

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

Dorothy Brizill et al.,
David Grosso
Complainants,

v.
Michael A. Brown,
Respondent.

Administrative Hearing
12-011A

Re: Challenge to the Nominating Petition of
Michael A. Brown,
Candidate for At-Large Member of the
District of Columbia Council

MEMORANDUM OPINION

INTRODUCTION

This matter came before the District of Columbia Board of Elections (“the Board”) on Monday September 10, 2012. It is a challenge to the nominating petition of Michael A. Brown (“Mr. Brown” or “Respondent”) for the office of At-Large Member of the District of Columbia Council. Two separate challenges were lodged, and the Board conjoined them for procedural expediency. One challenge was filed jointly by Dorothy Brizill and Gary Imhoff (“Ms. Brizill and Mr. Imhoff”). The other challenge was filed by David Grosso (“Mr. Grosso”) pursuant to D.C. CODE § 1-1001.08 (o)(1) (2011). Mr. Grosso is also a candidate (Independent) for the office of At Large Member of the District of Columbia Council. The Complainants asserted that their petition challenges, if valid, would leave Mr. Brown’s nominating petition below the statutory minimum of 3,000 registered voters, and thus disqualify Mr. Brown from ballot access in the November 6, 2012 election.

Chairman Deborah K. Nichols and Board member Stephen I. Danzansky presided over the hearing. Complainants appeared pro se, and the Respondent was represented by Mr. Thorn Pozen, Esq.

PROCEDURAL BACKGROUND

On August 7, 2012, Mr. Brown 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, six hundred seventy-six (4,676) signatures. Mr. Brown in accord with 3 D.C.M.R. § 1608.6 made three supplemental filings in addition to his initial submission as follows:

- An initial filing of one hundred eighty (180) sheets on August 7, 2012 containing three thousand, four hundred thirteen (3,413) signatures;
- A filing of sixty-eight (68) sheets on August 8, 2012 containing one thousand, two hundred thirty-eight (1,238) signatures;
- Two separate filings containing one (1) petition sheet each on August 8, 2012 containing twenty-five (25) signatures.

On August 11, 2012, the petition was posted for inspection pursuant to D.C. CODE §1-1001.08(o)(1)(2006).¹

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.

Challenges to Brown Petitions

On August 20, 2012, the Complainants collectively filed challenges to the Brown petition, objecting or taking exception to two thousand, six hundred fourteen (2,614) names and/or signatures. In conformity with the Board's regulations 3 D.C.M.R. § 1609.2, each signature/name was challenged on a specific ground or grounds.

Initial Pre-Hearing Conferences

On Wednesday, August 29, 2012 at 10:00 a.m. and 11:00 a.m. Pre-Hearing Conferences for Ms. Brizill, and Messrs. Imhoff and Grosso on this matter were scheduled at the Board's offices. At these conferences, the Registrar of Voters ("Registrar"), having reviewed Mr. Brown's petitions and the Complainants' challenges presented her preliminary findings as follows:

1. With regard to Mr. Grosso's challenge: one thousand, two hundred eighty-five (1,285) of the two thousand, forty-two (2,042) challenges raised were valid challenges and the signatures should not be counted for purposes of ballot access;
2. With regard to Ms. Brizill's and Mr. Imhoff's challenge: one thousand four hundred two (1,402) of the two thousand sixty-three (2,063) challenges raised were valid challenges and the signatures should not be counted for purposes of ballot access. Since neither of the challenges raised by the individual Complainants amassed enough challenges to bring the Respondent below the 3,000 signature minimum, the Registrar concluded that the Candidate had secured enough signatures on his nominating petition for ballot access.

The Complainants took exception to the Preliminary Determination of the Registrar and requested a review by and hearing before the Board of Elections. Anticipating such a request prior to the Pre-Hearing Conference, the Board had decided in advance to aggregate the challenges, as that would be the most expeditious way to proceed in the event a Board review and hearing was requested. The parties were informed of that intention during the Pre-Hearing Conference.

Board Hearing

A hearing before the Board of Elections was scheduled for Friday, September 7, 2012 at 10:00 a.m. All parties were notified of and at the commencement of that hearing were provided with a copy of the Consolidated Challenge Preliminary Determination Report of the Registrar. Upon receiving the Consolidated Challenge Report, the parties requested an extension of time to review its contents and reserved the right to object to its findings. The Board granted an hour-long recess to provide the parties an opportunity to review the report; however, it soon became evident that additional time would be needed for the parties to analyze the results of the consolidated report and adjust their preparations for the Board hearing. Accordingly, the Board and the parties agreed to:

- Continue the Board hearing to September 10, 2012, at 10:00am; and
- Schedule a second preliminary hearing that same day (September 7) to further reconcile the number of validated and rejected challenges and, given the number and scope of challenges, narrow and categorize the issues in dispute. To support this process, the Board offered to make its legal, executive, and the voter registration staff available to the parties.

