DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

Dennis Jaffe, Challenger	)	Administrative Order #22-011
v.	)	Re: Challenge to Nominating Petition Submitted for the At-Large Member of the Council
Bradley Thomas Candidate.	)	

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the District of Columbia Board of Elections ("the Board") on April 22, 2022. It is a challenge to the nominating petition submitted by Bradley Thomas ("Mr. Thomas") in support of his candidacy for the office of At-Large Member of the Council of the District of Columbia ("At-large Member of the Council") in the June 21, 2022 Democratic Primary Election ("the Primary Election"). This challenge was filed by Dennis Jaffe ("Mr. Jaffe") pursuant to D.C. Official Code § 1-1001.08 (o)(1) (2001 Ed.). Chairman Gary Thompson and Board members Michael Gill and Karyn Greenfield presided over the hearing. Mr. Jaffe appeared *pro se,* and Mr. Thomas was represented by Mr. Robert Bell.

Background

On March 23, 2022, Mr. Thomas submitted a nominating petition to appear on the ballot as a candidate in the Primary Election contest for the nomination for the office of At-Large Member of the Council ("the Petition"). The minimum number of signatures required to obtain ballot access for this office is 2,000 signatures of District voters who are duly registered voters in

the same party as the candidate. The Petition contained a total of 2,443 signatures. Pursuant to Title 3, District of Columbia Municipal Regulations (D.C.M.R.) § 1603.1, Karen F. Brooks, the Board of Elections' Registrar of Voters ("the Registrar"), accepted all 2,443 signatures for review.

On March 26, 2022, the Petition was posted for public inspection for 10 days, as required by law. On April 4, 2022, the Petition was challenged by Mr. Jaffe, a registered voter in the District of Columbia.

Mr. Jaffe filed challenges to a total of 865 signatures individually and on the grounds that the signer was not registered; the signer's voter registration was designated as inactive on the voter rolls at the time the petition was signed; the signer was not registered to vote at the address listed on the petition at the time the petition was signed; the signature was a duplicate of a valid signature; the signature was not dated; the petition did not include the address of the signer; the petition did not include the name of the signer where the signature was not sufficiently legible for identification; the circulator of the petition failed to complete all required information in the circulator's affidavit; the signature was not made by the person whose signature it purports to be; and the signer was not registered to vote in the same party as the candidate at the time the petition is signed, pursuant to Title 3 D.C.M.R. § 1607.1 of the Board's regulations.

Registrar's Preliminary Determination

The Registrar's review indicated that 789 of the 865 challenges were valid. 174 were valid because the signer was not registered to vote at the address listed on the petition at the time the petition was signed; 263 were valid because the signer was not registered; 23 were valid because the signer's voter registration was designated as inactive on the voter roll at the time the petition was signed; 10 were valid because the petition did not include the address of the signer; 27 were valid because the signature was not dated; 13 were valid because the signature was a duplicate of

a valid signature; 63 were valid because the petition did not include the name of the signer and was not sufficiently legible for identification; seven were valid because the signature was not made by the person whose signature it purported to be; 140 were valid because the signer was not registered to vote in the same party as the candidate at the time the petition was signed; and 69 were valid because the circulator of the petitions failed to complete all required information in the circulator's affidavit.

After the initial review but before the pre-hearing conference, the Registrar timely received 12 change of address forms from Mr. Thomas on Thursday, April 14, 2022. Six of these forms could be accepted as address changes. The remaining six were not accepted because two of the forms were from voters who were not registered, one of the forms was from a voter found to be inactive, and on three of the forms there was no indication of an address change. Accordingly, Mr. Thomas was credited with six signatures that had initially been determined to be invalid, bringing the number of presumptively valid Petition signatures to 1,660, 340 signatures below the number required for ballot access.

April 19, 2022 Pre-Hearing Conference

Pursuant to Title 3 D.C.M.R. § 415.1, the Office of the General Counsel ("OGC") convened a pre-hearing conference with both parties on Tuesday, April 19, 2022. In her findings report issued prior to the pre-hearing conference, the Registrar indicated that the number of valid challenges left the Petition with an insufficient number of valid signatures. The Registrar also provided a Nominating Petition Challenge Information Sheet outlining her determinations with respect to the validity of each signature challenged, as well as a key code explaining the notations she used to indicate the basis for upholding or denying each challenge.

During the pre-hearing conference, Mr. Thomas raised three specific issues in support of his claim that the challenge should be rejected. These issues are discussed below.

