

BEFORE THE DIRECTOR  
OF THE  
OFFICE OF CAMPAIGN FINANCE  
D. C. BOARD OF ELECTIONS AND ETHICS  
2000 14TH STREET, N. W., SUITE 433  
WASHINGTON, D.C. 20009  
(202) 671-0547

IN THE MATTER OF:	)	DATE: July 30, 2010
	)	
<b>Resolution 18-418, "Censure of</b>	)	
<b>Councilmember Marion Barry and</b>	)	
<b>Enforcement Referral Resolution of 2010,"</b>	)	DOCKET NO.: FI-2010-107
<b>March 2, 2010</b>	)	

**ORDER**

**Statement of the Matter**

The subject matter, "Resolution 18-418, 'Censure of Councilmember Marion Barry and Enforcement Referral Resolution of 2010,' March 2, 2010" (Resolution 18-418), adopts "the findings, conclusions, and recommendations of the Report of Investigation [(Report)], dated February 16, 2010, submitted by Special Counsel [of the Council of the District of Columbia (D.C. City Council)] to formally censure Councilmember Marion Barry for the conduct referenced in the report that violated Council Rule 202, and to refer to the Office of Campaign Finance [(OCF)] and the United States Attorney for the District of Columbia the conclusions of the Special Council that Councilmember Marion Barry violated District of Columbia laws and regulations." Resolution 18-418 at p. 1.

Specifically, the D.C. City Council referred to OCF "and the United States Attorney for the District of Columbia the conclusions of the Special Counsel that Councilmember Barry violated certain provisions of the District of Columbia's Conflict of Interest Statute, Standards of Conduct, Constituent Services Statute, and possibly criminal laws." Resolution 18-418 at p. 5. Pertinent to the OCF inquiry, Resolution 18-418 adopted the following conclusions:

1. "Approval of the personal services contract to Donna Watts-Brighthaupt was not obtained in accordance with District of Columbia law or Council rules, policies, and procedures because the authorities responsible for approving such contracts were misled about its purpose and Mr. Barry did not disclose his financial, personal, and sexual relationships with Ms. Watts-Brighthaupt."

2. "Councilmember Barry received part of the contract proceeds from Ms. Watts-Brighthaupt in payment for loans he claimed to have made to her."
3. "Councilmember Barry had an undisclosed financial interest in Ms. Watts-Brighthaupt's ability to repay him. He furthered that financial interest by taking official action to award her a public contract that enabled her to repay him as she was otherwise unemployed and had insufficient sources of income to pay her mortgage and other bills."
4. "Many of the grantee organizations to which Mr. Barry steered public funds were rife with waste and abuse and provided substantial financial benefits to some of his close friends and supporters. These grants also effectively permitted Mr. Barry to circumvent laws and regulations that restrict the nature and amount of funds that can be expended for citizen-service programs."
5. "Councilmember Barry violated section 1801 of the CMPA [Comprehensive Merit Personnel Act] and sections 1801.1(c) and 1806 of the District Personnel Manual (18 DPM §§1804.1(c) and 1806) [collectively known as the Standards of Conduct incorporated in toto as Council Rule 202 by the D.C. City Council] by allegedly ordering employees on his Council committee and office staff to draft and file the incorporation documents for the Ward Eight Councils."
6. "In violation of numerous District laws and regulations and Council Rule 202, Councilmember Barry's conduct: (A) [c]onstituted a conflict of interest; (b) [v]iolated the public trust; and (C) [c]ast substantial doubt on the integrity of the District government."

Resolution 18-418 at p. 4.

### **Issues**

1. Whether Councilmember Marion Barry (the Councilmember) violated D.C. Official Code §1-1106.01(b) [The District of Columbia Campaign Finance Reform Conflict of Interest Act (Act)] when he sought and obtained D.C. City Council approval of a personal services contract to Ms. Watts-Brighthaupt to obtain financial gain because he had previously extended a monetary loan to Ms. Watts-Brighthaupt.
2. Whether the Councilmember violated D.C. Official Code §1-1106.01(g) when he sought and obtained D.C. City Council approval of a personal services contract to Ms. Watts-Brighthaupt because he failed to disclose his financial, personal, and sexual relationships with Ms. Watts-Brighthaupt.

3. Whether the Councilmember used the Ward Eight Councils to circumvent the legal restrictions on citizens service programs by allowing Ms. Richardson to operate “several programs run out of” the Councilmember’s CSO. See Report at pp. 40-41 & 42.
4. Whether the Councilmember violated the CMPA Standards of Conduct when he allegedly ordered employees on his Council committee and office staff to draft and file incorporation documents for certain Ward Eight Councils.

### **Background**

On April 7, 2010, OCF was formally presented with Resolution 18-418 and the accompanying Report, which includes multiple attachments. All of the documents, including dozens of interview memoranda, deposition transcripts and exhibits, and financial documentation, amassed during this review were made available to OCF.

Of vital information to OCF was that pertaining solely to issues subject to its purview. Upon evaluation of the material, including thousands of document pages, it was decided that the Office of the General Counsel (OGC) staff of the OCF would conduct interviews and obtain depositions from the Councilmember; Ms. Richardson; Cynthia Brock-Smith, Secretary to the D. C. Council; Brian Flowers, Esq., General Counsel to the D.C. Council; Eric Goulet, Budget Director to the D.C. Council; and Rev. Anthony. Motley of Inner Thoughts, Inc. Alternately, William O. SanFord, Senior Staff Attorney; Jean Scott Diggs, Senior Hearings Examiner; Cecelia Townes, Hearings Examiner; and, the undersigned, undertook interviews and depositions thereof.

In addition to the review and analysis of the Report and depositions, the scope of the OCF investigation encompassed comparing all submitted documentation, in light of the Standards of Conduct and the statute; research, and in-house meetings. The investigation was completed on July 7, 2010. Notwithstanding, the record was held open until July 14, 2010, to receive a copy of the proposal submitted by Ms. Watts-Brighthaupt. Letter dated July 14, 2010.

