

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

Mayor Anthony A. Williams,
Appellant,

v.

D.C. Office of
Campaign Finance
Appellee,

Dorothy Brizill
Intervenor.

Administrative Hearing
No. 00-025

Re: Appeal of OCF Order
MUR-00-01

MEMORANDUM OPINION AND ORDER

The Board was represented by Chairman Benjamin F. Wilson and members Stephen Callas and Jonda McFarlane.

The Mayor was represented by Charles Reischel, Deputy Corporation Counsel from the Appellate Division of OCC. OCF was represented by its General Counsel, Kathy S. Williams, and Intervenor Dorothy Brizill appeared *pro se* on behalf of DC Watch.

I. BACKGROUND

A. Statement of Proceedings

This matter came before the Board of Elections and Ethics on Wednesday, September 6, 2000 pursuant to an appeal filed on behalf of Mayor Anthony A. Williams by the Office of Corporation Counsel (OCC) from an order of the Office of Campaign Finance (OCF). The Order found that the Mayor's use of the resources of the District of Columbia Government in connection with a June 8, 2000 press conference in support of the School Governance Charter Amendment created the appearance of adversely affecting the confidence of the public in the integrity of government, thereby violating the District of Columbia Personnel Regulations at Chapter 18, "Employee Conduct," of the District Personnel Manual (DPM) (Standards of Conduct), specifically §1803.1(f).

Preliminarily, the Board was presented with a motion to dismiss filed by Ms. Brizill claiming that OCC can not represent the Mayor while acting in the capacity of a private citizen. The Board decided the motion during the hearing in favor of the Mayor, but ultimately affirmed the order of the OCF.

B Statement of the Facts

On June 8, 2000, an event was held at J.O. Wilson Elementary School in Northeast Washington. This event was authorized and attended by Mayor Anthony Williams. Mayor Williams also served as the principal speaker at the event. During this event, the Mayor spoke in support of Charter Amendment No. 3, the School Governance Charter Amendment of 2000. The Charter Amendment, which has since become law,¹ was the subject of a special election held on Tuesday, June 27, 2000.

In addition to the Mayor, eleven government employees attended the June 8th event at the direction of the Mayor. These employees were: Lydia Sermons, Germanique Jones, Dan Leistikow, and Latef Mengum, of the Mayor's Office of Communications; Charly Carter, Wanda Alston, Carlene Cheatham, and Donald Robinson, of the Mayor's Office of the Public Advocate; Eric Foster of the Mayor's Office of Intergovernmental Relations; Press Secretary Peggy Armstrong, and; Deputy Chief of Staff, Mark Jones.²

Several of these employees distributed materials which expressed support for the then-proposed Charter Amendment. These materials included, *inter alia*, a press release from the Mayor's Office identifying those Council members in favor of the Charter Amendment, and an edition of a weekly newsletter published by the Mayor's office that expressed the Mayor's support for the Charter Amendment. Each of these documents

¹ Charter Amendment 3 became effective upon the Board's certification of election results on July 7, 2000 pursuant to Pub L. No. 106-226, 114 Stat. 459.

² An estimated 30-40 other D.C. government employees attended but did not actively participate in the press conference.

exhorted D.C. voters to vote in favor of the Charter Amendment. Government employees using government equipment and supplies prepared these materials.

At the event, the Mayor expressed his support for the Charter Amendment, and stated that he “would use the resources of [his] office as Mayor to support the proposed school governance Charter amendment.” In response to interrogatories propounded by OCF, as justification for his ability to do so, the Mayor referred to a legal memorandum, dated May 25, 2000, which his office had received from the Office of the Corporation Counsel. In the Mayor’s opinion, this memorandum provided that he would be able to use those “government employees whose existing duties . . . involve assisting in communicating [his] views as Mayor to the public,” as well as those resources normally accessible to such employees, “[to] assist [him] in advocating for the passage of the proposed Charter Amendment.”

On Friday, June 9, 2000, Dorothy Brizill, on behalf of DC Watch, filed a complaint with the Office of Campaign Finance alleging that the Mayor stated that “he was going to use government employees working during their regularly scheduled work hours, government facilities, and government supplies, all of which are paid for by the funds of the District of Columbia government,” and asking that the Office of Campaign Finance investigate “whether the use of government employees, facilities, and supplies on and before the press conference of June 8, 2000, constitutes violations of the campaign laws and regulations.”

