

Campaign Finance Act had occurred. Mr. SanFord also indicated in his email that the Commissioners should provide to OCF any response to the Complaint that they deemed appropriate. Later that day, Commissioner Warwick contacted Sonia King, an attorney in the Board of Ethics and Government Accountability's (BEGA's) Office of Government Ethics (OGE), (BEGA), seeking guidance concerning the ANC 2B Twitter postings that were the subject of the Complaint. On September 9, 2020, Ms. King responded to Commissioner Warwick's email, and informed him that the OGE would take no action regarding the ANC 2B Twitter postings at issue. However, Ms. King did provide Commissioner Warwick with a link to BEGA Advisory Opinion 1559-001 ("the BEGA Opinion"),¹ which concerns social media and the District's Code of Conduct, and suggested that he share the opinion with anyone with access to the ANC 2B Twitter account. The BEGA Opinion stated, in part, that,

Linking to a partisan political group's social media account in a post is political activity because it demonstrates support for the group as does posting the picture of a partisan political candidate or a political cartoon. And the same is true for linking to or sharing a link to a partisan political group's website or an article advocating for or against a partisan political candidate.

On September 11, 2019, Commissioner Warwick filed a response to the Complaint with OCF which indicated his belief that the ANC 2B Twitter postings conformed with the BEGA Opinion. Mr. Warwick further asserted that the sole purpose of the tweets was to share information concerning a local community event – the 17th Street Festival - that took place in ANC 2B, and that such sharing is a legal and common practice across District government-run social media accounts. Commissioner Warwick's response also stated that a retweet of content that is clearly about the 17th Street Festival does not automatically endorse a candidate or the electioneering of anyone specifically contained in the content of the tweet, and that "[t]he wording of the tags in the retweeted tweet which the complaint alleges imply endorsement are simply based on how Twitter displays the names of accounts which are tagged in photos."

On October 4, 2019, Commissioner Landry filed a response to the Complaint with OCF in which he asserted that "[t]he two tweets [at issue] were about the 17th Street Festival and contained content clearly about the 17th Street Festival", and that an end user who views the postings is "require[d] to engage in a series of manual intentional actions to access campaign content which is completely unrelated and not directly connected to the [ANC 2B Twitter account]." Commissioner Landry also stated that there was no intent to support or oppose a candidate when the ANC 2B Twitter account tweeted and tagged the photograph of Commissioners Downs, Warwick and Landry.

On November 21, 2019, Mr. SanFord interviewed Commissioner Landry regarding the Complaint. During the interview, Mr. SanFord cited the BEGA Opinion to say that a government social media account that links to a partisan political group's social media accounts in a post is political activity and is prohibited. In response, Commissioner Warwick stated that the ANC 2B twitter account did not link to Patrick Kennedy.

On December 17, 2019, OCF issued the Order, which sustained the allegation that the implicated Commissioners allowed the ANC 2B Twitter account to be used for prohibited campaign-related activity in violation of D.C. Official Code § 1-1163.36(a) and 3 DCMR § 3301.1(a). The Order concluded that the inclusion of the Patrick Kennedy tag, which, when clicked, led to Patrick Kennedy's Twitter page which indicated that he was "[r]unning for Ward 2 D.C. Council in 2020," rendered the retweet offensive as a violation of the pertinent provisions. The Order cited the above-referenced language from the BEGA Opinion in support of its conclusion. In addition, the Order stated that:

- a. Although the ANC 2B Twitter account did not directly link to Kennedy's page, Mr. Landry's posting included

¹ This advisory opinion was issued to provide interpretive guidance to District government employees ("Employee" or "Employees") regarding the effect of the District's Code of Conduct on the use of personal social media accounts. It provides examples to which the guiding principles can be applied, as well as an explanation of the result of that application. The Opinion is also applicable to elected ANC officials, because pursuant to D.C. Official Code §§ 1-1162.01a, 1-1162.02(a)(1) "[BEGA] is statutorily authorized to enforce the Code of Conduct as to "all employees and public officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council of the District of Columbia, boards and commissions, and Advisory Neighborhood Commissions[.]" https://bega.dc.gov/sites/bega/files/publication/attachments/1559-001_Social_Media_Advisory_Opinion_%28executed%29.pdf (Last visited August 3, 2020).

a link to Kennedy's photo and his political activity, which can be construed as using a government resource to support a political campaign;

b. The fact that merely clicking on Mr. Kennedy's name immediately produces his photograph and information regarding his candidacy for Ward 2 Councilmember creates the appearance of an impropriety. Thus, no matter how slight the impact, a government resource was used in a manner that could be beneficial to a candidate for political office in DC; and

c. It did not matter that there was no intent to promote Kennedy's campaign, because the prohibition on the use of government resources for political purposes does not require the intent to violate that provision of the statute.