The Challenger's Filing was Untimely. The first issue raised is that the challenger's filing was untimely. Mr. Thomas argued essentially that the Board lacks jurisdiction to entertain the challenge filed by Mr. Jaffe because the Board's date and time stamp shows that the challenge was filed at 5:00 p.m. on April 4, 2022, the last day of the challenge period. He argued that his read of the election statute is that all filings, both nominating petitions and challenges, should be submitted by 4:59 p.m. on whatever date is posted, in this case April 4, 2022, and that any filings received after that time should be deemed invalid.[1] In his strict interpretation, because the Board's offices officially close at 5:00 p.m., the Board loses its authority to process filings not submitted by 4:59 p.m. Mr. Thomas also requested evidence in the form of both video and witnesses to prove that the challenge was actually filed by 5:00 p.m.

The 2,000 Signature Requirement for Office is a Violation of the First and Fifth Amendments. The second issue Mr. Thomas raised was that the Board's requirement of 2,000 signatures for the position of At-Large Member of the Council is a violation of both the First and Fifth Amendments to the U.S. Constitution. He did not however, provide specifics on how this requirement violated either amendment.

The Board Did Not Allow Candidate 10 Days to Submit Address Changes. The final argument Mr. Thomas raised was that the Board did not afford him the full 10 days to gather and submit change of address forms in instances where address defects could be cured.

[1] While Mr. Thomas did not articulate which statute he was relying on, the Board believes that he is referring to D.C. Official Code § 1-1001.08 (q), which provides that "[a]ny petition required to be filed under this subchapter by a particular date must be filed no later than 5:00 p.m. on such date." This is in line with what he reported seeing posted on the Board's website regarding the submission deadline for nominating petitions.

April 22, 2022 Board Hearing

During the Board hearing, Mr. Thomas' attorney Mr. Bell did not address any specific challenges to the signatures on the Petition, or the Registrar's findings concerning the challenges, namely, that he fell 340 signatures short of the minimum requirement. Rather, Mr. Bell argued at the hearing that the Board does not have jurisdiction to consider the challenge filed by Mr. Jaffe or the authorization to act on it because the challenge was filed beyond the Board's posted 5:00 p.m. deadline. Mr. Bell raised for the first time the argument that the Board's acceptance of the challenge to the Petition violates 3 D.C.M.R. § 9900.1, which he said provides that 4:45 p.m. is the "official close of business" for the Board. Mr. Bell also reiterated the claim that, should Mr. Thomas not obtain ballot access because it was determined that the Petition did not meet the 2,000 minimum signature requirement for office, the Board would effectively be stripping him of his constitutional right to be on the ballot in violation of both the First and Fifth Amendments. For his part, Mr. Jaffe asserted that his filing was timely and should be accepted.

Discussion

With respect to his argument that the challenge was not timely filed, Mr. Thomas attempts to throw out a validly submitted challenge based on his view of how the Board should operate on dates when significant filings are due. This attempt must fail. The Board's published Primary Election calendar informed the public, including potential challengers, that the Board would accept challenges to nominating petitions up until 5:00 p.m. on April 4, 2022. On April 4, 2022, the Board was, in fact, open for business until 5:00 p.m., as was indicated on the Primary Election calendar. Mr. Jaffe's challenge was filed by that time, and was thus timely. Moreover, as long as a candidate or challenger is present at the Board's offices by the stated deadline (as the challenger so testified), the Board will process valid submissions. This is akin to how the Board allows voters to vote as

long as they are in line at the time the polls close. 5:00 p.m. does not represent the time at which the Board must cease processing filings. Rather, it is the time beyond which filers are not allowed in the door to submit filings.

Regarding Mr. Thomas' argument with respect to 3 D.C.M.R. § 9900.1, as noted above, the Board's offices were open until 5:00 p.m., as the notice it had provided in the Primary Election calendar indicated it would be, for the purpose of accepting challenges to nominating petitions.[2] Moreover, because Mr. Thomas failed to raise this issue prior to the Board's hearing in this matter, the Board is not inclined to entertain that issue at this juncture.

Further, the agency's time and date stamp should be accepted as true and accurate on its face. The stamp is the Board's customary way to mark the receipt of official documents, and there has been no evidence presented that it was altered or otherwise tampered with. At any rate, to the extent that Mr. Thomas claims that the Petition was not timely filed, the burden is on him to demonstrate the truth of that assertion, and he has not, and cannot, do so.

