

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ELECTIONS

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SPECIAL BOARD MEETING

+ + + + +

FRIDAY

NOVEMBER 4, 2022

+ + + + +

The District of Columbia Board of Elections convened via Video-Teleconference, pursuant to notice at 4:00 p.m. EDT, Gary Thompson, Chair, presiding.

BOARD OF ELECTIONS MEMBERS PRESENT:

GARY THOMPSON, Chair
MIKE GILL, Member
KARYN GREENFIELD, Member

BOARD OF ELECTIONS STAFF PRESENT:

MONICA HOLMAN EVANS, Executive Director
TERRI STROUD, General Counsel

CECILY COLLIER-MONTGOMERY, Office of
Campaign Finance

WILLIAM SANFORD, Office of General Counsel

C-O-N-T-E-N-T-S

Meeting Called to Order. 3

Ascertainment of Quorum. 3

Adoption of Agenda 4

Board Matters

A. Public Hearing, "Elissa for DC v.

D.C. Office of Campaign Finance"

(Limited Scope: Due Process Claims) 4

Adjournment. 59

1 P-R-O-C-E-E-D-I-N-G-S

2 4:08 p.m.

3 CHAIR THOMPSON: Okay. Well, good
4 morning, everybody. Thank you for attending
5 today's hearing. My name is Gary Thompson. I'm
6 the Chair of the Board of Elections.

7 Also present today through Zoom are
8 Board Members Michael Gill and Karyn Greenfield.
9 So we've a quorum of three. We appreciate
10 everybody joining us, the parties, their counsel,
11 and everybody listening.

12 I'll take a quick moment to say thank
13 you to all of our BOE staff and poll workers who
14 are working tirelessly around the clock as early
15 voting has started and leading up to Tuesday's
16 election day.

17 Our agenda for today was duly noticed
18 and circulated. It concerns only one topic, the
19 Matter of Elissa for DC v. DC Office of Campaign
20 Finance, limited scope regarding due process
21 claims.

22 I'll comment in a moment on the

1 procedures, but first I'll move that we adopt the
2 agenda as posted. Is there a second?

3 MEMBER GREENFIELD: Second.

4 CHAIR THOMPSON: Okay. All in favor?

5 (Chorus of aye.)

6 CHAIR THOMPSON: All right. So that's
7 three in favor. And we'll proceed with the
8 agenda.

9 This matter is on appeal from the
10 Office of Campaign Finance with regard to an OCF
11 order dated October 27, 2022. Our three-member
12 Board reviews that OCF order on a de novo basis.
13 De novo just means that our standard for review
14 is new or on a blank slate without any
15 presumptions or deference to any findings below.

16 I'm going to open this proceeding by
17 briefly summarizing the procedural background and
18 what our Board is here today to do, and also what
19 we are not going to do today. And then I will
20 call on the parties before us to make
21 presentations.

22 Each side will have 15 minutes,

1 including questions and answers that we may have.
2 And then ten minutes more each in a round of
3 rebuttal argument needed.

4 In my summary of these proceedings and
5 at all times I do not mean to indicate any
6 position or favor whatsoever as between the
7 parties with respect to the election at hand next
8 Tuesday.

9 Our three-member Board are like the
10 umpires in a baseball game. We are completely
11 neutral, and focused on the law and the process
12 of the law.

13 Just in case people don't know this,
14 the Board of Elections as a whole and our Board
15 are completely independent of any office or
16 public official. We Board members are private
17 citizens, like most of those observing today.

18 The Office of Campaign Finance is
19 likewise independent, and carries a degree of
20 full independence from our Board in conducting
21 its own investigations, like the one at issue
22 here.

1 And just like the Office of Campaign
2 Finance can be appealed through our Board, our
3 decisions in turn can likewise be appealed
4 through the DC Court of Appeals. All three of
5 these layers of review best ensure fair and just
6 process in the correct substantive result.

7 Turning to the procedural background,
8 the OCF matter originated on August 23rd with the
9 filing of an investigation request by Candidate
10 Karim Marshall.

11 This request, also called the
12 complaint, alleged that the Elissa for DC
13 Campaign violated DC Code Section 1-
14 1163.32F(d)(5), which provides in relevant part
15 that a, quote, participating candidate shall not
16 make expenditures for contributions, loans, or
17 transfers to another candidate's political
18 committee.

19 According to paragraphs 12 and 13 of
20 the complaint, it is alleged that, quote,
21 Silverman and committee engaged in unauthorized
22 coordination between campaign committees in

1 violation of District law, and made an
2 unauthorized in-kind contribution through the use
3 of a telephone push poll to attempt to influence
4 the composition and result of a Ward 3 primary
5 election, in violation of Section 332F(d)(5) of
6 the act, which is codified at DC Code 1-
7 1163.32F(d)(5), as I just quoted it.

8 That DC Code section is part of a
9 larger chapter within Title 1, Chapter 11A,
10 called Government Ethics and Accountability.

11 The DC Code governs but does not
12 always provide detail on the process. For
13 procedural details we look at the DC Municipal
14 Regulations, which we sometimes call DCMR.

15 The process for OCF investigations is
16 laid out at Title 3 of the DCMR at Sections 700,
17 3701, et cetera. It is Section 3703 that
18 addresses what happens first in the OCF process,
19 which involves the filing of a complaint by,
20 among others, any resident of DC.

21 With Mr. Marshall's complaint, the
22 Director of OCF, Ms. Collier-Montgomery, is the

1 one who determines if a full investigation is
2 necessary. That is what Director Collier-
3 Montgomery did here, but at that point she
4 reached no findings.

5 She delegated the investigation to be
6 conducted by the OCF Office of General Counsel,
7 which is led by Mr. William SanFord.

8 Section 3703.6 provides that the
9 subject of the investigation, here Elissa for DC,
10 receive notification for specifically three
11 things: A, a copy of the complaint; B, an
12 explanation of the existence of the investigation
13 and the general nature of the alleged violation;
14 and C, an offer to the subject affording the
15 opportunity to respond to the allegations.

16 That notification came in the form of
17 an August 26th email from Mr. SanFord to Elissa
18 for DC, A, attaching the complaint; B, noting
19 that OCF has, quote, commenced an investigation
20 to determine whether any violations of the
21 Campaign Finance Act have occurred, end quote;
22 and C, further stating, quote, pursuant to

1 receipt of the allegations, you may provide the
2 responses you deem appropriate.