Second Pre-Hearing Conference

The second Pre-Hearing Conference began at approximately 12:30 p.m., on September 7, and did not conclude until approximately 8:30 p.m. During the second Pre-Hearing Conference, the parties and staff reviewed, tallied, and reconciled the Registrar's count of valid and invalid challenges into the following categories:

- a) the total number of signatures/names submitted on the initial petition and supplemental petition submissions;
- b) the total number of signatures/names challenged by both sets of challengers;
- c) the total number of challenges found to be valid by the Registrar; and
- d) the total number of remaining signatures found to be valid by the Registrar and counted toward ballot access.

This open and extraordinary procedure essentially allowed the parties to directly engage with the Registrar by together examining the challenges lodged on every nominating petition sheet. At the Board's instruction, the Registrar's office was made available to the parties to provide the justification for her preliminary determinations with regard to each challenge submitted. At the conclusion of the Second Pre-Hearing Conference, while there were some changes in the number of challenges contested by the parties, each reserved the right to appeal the Registrar's findings to the Board. In addition, Ms. Brizill indicated her intent to file a motion requesting that the Board subpoena certain witnesses to which the Respondent, through his counsel, strenuously objected.²

² Ms. Brizill first expressed her intent to ask the Board to subpoena witnesses through email correspondence on August 27, 2012. She also made known her intent at the initial pre-hearing conference on August 29, 2012, and she served all parties with a list of witnesses and documents she wanted the Brown campaign to produce. Mr. Pozen, on Mr. Brown's behalf promised to act in good faith in making

The Second Pre-hearing Conference adjourned with an understanding of how the Board intended to proceed in the days leading up to the September 10, 2012 Board hearing, and that understanding was memorialized in an order pursuant to 3 D.C.M.R. § 415.2 and sent to the parties via electronic mail on the evening of Friday, September 7, 2012. Given the statutory timeframe, and to further expedite the hearing process, a process requiring the disposition of thousands of remaining challenges that the complainants requested the Board to review, the parties agreed to the following:

- a) By 2:00 p.m. on Saturday, September 8, 2012, the Board would generate a spreadsheet reflecting numbers the parties had reviewed during the Second Pre-hearing Conference on September 7. In light of the multiple charges and challenges, this was intended by the Board to provide a baseline starting point regarding which signatures/names are at issue before the Board. If the Complainants or Respondent took exception to any aspect of the accounting, they were requested to reply via email to all parties so that a consensus could be arrived at before the September 10, 2012 Board hearing. The parties were also requested to include their own accounting if it differed materially from the Board's spreadsheet.
- b) All motions requesting that the Board subpoena witnesses or documents must be submitted by email to the Board with copies to all parties by 5:00 p.m. on Saturday September 8, 2012. Pursuant to 3 D.C.M.R. § 430.4., the motion must state the relevancy, materiality, and scope of the testimony or documentary evidence sought.

available any and all evidence required by the Administrative Procedure Act codified at D.C. CODE § 2-501 *et seq.*

- c) Oppositions to any motions requesting that the Board issue subpoenas must be filed by email with the Board and all parties by 5:00pm on Sunday, September 9, 2012.
- d) After reviewing the motion to issue subpoenas and any objections or opposition thereto, the Board would, pursuant to the APA standard of review, either grant or deny the motion, in whole or in part.³
- e) No later than 12:00 noon on Sunday, September 9, 2012, the parties were to submit by e-mail to the Board and all parties a summary of outstanding issues/objections. The summation was to concentrate on the several categories of still outstanding issues raised during the pre-hearing conference and to indicate by petition page number and line number all issues and objections that fell within those categories. The categories included but were not limited to:
- ✓ Addresses missing city quadrants (i.e. N.W., S.W., N.E., S.E.);
 - ✓ Dates missing from circulator affidavits;
 - ✓ Illegibility of signatures; and
 - ✓ Registration status and Other

