DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

In Re:
"District of Columbia Public Education Reform Amendment Act of 2007"

Administrative Hearing
No. 07-04

Re: Rejection of Proposed Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections and Ethics ("the Board") on Wednesday, March 7, 2007, pursuant to D.C. Official Code § 1-1001.16(b)(1) (2006 Repl.). It involves a finding by the Board that the proposed initiative, the "District of Columbia Public Education Reform Amendment Act of 2007," ("the DCPERA") could not be accepted because it is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1) (2006 Repl.). Robert Brannum, the proposer of the initiative, appeared *pro se* before the Board. Chairman Wilma A. Lewis and Board members Lenora Cole and Charles R. Lowery, Jr. presided over the hearing.

Statement of the Facts

On January 5, 2007, Mr. Brannum filed the DCPERA pursuant to D.C. Official Code § 1-1001.16(a) (2006 Repl.). On January 11, 2007, the Board's General Counsel requested that the Office of Documents and Administrative Issuances ("ODAI") publish a "Notice of a Public Hearing: Receipt and Intent to Review" with respect to the DCPERA ("the Notice") in the D.C. Register. On January 12, 2007, the General Counsel's Office sent the Notice to the Attorney General for the District of Columbia and the General Counsel for the Council of the District of Columbia ("the Council") inviting them to address the issue of whether the DCPERA presented a proper subject for

initiative. The Notice was published in the D.C. Register on January 19, 2007. See 54 D.C. Reg. 468 (2007). On January 29, 2007, Mr. Brannum filed a verified statement of contributions with the D.C. Office of Campaign Finance pursuant to D.C. Official Code § 1-1001.16(b)(1)(A) (2006 Repl.).

On January 24, 2007, the Attorney General submitted comments to the Board stating that the DCPERA was not a proper subject for initiative because it would conflict with Title IV of the Home Rule Act by appropriating funds and amending the District Charter. The Attorney General also stated that the short title and summary statement for the DCPERA as formulated by Brannum were inaccurate. On March 5, 2007, the Council's General Counsel submitted comments to the Board stating that the DCPERA was not a proper subject of an initiative for essentially the same reasons given by the Attorney General.

Analysis

Pursuant to D.C. Official Code § 1-1001.02(10) (2006 Repl.), "[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." The Board may not accept an initiative measure if it

> finds that it is not a proper subject of initiative ... under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:
>
> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;[1]
> (B) The petition is not in the proper form established in subsection (a) of this section;[2]

[1] The verified statement of contributions consists of the statement of contributions required by D.C. Official Code § 1-1102.04 and the report of receipts and expenditures required by D.C. Official Code § 1-1102.06.

[2] Subsection (a) of D.C. Official Code § 1-1001.16 provides that initiative measure proponents must file with the Board "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100

(C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[3] or

(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[4]

D.C. Official Code § 1-1001.16 (b)(1) (2006 Repl.).

In the instant case, the proposer filed the DCPERA on January 5, 2007. However, he did not file his verified statement of contributions until January 29, 2007 in contravention of a Board regulation which requires that verified statements of contribution must be filed on or before proposed initiative measures are submitted to the Board. *See* D.C. Mun. Regs. tit. 3, § 1000.5 (1998). This lapse must necessarily result in the Board's rejection of the measure as submitted for failure to timely file the verified statement of contributions. This procedural deficiency, however, does not fully account for the DCPERA's shortcomings; the DCPERA runs afoul of the majority of the substantive limitations on the initiative right as well.

The summary statement for the DCPERA indicates that "if passed, [the DCPERA] would repeal the Home Rule Act provision creating an elected District of Columbia Board of Education." The initiative right does not give the electorate the authority to change any provision contained in Title IV of the Home Rule Act. *See* D.C. Official Code § 1-1001.16(b)(1) (2006 Repl.). *Hessey v.*

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words, and a short title of the measure to be proposed in an initiative[.]"

[3] Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act, the intent of which is to

> secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.

D.C. Official Code § 2-1401.01 (2006 Repl.).

[4] D.C. Official Code § 1-204.46 (2006 Repl.) deals with budgetary acts of the D.C. Council.

District of Columbia Board of Elections and Ethics, 601 A.2d 3 (D.C. 1991), offers guidance with respect to the limitations of the right to initiative in this respect:

> [T]he language of [§ 1-1001.16(b)(1)] suggests that the Council may have intended more than simply placing a restriction on direct amendments of the Charter. The language chosen by the Council is "under the terms of title IV." While the phrase is not precise, its meaning can only arise from the substantive provisions of title IV. Adopted to implement the Charter Amendments Act, the phrase could reasonably be interpreted to mean that an initiative is also prohibited if it would interfere with the responsibilities assigned to the Council by the Charter, such as the Council's revenue allocation role and control of special funds. Accordingly, by referring to title IV, the Council, accepting that the initiative right was no more extensive than its own powers, excluded from the initiative right matters that would purport to change the structure of government and the procedures and responsibilities assigned by the Charter. . . In other words, under [§ 1-1001.16(b)(1)], an initiative, like an act of the Council, could not directly amend the Charter, and an initiative also could not interfere with the ability of the Council to carry out its responsibilities under the Charter.

