DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re: Public Accountability Safety Standards Act of 2016 for the District of Columbia."	Administrative Hearing No. 16-001 Re: Disapproval of Proposed Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections ("the Board") on Wednesday, November 4, 2015, pursuant to D.C. Official Code § 1-1001.16(b)(1). It involves a finding by the Board that the proposed initiative, "Public Accountability Safety Standards Act of 2016 for the District of Columbia" ("the PASS Act"), is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). The proposer of the initiative, Mr. John Cheeks, appeared before the Board *pro se* with the assistance of Mr. Ronald Bonofilio. Chairman Deborah K. Nichols and Board Member Stephen I. Danzansky presided over the hearing. Also present were Executive Director, Clifford Tatum, General Counsel, Kenneth McGhie, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery.

Statement of the Facts

On July 2, 2015, John Cheeks filed the PASS Act initiative pursuant to D.C. OFFICIAL CODE § 1-1001.16(a). Mr. Cheeks then formally withdrew his initial submission and resubmitted an amended version of the PASS Act initiative on August 4, 2015. In summary, the PASS Act initiative requires random and scheduled drug and alcohol testing of virtually all District Government elected officials and candidates, certain District Government employees,

private individuals classified as "Independent Consultants," and even proposers and challengers of initiatives and referendums. The drug and alcohol tests are to be administered by Special United States Agencies with internal or external medical and/or laboratory capabilities independent of the District of Columbia Government. District Government employees who fail a test are subject to termination and loss of benefits, while elected officials may opt for treatment and temporary removal from office.

On August 5, 2015, the Board's General Counsel requested that the Office of Documents and Administrative Issuances ("ODAI") publish in the D.C. Register a "Notice of a Public Hearing: Receipt and Intent to Review" ("the Notice") with respect to the Initiative. The Notice was published in the D.C. Register on September 11, 2015. *See* 62 D.C. Reg. 38 (2015). On August 5, 2015, the General Counsel's office also sent the Notice to the Attorney General of the District of Columbia ("the Attorney General") , the Office of the Mayor's Legal Counsel, and the General Counsel for the Council of the District of Columbia ("the Council") inviting them to comment on the issue of whether the Initiative presented a proper subject.

On September 30, 2015, the Attorney General submitted comments to the Board stating that the Initiative was an improper subject. "We have concluded that, if the Measure were to become law, it would violate the U.S. Constitution and the District of Columbia Home Rule Act ("HRA"). Thus the measure is not a proper subject for an initiative in the District of Columbia."[1]

During the Proper Subject Hearing convened on November 4, 2015, Mr. Cheeks asserted that the District of Columbia has a drug epidemic inside its government that must be fixed and corrected. He went on to assert that the proposed measure does not violate the HRA or any

[1] Opinion of District of Columbia Attorney General, Karl A. Racine, Esq. (Sep. 30, 2015) p. 1.

constitutional rights. Mr. Cheeks also claimed the federal government would be responsible for any and all costs associated with the program.

Mr. Cheeks requested a continuance to respond to the comments submitted by the Attorney General. A continuance was granted until the close of business on Friday, November 6, 2015, to submit his response. Mr. Cheeks submitted his response on November, 6th reiterating his claims and submitting the results of his own drug test administered July 30, 2015.

Specifically, Mr. Cheeks claims that "[the PASS Act] does not test all District of Columbia Government [] officials, employees or Directors, the estimated amount of employees range from 21 minimum to 2,000 maximum."[2] Mr. Cheeks has limited administration of tests to the Defense Intelligence Agency and/or the National Security Agency in order to "reassure privacy and confidentiality for all parties of the District of Columbia Government who are tested for drugs and alcohol."[3] Mr. Cheeks also noted that the United States government is allowed to conduct drug tests without individualized suspicion when there is a *special need* that outweighs the individual privacy interest. He likened the *special need* in this instance to the District of Columbia Public School System employment law which purportedly requires all District of Columbia agencies that employ individuals in "Safety Sensitive" positions to implement a drug testing policy.

Analysis

Pursuant to D.C. Official Code § 1-1001.02(10) (2012 Repl.), "[t]he term 'initiative' means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." The Board may not

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2 Written response of John Cheeks, proposer of the PASS Act. (Nov. 6, 2015) p. 2.

3 *Id.*

accept an initiative measure if it is unconstitutional or finds that it is not a proper subject of initiative under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:

> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1163.07 and 1-1163.09;[4]
> (B) The petition is not in the proper form established in subsection (a) of this section;[5]
> (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[6] or
> (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[7]

D.C. Official Code § 1-1001.16 (b)(1) (2012 Repl.).

The PASS Act violates the Fourth Amendment to the U.S. Constitution in a number of respects. As noted in the opinion letter submitted by the Attorney General: "The Supreme Court has held that drug testing a government employee is a search subject to the Fourth Amendment's reasonableness requirement."[8] Although Mr. Cheeks has raised the *special needs* exception to the general rule that warrantless searches are *per se* unreasonable under the Fourth Amendment, the exception does not apply in this case.