### **Statutory and Regulatory Provisions**

#### **The Act**

D.C. Official Code §1-1104.03(a) states, in pertinent part, “[E]ach member of the Council may finance the operation of [constituent services] programs with contributions from persons, provided, that contributions received by [each member] do not exceed an aggregate amount of \$80,000 in any 1 calendar year[.]” and “No

campaign activities shall be conducted nor shall campaign literature or paraphernalia be distributed as part of citizen-service programs conducted pursuant to this subsection.”

D.C. Official Code §1-1104.03(a-1) states, in pertinent part, “Furnishings, equipment, telephone service, and supplies to [the CSO] office space shall be provided from funds other than appropriated funds of the District of Columbia government.”

D.C. Official Code §1-1104.03(e) states, “Activities authorized by this section may be carried on at any location in the District of Columbia, provided that employees of the District of Columbia government do not engage in citizen-service fundraising activities during normal business hours.”

D.C. Official Code §1-1106.01(a) states, “The Congress declares that elective and public office is a public trust, and any effort to realize personal gain through official conduct is a violation of that trust.”

D.C. Official Code §1-1106.01(b) states, in part, “No public official shall use his or her official position or office to obtain financial gain for himself or herself, any member of his or her household, or any business with which he or she or a member of his or her household is associated, other than compensation provided by law for said public official.”

D.C. Official Code §1-1106.01(g) states, in part, “Any public official who, in the discharge of his or her official duties, would be required to take an action or make a decision that would affect directly or indirectly his or her financial interests or those of a member of his or her household, or a business with which he or she is associated, or must take an official action on a matter as to which he or she has a conflict situation created by a personal, family, or client interest, shall [notify the Board of Elections and Ethics and his or her supervisor in writing].”

D.C. Official Code §1-1106.01(i)(1) defines “public official” to mean “any person required to file a financial statement under §1-1106.02.”

D.C. Official Code §1-1106.01(i)(2) defines “business” to mean “any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock, trust, and any legal entity through which business is conducted for profit.”

D.C. Official Code §1-1106.01(i)(3) defines “business with which he or she is associated” to mean “any business of which the person or member of his or her household is a director, officer, owner, employee, or holder of stock worth \$1,000 or more at fair market value, and any business which is a client of that person.”

D.C. Official Code §1-1106.01(i)(4) defines “household” to mean “the public official and his or her immediate family.”

D.C. Official Code §1-1106.01(5) defines “immediate family” to mean “the public official’s spouse and any parent, brother, or sister, or child of the public official, and the spouse of any such parent, brother, sister, or child.”

### OCF Regulations

At 3 D.C.M.R. §3301.1, it reads:

“A public official shall be prohibited from using their official position to obtain financial gain, other than that compensation provided by law for the public official, for the following:

- “(a) The public official;
- “(b) Any member of the public official’s household; or
- “(c) Any business with which the public official or a member of the public official’s household is associated.”

At 3 D.C.M.R. §3014.1, it reads, “A citizen-service program shall encompass any activity or program which provides charitable, scientific, educational, medical, recreation or other services to the residents of the District of Columbia, and promotes their general welfare.”

At 3 D.C.M.R. §30104.2, it reads:

“Citizen-service programs shall be prohibited from participating in any of the following:

- “(a) Promoting or opposing a political party or committee;
- “(b) Promoting or opposing the nomination or election of an individual to public office;
- “(c) Promoting or opposing any initiative, referendum or recall measure;
- “(d) Distributing campaign literature or paraphernalia;
- “(e) Using any funds for personal purposes of the elected official; and
- “(f) Conducting any other campaign activities covered in this [t]itle.”

At 3 D.C.M.R. §3014.5, it reads:

“An elected official shall fund the citizen-service program only through the following methods:

- “(a) By transferring any surplus, residue, or unexpended campaign funds to the citizen-service program;
- “(b) By receiving contributions which do not exceed, in the aggregate, eighty thousand dollars (\$80,000) in any one (1) calendar year;
- “(c) By receiving cash contributions from any person which, when aggregated with all other contributions received from the same person, do not exceed five hundred dollars (\$500), in any one (1) calendar year; and
- “(d) By receiving personalty from any person which, when aggregated with all other contributions received from the same person, do not exceed one thousand dollars (\$1,000) in any one (1) calendar year.”

At 3 D.C.M.R. §9900.1, “effort to realize personal gain” is defined as “any attempt by a public official to profit or obtain an advantage or an addition to that which official lawfully receives in his or her official capacity. No actual gain is necessary.”

At 3 D.C.M.R. §3711.2, it reads, in pertinent part:

“Fines shall be imposed as follows:

- (s) Accepting contributions in excess of the citizen-services program contribution limitation - \$2,000;
- (t) Making contributions in excess of the citizen-services program - \$2,000;
- (v) use of official position for personal financial gain - \$2000; and
- (z) Failure to disclose potential conflicts of interest - \$2,000.

#### Legislative History

“Committee Report No. 1: Bill No. 2-218[,] Full Political Participation Act of 1978,” Report of the District of Columbia Council, dated February 15, 1978 (Committee”

Report), states, in pertinent part: “[t]hat the provisions of D.C. [Official] Code, sec. 1-1181(g) [currently 1-1106.01(g)] requiring a Member to announce his or her potential disqualification from votes is governed by the overriding principles in D.C. [Official] Code, sec. 1-1181(a) [1-1106.01(a)]”.

“Conference Report: District of Columbia Campaign Finance Reform and Conflict of Interest Act,” HR No. 93-1225, dated July 25, 1974 (Conference Report), states, in pertinent part: “[t]he Senate amendment prohibited a public official of the District from using his office to obtain financial gain[.]”

### Standards of Conduct

At §1800.1, it reads, "Employees of the District government shall at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government."

At §1800.3, it reads, "No employee of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities."

At §1801.2, it reads, in part, "When, after consideration of the explanation of the employee, the Board of Elections and Ethics [as delegated to the Office of Campaign Finance] decides that remedial action is required regarding any matter covered under this chapter, appropriate action shall be immediately taken or ordered. Remedial action may include, but shall not be limited to, the following:

"(a) Changes in assigned duties;

"(b) Divestment by the employee of his or her conflicting interest;

"(c) Corrective or adverse action pursuant to D. C. Code §1-617.1(d) (1981); or

"(d) Disqualification for a particular assignment."

