

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

In Re:

“Delegate Voting Rights Act
Of 2018”

Administrative Hearing
No. 18-011

Re: Acceptance of Proposed
Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections (“the Board”) on Wednesday, June 6, 2018, pursuant to D.C. Official Code § 1-1001.16(b)(1) (2016 Repl.). It involves a finding by the Board that the proposed measure, the “Delegate Voting Rights Act of 2018” (“Delegate Voting Rights Act” or “the Measure”), is a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). The proposer, Mr. Walter Smith, appeared before the Board with counsel, Aaron Flynn, of Hunton Andrews Kurth LLP. Chairman D. Michael Bennett and Board Members Dionna Lewis and Michael Gill presided over the hearing. Executive Director Alice Miller, General Counsel Kenneth McGhie, and Director of the Office of Campaign Finance Cecily Collier-Montgomery were also present. This Memorandum Opinion constitutes the Board’s findings of fact and conclusions of law.

Statement of the Facts

On May 1, 2018, Walter Smith filed the Delegate Voting Rights Act as an initiative measure pursuant to D.C. Official Code § 1-1001.16(a). In summary, the Measure seeks to “amend the District of Columbia Delegate Act of 1970 to provide the D.C. Delegate to the House of Representatives the right to vote in the House of Representatives on matters exclusively related to the District.”¹

On May 11, 2018, a notice was published in the *D.C. Register* advising the public of a hearing to be held on June 6, 2018 at which the Board would consider whether the Delegate Voting Rights Act presented a proper subject of initiative. 65 DCR 5163. Notice of the public hearing to review the Measure was sent to the Attorney General for the District of Columbia (“the Attorney General”), the Office of the Mayor’s Legal Counsel, and the General Counsel for the Council of the District of Columbia (“the Council”) inviting them to comment on the issue of whether the Measure presented a proper subject. The only written comments received were from DC Appleseed, which argued in favor of the Measure as a proper subject of initiative.

During the Proper Subject Hearing convened on June 6, 2018, there were no witnesses in opposition to the Measure. Mr. Walter Smith, the proposer and Executive Director of DC Appleseed, spoke in favor of the Delegate Voting Rights Act as a proper subject. Specifically addressing the issue of whether the Measure violated the Home Rule Act, Mr. Smith argued that the Measure would amend a federal law that is local in character only and does not concern the functions of the United States, and therefore does not run afoul of the subject prohibition at § 602 (a)(3) of the Home Rule Act.

Analysis

The right of initiative is to be construed liberally, and “only those limitations expressed in

¹ Delegate Voting Rights Act of 2018, Summary Statement, filed May 1, 2018.

the law or clear[ly] and compelling[ly] implied” are to be imposed upon that right.² “Absent expressed or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the [Council] to adopt legislative measures.”³

In the District of Columbia, the people’s direct legislative right expressly excludes laws which appropriate funds. D.C. Official Code § 1-1001.02(10) (“[t]he term ‘initiative’ means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.”) In addition to the express exclusion of proposed measures which appropriate funds, pursuant to D.C. Official Code § 1-1001.16 (b)(1), the Board is also obligated to refuse to accept an initiative measure if it finds that it violates Title IV of the District of Columbia Home Rule Act; authorizes or would have the effect of authorizing discrimination prohibited by the District of Columbia Human Rights Act (codified at D.C. Official Code § 2-1401 *et seq.*); or negates or limits a budget act of the Council.⁴

In the proper subject review of this Measure, the only question before the Board is whether it violates the Home Rule Act. “Upon receipt of each proposed initiative or referendum measure, the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative or referendum, whichever is applicable, under the terms of title IV of the

² *Convention Center Referendum Committee v. DCBOEE*, 441 A.2d 889, 913 (D.C. 1981)(“*Convention Center II*”).

³ *Convention Center II* at 897.

⁴ D.C. Official Code § 1-1001.16 (b)(1) creates an obligation on the Board to reject proposed ballot measures when they concern the prohibited subjects listed, as well as when the proponent of the measure fails to meet certain filing requirements. The filing requirements are for “5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title,” as well as the proper filing of a statement of organization and report of receipts and expenditures with the Office of Campaign Finance. § 1-1001.16 (b)(1)(A) and (B).

District of Columbia Home Rule Act[.]” D.C. Official Code § 1-1001.16 (b)(1). Title IV, Section 404 provides that the legislative power granted to the District, either through the Council of the District of Columbia or through the people’s right of initiative, is “subject to the limitations specified in title VI of this Act[.]”⁵ Title VI of the Home Rule Act enumerates several limitations on the District’s legislative power, including the specific limitation that there shall be no authority to “enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District.” Section 602 (a)(3).

The Measure at issue here seeks to amend a federal law, the District of Columbia Delegate Act (“Delegate Act”),⁶ by giving the Delegate to the United States House of Representatives “the right of voting with regard to any matter restricted in its application exclusively in or to the District.”⁷ The Board’s responsibility is to determine whether the Measure as proposed amends an Act of Congress that applies exclusively to the District of Columbia and whether such amendment concerns the functions of the United States. After consideration of the Measure, relevant judicial precedent, and evidence submitted for the record before the Board, for the reasons discussed herein we conclude that the Delegate Voting Rights Act presents a proper subject of initiative and accordingly must accept it.