Compliance with Board Procedure

- Mr. Imhoff submitted his accounting of the signatures at issue on Friday, September 7, 2012 at approximately 10:30 p.m., and resent the submission on Saturday, September 8, 2012 at approximately 10:58 a.m.⁴

³ At 6:26 p.m. on Sunday, September 9, 2012, the Board notified the parties of its decision to deny the Complainants' motion

⁴ Apparently, Mr. Imhoff did not see the distribution list and thus resent his initial email to all parties. His email included a table of the signature accounting from the Second Pre-hearing Conference. The Board's staff noted some discrepancies that were attributable to typographical error and notified all parties to this effect when the Board sent its own spreadsheet on Saturday, September 8, 2012

- At 4:45 p.m. on Saturday, September 8, 2012, Mr. Imhoff forwarded a motion requesting the Board to subpoena witnesses and documents.
- On Sunday, September 9, 2012 at approximately 11:20 a.m. Mr. Pozen submitted a spreadsheet containing the names of registered voters whose signatures had been challenged but whom the Brown campaign had located in the voter registry. The spreadsheet included the voter registration numbers of those individuals.⁵
- Due to computer error, Ms. Brizill's and Mr. Imhoff's summation of remaining issues was not forwarded to the Brown campaign or the Board by the deadline established in the pre-hearing order.⁶

On Sunday, September 9, 2012 at approximately 4:41 p.m., Mr. Pozen submitted the Brown campaign's objection to the motion requesting the Board to issue subpoenas submitted by Mr. Imhoff. The objection asserted that the "last minute" timing of the request placed an unreasonable burden on the Brown campaign. The objection also claimed that the motion failed to show the relevancy and materiality of the witnesses or information sought.

⁵ While Mr. Pozen submitted a list of two hundred and seven (207) signatories' registration numbers, he readily admitted that the list contained a number of signatories with respect to whom challenges had already been rejected by the Registrar.

⁶ The parties first received their summation on the date of the September 10, 2012 hearing. Mr. Pozen objected to the Board considering the summation because it was not sent by the 12:00 p.m. September 9th 2012 deadline in accordance with the Board's pre-hearing schedule and order. The Board, however, decided to incorporate Ms. Brizill's and Mr. Imhoff's summation into the Grosso summation because it essentially raised the same issues.

DISCUSSION

The Board of Elections, among its other functions, is called upon to play the role of referee in the electoral process. In that capacity, and in its application of the law, it must impartially weigh the competing interests of the candidates, the interests of citizen participants, and the overarching interests of good government.

By the time this case had reached its September 10, 2012, Board hearing which was a resumption of the September 7, hearing, the Board had closely monitored the proceedings leading up to that hearing, read the report and submissions from the Initial Pre-hearing Conference, ordered and read the submissions and motions resulting from the Second Pre-Hearing Conference, and reviewed the e-mail correspondence submitted by the Board staff, Registrar, the Complainants and Respondent during the weekend of September 7-9. The Board members thus had in their possession a full record of the challenges and responses made by the parties as well as actual copies of the petitions.

Given the size of the record, the thousands of challenges still being pursued by the Complainants, the statutory timeframe, and a general agreement on the categories of challenges, the Board, at the September 10 public hearing, allotted the parties a reasonable amount of time to summarize their case and present specific examples of instances where the Registrar's preliminary and secondary determination of eligibility and challenge validity (or invalidity) should be overturned. Having denied Complainant's request for a Board subpoena, the Board weighed the arguments and evidence presented both at the hearing and throughout the preparatory process.

A. The Request for Subpoena

On Saturday, September 8, 2012, pursuant to the Board's directions that any request for subpoenas be submitted to the Board and served on the parties by 5:00pm, Ms. Brizill submitted a request by email from Mr. Imhoff at 4:46pm to subpoena twelve (12) individuals for the hearing on Monday, September 10, 2012, at 10:00 a.m.

Title 3 D.C.M.R. § 430 "Subpoenas and Depositions" governs the Board's procedures and requirements for the issuance of subpoenas. Any party making a request for the issuance of subpoenas must file a written motion; 3 D.C.M.R. §430.3 and state the relevancy, materiality, and scope of the testimony. 3 D.C.M.R. §430.4. The Brizill request failed to state what testimony was being sought from the twelve individuals and how that testimony would be relevant or material to the specific issues that were before the Board, namely ballot access.