At §1802.1, it reads, in part, "In accordance with D. C. Code §1-619.3(e) (1981), enforcement of this chapter shall, consistent with the regulations set forth herein, be the responsibility of each agency head, except that enforcement for the following persons shall be the responsibility of the D. C. Board of Elections and Ethics:"(a) The Mayor, the Chairman and each member of the Council[.]”

At §1803.1, it reads:

"An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in, or create the appearance of the following:

- "(1) Using public office for private gain;
- "(2) Giving preferential treatment to any person;
- "(3) Impeding government efficiency or economy;
- "(4) Losing complete independent or impartiality;
- "(5) making a government decision outside official channels; or
- "(6) Affecting adversely the confidence of the public in the integrity of government."

At §1806.1, it reads:

"A District employee shall not use or permit the use of government property, equipment, or material of any kind, including that acquired through lease, for other than officially approved purposes. An employee has a positive duty to protect and conserve government property, including such equipment, supplies, materials, and other items as may be issued or entrusted to him or her. Nothing in this subsection, however, shall serve to prohibit the following:

- "(a) The acceptance of any material, article, or service which is available as part of any DC government program properly being dispensed or provided free to DC residents or visitors to the District;
- "(b) The use of District facilities by recognized employee groups for authorized off-duty training or meeting purposes;
- "(c) The use of government facilities or equipment under circumstance which do not increase the maintenance cost of such resources; for example, the use of existing library materials or government-purchased books is not prohibited[.]"

### **Summary of Evidence**

Resolution 18-418 concluded that the Councilmember violated certain District laws and regulations, based upon the Report. As a result, the Councilmember was formally censured. Notwithstanding, certain issues were presented to OCF for

investigation and evaluation to determine to what extent, if any, the Councilmember may have violated statutes and regulations within OCF purview. To that end, the OGC staff deposed certain staff members. Abstracts thereof follow below.

To the extent that it is not inconsistent with the findings and conclusions herein, OCF relies upon the Report. OCF also relies upon the legal opinion rendered by Brian Flowers, the General Counsel to the D.C. City Council, on the subject of "Procedure governing Council award of personal services contracts," dated September 30, 2009, to the OCF Director, when this matter was considered thereby as an internal inquiry.

On June 8, 2010, OGC deposed Cynthia Brock-Smith, Secretary to the D.C. City Council (Secretary) with Brian Flowers, Esq., General Counsel to the D.C. City Council (Counsel to the Council), at his office. The Secretary stated that during the first 3 years (the period during which the personal services contract was at issue) of D.C. City Council Chairperson Vincent Gray's (the Chairperson) term, the standard for review for awards of personal services contracts was to submit a request to the Secretary to enter into a contract, followed by the preparation of standard documents, including a Statement of Work and/or a Determination of Findings. The Secretary stated that during this period, there was no criterion to verify the qualifications of an award recipient or a proposed contractor recommended by a Member of the Council. Consequently, the Secretary's office relied on Members to confirm the qualifications of their contractors. Further, the Secretary stated that some Members presented fully executed personal services contracts to her office, which were subsequently ratified by the execution of a purchase order. Moreover, contract compliance remained the responsibility of the procuring Member.

According to the Secretary, Members have no legal authority to enter into contracts unilaterally; and that all contracts negotiated by Members are ultimately those of the D.C. City Council. The Secretary stated that the Chairperson is given authority by District law to enter into contracts on behalf of the D.C. City Council. The Chairperson's contracting authority, notwithstanding, was delegated to the Secretary of the Council. Whereupon, the Secretary opted to use the Procurement Practices Act (PPA) as guidance in crafting standards for D.C. City Council procurements.

With regard to the Councilmember's personal services contract with Ms. Watts-Brighthaupt, the Secretary initially received a contract signed by the Councilmember's former Chief of Staff, Keith Perry, and Watts-Brighthaupt. The Secretary deemed this proposed contract as not within the scope of the Committee on Housing and Workforce Development (Committee) nor consistent with the Councilmember's responsibilities. Whereupon, a second proposed contract was submitted to the Secretary. It was signed by the Councilmember and Ms. Watts-

Brighthaupt; modified to meet certain requirements; and deemed acceptable for processing by the Secretary. Consequently, work proceeded on what was believed to be the accepted contract. It was later determined that the work performed by Ms. Watts-Brighthaupt was not consistent with the accepted contract. It should be noted that at the time of the instant personal services contract, the Secretary's office did not review deliverables by the contractor; but rather, a listing representing what was done by the contractor, and the invoice for payment associated with such services. Currently, however, the Secretary has employed a contract officer to review and monitor compliance with Council contracts.

With respect to the close relationship between the Councilmember and Ms. Watts-Brighthaupt, the Secretary stated that she had no knowledge of it. Further, according to the Secretary, the Secretary's office does not inquire into the relationship between a Councilmember and a proposed contractor. Moreover, the Secretary stated that her office has no way to determine whether a relationship exists.

According to the Counsel to the Council, if the Councilmember had sought advice from him concerning disclosure of his personal relationship with Ms. Watts-Brighthaupt prior to the contract award, he likely would have advised that the relationship would present an appearance of a conflict of interest. The Counsel to the Council further stated, in his opinion, the contract award would violate the District of Columbia Government's Standards of Conduct. Notwithstanding, he added, in his view, a prohibitive personal relationship would also depend on how close in time it was to the transaction at issue. However, in response to a query as to the effect of disclosure of the personal relationship, Mr. Flowers responded that he was uncertain whether it would have resulted in rejection of the contract. Further, the Counsel to the Council stated that the instant contract followed the same process as every other contract recommended by the Councilmember to the Secretary; to wit, the Councilmember made a recommendation and the Secretary issued the contract.