Hessey, 601 A.2d at 14.

Title II of the DCPERA is entitled "Board of Education Charter Amendment." Section 202 of Title II specifically seeks to amend Section 452 of the District of Columbia Home Rule Act. Moreover, under § 203, "[s]ection 495 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 820; D.C. Official Code § 1-204.95), is repealed." In sum, Title II appears to be an attempt to amend the Charter by eviscerating the independent agency presently responsible for the formulation of the public schools budget in the District of Columbia. Repealing a provision of the Home Rule Act is in direct contravention of the limitation on the initiative right under the terms of Title IV. Additionally, the amendment contained in Section 203 of Title II would reallocate public funds, which also violates the prohibition against laws appropriating funds codified at D.C. Official Code §§ 1-204.101(a) and 1001.02(10) (2006 Repl.).

Appropriation of funds is the hurdle where most proposed initiatives run afoul of the

limitations on the right of initiative. The District of Columbia Court of Appeals has addressed whether an initiative, either passed or proposed, runs afoul of the law's prohibition on initiatives that "appropriate[e] funds" on seven previous occasions—most recently in *District of Columbia Board of Elections and Ethics and District of Columbia Campaign for Treatment v. District of Columbia*, 866 A.2d 788 (D.C. 2005) ("*Campaign Treatment*"). A measure can not: 1) block the expenditure of funds requested or appropriated; 2) directly appropriate funds; 3) require the allocation of revenues to new or existing purposes; 4) establish a special fund; 5) create an entitlement enforceable by a private right of action; or 5) directly address and eliminate any revenue source. *See Campaign Treatment,* 866 A.2d at 794. The DCPERA violates a number of the prohibitions outlined in *Campaign Treatment*.

The DCPERA, in relevant part, transfers all Board of Education appropriations—both existing and future—to the office of the Mayor.[5] Not only is this a reallocation of current appropriations, but the provision inexorably reallocates budget authority from the School Board to the Mayor. The DCPERA disturbs the balance of governmental powers set forth in the Charter. The Court of Appeals has noted that the Council, in passing the laws appropriating funds prohibition, was primarily concerned with the consequences of the electorate having an unfettered right to interfere with the budgetary process:

> In particular, members expressed their concern that the initiative right would permit

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[5] *See generally* Title I § 108(b):

> All positions, personnel, property, records, and *unexpended balances of appropriations, allocations, and other funds available or to be made available to the Charter-created Board of Education or D.C. Public Schools as it existed prior to the effective date of Title II of this act are hereby transferred to the Mayor for the purposes of providing educational services to residents of the District of Columbia.* The primary purpose of any school property or facility shall remain to fulfill the public education functions of the District government.

(emphasis added).

> citizens to establish a program for which the Council then could be required to seek funding, regardless of the fiscal impact. Proponents of the amendment responded by distinguishing sharply between the power to authorize a substantive program, which the initiative right would confer on citizens, and the power to authorize expenditures, which the amendment explicitly reserved to the Council and Congress.

Convention Center Referendum Committee, et al. v. District of Columbia Board of Elections and Ethics, et al, 441 A.2d 889, 912 (D.C. 1981). Accordingly, while the electorate may authorize new programs such as the Public Education Facilities Management and Construction Authority located in Title VII of the DCPERA, the electorate may not use the initiative process to usurp the Council's authority to authorize expenditures and allocate resources to particular funds. The DCPERA goes above and beyond merely establishing a new instrumentality of the District by establishing new funds[6] and granting contracting authority in excess of the limits proscribed under § 451 of the Home Rule Act, codified at D.C. Official Code § 1-204.51 (2006 Repl.).[7] The proponent of this measure was not mindful of the broad scope of the prohibition against appropriating funds, and his measure frustrates the discretionary process by which the Council identifies revenues and allocates them among competing programs.

Accordingly, the Board refuses to accept the DCPERA, as it finds that it is not a proper subject for initiative because it attempts to amend the Charter and appropriate funds in contravention of Title IV of the Home Rule Act, and because the verified statement of contributions was untimely filed pursuant to D.C. CODE § 1-1001.16(b)(1) (2006 Repl.).

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[6] Section 703(a)(2) of Title VII states in relevant part: "The Facilities Management and Construction Authority shall have the power to: (2) Receive, establish, and manage funds. . ."

[7] Section 703(a)(3) of Title VII states in relevant part:

> Manage and execute all lease agreements, notwithstanding section 451(b) and (c) of the District of Columbia Home Rule Act. . . for the use of District of Columbia Public Schools facilities, the revenues from which shall be deposited in a revolving fund established by the Facilities Management and Construction Authority and separate from the General Fund of the District of Columbia

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, the "District of Columbia Public Education Reform Amendment Act of 2007," is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. CODE § 1-1001.16(b)(2) (2006 Repl.).

6/12/07
Date

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

Dr. Lenora Cole
Member, Board of Elections and Ethics

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing order was hand-delivered this 12th day of June, 2007 to Robert V. Brannum, 158 Adams Street, N.W. Washington D.C. 20007.