OCF commenced an investigation into the matter and on Friday, June 16, 2000 issued an order finding that, through his actions in connection with the June 8th event, the Mayor had violated section 1803.1(f) of the District of Columbia Personnel Regulations which prohibits activities which might result in, or create the appearance of, “affecting adversely the confidence of the public in the integrity of government.” The order also ordered the Mayor to “immediately terminate all action involving the use of the resources

of the District of Columbia to influence the outcome of the June 27, 2000 election on the matter of a Charter Amendment.”

II. ANALYSIS

A. Brizill Motion to Dismiss

Ms. Brizill lodged a motion with the Board of Elections to dismiss the appeal based on an alleged conflict of interest. Specifically, Ms. Brizill contends that when the interests of an official or employee coincide with the interests of the government, OCC may not represent the Mayor or any other official of the District government in an adversarial action against that government.

The main issue to be resolved with respect to this motion is whether the Mayor was acting within his official capacity in his actions. D.C. CODE §1-361 provides: “The Corporation Counsel shall be under the direction of the Mayor, and have charge and conduct of all law business of the said District...He shall furnish opinions in writing to the Mayor, whenever requested to do so. All requests for opinions shall be transmitted through the Mayor, and a record thereof kept...” In the instant case the Mayor did exactly that—he asked for a legal opinion on how to proceed on a matter as Mayor, and acted upon that opinion accordingly. Notwithstanding the accuracy and/or sufficiency of said opinion, the OCC should be able to defend its own advisory opinion. Clearly if the Mayor is directing the use of government resources, he is acting in his authority as mayor and not as a private citizen. Furthermore, the Board of Elections and the OCF were established by Congress as independent agencies and expressly given the authority to have their own legal counsel in the event that such conflicts may arise.³ Accordingly, the Mayor was acting within his official capacity during the press conference, and the Board—having its own General Counsel to defend its decisions—sees no conflict of

³ D.C. CODE §1-1306(e)(3) provides that the Board may appoint a General Counsel to perform duties assigned or delegated by the Board. The Board, through its General Counsel, has the power to initiate, defend, or appeal any civil action relating to the Board’s enforcement duties.

interest in the OCC representing the Mayor. Accordingly, the motion to dismiss this appeal based on a conflict of interest is denied.

B Government Resources Used in Campaign

The issue presented in this appeal is whether the Mayor may use the powers of his office in a partisan effort to influence the outcome of a Charter Amendment placed on the ballot. The Mayor has attempted to cast this appeal in terms of an abridgement of his First amendment rights as Mayor to “hold a press conference in his official capacity and using the limited resources of his Office to address issues of interest and concern to the electorate.” However, the Mayor’s efforts in this case went beyond merely addressing issues of interest, and can reasonably be construed as advocacy of a particular view in the context of a question put to voters in a special election. Furthermore, the press conference at issue was a coordinated effort in conjunction with the New Leadership Committee. Not only did this committee pay for the rental of J.O. Wilson Elementary School facilities to hold this event, but the Mayor also introduced officers of the committee that he collectively referred to as our campaign, “Mary Levy is going to be *chairing our campaign*, and I want to welcome her. Bill Lightfoot is going to be *our treasurer*, and there are a number of other leaders here from the business community, community leaders, PTA leaders who are *going to be helping us with this effort.*” *emphasis added.* Furthermore, the Mayor’s own press release informing the media about the press conference is titled as a campaign: “City Leaders Join Parents, Teachers and PTA Members to Urge Voters to Say ‘Yes on June 27th’ Mayor pledges vigorous *campaign* for ‘accountability, leadership and change.’” Clearly this went beyond merely informing the voters about the election and of the scope of the charter amendment; rather, the mayor went above and beyond his call of duty and began to coordinate with this committee in an effort to influence the outcome of this election.