A. The Delegate Act is an Act of Congress which applies exclusively to the District.

The legislative power of the District of Columbia includes the ability to repeal laws that

⁵ Home Rule Act § 404 (a) (codified at D.C. Official Code § 1-204.04).

⁶ District of Columbia Delegate Act, Pub. L. No. 91-405, §§ 201-206, 84 Stat. 845, 848-855 (1970) (codified at 2 U.S.C. § 25a.)

⁷ Delegate Voting Rights Act of 2018, Legislative Text, filed May 1, 2018.

apply exclusively to the District, even if those laws were enacted by Congress.⁸ “Congress intended...to withhold from local officials the authority to affect or to control decisions made by federal officials in administering federal laws that are national in scope as opposed to laws that relate solely to the District of Columbia.” *District of Columbia v. Greater Washington Central Labor Council*, 442 A.2d 110, 116 (D.C. 1982). “When Congress acts as the local legislature for the District of Columbia and enacts legislation applicable only to the District of Columbia and tailored to meet specifically local needs, its enactment should – absent evidence of Congressional intent – be treated as local law[.]” *District Props. Assocs. V. District of Columbia*, 743 F.2d 21, 27 (D.C. Cir. 1984).

The Delegate Act, by its terms, applies exclusively to the District of Columbia because it only affects the residents of the District of Columbia. The Delegate Act, by creating the Office of the Delegate, was tailored to meet specifically local needs of having a voice in the House of Representatives. The Delegate Act only mentions the District of Columbia; it does not refer to any other state, territory or jurisdiction. Accordingly, it can be characterized as a local law enacted by Congress capable of being amended pursuant to the Home Rule Act.

B. According to relevant judicial precedent, the Delegate Act does not concern the functions of the United States.

The legislative power of the District does not extend to laws which affect the functions of the United States.⁹ “The term ‘federal function’ is narrowly construed and pertains only to those activities that explicitly impact the federal government’s ability to operate.” *Myerson v. United States*, 93 A.3d 192, 197-198 (D.C. 2014). A law impinges on the federal function prohibition

⁸ Provided also that the law does not affect the functions or property of the United States. *See* Home Rule Act, § 602 (a)(3) (codified at D.C. Official Code § 1-206.02 (a)(3)).

⁹ *See* Home Rule Act, § 602 (a)(3) (codified at D.C. Official Code § 1-206.02 (a)(3)).

when it “affect[s] or control[s] decisions made by federal officials in administering laws that are national in scope.” *Greater Washington Central Labor Council*, 442 A.2d at 116. Simply because federal officials are involved does not transform an otherwise local activity into a “function of the United States.” *Id.*

Here, the Measure does not impinge on the federal function prohibition because the amendment contemplated by the Measure, namely allowing the Delegate to vote on matters that exclusively pertain to the District of Columbia, would only affect federal officials when acting on local matters, not those national in scope.

C. Congress has the ultimate legislative authority over all District legislation.

Moreover, and more importantly, Congress maintains its right to exercise its authority to legislate for the District.

Congress, ultimately, has the last word on any District legislation. An initiative, like any other D.C. law, can be disapproved by Congress. If the initiative passes, and becomes an “Act of the Council” Congress may by resolution, disapprove it. The Home Rule Act, requires that the Council transmit all legislation passed by the District to Congress. The legislation is then subject to a 30 calendar day review period (excluding Saturdays, Sundays and holidays and any day on which neither House is in session) by Congress. During that time, Congress may effectively repeal the law by passing a joint disapproval resolution which the President also signs confirming such disapproval.

Thus, Congress will always completely retain control over District law and may disapprove of any legislative action taken by the District.

Conclusion

The right of initiative is to be construed liberally, and “only those limitations expressed in the law or clear[ly] and compelling[ly] implied” are to be imposed upon that right.¹⁰ Here, the Measure does not violate the Home Rule Act because the federal law at issue pertains exclusively to the District of Columbia and the proposed amendment to the federal law does not impact a federal function.

For the foregoing reasons, it is hereby:

ORDERED that the Measure, the “Delegate Voting Rights Act of 2018,” is **ACCEPTED** pursuant to D.C. Code § 1-1001.16(b)(1).

A handwritten signature in blue ink, appearing to read "D. Michael Bennett", is written over a horizontal line.

D. Michael Bennett, Esq.
Chairman

Date: June 11, 2018

Member Mike Gill, Dissenting. I respectfully disagree with the majority’s conclusion that the Measure would not impact a federal function. By allowing the Delegate to vote, even though limited to local matters, the Measure would impact how Congress operates, and that Congress’ ability to legislate on local matters *is* a federal function conferred upon it by the Constitution of the United States. I believe Congress has the ability to confer voting rights to the Delegate for the District of Columbia for all matters before the House of Representatives even beyond those pertaining just to the District. However, I do not believe the Home Rule Act allows the Council of the District of Columbia or this Measure to unilaterally confer those rights to the Delegate, regardless if Congress ultimately accepted the Measure’s results. For these reasons, I

¹⁰ *Convention Center II* at 913.

find that the Measure would violate the Home Rule Act, and accordingly would reject the Measure as required by D.C. Official Code § 1-1001.16 (b)(1).