3 Section 3704 sets forth many means by
4 which the OCF may conduct its investigation:
5 through interviews, written questions,
6 depositions, subpoenas, and other means.

7 Section 3704.3 provides that OCF may
8 require any person to submit written answers to
9 questions. And 3704.4 says that it can be on a
10 seven-day deadline, subject to extensions that
11 may be allowed.

12 This whole process plays out within a
13 90-day window, as Section 3704.6 requires OCF to
14 make its determination on or before the 90th day
15 after filing of the complaint, which here was
16 Monday, November 21st, 90 days hence from August
17 23rd, when the complaint was received.

18 After that there were other emails
19 exchanged between OCF and Elissa for DC. I will
20 leave it to the parties to address those.

21 I'll note for the record that on
22 September 23rd OCF provided a list of 20

1 questions to Elissa for DC, and on October 7th
2 these were answered in writing. Those answers
3 are in the record.

4 On October 27th, the OCF issued its
5 order signed by Director Collier-Montgomery. The
6 OCF found that there was insufficient evidence of
7 a, quote, coordination violation of DC Code 1-
8 1163.32F(d)(5).

9 I'll note there was a small citation
10 error in the order whereby the F was in a
11 parentheses and that another time the F was left
12 out, but it's no matter. It was easy to spot the
13 correct reference.

14 In short, OCF found there was no
15 violation of the statute that was expressly
16 referenced in the complaint.

17 On page 11 of the order, OCF indicated
18 that beyond investigating the allegations raised
19 in the complaint, its investigation, quote, also
20 focused on whether the respondent committee and
21 the councilmember violated provisions of the Fair
22 Elections Act by using Fair Elections funds to

1 commission and finance two polls in connection
2 with the Ward 3 Council Primary Election, in
3 which the councilmember was not on the ballot but
4 otherwise competing, end quote.

5 It concluded that Elissa for DC
6 violated 3 DCMR Sections 3013.1 and 4209.6.
7 There was another small citation glitch. The
8 order referenced 3033.1 instead of 3013.1, but
9 again that was easy to spot.

10 Those two provisions are similar.
11 Section 3013.1 provides that, quote, campaign
12 funds shall be used solely for the purpose of
13 financing directly or indirectly the election
14 campaign of a candidate.

15 Section 4209.6 says something similar
16 in the context of using Fair Elections Program's
17 funds, that FEP funds, quote, may not be used for
18 an expenditure for any purpose other than the
19 furtherance of the participating candidate's
20 nomination or election, end quote.

21 In light of OCF's conclusion, it
22 imposed a civil penalty of \$6,277.52 in the form

1 of a refund of the approximate cost of the two
2 polls from the Fair Elections Fund. In
3 accordance with 3 DCMR 3703.7 and 3711, which
4 provides a schedule of fines.

5 On Monday, October 31st, Elissa for DC
6 Campaign emailed to the BOE a notice of appeal de
7 novo under 3709.11. And then on Wednesday,
8 November 2nd, this was followed by a request for
9 an immediate and expedited hearing de novo under
10 3 DCMR 3709.11.

11 This request argued first that OCF
12 violated Elissa for DC's due process rights. And
13 second, that OCF erred in finding substantive
14 violations of 3 DCMR 3013.1 and 4209.6.

15 It is only the first argument that the
16 Board focuses on here today. The petitioners
17 have requested that the due process violations
18 are such that, quote, the Board should
19 immediately vacate OCF's order and remand the
20 case to afford petitioners the opportunity to
21 respond to the complaint, end quote.

22 So we are only here today to discuss

1 the procedural due process matters that the
2 petitioners have asked us to decide immediately.
3 We are not here today to discuss or make a
4 decision on OCF's ultimate determination that the
5 Elissa for DC Campaign in fact violated 3 DCMR
6 3013.1 and 4209.6 when it used FEP funds to
7 conduct their polling.

8 Thus, our instructions to the parties
9 asked them to address due process issues raised
10 by the petitioners in part one of their brief.
11 Today by 1:00 p.m. the OCF filed an opposition
12 brief on these two issues already addressed by
13 the Elissa for DC brief filed November 2nd.

14 We're here today on whether OCF
15 violated the petitioner's due process rights by
16 not giving petitioners notice that they were
17 facing new charges, violating the regulations
18 under 3 DCMR 3013.1 and 4209.6, and not giving
19 petitioners an opportunity to respond to OCF's
20 new, quote, purpose charges announced.

21 And two, we'll also consider whether
22 OCF may have violated the petitioner's due

1 process rights by disregarding an alleged
2 agreement that petitioners would have 90 days
3 from the filing of the complaint to refute the
4 allegations raised in the complaint, and going
5 back on that alleged agreement by issuing the
6 order when it did.

7 Counsel can address these two issues
8 in either order or intertwined, however they
9 would like. Those are the two issues we're
10 prepared to hear today and possibly rule upon. I
11 would also welcome any corrections or
12 clarifications in the procedural background that
13 I just recited.

14 With that, I will ask Counsel for
15 Petitioner, Mr. Jason Downs, to proceed first for
16 about 15 minutes with any Board questions.

17 MR. DOWNS: Thank you, Mr. Chairman.
18 I do not have any corrections or edits to the
19 procedural representation that you just set
20 forth.

21 Members of the Board, thank you for
22 the opportunity to have an expedited hearing. As

1 the Chairman noted, we are requesting that this
2 Board summarily vacate and remand these
3 proceedings with instructions to the Office of
4 Campaign Finance. And our request is based on
5 two factors.

6 First, OCF did not give the
7 petitioners notice of the allegations that it sua
8 sponte raised for the first time on page 4 of its
9 order, calling these allegations, quote, other
10 violations, end quote.

11 Second, OCF breached an agreement it
12 made in writing regarding the time line of this
13 investigation and has continued to brazenly deny
14 entering into the agreement.

15 Each of these two factors, members of
16 the Board, individually constitute due process
17 violations. Viewing the two factors in
18 conjunction raising troubling concerns about the
19 integrity of the process at OCF.