The Order, which did not make reference to Tweet #2, imposed a fine of \$4,000 against the named Commissioners, but recommended that the Director of OCF reduce the fine to \$1000 pursuant to 3 DCMR § 3711.6 if the Commissioners attended Ethics Training at BEGA within 60 days of the issuance of the Order.

On December 22, 2019, all named Commissioners filed Motions for Reconsideration of the Order. On March 2, 2020, OCF denied the Motions for Reconsideration. On March 17, 2020, Commissioners Landry and Warwick timely filed a request for a hearing *de novo* with the Board. Over the course of two days, April 22, 2020 and May 11, 2020, the Board's Office of the General Counsel held a prehearing conference in this matter. During the prehearing conference, Commissioners Landry and Warwick conceded that ANC 2B's Twitter account is a government resource, and Commissioners Downs, Sampson, Silverstein, and Cunningham were absolved of responsibility in the matter pursuant to representations made by Commissioners Landry and Warwick, each of whom maintained their request that OCF vacate the Order, rescind the fines, and provide guidance regarding prohibited social media activity on government-run social media platforms.

Analysis

Pursuant to D.C. Official Code § 1-1163.36(a), "[n]o resources of the District of Columbia government, including the expenditure of funds, the personal services of employees during their hours of work, and nonpersonal services, including supplies, materials, equipment, office space, facilities, and telephones and other utilities, shall be used to support or oppose any candidate for elected office, whether partisan or nonpartisan, or to support or oppose any initiative, referendum, or recall measure, including a charter amendment referendum conducted in accordance with §1- 203.03." 3 DCMR § 3301.1(a) states in pertinent part that "[n]o District of Columbia government resources shall be used to support or oppose...[a]candidate for elected office, whether partisan or nonpartisan[.]"

During the hearing, the Board considered whether Tweet #1, which was posted on the ANC 2B Twitter account, amounted to a violation of D.C. Official Code §1-1163.36(a)(1) and/or 3 DCMR § 3301.1(a)(2) because it contained a statement that read, "I love the 17th Street Festival" and a photograph that showed activity taking place during the 17th Street Festival, including Patrick Kennedy campaigning, and tagged Patrick Kennedy such that the tag, if it were clicked, led to Patrick Kennedy's Twitter page which indicated that he was "[r]unning for Ward 2 D.C. Council in 2020[.]" The Board did not consider Tweet #2.

A. The ANC 2B Twitter Account is a Government Resource

As a preliminary matter, the Board must first consider whether the ANC 2B Twitter account constitutes a government resource. Pursuant to D.C. Official Code § 1-1163.36(a)(1), government resources include, "the expenditure of funds, the personal services of employees during their hours of work, and nonpersonal services, including supplies, materials, equipment, office space, facilities, and telephones and other utilities." While social media platforms, including Twitter, are not specifically listed in the statute, 3 DCMR § 3301.3 provides several examples of nonpersonal services, and provides clear instructions that the list is not limited to those items.

The Board's position is that the ANC 2B Twitter account falls under D.C. Official Code §1-1163.36(a)(1), as well as 3 DCMR § 3301.1(a). ANC 2B, which operates the ANC 2B Twitter account, exclusively performs government

regulated functions. This is enumerated in D.C. Official Code §1-309.10(a), which states that, “[e]ach Commission may advise the Council of the District of Columbia, the Mayor and each executive agency, and all independent agencies, boards and commissions of the government of the District of Columbia with respect to all proposed matters of District government policy including, but not limited to, decisions regarding planning, streets, recreation, social services programs, education, health, safety, budget, and sanitation which affect that Commission area.” As it relates to this matter, the ANC 2B account was being used by Petitioners to engage with constituents living in DuPont Circle, about a recreational activity, the annual 17th Street Festival. This was an exercise of one of their approved government functions.

Moreover, as the Petitioners themselves have pointed out, the ANC 2B Twitter account was created by former ANC 2B Chairman Will Stephens not as a personal account, but as a medium to communicate directly with the members of his constituency. Commissioner Landry also stated during his interview with OCF that, “[i]n this specific instance of ANC 2B, as our Executive Director is responsible for the content of our Twitter account, I do not dispute that the ANC 2B Twitter account is a government resource.”² Finally, the Petitioners conceded that the ANC 2B Twitter account is a government resource during the pre-hearing conference. Therefore, the Board finds that the ANC 2B Twitter account is a government resource.