Also on June 8, 2010, OGC deposed Eric Goulet, Budget Director of the D.C. City Council (Budget Director) in the office of the Counsel to the Council in his presence. The Budget Director instructed that earmarks originated with the Council's Health Committee under Council Member Catania (Councilmember Catania) in 2005. The Budget Director believed the goal of the earmarks was to provide funding for specific groups that Councilmember Catania identified as providing quality services, so as not to get bogged down in the Department of Health's (DOH) procurement process. According to the Budget Director, earmarking spread to other D.C. City Council Committees for a variety of organizations and causes.

The Budget Director stated there was no record or compilation of earmarks originally, but they were disclosed in Committee reports. Subsequently, earmarks were placed in the Budget Support Act. The Budget Director stated that because groups

receiving earmarked funds were not regulated, the Chairperson initiated efforts to place some basic requirements on these groups, e.g., articles of incorporation, IRS certification, financial audits, current status on District and federal taxes. He further stated that the intent of earmark regulations was to provide funding for non-profit groups to serve their communities; not to supplement constituent services functions of a Member.

Goulet clarified that the Councilmember and Councilmember Graham, in particular, who had “loosely- based community groups,” complained that some of their groups did not meet 501(c) (3) status, and consequently pushed for a fiscal agent [an established and incorporated 501 (c)(3) organization] through which these funds could be reliably disbursed. The fiscal agents, or fiscal sponsors, would hold and regulate expenditures of grantees in accordance with an approved spending plan. Customarily, fiscal agents would charge a fee for services as a percentage of the total grant award.

With respect to the Councilmember’s earmarks, according to the Budget Director, complaints surfaced concerning his involvement in the day-to-day operations of the grants. The Budget Director noted that oversight of grants was contemplated at the District agency level. Further, according to the Budget Director, there were allegations that Barry was involved in decision-making relative to, e.g., hiring; and, this was inconsistent with the D.C. City Council’s intent that these groups operate independently. In addition, there was concern that the Councilmember was attempting to supplement his Constituent Services budget with earmarked funds.

The Budget Director stated that another issue arose relative to the Councilmember’s earmarked grants concerning the legitimacy of certain signatures on articles of incorporation of certain Ward 8 Councils, which matter Goulet did not pursue in his capacity as Budget Director. However, the Budget Director viewed this issue as ironic as there was no need for certain groups to incorporate because a fiscal agent was in place in lieu of incorporating.

The Budget Director stated that two (2) issues forebode the demise of earmark grants in the District of Columbia: (1) the Councilmember’s scandal, and (2) fiscal pressures culminating in the District’s Chief Financial Officer’s (CFO) revision of the revenue estimate downward by approximately \$145 million for fiscal year 2009. As a result, the Chairperson recommended the removal of all earmarks in the FY 2010 and FY 2011 budgets.

On June 9, 2010, OGC deposed Rev. Anthony Motley (Rev. Motley) in the OCF office. Reverend Motley, who was accompanied by his counsel, Talib Wills, Esq., revealed that, for the past eighteen years, he has been a self-employed minister and administrator in educational program development, strategic planning and community building. One organization that paid him for his services was Inner Thoughts, Inc.

Reverend Motley disclosed that he has known the Councilmember for approximately thirty years; and, that his most recent dealing with the Councilmember was through the Marion Barry Scholarship Fund (Fund). Rev. Motley served as an organizer, an incorporator, and the Treasurer of the Fund. He stated that the Fund's purposes were to provide educational scholarships for Ward 8 residents and to support and promote educational opportunities by developing informational programs. Rev. Motley stated that, as Treasurer, he was authorized to determine how the funds were spent. He personally wrote checks after consulting with the other incorporators, Linda Greene and Donna Rouse. The incorporators determined whether or not funds were going to be released by determining whether the expenditure was appropriate for the Fund's purpose.

Rev. Motley stated that a "gentleman named Hubbard (?)" asked him to pay the incorporation fees for some of the Ward 8 Councils. According to Rev. Motley, Hubbard stated that the Councilmember told Hubbard to seek him out and ask him for the incorporation fees.

Rev. Motley stated that no one specifically told him to use the Fund's monies for incorporation fees, but that he decided to use the Fund's monies because it "seemed like a natural fit."<sup>1/</sup> He stated that he came to this conclusion despite the fact that Ms. Greene was in disagreement with using the Fund's monies in such a manner. Rev. Motley conceded that he had the option to use funds from Inner Thoughts, the Jobs Coalition, or his personal funds; however, he determined that the Fund's purpose and monies were better suited for the task.

Rev. Motley deduced that the Fund's endowments came from donations totaling \$42,000. The \$42,000 was spent on scholarships, operational costs (totaling \$1200 over a three year period) and the incorporation fees (\$770). Motley stated that the purpose of the Marion Barry Birthday Party was to raise monies for the Fund, and that the event was advertised as such.

Rev. Motley advised that he was the Founder and Executive Director of Inner Thoughts and simultaneously served as a fiscal agent for the National Association of Former Foster Care Children in America (NAFFCCA). As the fiscal agent, Rev. Motley stated that he received sporadic grant monies, which sometimes resulted in him prepaying himself. He stated that he took on the role as fiscal agent for the NAFFCCA because the grants auditor asked him to assist Louis Henderson, founder

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<sup>1/</sup> Contra note 197, in part, of the Report regarding payment of the incorporation filing fees from the Marion Barry Scholarship Fund, "Interview with Drew Hubbard, Esq. [the Councilmember's then Committee Clerk] stating that Council Member Barry told him to ask Rev. Motley to pay the filing fees for the organizations out of the Marion Barry Scholarship Fund[.]"

of NAFFCCA. He admitted that grant monies from both organizations were comingled, but noted that he had good intentions.

Rev. Motley stated that it was his understanding that the Councilmember created the Ward 8 Councils in an effort to empower the Ward 8 residents and address social issues by increasing volunteerism. He became involved in the Workforce Development Council after one of its incorporators asked for his assistance. Rev. Motley stated that the Councilmember rarely attended board meetings and that he and the Councilmember never communicated about Council policies. Rev. Motley admitted, however, that the Councilmember would “ask for tidbits of general information.”