20 So taking a step back, in the
21 complaint underlying this matter there were only
22 two allegations against the petitioners, both of

1 which were without merit. And if there had been
2 merit to the allegations in the complaint, there
3 would have been no need for OCF to go out and
4 look for, quote, other violations, end quote.

5 Paragraphs 12 and 13 of the complaint
6 are preceded by the caption, quote, allegations,
7 end quote. And there are two explicit
8 allegations: unauthorized coordination, which is
9 paragraph 12, and alleged unauthorized in-kind
10 contribution, which is paragraph 13.

11 Both of these paragraphs can be found
12 on page 3 of the complaint. And the allegations
13 are described in the following paragraphs of the
14 complaint.

15 It's important to highlight the fact
16 that OCF did not issue any findings that either
17 allegation was sustained. In other words, there
18 was no finding of an unauthorized coordination.
19 And there was no finding of an unauthorized in-
20 kind contribution. And the case should have been
21 closed right there.

22 Without notifying Councilmember

1 Silverman, OCF went out searching for other
2 violations, each of which are equally baseless.
3 But setting aside the substance as a matter of
4 process, Ms. Silverman's due process rights were
5 violated for the following reasons.

6 First, the complaint does not allege
7 that it was improper to commission a poll in a
8 primary election in which the councilmember was
9 not a candidate. And it makes sense that the
10 complaint wouldn't make such an allegation
11 because Councilmember Silverman is an at-large
12 candidate, and she needs to understand the
13 electorate of the entire District of Columbia,
14 which necessarily includes Ward 3.

15 Second, the complaint underlying this
16 matter never mentions DCMR 3013.1. And third,
17 the complaint does not mention DCMR 4209.06. And
18 the last two cold provisions that I just cited,
19 those are the cold provisions under which the
20 Office of Campaign Finance issued its fine.

21 And given that the Office of Campaign
22 Finance issued its fine under allegations that

1 were never raised in this complaint, under DC
2 regulations that were never referenced in this
3 complaint, Ms. Silverman did not have notice of
4 the allegations against her. And her due process
5 rights were therefore violated.

6 And the Board could summarily vacate
7 OCF's decision on that basis alone. We could
8 stop there. However, there is another
9 independent basis for the Board to vacate this
10 matter and send it back to OCF.

11 And that is OCF made an agreement that
12 it would consider Ms. Silverman's response as
13 long as the response was received within 90 days.
14 And now OCF is denying that this agreement ever
15 occurred.

16 Thankfully, members of the Board, we
17 don't have to rely on anyone's recollection. We
18 don't have to rely on anyone's memory. You don't
19 have to take my word for it. You don't have to
20 take Mr. SanFord's word for it. The documentary
21 evidence speaks for itself.

22 The email exchange from August 31st is

1 important because of what it says and because of
2 what it does not say. OCF confirmed that it
3 would consider Ms. Silverman's response, quote,
4 as long as the response is received within the
5 90-day investigative period, end quote.

6 What's more important than what the
7 email actually says is what the email exchange
8 does not say. The email exchange does not say
9 that Ms. Silverman agreed to respond by September
10 30th. The email exchange does not say that OCF
11 expected Ms. Silverman to respond by September
12 30th.

13 The email exchange does not say
14 anything about September 30th at all because
15 there was never such an agreement. That's why
16 September 30th isn't referenced in the email
17 exchange.

18 OCF is asking this Board to disregard
19 the plain reading of the August 31st email
20 exchange. OCF is asking the Board to disregard
21 common sense. OCF is asking the Board to imply
22 that some separate agreement was reached that was

1 never memorialized in the initial correspondence.

2 And the Board should decline to do so.

3 We are asking the Board to rely on the plain
4 language of the August 31st email agreement that
5 was memorialized in an email.

6 By unilaterally changing this
7 agreement and brazenly denying that the agreement
8 ever happened, OCF has unilaterally changed the
9 agreed-upon time line and violated Ms.
10 Silverman's rights of due process. And for those
11 reasons, this Board should vacate and remand
12 these proceedings back to the Office of Campaign
13 Finance. Thank you.

14 CHAIR THOMPSON: Let me ask you a few
15 questions, if I may.

16 MR. DOWNS: Yes.

17 CHAIR THOMPSON: I'll start with that
18 second point about the agreement and then go back
19 to the first point. We've seen these two emails
20 in the exchange on August 31st.

21 Your interpretation of those two
22 emails obviously is that an agreement had been

1 reached, that you could take up to the 90th day
2 of the period to submit your full response, I
3 guess, apparently giving a very short amount of
4 time for OCF to release the decision by the 90th
5 day as well.

6 That doesn't make a lot of sense in
7 terms of the context of the statute which gives
8 OCF a full 90 days to issue its order.

9 But however you interpret that August
10 31st exchange, we've now seen additional emails
11 submitted today of another exchange in September
12 where General Counsel SanFord makes very, very
13 clear that he never meant you could take until
14 the 90th day.

15 In fact, he says that you had
16 initially agreed to submit your full response by
17 September 30th. He then agrees to an October 7th
18 date.

19 And in his email on September 30th he
20 writes, in view of the foregoing, we are
21 restating our deadlines for Ms. Silverman to
22 provide responses to the question OCF transmitted

1 by Friday, October 7th, and the, quote, full
2 response by October 14th.

3 Failure to comply with the stated
4 deadlines will result in the issuance of (audio
5 interference) based upon the information issued
6 in the record thus far. He restates that a week
7 later when he says the October 14th is non-
8 negotiable.

9 So at least of September 30th, it
10 seems like he knew that there was this hard
11 deadline of an October 14th submission of the
12 response. And you seem to be saying that you
13 captured those August 31st two emails in time so
14 it cemented an agreement that wouldn't be
15 changed.

16 I'm trying to reconcile your position
17 with what the subsequent email trail quite
18 clearly says, which is that you have a hard
19 deadline of October 14th. And you knew at least
20 two weeks in advance that wasn't going to change.

21 CHAIR THOMPSON: Thank you for the
22 question, Mr. Chairman. I think it's important

1 to view the subsequent conversations in context.

2 And so the context of the subsequent
3 conversations after August 31st, after the
4 initial email correspondence where there was an
5 agreement, that context was OCF was denying that
6 an agreement ever existed. That was the context.