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[4] The verified statement of contributions consists of the statement of organization required by D.C. Official Code § 1-1163.07 and the report of receipts and expenditures required by D.C. Official Code § 1-1102.06.

[5] Subsection (a) of D.C. Official Code § 1-1001.16 provides that initiative measure proposers must file with the Board "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title of the measure to be proposed in an initiative[.]"

[6] Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act, the intent of which is to secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.

D.C. Official Code § 2-1401.

[7] D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

[8] Opinion Letter of D.C. Atty. Gen. Karl A. Racine (Sep. 30, 2015) p. 4.

> [T]he employees to be tested are not limited to those who perform the types of functions that courts have found would justify drug testing, such as carrying weapons, driving vehicles, or engaging in other tasks so fraught with risks of injury to others that even a momentary lapse of employee attention can have disastrous consequences.[9]

Moreover, the Supreme Court in *Chandler v. Miller*, 520 U.S. 305 (1997) has held that "[o]ur precedents establish that the proffered special need for drug testing must be substantial--important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 318. In other words, "[h]owever well meant, the candidate drug test Georgia devised diminished personal privacy for a symbol's sake; state action that is prohibited by the Fourth Amendment. Where, as in this case, public safety was not genuinely jeopardized, the Fourth Amendment precluded a suspicionless search, no matter how conveniently arranged." *Id.* at 305. In the instant case, the PASS Act initiative attempts to do the same. In instances such as this, which lack an "indication of a concrete danger demanding departure from the Fourth Amendment's main rule[,]" *Id.* at 319, such unfounded drug and alcohol testing is patently unconstitutional.

Further, the District of Columbia Court of Appeals has determined that "a measure which would intrude upon the discretion of the Council to allocate District government revenues in the budget process is not a proper subject for initiative. This is true whether or not the initiative would raise new revenues." *Hessey v. District of Columbia Board of Elections and Ethics, et al.*, 601 A.2d 3 at 19 (D.C. 1991) ("*Hessey*"). In order for an initiative measure to pass muster with respect to the prohibition on laws appropriating funds, the measure must not: block the expenditure of funds requested or appropriated by the Council; directly appropriate funds;

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[9] Opinion Letter of D.C. Atty. Gen. Karl A. Racine (Sep. 30, 2015) p. 5.

require the allocation of revenues to new or existing purposes; establish a special fund; create an entitlement enforceable by private right of action; or directly address and eliminate any revenue source. Finally, the mandatory provisions of the initiative may not be precluded by any lack of funding. *See District of Columbia Board of Elections and Ethics and District of Columbia Campaign for Treatment v. District of Columbia*, 866 A.2d 788, 794 (D.C. 2005) ("*Campaign Treatment*").

The PASS Act initiative calls for Special Elections to take place in the event that an affected elected official, after failing an administered drug or alcohol test, is removed from office or is unable to recover after opting for treatment. The cost of such an election, as measured by a 2013 city-wide Special Election to fill a vacated At-Large Council seat, approximates two million dollars. The PASS Act initiative subjects every elected officer to the possibility of a forced resignation thereby triggering a Special Election and the funding necessary to conduct it. Such an allocation of revenues to new purposes runs afoul of the holding in the *Campaign for Treatment case*.

A similar allocation of revenues occurs as a consequence of the PASS Act initiative requiring drug and alcohol testing for District government employees, elected officials, candidates, and duly qualified voters seeking to participate in the electoral process by initiative and referendum. In his testimony before the Board, Mr. Cheeks insisted that the DC budget would not be affected:

> [The PASS Act] does not go into the budget and ask for a million or a billion dollars from the District, the Federal Government will pick this tab up—the Defense Intelligence [Agency] or the National Security Agency depending on your role into the District Government. We're not asking you to pay for anything.[10]

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[10] Testimony of John Cheeks, proposer of the PASS Act, during proper subject hearing. (Nov. 4, 2015).

A District of Columbia initiative, however, cannot foist funding for a local program onto a federal government agency to avoid the appropriation prohibition. The initiative's primary purpose would necessarily be frustrated if the Defense Intelligence Agency or the National Security Agency refuses to fund the administration of the tests. The establishment of unfunded mandates is exactly what the Council feared when enacting the "Dixon Amendment" prohibiting initiatives and referendums that appropriate funds or negate or limit an existing Budget Request Act.

Further, the actual cost of initiating such a universal drug and alcohol testing program is vague due to the uncertainty of who would be subjected to the tests. For example, there is no accounting for who would be subjected to drug and alcohol testing among the untold number of private contractors working with the District Government or citizens wishing to participate in the electoral process.[11] This would leave the Council in a fiscal quandary with regard to properly budgeting for such unanticipated contingencies.