Rev. Motley said that he came to know Ms. Richardson after she introduced herself as a member of the Ward 8 CSO. He stated that he became a board member of the Workforce Development Council after Ms. Richardson asked him to attend a Council meeting, and he signed incorporation papers. He believed that Ms. Richardson developed the agenda and was an administrator for the Councils. In his opinion, Rev. Motley believed the Workforce Development Council was not a constituent service since it only provided educational information for purposes of empowerment; and, not financial support for the Ward 8 citizens. He also said that, in his view, the Ward Eight Councils did not duplicate the services provided by the constituent services fund because the former had a broader purpose of empowerment and was not an adjunct to the Councilmember’s constituent services program which, he opined, was not encompassed in the goals of the latter.

On June 9, 2010, OGC deposed Ms. Richardson in the office of her attorney, A. Scott Bolden, Esq., of Reed Smith, LLP. She stated that since January of 2010, she has been employed as the Deputy Chief of Staff in the Councilmember’s office. She indicated that prior to her appointment to that position she served as a volunteer with the Councilmember’s Constituent Services Program [Citizens Services Program or CSP] from 2007, but could not recall the specific month she started. She stated that her duties as a volunteer included organizing the Ward Eight Councils and special events. She clarified that her reference to the councils meant councils in Ward 8. Ms. Richardson said that she feels that she created the Ward Eight Councils, after being invited by the Councilmember, to establish forums for dialogue for members of the community to come together to address issues regarding health, education, leadership, and youth which continued to emerge as topics of discussion during the Councilmember’s town hall meetings.

Ms. Richardson said that she was responsible for identifying the candidates for the Ward 8 Councils’ boards of directors, incorporators and registered agents. She also said that she was responsible for identifying locations for meetings, inviting government officials and service providers to monthly meetings, and attended to the

administrative duties for the councils. Ms. Richardson stated that her initial involvement with the councils preceded any funding and that everything prior to funding was done by volunteers. She continued that the councils met at different places including, the conference room in the Councilmember's Southeast office, churches and service providers' offices.

Ms. Richardson advised that funding for the councils occurred after the councils received a letter from the Chairman of the City Council, advising that funding was available. However, in order to qualify for funding, the councils had to be incorporated, operated under by-laws and boards of directors. She pointed out that she assisted six councils in meeting these requirements. She added that following the receipt of funding she was compensated by four (4) of the councils as a consultant. She answered that at no time did she receive compensation from both the District government and the councils. However, she conceded that, on occasion, she used the Councilmember's office telephone and facsimile for work related to the councils.

Ms. Richardson stated that the councils had separate and distinct objectives from constituent services which were primarily to promote dialog within the community to address more comprehensive issues as opposed to dealing with constituents who were facing financial hardships. She pointed out that the councils were designed to benefit the broader community with regard to issues involving concerns about drug abuse, the environment, health and other matters that are mutually exclusive entities. She additionally stated the Councilmember visualized the councils as a way of embracing issues that were raised in town hall meetings and her responsibility was to create forums through the councils to fulfill that vision. She continued that she still feels very strongly about the goals of the councils because she did all the work during the first three years. She also stated that the Ward Eight Councils became so popular that other Members were interested in instituting councils because they represented a form of meaningful engagement.

Ms. Richardson said that, to her knowledge, the Councilmember did not make any personnel decisions for the councils and his involvement was generally limited to attending monthly meetings. She further said that the councils operated democratically and in accordance with the leadership of their boards of directors. She advised that she continues to volunteer with the councils even though she is no longer being compensated therefor. Ms. Richardson emphatically denied that the Councilmember exercised control over the councils.

Ms. Richardson responded that she did not play a role in the award of the personal services contract to Ms. Watts-Brighthaupt. She added that, during the period of the contract, Ms. Watts-Brighthaupt worked out of the Councilmember's southeast Office that she occupied. Although she was not engaged in monitoring Ms. Watts-Brighthaupt's performance, Ms. Richardson said, she believes that Ms. Watts-

Brighthaupt was quite diligent. Ms. Richardson denied any knowledge of a social relationship between the Councilmember and Ms. Watts-Brighthaupt prior to observing reports in the media.

On June 14, 2010, OGC deposed the Councilmember, who was accompanied by his counsel, Fred Cooke, Esq. At our request, he answered that he viewed "official action" as representing his constituents in all capacities, and agreed that providing a recommendation for a personal service contract could constitute an official action even though Members of the D.C. City Council do not have contracting authority; only the Secretary has the authority to award the contracts.

The Councilmember next discussed the procedures for awarding personal service contracts. He stressed that there were not any written guidelines for awarding the contracts. However, he said that he typically submitted a recommendation and an outline of the scope of work; whereupon, the contract would be approved or disapproved by the Secretary of the Council. The Councilmember stated that he used the same format for awarding the personal service contract to Ms. Watts-Brighthaupt. He insisted that he personally determined that Ms. Watts-Brighthaupt and other contract recipients were qualified before he recommended them. The Councilmember stated that he believed that both the Member, who recommended the personal service contract recipient, and the Secretary, should monitor the progress of the contracts. While the Councilmember indeed admitted that his failure to disclose his prior relationship with Ms. Watts-Brighthaupt was, in hindsight, a mistake because it could be perceived as an impropriety; he was steadfast in his contention that he awarded Ms. Watts-Brighthaupt the personal services contract because he truly believed that she was qualified for the position. Moreover, he was very pleased with the product, contrary to the findings of the Report.