7 Even in the context of denying that an
8 agreement even existed, we wrote OCF a letter on
9 October the 14th. And that letter is attached to
10 our filing. That letter offers a response by
11 November the 4th, even though OCF is denying that
12 we even reached an agreement.

13 I think it's important to note that
14 the agreement is memorialized. It happened. And
15 OCF began denying that the agreement happened.
16 We strongly disagree with that. We said we
17 reached an agreement. OCF has continued to say
18 there was no agreement.

19 Despite the fact that OCF denied
20 reaching an agreement and unilaterally changed
21 the date, we offered to compromise and file a
22 response by November the 4th, and OCF declined to

1 do so and has continued to deny that the
2 agreement existed.

3 CHAIR THOMPSON: The agreement that
4 you spot from those August 31st in those emails,
5 in your mind, that meant you could take until the
6 90th day, November 21st, to submit your full
7 response?

8 MR. DOWNS: As long as we responded
9 within 90 days. Exactly, as long as we responded
10 within 90 days. I think that's a really
11 important part. And that was the agreement.

12 CHAIR THOMPSON: How does that make
13 sense? I mean, the overall process entails OCF
14 issuing its order by the 90th day. There's a lot
15 of things to do on the way, get witnesses, get
16 questions answered, et cetera.

17 How does it make sense that Mr.
18 SanFord would ever agree to you taking until the
19 90th day to respond, the same day their order is
20 due?

21 MR. DOWNS: We took Mr. SanFord at his
22 word, not only what he said orally but what he

1 put in an email, that he would give us the full
2 90 days. But the moment he changed his mind,
3 once he changed his mind, we went back to the
4 drawing board and said it sounds like OCF has
5 changed its mind, for whatever reason.

6 Although we don't know what that
7 reason is, we will respond by November the 4th,
8 which would have given OCF ample time to conduct
9 another investigation if they wanted to conduct
10 an investigation.

11 CHAIR THOMPSON: If you were going to
12 respond by November 4th, why didn't you just
13 respond on October 14th? You knew that two weeks
14 in advance on the 14th that Mr. Sanford meant
15 what he said then. Why did you let that date
16 come and go?

17 MR. DOWNS: Unlike the Office of
18 Campaign Finance, we conducted an investigation
19 at the beginning of this matter when we talked to
20 the Office of Campaign Finance. When they gave
21 us 90 days, Ms. Silverman continued to campaign.
22 She continued to focus on campaigning.

1 Once we got word from Mr. SanFord that
2 OCF has changed its mind and is now no longer
3 honoring the agreement that we reached in
4 writing, that's when we hit the gas and made sure
5 that we started investigating, which we have
6 done.

7 We have investigated this matter. I
8 can't say that OCF has done the same. We
9 certainly have.

10 And once we began investigating this
11 matter, we started the process of putting our
12 response together, but OCF has declined to give
13 us at least until November the 4th. They've
14 decided to unilaterally set a date of October the
15 14th despite the written agreement.

16 CHAIR THOMPSON: Let me go back to the
17 first argument. When you were first notified of
18 the complaint, Mr. SanFord's email on August 26th
19 expressed that the investigation will determine
20 whether there may be any violations of the
21 Campaign Finance Act.

22 And then in the subsequent 20

1 questions that he sent, his questions certainly
2 do address a wide range of topics, including the
3 purpose of polling Ward 3.

4 Between the email that references any
5 violations, the Q&A, and the general point that
6 OCF has made, the investigator obviously isn't
7 bound by the citation of the complaint. The
8 investigator has arranged to follow the facts and
9 pursue the violations that are found.

10 Those things altogether, how does that
11 not constitute due process that you were at least
12 on notice that this topic of whether the campaign
13 funds were mispurposed allegedly, that this topic
14 wasn't implied?

15 MR. DOWNS: Thank you for the
16 question. So due process does not require a
17 petitioner or a respondent to come up with any
18 conceivable theory of a Campaign Finance
19 violation, any conceivable statute, any
20 conceivable regulation, any conceivable theory.

21 What Mr. SanFord's overarching point
22 was there was some Campaign Finance violation.

1 That couldn't possibly put us on notice that
2 there was an allegation that just in and of
3 itself, an at-large candidate conducting a poll
4 of Ward 3 during a primary, that in and of itself
5 is a violation.

6 That was never stated. That theory
7 was never intimated. That theory was never set
8 forth in any email correspondence. And as you
9 have seen, we have had many conversations over
10 email, over the phone. That never came up.

11 There was no discussion that this is
12 the new allegation, that there is some other
13 allegation that we are now investigating. That
14 never came up, although OCF had ample opportunity
15 to do so.

16 Due process requires that we at least
17 have an idea of the nature of the theory. And
18 here, we didn't have any idea that this was
19 there, that there was some theory that an at-
20 large candidate conducting a poll in a specific
21 ward, that in and of itself is the violation.

22 CHAIR THOMPSON: This is my last

1 question. I'll see if the other Board members
2 have any. The question of what was the purpose
3 of the Ward 3 polling, did it have a purpose that
4 related to the Elissa for DC Campaign or was it
5 outside of the purpose, you in fact addressed
6 that in answering some of those 20 questions.

7 You said in some detail that there
8 were three overall reasons for doing the Ward 3
9 polling that do relate to the Elissa for DC
10 Campaign. Namely, she wanted to endorse by
11 candidate; two, something to do with taking on a
12 financing source background; and three, how to do
13 testing on the polls.

14 I see that you largely repeated those
15 in your brief that you filed with us. So you've
16 got those points out.

17 My question is are there other
18 purposes that you haven't had a chance to put
19 into the record, that you didn't include in the
20 answer to those questions or in your brief (audio
21 interference) us?

22 MR. DOWNS: No. We didn't leave out

1 purposes. We set forth the purposes for which
2 Ms. Silverman conducted the poll.

3 And I think it's important to note
4 that those questions, the question about why Ms.
5 Silverman conducted the poll, go to whether there
6 was an in-kind contribution. In other words,
7 whether some other candidate benefitted from the
8 poll.

9 So we understood that to go to the
10 core of the allegation set forth in paragraphs 12
11 and 13. We did not understand those questions to
12 be going to some new theory that had never been
13 set forth before the order was issued by OCF.

