enforcement authority over were regulated by OCF through the Campaign Finance and Conflict of Interest Act.

<sup>6</sup> With the exception of § 1815, there are no procedural provisions in the DPM. Section 1815 provides specific administrative enforcement procedures for certain former District government employees only. *See, e.g.,* § 1815.7, which details the requisite contents of a notice of disciplinary proceeding from the D.C. Ethics Counselor. Presumably these procedures are included because the former employee is no longer subject to enforcement and discipline by an agency head or the Board.



(d) Disqualification for a particular assignment.

6-B D.C.M.R. § 1801.2 (emphasis added). This very unspecific procedure provides that when an agency head or the Board come to know of facts which may indicate a possible violation of the standards of conduct in the DPM, all that the Board or the agency head is required to do is “consider the explanation of the employee,” presumably through some sort of interview with the employee.

This absence in procedure is revealing in that what is *not* intended by these provisions of DPM is to create an adversarial proceeding with complainants and respondents. This is supported by the fact that there are no provisions regarding the filing of “complaints.” In other words, there are no *parties* in the traditional adversarial sense. Instead, what really is occurring is personnel activity or an employment action. This is evidenced by the list of “remedial actions” in § 1801.2. All of these remedial actions are employment related – no civil fines or forfeitures are associated, nor can they be prescribed. Put another way, the Board acts identically to that of any agency head by recommending or taking disciplinary *employment* action against the government employees over which it has DPM enforcement authority.

Importantly, in an employment or personnel action, the affected employee is the only “party.” Thus, any appeal from an adverse employment action, other remedial action, may only come from the affected employee.<sup>7</sup> That an agency head or the Board may come to know of facts which indicate a violation of the DPM from a third-party complaint does not give that third-party the standing to appeal a personnel or employment action taken against a D.C. government employee.

Here, Ms. Leonard-Chambers is a District government employee over which the Board has DPM enforcement authority. 6-B D.C.M.R. § 1802.1. OCF came to know of facts which indicated that Ms. Leonard-Chambers may have violated the DPM standards of conduct through the Complaint that Ms. Padou had filed with OCF. Order at 1-2. OCF considered Ms. Leonard-Chambers’ explanation, presumably from the questions that OCF asked during the full investigation related to the allegations of violations of the Campaign Finance and Conflict of Interest Act, and then determined that Ms. Leonard-Chambers had violated DPM §§ 1804.1 (b) and (c). Order at 9. The Director of OCF admonished Ms. Leonard-Chambers for her violation of the standards of conduct, and further ordered Ms. Leonard-Chambers to review the DPM “to ensure that she remain[] vigilant concerning her responsibility” to protect the public’s confidence in the government. Order at 10.

Because she is not the employee affected by the employment action contained in the

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<sup>7</sup> See E-DPM, Chapter 18, Part II, “Implementing Guidance and Procedures”, § 1.8 (A) (which provides that “any disciplinary action taken may be in addition to any penalties prescribed by law, and in accordance with applicable laws and regulations, particularly D.C. Official Code § 1-616.51 et seq. and Chapter 16 of the D.C. personnel regulations) (emphasis added). See also 6-B DCMR § 1618.1 (which provides that “an employee shall be entitled to appeal...any final [agency] decision regarding an adverse action” to the Office of Employee Appeals) (emphasis added).

Order, Ms. Padou is not a party to this part of the matter contained in the Order. It is of no import that Ms. Padou filed a complaint alleging that Ms. Leonard-Chambers violated the DPM standards of conduct, nor does it matter that she was the Complainant in the full investigation regarding the alleged violations of the Campaign Finance and Conflict of Interest Act. As a non-party to the employment matter, Ms. Padou may not appeal the remedial action taken against Ms. Leonard-Chambers.

More silent yet are the D.C. personnel regulations concerning the ability to appeal agency head or OCF findings which *do not* recognize violations of the standards of conduct. In the absence of specific rules, presumably the DCAPA's general rules regarding standing should apply. Even if applying the D.C. Court of Appeals three-part test for standing under the DCAPA, Ms. Padou has failed the first prong which requires her to demonstrate that she is "injured in fact." As discussed, *supra*, a petitioner's "injury in fact" must be an invasion of a legally protected interest which is both concrete and particularized. *Miller*, 948 A.2d at 574. The harms that Ms. Padou listed in her request for review of the Order failed to demonstrate a concrete injury because she was not denied a personal, pecuniary, or property right, nor received a burden or obligation, as a result of the OCF findings that Ms. Leonard-Chambers did not violate other provisions of the DPM. Further, the harms listed in her request for review are not particularized to Ms. Padou because they are nebulous grievances that could be asserted by any number of people. For these reasons, Ms. Padou could not possibly satisfy the standing requirements in the DCAPA, even if they were applicable here, to appeal OCF's findings which conclude that Ms. Leonard-Chambers did not violate, *inter alia*, DPM § 1804.1 (e).

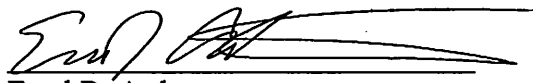
In summary, Ms. Padou is not the affected employee by the remedial action contained in the Order. As such, she lacks the ability to appeal the remedial employment action taken against Ms. Leonard-Chambers. With respect to OCF's findings that Ms. Leonard-Chambers did not violate certain provisions of the DPM, even if the DCAPA test for standing were to apply, Ms. Padou has failed to demonstrate injury in fact. For these reasons, Ms. Padou lacks standing to appeal both the OCF findings related to suspected violations of the DPM and the remedial action taken against Ms. Leonard-Chambers.

## V. Conclusion

In light of the foregoing discussion, it is hereby

**ORDERED** that the Complainant's request for review of the Order is denied.

July 29, 2010  
Date

  
Errol R. Arthur  
Chairman, Board of Elections and Ethics

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