The Councilmember stated that, at the time he recommended Ms. Watts-Brighthaupt for a personal service contract, she owed him money, pursuant to a loan extended to her by him. He insisted, however, that the loan arrangement had no bearing on his decision to award the contract. The Councilmember additionally stated that he and Ms. Watts-Brighthaupt had the understanding that the monies he had given her constituted a loan that she verbally agreed to repay him, and that she made efforts to pay installments on the loan. When questioned, the Councilmember stated that he accompanied Ms. Watts-Brighthaupt to the bank on one occasion; and, that it was not for the purpose of obtaining money from her.<sup>2/</sup> He said that Ms. Watts-Brighthaupt

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<sup>2/</sup> Contrarily, Ms. Watts-Brighthaupt testified before the Special Counsel in this matter that, upon payments for her services pursuant to the contract, the Councilmember accompanied her to the bank on more than one (1) occasion; and, requested reimbursement for monetary loans extended to her. Transcript of Ms. Watts-Brighthaupt before the Special Counsel, pp. 104-108 & 212-213 (TWB).

contract was initially terminated because of budgetary issues and because she wanted to take a break. He averred that the contract was reinstated so that she could complete her work; and, he effused that he was “more than satisfied” with the final product.

The Councilmember stressed that there were very few rules for awarding earmarks. He emphasized that the only rules for earmarks were that the organization had to have 501(c)(3) IRS status and that the organization had to have a fiscal agent. He stated that in 2006 he created thirteen Ward 8 Councils which were all staffed by volunteers, during a time before earmarks became available. The Councilmember said that when he helped some of the councils become incorporated, it was not for the purpose of obtaining funding. He asserted that he occasionally gave guidance, when asked, to some of the councils, but that he was not involved with their day-to-day operations. He advised that, from time to time, he obtained a status update from Ms. Richardson and instructed her to review the Council’s reports. The Councilmember said that he did not believe that the councils were actually constituent services or that any earmark monies were used for constituent services. He distinguished the councils from constituent services in that the councils provided empowerment through education and services while the constituent services strictly provided financial assistance for Ward 8 citizens. The Councilmember said that, to his knowledge, he did not authorize the use of government funds to assist the councils.

Finally, the Councilmember was presented with a series of documents, attached hereto as an exhibit, which served to indicate that he may have exercised a certain amount of control over the councils. When presented with the 12 documents, consisting of e-mails, letters, reports and flyers, the Councilmember replied that he had not seen any of the documents. He acknowledged that he was aware that Ms. Richardson would use his name when directing tasks. When queried as to Ms. Richardson’s style of management, the Councilmember admitted that she believed that using his name with subordinates would motivate them to quickly perform and not question her instruction.

### **Findings of Fact**

Having reviewed the allegations and the record herein, I find:

1. The Councilmember, who has served as the representative for Ward 8 since 2005, is a public official required to file a Financial Disclosure Statement (FDS) with OCF.
2. As a member of the D.C. City Council, subject to the authority of the Chairperson of the D.C. City Council (the Chairperson), the Councilmember is entitled to request and receive personal services contracts “to contract with

individuals and organizations when professional, specialized, or technical expertise is needed.” Report at p. 21.

3. The Chairperson delegated his authority to award personal services contracts to Members of the D.C. City Council (the Members) to the Secretary of the D.C. City Council, Cynthia Brock-Smith. Id.
4. The Secretary instituted a procedure and criteria for the Members and that she executed the award of personal services contracts in accordance therewith.
5. Ms. Watts-Brighthaupt presented the Councilmember with a proposal for a project to be instituted in Ward 8; and, the Councilmember believed that the proposal, “the training of young, black men and women to assume leadership positions in the communities within which they reside,” which accorded with his “vision of emerging leaders,” would be beneficial for his ward. Letter dated July 14, 2010; Transcript of the Councilmember, June 14, 2010, pp. 17-18 (TC).
6. Ms. Watts-Brighthaupt was a college graduate who had prepared a paper that incorporated some of the tenets with the Councilmember’s vision for the project to be instituted in Ward 8; and, the Councilmember was impressed with the proposal. TWB, pp. 32 & 276; see also TC, pp. 18-20.
7. Ms. Watts-Brighthaupt had been a volunteer driver for the Councilmember during his campaign and they developed a close personal relationship. Ms. Watts-Brighthaupt. TWB, pp. 30-35.
8. Prior to the award of the personal services contract, Ms. Watts-Brighthaupt was indebted to the Councilmember for the extension of a loan with which to pay a month’s mortgage of \$700.00 on her home. TWB, pp. 48-54, 56 & 58.
9. The Councilmember requested a personal services contract for Ms. Watts-Brighthaupt from the Secretary, which was rejected by the Secretary because it was inconsistent with the Councilmember’s responsibility and mission of his Subcommittee on Workforce Development; and, the Secretary was unaware of the close friendship or the loan arrangement between the Councilmember and Ms. Watts-Brighthaupt. Transcript of Cynthia Brock-Smith (TBS), June 8, 2010, p. 7.
10. The Councilmember revised the initial request for a personal services contract for Ms. Watts-Brighthaupt, and again, submitted same for a personal services contract for Ms. Watts-Brighthaupt, which was ultimately granted by the Secretary to the Councilmember; and, the Secretary remained unaware of

the close friendship or the loan arrangement between the Councilmember and Ms. Watts-Brighthaupt.

11. Had the Secretary known of the close friendship or the loan arrangement between the Councilmember and Ms. Watts-Brighthaupt, the Secretary stated that she would have queried the Counsel to the Council as to the law on the matter. TBS, p. 46.
12. “In 2007 and 2008, [Ms.] Richardson entered into two personal services contracts to perform work for [the Councilmember] and the Council Committee on Housing and Urban Affairs[; and, she was] a temporary consultant for [the Councilmember’s] Constituent Services Office, and set up several programs [Ward Eight Councils] run out of [the Councilmember’s] CSO, including the Anacostia Business Improvement District Committee, the Ward 8 ANC Council, and the Ward 8 Drug Prevention Council.” Report at p. 41.
13. Nonetheless, the Councilmember’s vision for the emerging leaders project occurred in 2007 when he campaigned for office and the Ward Eight Councils were established prior to the institution of the earmark grants. Transcript of the Councilmember before the Special Counsel (TCS), pp. 10-12.
14. “On October 16, 2009, [the Councilmember] sought a third personal services contract for Ms. Richardson. . .to continue the work she had previously been doing with the existing Ward Eight Councils and establish at least six more councils”; and, the Secretary “declined to approve the contract [because] the proposed scope of work for the contract consisted of [CSO] work.” Id.
15. In Fiscal Year 2009, the D.C. City Council, through the Members, also provided to an entity an “earmark,” or “an approved measure by the council, which results in the appropriation of funds for a specific purpose. . .direct[ly to] organizations, institutions, and private sector entities.” Report at p. 45.
16. To qualify for an earmark grant in fiscal year 2009, an organization was required to have an identified Board of Directors, incorporators, a registered agent, and a fiscal agent.
17. The Councilmember obtained earmark grants for certain entities, under the rubric of the aforementioned “Ward Eight Councils,” previously created before he obtained same and he believed “that the councils were his “vision [for] empower[ing] the people of Ward Eight.” Report at p. 51.
18. Ms. Richardson, during her volunteer and paid tenure, was the coordinator for the Ward 8 citizens-services programs (CSP, also previously cited in this Order as the CSO).