14 CHAIR THOMPSON: So now that you know
15 where Mr. SanFord went to the specific provisions
16 cited in his order under the DCMR, does that
17 context change the way you would explain purposes
18 of conducting the poll?

19 MR. DOWNS: It very much changes the
20 legal argument that we would have. We would have
21 made a legal argument surrounding why Ms.
22 Silverman was allowed to conduct the poll. I

1 don't think the factual scenario would change.
2 The legal argument would change, and the legal
3 argument we didn't have a chance to set forth.

4 CHAIR THOMPSON: Okay. I'll call on
5 member Karyn Greenfield. Do you have any
6 questions at this time?

7 MEMBER GREENFIELD: What time frame
8 did you think you had in terms of giving a
9 response knowing that on day 90 a ruling or
10 something had to be issued?

11 MR. DOWNS: So the question is when
12 did we think --

13 MEMBER GREENFIELD: What time frame?
14 You had an agreement of within 90 days, but it
15 doesn't look like you had an agreement on the
16 time frame. Were you all anticipating a time
17 frame up until day 89?

18 MR. DOWNS: No, we were not. We were
19 anticipating not impacting the election -- to be
20 clear, this was internal. This was not an
21 agreement that was reached.

22 But to answer your question, what we

1 were contemplating was not impacting the election
2 and responding sometime thereafter, not impacting
3 the election. And that would have been beyond 75
4 or so. I'm estimating the exact day.

5 To be clear, that was not a part of
6 the agreement. The agreement was we can respond
7 within 90 days. If the question is when would we
8 have responded, sometime that would not have
9 impacted the election.

10 MEMBER GREENFIELD: Okay.

11 CHAIR THOMPSON: Mike Gill, are there
12 questions from you?

13 MEMBER GILL: Yes. Karyn picked the
14 first issue. I'll pick the second.

15 So just really quickly, your point, I
16 think I'm going to restate and you just tell me
17 if I get it wrong. Your point is the questions
18 in the survey that got to the polling and why was
19 the polling done, you answered those.

20 I think the crux is there should have
21 been a second notice from the Campaign General
22 Counsel's Office saying, based on those certain

1 questions and the answers you gave, we are also
2 looking at whether or not that polling was an
3 appropriate use of funds.

4 And then based on that, you would have
5 in the response -- so leaving aside whether or
6 not you would have done the response on the 89th
7 day or October 4th or whatever -- in that
8 response you would have dealt with that question.
9 Is that kind of the crux?

10 MR. DOWNS: Yes, that's correct.

11 MEMBER GILL: Okay. And the fact that
12 you didn't get a second notice, that you were due
13 a second notice of, we didn't ask those questions
14 just because we were interested. Based on those
15 answers, we believe there's a violation.

16 MR. DOWNS: That is correct. I'm not
17 sure I would call it a second notice because we
18 would say that we never got notice in the first
19 place of the allegation that using the funds in
20 and of itself for a Ward 3 poll was unlawful or
21 was improper. But yes, I agree with the way that
22 you've phrased it.

1 MEMBER GILL: Thanks.

2 CHAIR THOMPSON: Okay. I guess with
3 that, thank you so much.

4 I'll ask Mr. William SanFord to make
5 his presentation.

6 MEMBER GILL: We're ready, Bill.

7 CHAIR THOMPSON: Go ahead, Mr.
8 SanFord.

9 MR. SANFORD: Good afternoon, Mr.
10 Chairman and distinguished Board members. I am
11 William SanFord, General Counsel, from the Office
12 of Campaign Finance.

13 First off, I'd like to say for the
14 record there was never an agreement between
15 myself, Mr. Downs, or the Elissa for DC Campaign
16 that they would have a 90-day period to respond
17 to allegations in a four-and-a-half-page
18 complaint. There was never an agreement.

19 And in addition to that, I'd like to
20 point out that the original complaint on page 2,
21 paragraph 9, also cites the inappropriate use of
22 campaign funds. So it was not a new allegation

1 that they were not familiar with because
2 Councilmember Silverman was served a copy of the
3 complaint on the 26th of August.

4 And quite frankly, I do not want to
5 spend a lot of time refuting Mr. Downs'
6 statements about an agreement and me unilaterally
7 changing the time table because none of that
8 occurred.

9 And we have submitted emails that
10 reflect the exchanges. If Mr. Downs
11 misunderstood a 90-day investigative period, that
12 was clarified in subsequent emails.

13 And even the initial email ended with
14 the statement: In view of the fact that providing
15 timely responses to the questions submitted is
16 imperative to a fair investigation of this
17 matter, we trust that you will comply with our
18 specified deadline. That was part of the email
19 that he received from this office on the 31st of
20 August.

21 In addition to that, we emphatically
22 oppose this petition for de novo and their

1 request that the order be vacated. We will just
2 briefly go through the procedural record.

3 The complaint was received by the
4 Office of Campaign Finance from Mr. Karim
5 Marshall on the 23rd of August 2022. On page 2
6 and 5 out of 9, Mr. Marshall specifically alleged
7 that the Silverman campaign had engaged in the
8 inappropriate expenditure of campaign funds.

9 And he specifically cited the sections
10 that refer to the Fair Elections Program: Section
11 332D, which refers to the base amount that
12 candidates are provided, and 332E that refers to
13 the matching funds the candidates will qualify
14 for. So that was the initial allegation and
15 involved the inappropriate expenditures of
16 campaign funds.

17 On August 31st we exchanged a
18 telephone conversation, during which Mr. Downs
19 requested until September 30th to submit a
20 response to the allegations. That was in a
21 telephone conversation. On August 31st, Mr.
22 Downs submitted an email to confirm our

1 discussion.

2 We indicated that we would not
3 prematurely issue an order before Councilmember
4 Silverman and the campaign had an opportunity
5 respond. However, we did not agree that we were
6 going to provide 90 days for a respondent to
7 respond in a 90-day investigative period.

8 On September 23rd, we sent an email
9 request to Counsel for the Petitioner. On the
10 27th of September, Mr. Downs responded to the
11 email and requested an extension to respond to
12 those questions. That extension was granted.
13 That was the second extension on September 27th.