The Board considered the timing of the motion. The request was for the Board to issue subpoenas over the weekend or early Monday morning to secure the testimony of a dozen individuals in time for a 10:00 a.m. hearing. Although Ms. Brizill indicated that she apprised the Board's legal staff and opposing party as early as August 27, 2012, of her intention or desire to seek the testimony of these individuals either voluntarily or by subpoena, she nevertheless failed to file any such written motion as required by 3 D.C.M.R. §430.3 until September 8, 2012, less than 43 hours before the scheduled hearing. Ms. Brizill also alleges that she had not acted earlier thinking she had obtained a promise from legal counsel for Mr. Brown to make these individuals available and further, that her "List of Individuals for Subpoenas," which was provided to the Board's legal staff and opposing counsel, was the essential equivalent of a formal motion. Mr.

Brown's counsel denies that he consented to have these named individuals appear, and the list of names without any statement as to the relevancy, materiality and scope of the testimony clearly does not meet the requirements of 3 D.C.M.R. §430.4. Ms. Brizill's expressed "intention" to seek subpoenas, is no substitute for the actual filing of a motion. *See Respondent's Objection at 3, fn. 4.*

Furthermore, Ms. Brizill's request also failed to show why the testimony sought was relevant or material to the issues before the Board. The only reason provided in Ms. Brizill's motion is her assertion that it is "improbable" that a "high percentage of errors...can occur by chance or accident..." absent forgery and therefore the Complainants *believe* there must have been *forgeries* on the nominating petitions. The Brizill motion never states which petition sheets she believes contain forgeries; who the circulators of those petition sheets were; how the several individuals on her list who were not circulators could provide relevant or material testimony to the issue of forgery or that they were even part of the petition process. No additional evidence of "forgery" was proffered by Complainants.

For those reasons, the Board denied the Motion.

B. Registrar's Preliminary Determination

Following the Second Pre-Hearing Conference, the Consolidated Challenge Report reflects the parties' and the Registrar's agreement on the total number of signatures and challenges that the Board was asked to consider at its public hearing and the process leading up to it. In summary, the Brown campaign submitted a total of four thousand, six hundred seventy-six (4,676) signatures. The Complainants collectively filed challenges to two thousand, six hundred and fourteen (2,614) signatures. The

Registrar upheld one thousand, five hundred thirty-one (1,531) challenges and denied one thousand, eighty-three (1,083) challenges. This left the Respondent with three thousand, one hundred sixty-six (3,166) valid signatures—one hundred sixty-six (166) signatures more than the three thousand (3,000) requisite signatures pursuant to D.C. CODE §1-1001.08 (j)(1)(B) (2011).

C. Categorical Challenges

Although both Complainants and Respondent reserved all objections to the Registrar's determination, there appeared to be a general agreement among and between the parties on the various categories of challenges. As previously referenced, at the September 10, 2012 public hearing, the Board allotted the parties a reasonable amount of time to summarize their case and present specific examples of instances where the Registrar's preliminary and secondary determination of eligibility and challenge validity (or invalidity) should be overturned. Because the Board has access to the signatures of all registered voters in the voter registry, the Registrar's methodology relies on petition sheets being documentarily self-evident. If a challenged signature on a petition sheet matches the signature in the registry, then that citizen is entitled to the presumption that he or she is a duly registered voter provided that the address on the petition matches the one in the voter registry.

In cases where a signature is not sufficiently legible to clearly identify the signatory as a qualified registered voter, the Registrar's methodology in such cases is to look up the voter registration card by address and compare the handwriting of the signatory with the card on file. If there's a match, the signatory's "vote" on the nominating petition is counted. While the Complainants took issue with this procedure,

the Board of Elections is committed to the ideal of maintaining an environment for citizen engagement in the democratic process, and fully supports the Registrar's methodology as embracing that ideal, The Board also notes the presumption of validity of signatures embodied in D.C. CODE §1-1001.08(o)(1).

1. Illegibility

The Complainants objected to the Registrar counting a significant number of signature entries that the Complainants regarded as "illegible." In some of those cases of alleged illegibility, the petition entry did not include the typed or printed name of the signatory making identification difficult. The Board's test in such cases is not whether the challenged signature cannot be deciphered by the challenger, but rather whether that individual is a duly registered voter in the District of Columbia. Under 3 D.C.M.R. §424.1, "The party who asserts the claim bears the affirmative duty of establishing the truth of the assertion." In the instant matter, the Complainants were given the purported name and address of each questioned signatory and access to the voter registry, whereby to compare signatures, but they opted not to do so. As previously mentioned it is the Registrar's methodology in cases where the printed name was undecipherable, but the address is nevertheless legible, to search the voter records at the address indicated and compare signatures. If the signatures match, and the name becomes known from the voter records, the signature/name is counted, and coincidentally the previously illegible printed name, suddenly becomes decipherable.