19. Ms. Richardson, as part of her joint, volunteer and paid, duties as the Councilmember's Deputy Chief of Staff and CSP coordinator, created eight (8) councils, which evolved from town hall meetings conducted by the Councilmember, and which were designed to facilitate "forms of dialogue" during monthly meetings, in accordance with the Councilmember's vision.
20. The Ward Eight Councils, before receiving earmark funds, conducted business specific to the focus of each council, e.g., health, education or sobriety, promoted guest speakers and other special events, and were each self-administered by volunteers and non-funded; and, met in the Councilmember's southeast Office, which also housed Ms. Richardson, who was performing her joint volunteer duties as the Councilmember's Deputy Chief of Staff and CSP coordinator.
21. The Ward Eight Councils, six (6) of which later received earmark funds, conducted business specific to the focus of each council, e.g., health, education or sobriety, promoted guest speakers and other special events, and were incorporated and administered by Board of Directors and funded; and, met in the Councilmember's southeast Office, which also housed Ms. Richardson, who was performing her joint volunteer duties as the Councilmember's Deputy Chief of Staff and CSP coordinator and receiving a salary from the earmarked funds for three (3) Councils for her administrative duties therefor, e.g., among other things, she developed work plans, kept minutes, and facilitated the purpose of the affected council.
22. Notwithstanding that the work and purpose of the Ward Eight Councils were, at a minimum, to contribute to the general well-being of the residents, both the Councilmember and Ms. Richardson, who performed contractual, volunteer and paid duties as the Councilmember's Deputy Chief of Staff and CSP coordinator, and who is currently performing joint paid duties as the Councilmember's Deputy Chief of Staff and CSP coordinator, believe contrarily that the objectives of the Ward Eight Councils are "to provide a dialogue of forum" and that the function of the CSP office is to facilitate "monetary problems of residents."
23. The Councilmember's imprimatur, nonetheless, shadows the inception, formation, character and general operation of the assorted Ward Eight Councils; to wit, the Ward Eight Councils and their joint purposes to empower the people of Ward Eight thereby materialized from his special vision; the Councilmember's engagement with the Ward Eight Councils included regularly contacting Rev. Motley and Ms. Richardson, among others, regarding the status of meetings and business; much of the business of the

Ward Eight Councils was performed directly from the Councilmember's southeast Office; and, said business is facilitated by the Councilmember's Deputy Chief of Staff and CSP coordinator.

### **Conclusions of Law**

Based upon the record and the evidence, I conclude:

1. The Councilmember, who served as the Member from Ward 8, since 2005, is a public official who has been required to file a yearly Financial Disclosure Statement (FDS), in support of D.C. Official Code §1-1106.01.
2. The Councilmember, as an employee of the District of Columbia, is subject to the enforcement provisions of the Standards of Conduct at §§1800 et. seq.
3. The Councilmember did not violate D.C. Official Code §§1-1106.01(a)-(b)&(g) when he sought and obtained from the D.C. City Council approval of a personal services contract to Ms. Watts-Brighthaupt to obtain financial gain, to whom he had extended a loan of a mortgage payment and for which he expected payment, because Ms. Watts-Brighthaupt was qualified, by education and experience, for such a personal services contract and produced a satisfactory written product for the Councilmember; and, it cannot be reasonably concluded that the Councilmember hired Ms. Watts-Brighthaupt under a \$10,000 personal services contract to repay him for the loan of one mortgage payment in the amount of \$700.00.
4. The Councilmember did not violate D.C. Official Code §1-1106.01(g) when he sought and obtained from the D.C. City Council approval of a personal services contract to Ms. Watts-Brighthaupt, with whom he had a close personal relationship, because the procedures outlined therein are "governed by the overriding principles" of D.C. Official Code §§1-1106.01(a)-(b), which prohibit the misuse of public office for personal financial gain. Committee Report, p. 23; Conference Report, p. 31; see also D.C. Official Code §§1-1106.01(4)-(5).
5. The Councilmember did not violate D.C. Official Code §1-1104.03, when he supported the receipt of earmark grants by various Ward Eight Councils, which he structured and allowed the operation thereof from his Constituent Services Office prior thereto because the tasks performed by Ms. Richardson, under two (2) personal services contracts in 2007 and 2008, "as a temporary consultant for [the Councilmember's] Ward 8 Constituent Services Office"

{(CSO) when she monitored “several programs run out of [the Councilmember’s CSO]}” did not circumvent “legal restrictions on the type and amount of funding that may be used for CSO programs,” pursuant to D.C. Official Code §1-1104.03, because, although the Councilmember used the Ward Eight Councils to provide non-monetary services to the constituents of Ward 8, he did not control or direct the expenditure of funds from earmark grants awarded to the Ward Eight Councils, which were documented and structured, prior to the origination of earmark grants.