With respect to his argument that the requirement for 2,000 signatures is a violation of the First and Fifth Amendments, Mr. Thomas does not list any specific ways in which he was harmed by this signature requirement, or provide specific details on how this requirement violates these two amendments. The First Amendment holds in part that people have the right to assembly, and can petition their government for a redress of grievance where their issues are heard by a representative or agency of the government. The Fifth Amendment holds in part that the government cannot deprive someone of their life, liberty or property without following certain procedures.

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[2] 3 DCMR 9900.1 further provides a general definition of "Close of Business Hours" as "4:45 p.m. Monday through Friday, excluding District of Columbia legal holidays, *unless where otherwise indicated* in this title" and further, as the cover language to all definitions provide, "*unless the text or context of the particular chapter, section, subsection, or paragraph provides otherwise*" (emphasis added).

The Board did not deny Mr. Thomas the right to freely express himself or petition the Board for redress of any grievances he believes he may have. In addition, Mr. Thomas was not denied due process in any way by the Board where he was afforded the same opportunity to freely petition for signatures, was provided the same information regarding ballot access requirements as all other candidates, was not held to a higher standard than any other candidates, and was allowed the opportunity for a hearing in this matter.

Mr. Thomas states that the 2,000 signature requirement is unfair in light of the Covid-19 pandemic. However, Mr. Thomas' submission of 2,443 signatures demonstrates his ability to secure the requisite amount of signatures. Moreover, there were five other candidates for the same office Mr. Thomas seeks who submitted more than enough signatures to surpass the minimum signature requirement in order to gain ballot access in the Primary Election. Each of these candidates operated under the same conditions as Mr. Thomas. Mr. Thomas' failure to collect enough valid signatures to survive a challenge does not render the 2,000 signature requirement invalid under the U.S. Constitution.

As to Mr. Thomas' argument that the Board did not afford him a full 10 days to cure defective addresses where appropriate, several facts undermine that claim. First, the "Circulating and Filing Nominating Petitions" document he received when he picked up ballot access documents on January 28, 2022 clearly details the candidate's responsibility to timely submit address change forms should a challenge identify address defects. In the "Valid Petition Signatures" section on page 2, the document provides that:

> [i]n order for a signature on a nominating petition to be valid:
>
> The signer must be a duly registered voter in the District of Columbia; (However, if an address on a petition is different than the address which appears in the Board's records, it shall be deemed valid if the signer's current address is within the electoral jurisdiction from which the candidate

> seeks nomination *and* the signer files a change of address form with the Board during the first 10 days following the date a challenge to the nominating petition is filed.)

Moreover, the same document advises candidates to scrutinize their petition sheets throughout the circulation period to ensure that their signatures are valid. In the "Filing Nominating Petitions and Other Supporting Documents" section on page 3, the notice provides the following counsel:

> Before filing [the nominating petition], make sure that each signer's address matches the address listed for that voter in the Board's records. If a signer's address on the petition is not the same as their address in the Board's records, but the voter still resides in the same electoral jurisdiction in which you are seeking office, the voter can complete and sign a change of address up until the 10th day after a challenge has been filed to your petition, if any.

Second, each of the petition sheets that Mr. Thomas received on January 28, 2022, states that:

> [a]t the time the petition is signed, each signer must be registered to vote at the address listed on the petition page. If the signer is registered at a District address other than the one listed on the petition, and his or her signature is challenged on that basis, the signer must file a change of address within ten (10) days after the challenge has been filed to the nominating petition or the signature will not be counted.

Contrary to Mr. Thomas' assertion, the notice that he received regarding the challenge from the OGC was not the first time he was informed of the responsibility to timely cure address defects, and that the deadline for filing change of address forms with the Board for that purpose was April 14, 2022, the tenth day after the challenge to the Petition was filed.

The Board finds the arguments raised by Mr. Thomas in support of his claim that the Petition should be accepted unpersuasive. While he submitted enough signatures to preliminarily meet the minimum signature requirement, the valid challenges to defects in his petition were enough to bring him below the required threshold of 2,000 signatures, making him ineligible for ballot access. None of the procedural claims Mr. Thomas raises merit granting him ballot access.

Conclusion

For the reasons indicated above, it is hereby

ORDERED that challenge to the nominating petition of Bradley Thomas for the office of At-Large Member of the Council is hereby **GRANTED**, and that Mr. Thomas is therefore **DENIED** ballot access in the Primary Election.

The Board issues this written order today, which is consistent with its oral ruling rendered on April 22, 2022.

Date: April 25, 2022

Gary Thompson
Chairman
Board of Elections