14 On September 29th Mr. Downs sent an
15 email confirming our conversation and
16 acknowledging that we had granted an extension
17 until the 7th of October. He also indicated that
18 he could not respond to provide a full response
19 on the date that we had designated as October 14,
20 2022.

21 On September 30th, I sent Mr. Downs an
22 email informing him that the law does not provide

1 90 days for a respondent to respond to an
2 allegation during a 90-day investigative period.

3 So if Mr. Downs had any
4 misunderstanding and he had any belief that there
5 was an agreement, on at least two occasions we
6 should have resolved that with Mr. Downs.

7 On October 7th, Mr. Downs sent an
8 email to inform us that he would unilaterally
9 respond to the complaint on the 4th of November.

10 Now, what's important here is that
11 during the entire process Mr. Downs never
12 indicated why he needed more time than the time
13 allotted. After three extensions, he never
14 explained why he could not respond within the
15 allotted period to a four-and-a-half-page
16 complaint.

17 He did not say they needed to talk to
18 witnesses who were unavailable. He did not say
19 they needed to conduct legal research. He never
20 provided any reasonable explanation for failing
21 to respond. He had ample opportunity to provide
22 a response.

1 However, the idea of notice that they
2 were not provided is totally and completely
3 false. They received notice when they received a
4 copy of the initial complaint. It cited
5 violations of expenditure provisions in the
6 Campaign Finance Act.

7 In addition, when they received the
8 questions, clearly the questions indicated that
9 the scope of investigation involved inappropriate
10 expenditures. They responded to the questions by
11 indicating -- when asked whether or not the
12 councilmember's committee conducted a poll in
13 Ward 3 prior to the June 21st primary election,
14 she responded in the affirmative that she
15 conducted the poll.

16 When asked how much the poll cost, she
17 responded by indicating that the cost of two
18 polls was \$6,277.52. And when asked how the poll
19 was funded, she stated that she used funds in her
20 Fair Elections Campaign Committee.

21 So it was clear that the Office of
22 Campaign Finance was investigating expenditures

1 that were made for that Ward 3 poll during a
2 primary election period in which the
3 councilmember was not a candidate and not on the
4 ballot.

5 With regard to the allegation that we
6 unilaterally denied due process, we granted this
7 petitioner three extensions. We gave them more
8 than sufficient time to respond. And even to
9 date, they have not filed a response nor a
10 reasonable explanation why they could not respond
11 to a four-and-a-half-page complaint within two
12 months.

13 I will reserve the balance of my time
14 if there's any remaining.

15 MEMBER GILL: Chairman, before you
16 jump in, I think we're having troubles with the
17 Zoom here. I know that's not under your control.
18 If the tech folks could get a handle on that,
19 that would bring us back to the august and
20 esteemed body that we like to be.

21 CHAIR THOMPSON: Thank you so much.
22 Everybody listening, we are frequently the victim

1 of Zoom bombers, all kinds of Zoom bombers,
2 including something that maybe some people just
3 saw.

4 MEMBER GILL: I know you can mute
5 everybody. If you can block everybody's screen,
6 that's great too, and maybe just leave Karyn.
7 I'm happy for Karyn and I to just be on audio.

8 We heard you fine, Bill. So we can
9 hear you.

10 MR. SANFORD: Thank you.

11 CHAIR THOMPSON: I think we've removed
12 the Zoom bomber. All right.

13 So Mr. SanFord, here's my question.
14 When I go back to the original complaint filed by
15 Mr. Marshall, paragraph 6 does specifically refer
16 to Section 332F(d)(5), which corresponds to the
17 DC Code provision I quoted at the beginning, 1-
18 1163.32F. As you pointed out, paragraph 9 goes
19 on to make reference to Sections 332D and 332E of
20 the act.

21 And I guess my question is, are those
22 in fact the provisions of the act as promulgated

1 that correspond ultimately to the regulations
2 that you cite in your order, specifically
3 regarding the purpose of funds, either 3013.1 and
4 corresponding ones, either FEP or 209.6
5 (phonetic)?

6 MR. SANFORD: Thank you for your
7 question, Mr. Chairman. Those are specific
8 references relying on DC Official Code.

9 In the complaint the reference was to
10 whether they were inappropriate expenditures.
11 The references are to sections of the Fair
12 Elections Act, specifically the base amounts
13 which are provided and the matching funds which
14 are provided.

15 So the allegation here is that the
16 Elissa for DC Campaign used those funds which
17 they received through the Fair Elections Program
18 for inappropriate purposes. Those inappropriate
19 purposes relate to the provisions in our regs
20 which specifically state what campaign funds may
21 be expended for.

22 CHAIR THOMPSON: And you're saying

1 that there's fair notice of that even within the
2 four corners of the complaint itself?

3 MR. SANFORD: I had difficulty hearing
4 you.

5 CHAIR THOMPSON: Oh. You're saying
6 there's fair notice of that within the four
7 corners of the complaint itself?

8 MR. SANFORD: I am. Yes, we are.

9 CHAIR THOMPSON: In addition, I
10 noticed your email with the notice does make
11 reference to any violations of the Campaign
12 Finance laws.

13 Can you talk some more about your role
14 as an investigator and how the facts lead you to
15 where they lead you? Specifically as you're
16 going along, when you identify specific
17 regulations, are you under an ongoing duty to
18 maybe send a second notice, as was asked earlier?

19 MR. SANFORD: I do not believe we had
20 the duty to send a second notice. The initial
21 email transmitted to Councilmember Silverman and
22 her treasurer indicated that we had the authority

1 to investigate any violations of the Campaign
2 Finance Act.

3 In addition, as an investigative
4 agency and as an enforcement agency, we have the
5 authority to determine the scope of our
6 investigation. And if we uncover misconduct
7 during an investigation, we have an ethical
8 responsibility to reveal that misconduct and to
9 publish it in our order. This is exactly what
10 happened in this case.

11 CHAIR THOMPSON: Thank you.

12 Karyn Greenfield, do you have any
13 questions?

14 MR. SANFORD: Was there a question for
15 me?

16 CHAIR THOMPSON: No. I'm just
17 checking to make sure the other Board members --

18 MEMBER GREENFIELD: No. I don't at
19 this time, no.

20 CHAIR THOMPSON: Mike Gill, anything
21 else?

22 MEMBER GILL: Bill, I'm going to ask

1 you the same thing I asked Mr. Downs, just to
2 restate. If they had sent a response -- they did
3 not send a response and that's a separate
4 argument over when that was due.