The Complainants' most compelling example of illegibility was a challenge to the signature/name of Maria Tatiana Morales-Torres. Ms Torres apparently signed her initials on a petition sheet as a signatory and then signed her full name as the circulator of

said petition sheet. Respondents proffered an affidavit, sworn under penalty of perjury by Ms. Morales-Torres, attesting to the circumstances of her signature appearing differently on the petition page. In light of the affidavit indicating that she signed all circulator affidavits attributed to her, coupled with the striking similarity between the mark of her initials and her signature in the registry, the Board adopts the Registrar's findings and accepts all of the Morales-Torres circulator affidavits, and thus the signatures that appear therein.

2. Missing Quadrants and Apartment Numbers

Several examples were offered by the Complainants of instances where signatories had omitted to include with their address, the quadrant of the city in which they lived e.g. N.W., S.W., N.E., S.E.; However, pursuant to 3 D.C.M.R. §1608.5(c), the Board in its discretion may waive any formal error. As in the case of illegible signatures or printed names, provided that two voters with the same name are not registered at the same address in different quadrants, the Board assumes that the person is who they purport to be, especially if the signature matches the one on the registry. The Board therefore upholds the Registrar's decision not to validate a challenge to the inclusion of citizens whose petition entry omitted quadrants and apartment numbers, provided that:

- the signatures match the signature on file for the duly registered voter at that address; and
- there are not duplicate addresses on the same street in two different quadrants.

3. Missing Dates or Circulator Dates that Predate the Signature/names on a Petition

In general the Board has ruled that failure to include a date by the names of a signatory or circulator is fatal to inclusion of that signature/name or petition unless evidence in the form of sworn testimony is presented that will establish and confirm the date of signing. Where a date is provided but missing the year, the Board has generally considered that to be harmless error since the Board only distributes nominating petitions to the candidates in the year in which the election is to be held.

4. Change of Address

An address on a petition which differs from that on the voter registration card, invalidates the signature/name and a challenge to that signature/name will be upheld. The only cure is statutory i.e. a change of address card filed with the Board during the first ten days after a challenge was filed. If a change of address card was stamped as received during that ten day period, then the Board by statute is compelled to accept the change of address and include the signature/name in the count.

5. Variation of Names on Nominating Petition

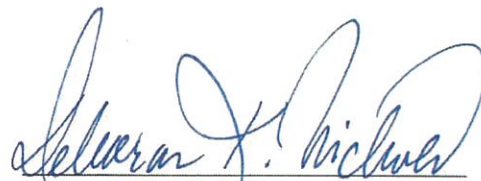
The Complainants challenged a group of names whose signatures differed from the one in the voter registry. Complainants used the example of one Deborah Steiner who printed her name using a maiden surname and signed using her married name. Ms. Steiner's voting record shows that she changed her name in 1997. Absent contrary evidence from the Complainants, the Registrar accepted Ms. Steiner's name because the signature matched the one on file in the voter registry, The Board upholds the Registrar's determination.

In view of the evidence presented and weighed within the categories of challenges presented, the Board finds that the Complainants' challenge is insufficient to change the

Registrar's determination that the Respondent submitted three thousand, one hundred sixty-six (3,166) valid signatures—one hundred sixty-six (166) signatures more than the three thousand (3,000) requisite signatures pursuant to D.C. CODE §1-1001.08 (j)(1)(B) (2011). . Therefore, the Board denies the challenge and holds that Mr. Brown qualifies to be placed on the ballot for forthcoming election...

ORDERED that candidate Michael Brown is granted access to appear on the ballot for the November 6, 2012, election for the office of At-Large Member of the District of Columbia Council.

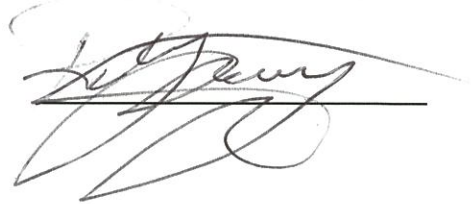
September 13, 2012
Date



Deborah K. Nichols
Chairman,
Board of Elections

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing order was sent electronically to all parties, September 13 2012.

A handwritten signature in black ink, appearing to read "K. J. Perry", is written over a horizontal line. The signature is stylized and cursive.