B. Use of the ANC 2B Twitter Account to Support a Candidate for Elected Office is Prohibited Campaign Activity

It is well established that the District of Columbia’s campaign finance laws prohibit elected officials from using government resources for campaign related-activities. Since the Board finds that the ANC 2B Twitter account is a government resource, it must now determine whether it was unlawfully used to promote Patrick Kennedy’s candidacy for Ward 2 Member of the Council of the District of Columbia. The Board finds that it was.

While, as noted in the BEGA Opinion, “[t]he most obvious example of political activity in the realm of social media is a post that explicitly directs people to vote for or against a candidate[,] ... [p]olitical activity on social media ... is not limited to such a post.”³ Political activity may also be found in an instance such as the one complained of here, where the ANC 2B Twitter account retweeted a post that included not simply a tag, but rather an embedded link that linked to Mr. Kennedy’s Twitter account, which identified him as a candidate for Ward 2 Member of the Council of the District of Columbia. The Board finds the inclusion of the embedded link to Mr. Kennedy’s Twitter account is what renders Tweet #1 violative of the prohibition against using government resources for campaign-related activity.

Irrespective of the fact that the photograph did not exclusively show Patrick Kennedy, and the caption read, “I love the 17th Street Festival,” if a Twitter user clicked on Patrick Kennedy’s name in the caption under the picture, they were linked to his Twitter page, which clearly indicated that he was “[r]unning for Ward 2 D.C. Council in 2020.” The tweet therefore gives the impression that the Petitioners were endorsing Patrick Kennedy for Ward 2 D.C. Council, especially in light of the fact that, while other candidates were present at the 17th Street Festival, none of them were tagged in the picture. While the Petitioners contend that there was no “intent” to endorse or oppose any candidate, or to engage in prohibited campaign activity, the prohibition on the use of government resources for political purposes does not require that there be an “intent” to engage in campaign activity to find a violation.

While the Petitioners view social media usage as commonplace, pervasive, and vital to their work, they must ensure that such usage conforms to applicable laws, including those that prohibit the use of government resources for campaign-related activity. By doing so, they will help to ensure the integrity of government-run social media platforms and maintain public trust. That said, the Board is keenly aware of the Petitioners’ contention that they sought, but did not receive, adequate guidance from OCF concerning what kinds of social media usage constitutes campaign activity under current District of Columbia campaign finance laws. The Board agrees that, “[w]hile the definition of political activity is clear, the manner in which it can manifest on social media is not as straightforward.” As a result, the Board strongly recommends that OCF issue guidance that will inform District government public officials as to what types of usage on government-run social media

² See Aaron Landry Hearing Transcript, pages 1-2.

³ *Id.*

constitutes campaign-related activity such that it would run afoul of D.C. Official Code 1-1163.36(a) and /or 3 DCMR 3301.1(a).⁴

Conclusion

In conclusion, the Board finds that Commissioners Landry and Warwick violated D.C. Official Code 1-1163.36(a) and 3 DCMR 3301.1(a) when they allowed the ANC 2B Twitter account, a government resource, to be used for campaign-related activity.

Accordingly, it is hereby:

ORDERED that the Order is upheld, but that the fines imposed therein are reduced to \$50 each for Commissioners Landry and Warwick pursuant to 3 DCMR § 3711.6.

Date: December 2, 2020



Mike Gill
Board Member



Karyn Greenfield
Board Member

Board Chairman D. Michael Bennett, *dissenting*:

I write separately to say that I respectfully disagree with the conclusion reached by my fellow Board members. I agree with Mr. Landry’s assertion that an end user would be “require[d] to engage in a series of manual intentional actions to access campaign content which is completely unrelated and not directly connected to the [ANC 2B Twitter account]. Because of this, I do not view the ANC 2B Twitter account as having been used for campaign-related activity, and therefore find no violation.

I do, however, agree that the District would be well served through OCF’s provision of comprehensive guidance concerning what constitutes campaign-related activity in the context of social media.



D. Michael Bennett
Chairman

⁴ OCF is encouraged to review the advisory opinions and guides drafted by other local election bodies, including the Maryland State Board of Elections’ comprehensive Summary Guide for Maryland Candidacy & Campaign Finance Laws, which includes specific chapters dedicated to social media protocol for political officials and their staff. https://elections.maryland.gov/campaign_finance/documents/Summary_Guide_2017_final.pdf (Last visited August 13, 2020).