5 But if they had sent a response, would
6 they have known to address the polling questions
7 because of the fact that they were in the survey,
8 and it was clear from those questions that this
9 was not about the Silverman campaign, this was
10 directed towards affecting a Ward 3 race?

11 I think their complaint is, look, even
12 if we did respond, we wouldn't have responded to
13 that because you didn't allege that until we got
14 the order.

15 MR. SANFORD: I didn't allege that
16 they had misspent the funds?

17 MEMBER GILL: In the manner that they
18 had. Because you asked those questions and they
19 responded to the questions in the way they did,
20 you're saying that there's the violation.

21 MR. SANFORD: Well --

22 MEMBER GILL: I think what they're

1 saying is that wasn't noticed, that they wouldn't
2 have known to respond because it was just
3 questions in the survey. There was no next step
4 of, based on your responses I believe you've
5 violated X, and how do you respond to that.

6 MR. SANFORD: Well, there were 20
7 questions. And they had an opportunity to
8 respond to all 20 of the questions.

9 The questions not only focused on the
10 expenditure of funds, which was primary because
11 it was an investigation, and as I indicated, the
12 initial complaint alleged that there was an
13 inappropriate expenditure of funds.

14 In addition, they should have known.
15 And if they had any questions regarding whether
16 or not their expenditure of funds was being
17 examined, then they could have reached out to me.

18 They didn't seem to have any problem
19 answering the questions which, I presume
20 truthfully, yes indeed, they used those funds for
21 a contest in which the Candidate Ms. Silverman
22 was not a candidate. And they took those funds

1 out of her principal campaign committee, which is
2 a Fair Elections committee.

3 So there was no ambiguity regarding
4 our interest in how and why these funds were
5 expended.

6 MEMBER GILL: All right.

7 CHAIR THOMPSON: Thank you, Mr.
8 SanFord.

9 We'll turn back to Mr. Downs any
10 rebuttal you'd like to make.

11 MR. DOWNS: All right. Thank you for
12 the opportunity to make rebuttal.

13 I think it's important to highlight
14 the fact that paragraph 9 of the complaint does
15 not place Ms. Silverman on notice here.
16 Paragraph 9 references Sections 332D and 332E of
17 the DC Campaign Finance Act.

18 These provisions merely lay out the
19 rules for qualifying for base amounts. That's
20 332D. And the program's matching payments for
21 qualifying small donor contributions to the
22 program, that's 332E.

1 Those provisions do not at all place
2 Ms. Silverman on notice that she is alleged to
3 have misspent funds by conducting a poll in Ward
4 3 although she's an at-large candidate. Those
5 provisions can't do that and don't do that. And
6 they did not do that in this case.

7 So I think as a practical matter and
8 as a legal matter, paragraph 9 does not place Ms.
9 Silverman on notice of the allegations that OCF
10 ultimately based its order on. And for those
11 reasons, we rely on the paper. We rely on the
12 arguments that we have submitted today.

13 We're happy to answer any additional
14 questions from the Board. I think that there is
15 ample reason for the Board to find that Ms.
16 Silverman's due process rights were violated in
17 at least two ways. Thank you.

18 CHAIR THOMPSON: Thank you so much.

19 Mr. SanFord, any final sur-rebuttal?

20 MR. SANFORD: Yes, just a brief
21 rebuttal, Mr. Chairman.

22 Councilmember Silverman is an elected

1 official who has served honorably for a number of
2 years in the District of Columbia. She, if
3 anyone, should have been aware of the
4 restrictions of the Fair Elections Act because
5 she helped write it.

6 So to suggest that she would not
7 understand that the complaint, which started out
8 by alleging that she engaged in activity in
9 violation of the Campaign Finance Act,
10 specifically expended funds inappropriate, did
11 not mean that our investigation would encompass
12 any expenditure of her funds is not credible
13 response.

14 I just would conclude by saying that
15 we have an ethical obligation to expose any
16 misconduct that we uncover during our
17 investigation. And that is exactly what happened
18 here, even though more-than-sufficient notice was
19 provided to the councilmember that we would look
20 into the expenditure of the funds for a poll in a
21 ward in a primary election in which Silverman was
22 not a candidate.

1 Thank you for the opportunity to
2 respond, Mr. Chairman.

3 CHAIR THOMPSON: Okay. I think both
4 sides have had ample opportunity to draw out
5 their arguments and answer our questions. At
6 this point I think what we'll do is retire to
7 executive session to deliberate and discuss.

8 If we feel like we can reach a ruling
9 today, we'll come back on the record and
10 communicate our ruling affecting obviously the
11 procedural due process components. Either way,
12 we are not going to get to the substance of
13 whether there was in fact a violation of the two
14 provisions in question.

15 Anything else before we move?

16 MS. STROUD: No. I just wanted to
17 indicate that you are to vote to go into
18 executive session for the purpose of
19 deliberating.

20 CHAIR THOMPSON: I will move that our
21 Board go into executive session for the purpose
22 of deliberating regarding the issues that have

1 come up for us in today's special session.

2 Is there a second?

3 MEMBER GREENFIELD: Second.

4 CHAIR THOMPSON: All in favor?

5 MEMBER GREENFIELD: Aye.

6 MEMBER GILL: Aye.

7 CHAIR THOMPSON: Aye.

8 MEMBER GILL: Gary, I don't want to
9 prejudge a time limit. I guess Terri can reach
10 out to the principals if we can get to a
11 conclusion tonight.

12 CHAIR THOMPSON: I guess 5:45 or 6:00.
13 I think we'll just say 6:00 for good measure.

14 MEMBER GREENFIELD: Yes.

15 CHAIR THOMPSON: We won't be earlier
16 than 6:00. If we're later than 6:00, it means
17 we're still deliberating.

18 But everybody that's listening, if
19 you'd like to hear our result and you hang around
20 or you link back in at 6:00 p.m. -- we might
21 leave the record open. We don't know. Either
22 way, we'll be back at 6:00 p.m. or thereabouts.