Such action taken by a government official was disposed of in the case of *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1 (1988). In that case, a

citizens group—much like DC Watch—brought suit to prohibit the District from expending public funds to oppose citizens' initiative. The funds expended in that case were subject to a congressional appropriations statute that provided: "No part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature." *Id.* at 11 (citing H.R. 5899, 98th Cong., 2d Sess. §117 (1984)). The Court further found that printing pamphlets, flyers and posters in connection with an initiative campaign constitutes publicity or propaganda within the meaning of the appropriations statute. *Id.* at 11. The exact same language can be found in this year's FY 2000 appropriations (H.R. 3194, 106th Cong., 1st Sess. §112 (1999)) and the Board sees no distinction between the activities in that case.

Although the Mayor has attempted to mitigate his expenditures in this context, they are, nonetheless, measurable. Indeed man-hours were used in this effort, transportation was used and perhaps the most telling expenditure was the compilation of campaign literature generated by government resources. The Mayor's press kit, which was distributed by government workers, contained pamphlets flyers and information encouraging voters to support the Charter Amendment. The Mayor's actions with respect to this so-called press conference can reasonably be seen as use of official authority or influence to interfere with an election. Such a use of government resources—even as OCC argues "no similar measurable and discrete expenditure of funds," when compared to the *Common Cause* case—"might result in, or create the appearance of...[a]ffecting adversely the confidence of the public in the integrity of government." Specifically, you have the Executive and some members of the Legislative branch of the government advocating the passage of a ballot measure which eventually passes, and you have an agency (BOEE) of that same government now assuring the public—despite the government's active involvement in the campaign—that the election was, nevertheless, conducted in a fair impartial manner.

When presented with a coordinated political effort in conjunction with a well-financed political action committee, all as a means to encourage people to vote for a position, the Board can come to no other conclusion than this cast a cloud over the integrity of an election that *Common Cause* sought to avoid.

The Mayor is, of course, permitted and encouraged to express his views on any policies or programs that meet the needs of the citizenry. The Mayor may use the assistance of the Press Secretary or any other resources properly appropriated to assist the Mayor in his relationship with the media, and to ensure timely and accurate communication of the Mayor's views and position. The Mayor can also freely campaign for any candidate or ballot measure; however, he cannot, in this respect, use government resources. If the Mayor wishes to campaign or engage in political activity on behalf of or against ballot measures, he must do so with private funding. Although, the OCC argues, the Mayor is always on duty, twenty-four hours a day, seven days a week, he can only use government resources for authorized government business—which campaigning is not.⁴

Not only is this part and parcel of the code of conduct for government employees here in the District, but such expenditures are prohibited by virtue of Congressional appropriations. The OCF opinion does not hobble the communicative function of the mayor's office; on the contrary, the opinion reflects the judicial pronouncements in *Common Cause*, and the Congressional enactment prohibiting such use of appropriated funds in support of a charter amendment.

⁴ The Mayor, arguably, can still travel to and from campaign-related activities with his security detail in a government vehicle because such expenditures are necessary and appropriated for the security of the Mayor.

III CONCLUSION

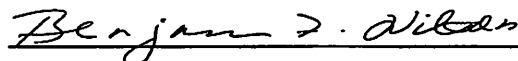
Based on the foregoing, we submit public officials may properly express their views on ballot measures placed before the electorate, engage in activities which encourage citizens to vote on ballot measures, and take steps to educate and inform the electorate of the proposed measures. Such public officials may use to this end whatever government resources and employees are authorized by program and budget to assist with these activities. However, public officials must refrain from campaigning or engaging in political activity on behalf of or against ballot measures while using government resources and employees to do so. Political activity is defined in the District of Columbia Municipal Regulations as "any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." D.C. Mun. Regs. tit. 3, § 708.8 (1999).

The Board finds that in connection with the June 8, 2000 press conference, the Mayor used government resources to campaign on behalf of Charter Amendment No. 3, and that he thereby engaged in an activity which created the appearance of adversely affecting the confidence of the public in the integrity of government, violating Section 1803.1(f) of the District of Columbia Personnel Regulations.

Accordingly, it is this 6th day of September, 2000,

ORDERED that the June 16, 2000 Order of the Office of Campaign Finance is affirmed.

September 22, 2000



Benjamin F. Wilson
D.C. Board of Elections and Ethics