The PASS Act initiative also provides for administrative medical leave for elected officials and selected agency officials who fail a drug or alcohol test. This too devolves into yet another unfunded mandate that would thwart the purpose of the measure since there is no mention of how to pay for this mandatory drug or alcohol treatment. In *Campaign for Treatment*, the proposed initiative, entitled "the Treatment Instead of Jail for Certain Non-Violent Drug Offenders Initiative of 2002," provided for substance abuse treatment as an alternative to incarceration for certain drug offenses. The Court reasoned that if the Council chose not to fund the program, then the right to treatment would be thwarted for a lack of funds.

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[11] As aforementioned in note 2 *supra*, Mr. Cheeks estimates the amount of employees subject to testing ranges from 21 minimum to 2,000 maximum, but this does not account for the untold number of citizens subjected to testing by virtue of running for political office, proposing initiatives and referendums, or challenging petition signatures. The actual number of those subjected to testing is inherently inscrutable due to the broad ambit of the PASS Act.

> This mandatory language means, once in effect, the Superior Court would be obliged to comply with the initiative's provisions. . . Courts are bound by. [] legislation, and must enforce [statutes] while they exist. [] Plainly, however, the courts would be unable to comply with these mandatory duties in the absence of funding to establish and operate the treatment programs contemplated by, and indeed at the very heart of, the initiative.[12]

As in *Campaign for Treatment*, in the absence of funding to establish and operate the treatment programs contemplated by the initiative, the District Government would be unable to comply with the mandatory duties set out in the PASS Act.

The Attorney General's opinion letter raised the PASS Act's conflict with the Home Rule Act (HRA) as it relates to filling vacancies of elected officials removed from office as a result of failing mandatory drug tests:

> In each of these instances, the Measure provides a method of filling a vacancy in an elected office that is different from that provided in the HRA. Sections 401(b)(3) and 401 (d)(1) of the HRA (D.C. Official Code §§ 1-204.01(b)(3); and (d)(1)), set forth the process for filling vacancies in the offices of Council Chairman and Councilmember respectively.
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> Likewise, in the event of a vacancy in the Office of the Mayor, section 422(1) of the HRA (D.C. Official Code §1-204.22(1)) provides that "[t]he Mayor may designate the officer or officers of the executive department of the District who may, during periods of disability or absence from the District of the Mayor, execute and perform the powers and duties of the Mayor." Furthermore section 422(c)(2) of the HRA (D.C. Official Code § 1-204.21(c)(2)) provides that "the Board of Elections shall hold a special election. . at least 70 days and not more than 174 days after the date" of the vacancy. [13]

The PASS Act also prevents election winners from holding office if they fail a drug test and proposes to award the election to the next highest vote getter who passes the test. This runs counter to the "American Rule" of elections applied to the District of Columbia in *Bates v. District of Columbia Bd. of Elections & Ethics*, 625 A.2d 891 (D.C. 1993).

> [T]he "American rule," that holds that where the candidate receiving the most

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12 *Campaign for Treatment* at 796. (internal citations omitted).

13 Opinion Letter of D.C. Atty. Gen. Karl A. Racine (Sep. 30, 2015) pp. 10-11.

> votes is deceased, disqualified, or ineligible, the runner-up candidate will not be deemed the winner of the election. According to the American rule:
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> votes cast for a deceased, disqualified, or ineligible person are not to be treated as void or thrown away, but are to be counted in determining the result of the election as regards to other candidates. . . . The result of its application in such cases is to render the election nugatory, and to prevent the election of the person receiving the next highest number of votes.

Further, not only does the PASS Act seek to change the vacancy filling procedures enumerated for each elected office in the HRA, as noted by the Attorney General, but the measure proposes to establish new qualifications for office, which even the Council cannot do without initiating a Charter Amendment as it did most recently with Charter Amendments 5-7 on the 2012 General Election Ballot. The PASS Act cannot do what ordinary legislation could not do: namely change the HRA qualifications for elected offices.

Finally, the PASS Act would subject to drug testing District government employees who are union members with collective bargaining agreements that provide specific hearing rights. The automatic termination and revocation of contractually guaranteed benefits contemplated in the PASS Act initiative would violate the Contract Clause[14] of the U.S. Constitution. As the Attorney General's opinion letter notes: "In this instance, the Measure would attempt by legislation to abrogate significant employee rights established in collective bargaining agreements."[15]

Conclusion

In conclusion, the PASS Act presents an improper subject for initiative because it violates the U.S. Constitution and the Home Rule Act, and violates the prohibition on laws appropriating funds by establishing an unfunded program that cannot function as intended without forcing the

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[14] U.S. CONST., art. I, § 10. "No state shall . . . pass any . . . Law impairing the obligation of contracts."

[15] Opinion Letter of D.C. Atty. Gen. Karl A. Racine (Sep. 30, 2015) p. 10.

Council to appropriate funds for an unknown expense.

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, the "Public Accountability Safety Standards Act of 2016 for the District of Columbia," is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Code § 1-1001.16(b)(2)

Date: February 9, 2016

Deborah K. Nichols, Esq.
Chairman