1 MEMBER GILL: Aye.

2 CHAIR THOMPSON: Thank you, everybody.
3 We really appreciate your attendance.

4 (Whereupon, the above-entitled matter
5 went off the record at 5:07 p.m. and resumed at
6 6:11 p.m.)

7 CHAIR THOMPSON: At this time I will
8 make a motion to deny the Petitioner's request to
9 vacate and remand the October 27th OCF order on
10 grounds of procedural due process with no comment
11 on whether the (audio interference) violations
12 found in the order (audio interference) be
13 determined.

14 Is there a second?

15 MEMBER GREENFIELD: Second.

16 CHAIR THOMPSON: So we'll go around
17 and each of us can share our thoughts. My
18 thoughts on making the motion, number one, once I
19 saw the entire email record with the context of
20 Counsel's exchanges, it's quite clear to me that
21 there was no agreement that Petitioner could take
22 until the 90th day to submit a full response.

1 In fact, Mr. SanFord made it quite
2 clear plenty of times that he would like a full
3 response by October 14th. That one was very
4 clear to me.

5 The other one was a closer call.
6 However, I believe that the subject matter of the
7 complaint and the allegations therein, the Q&A,
8 and the email with the notice provided sufficient
9 notice that the other purpose regulations were at
10 issue and could be addressed ultimately as they
11 were in the October 27th order.

12 As to what kind of response the
13 petitioners may or may not have submitted, we
14 don't know because they chose not to submit one.

15 So that's my thinking in declining
16 either argument, and thus moving to deny the
17 request to vacate and remand. I'll turn next to
18 Karyn Greenfield for her comment.

19 MEMBER GREENFIELD: Yes. I did think,
20 with respect to the August agreement, whether
21 there was an agreement or not an agreement, I
22 think it was made clear in subsequent emails by

1 Mr. SanFord that he needed things by a certain
2 date. And so that, to me, modified that.

3 I can't go with that there was an
4 agreement because there was no time frame. There
5 was no time or date when things had to get done.
6 For me, that was one of the issues. And so I
7 think once he did lay out a time frame and a
8 date, then that changed from 90 days.

9 On the second one I would concur with
10 you, Gary. I go back to the Q&As, the questions,
11 and whatever in terms of what was being asked and
12 the responses to what was being asked. I think
13 the order covered that.

14 CHAIR THOMPSON: Thank you.

15 Mike Gill?

16 MEMBER GILL: Thanks, Gary. I agree
17 on the 90-day issue.

18 I think the email record is clear that
19 the 90 days in the statute is for the
20 investigation and how long the investigation
21 rolls. That's not you have 90 days to respond.

22 And whether there was an agreement or

1 not, that's wrong. You don't have 90 days to
2 respond. And there was subsequent emails laying
3 out when deadlines were due. I think in that
4 respect there's no due process issue.

5 On the second one, I differ from Gary
6 and Karyn, but we can't get to a conclusion
7 because there was no response. In my mind, this
8 would be more of a salient point if there had
9 been a response to OCF that dealt with the
10 original Karim Marshall issues only, and then
11 they were sort of given an order that had things
12 that were outside that.

13 I agree that it reads any violation,
14 but I don't think a campaign can search the
15 entire universe for things that may or may not be
16 a problem. And in this case, I think what it
17 comes down to is that the campaign doesn't think
18 it's a problem.

19 And so if they had filed a response
20 that did not address that the poll in Ward 3 was
21 wrong on its face for being in Ward 3, then I
22 think they could bring something to us that says,

1 look, we didn't know that was an issue. We
2 answered the questions faithfully and we are now
3 being told that based on our answers we violated.
4 And so that would be an issue.

5 Because there's no response, I don't
6 know that they can say that they would have
7 responded differently because they didn't
8 respond. They're on notice. If there's an
9 appeal, there's ways to handle that, I guess.

10 I think that this is one where I feel
11 that there probably should have been some
12 communication on the exact nature of the
13 violations since they were different than the
14 original allegations, such that the respondents
15 could -- it should be more than just how they
16 answered the survey.

17 They could contextualize those answers
18 and maybe give more context to them. But because
19 there is no response, I don't know how we could
20 remand based on that. So that's my viewpoint.

21 CHAIR THOMPSON: Okay. With those
22 thoughts, I'll call the vote on the motion to

1 deny the Petitioner's request to vacate and
2 remand.

3 All in favor?

4 (Chorus of aye.)

5 CHAIR THOMPSON: The motion itself
6 carries 3-0, albeit for different reasons.

7 And as I noted in making the motion,
8 we make no comment on whether there were in fact
9 any violations of these Campaign Finance
10 regulations. That's something that we'll
11 determine at a later time in accordance with a
12 further briefing schedule.

13 And in that regard, we are suggesting
14 November 14th.

15 MS. STROUD: For the petitioners, yes.
16 And a response from the Office of Campaign
17 Finance by November 21st.

18 The question to be briefed is whether
19 or not the petitioners violated 3 DCMR Sections
20 3013.1 and 4209.6 when they commissioned two
21 polls related to the Democratic Primary Election
22 and the Ward 3 Council Democratic Primary

1 Election.

2 CHAIR THOMPSON: If counsel would like
3 to make any comment or objections or anything on
4 the record, the record is open. I'll ask Mr.
5 Downs first if he has any comment or statement.

6 MR. DOWNS: No comment or statement
7 other than to say that the petitioners preserve
8 all their rights to appeal, and we will abide by
9 the November 14th briefing schedule.

10 CHAIR THOMPSON: Thank you so much.

11 Duly noted.

12 Mr. SanFord?

13 He's not on. He seems to have dropped
14 off. We'll go ahead and proceed. I'm sure he'll
15 let us know if the briefing schedule is not okay
16 with him. If he has any other objections or
17 notes to make, we'll allow him to do so in
18 writing.

19 With that, I would move that we
20 adjourn.

21 MEMBER GILL: Second.

22 CHAIR THOMPSON: All in favor?

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(Chorus of aye.)

CHAIR THOMPSON: Thank you so much,
everybody, for listening. We appreciate it.

(Whereupon, the above-entitled matter
went off the record at 6:20 p.m.)

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In the matter of: Special Board Meeting

Before: DC BOE

Date: 11-04-22

Place: teleconference

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Court Reporter

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