6. The Report delineates items which compose a set of circumstances, the totality of which, create the appearance particularly of using public office for private gain, pursuant to §1803.1(1) of the Standards of Conduct, when the Councilmember recommended to and received from the Secretary the personal services contract with Ms. Watts-Brighthaupt, a person with whom he had a close relationship, and who owed him money, the fact of which he failed to disclose to the Secretary, notwithstanding that it may not have been required for disclosure; also of using government property for other than officially approved purposes, pursuant to §1806, because it appears that he may have ordered employees and staff to draft and file incorporation documents for certain Ward Eight Councils to become eligible for earmark grants and allowed the Ward Eight Councils to continue to operate out of his southeast Office, upon their receipt of earmark grants; and, generally, of failure to “at all times [to] maintain a high level of ethical conduct in connection with the performance of official duties, and [to] refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government”.

## **RECOMMENDATION**

Upon evaluation of the material amassed in this inquiry, it became apparent that the parameters thereof extended solely to the Standards of Conduct. The record was devoid of any evidence upon which to conclude that the Councilmember committed any violations of the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974 (the Act), as amended, D.C. Official Code §§1-1101.01 et seq. (2001 Edition).

Simply put, the Councilmember’s behavior did not meet the standard established by the Act. The Councilmember hired Ms. Watts-Brighthaupt for a job and she produced a product. It may have been imprudent for him to hire a person with whom he had a close relationship; but, the overriding principles of disclosure do not govern such a relationship. Clearly, the Ward Eight Councils were operated by Ms. Richardson from the Constituent Services Office and certain councils and Ms. Richardson were receiving monies from the earmark grants for her services. The

Ward Eight Councils were documented prior to the institution of earmark grants and Ms. Richardson was a volunteer in the Councilmember's office when she received monies from the earmark grants to coordinate certain councils. There was no evidence to support the circumvention of the contribution limits of citizen service program where the Councilmember did not control or direct the expenditure of funds from earmark grants to the Ward Eight Councils.

The Councilmember violated the Standards of Conduct through his failure to disclose his relationship with Ms. Watts-Brighthaupt to the Office of the Secretary, and to prevent the use of his employees and his CSO to facilitate the operation and activities of the Ward Eight Councils. These actions affected adversely the confidence of the public in the integrity of government, and allowed the use of government resources for other than officially approved purposes, pursuant to §§1803.1(a)(6) and 1-1804.1(b).

The Report documented that the Councilmember had advanced the sum of \$700.00 to Ms. Watts-Brighthaupt prior to the award of the personal services contract. Notwithstanding, it is speculative that this financial interest would have been a compelling reason for the councilmember to recommend a personal services contract totaling \$10,000 for the purpose of ensuring repayment of a personal loan. Moreover, it is speculative that the award of the contract would have guaranteed repayment of the loan. It is well established that one's personal ability to pay does not always influence one's willingness to pay a debt.

When OCF determines that a violation of the Standards of Conduct has occurred, OCF may order immediate remedial action against the employee by his or her supervisor, not limited to, a change in assigned duties, divestment by the employee of the conflicting interest, corrective or adverse action in accordance with the CMPA, and disqualification for a particular assignment, pursuant to §1801.2.

In the instant case, had there not been a censure proceeding against the Councilmember, it would have been my recommendation to the Director that disciplinary action be taken against the Councilmember, in accordance with §1801.2. Conversely, proceedings of the Council, pursuant to the Report's conclusions, operate to nullify my recommendation.

I therefore recommend the Director to admonish the Councilmember, and advise him, that in the future, to avail himself of the resources made available through the Ethics Counselor, the General Counsel to the D.C. City Council, with respect to any future employee conduct issues, pursuant to Council Rule 202.

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Kathy S. Williams  
General Counsel

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Date

### **ORDER OF THE DIRECTOR**

I hereby admonish Councilmember Marion Barry for his failure to adhere to §§1803.1 (a)(6) and 1-1804.1(b) of Chapter 18, "Employee Conduct," of the District of Columbia Personnel Regulations. Section 1-1803.1(a)(6) imposes upon employees the responsibility to avoid action, whether or not specifically prohibited by Chapter 18, which might result in or create the appearance of "affecting adversely the confidence of the public in the integrity of government." Section 1-1804.1(b) prohibits employees from engaging in conduct which is not incompatible with government employment, including "using government time or resources for other than official business or government approved or sponsored activities..."

Specifically Councilmember Barry failed to disclose his personal and financial relationship with Donna Watts-Brighthaupt to the Office of the Secretary of the Council, when he was pursuing the approval of the personal services contract for Ms. Brighthaupt. Disclosure of the relationship would have resulted in the transparency of the transaction and removed any cloud from the contract process. Further, Councilmember Barry failed to closely monitor and oversee the activities of his employees and the operations of his citizen-services office, which resulted in the entanglement of the citizen-service program with the operations of the non-governmental Ward 8 Councils. Because of these failures to take the appropriate action, Councilmember Barry's conduct adversely affected the confidence of the public in the integrity of the District Government.

The general public places its trust in public officials to act in, and serve their best interests at all times. That said, it is, however, impossible to avoid the occasional clash which at times occurs between one's personal and public interests. It is the choices made by public officials when faced with these competing personal and public conflicts of interest which determine the outcome of the road taken. To act in conformity with the tenets of the Standards of Conduct invariably ensures the achievement of integrity, honesty, and neutrality in the execution of the responsibilities of public office. To act otherwise may result in behavior that betrays the broader public interest.

Therefore, I strongly advise Councilmember Barry to avail himself of all the resources made available through the Legal Ethics Counselor of the Council, with respect to any future employee conduct issues he may confront, and to become intimately familiar with the principles of the Standards of Conduct so that they might guide him in the choices he must make as a public official of the District of Columbia.

Attachments are available for review or copying in OCF, upon request. This Order may be appealed to the Board of Elections and Ethics within 15 days from issuance.

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Cecily E. Collier-Montgomery  
Director

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Date

**SERVICE OF ORDER**

This is to certify that I have served a true copy of the foregoing Order to:

The Honorable Marion H. Barry  
D.C. City Councilmember – Ward 8  
Wilson Building  
Washington, D.C. 20001

Brian Flowers, Esq.  
D.C. City Council General Counsel  
Wilson Building  
Washington, D.C. 20001

Cynthia Brock-Smith  
Secretary  
D.C. City Council  
Wilson Building – First Floor  
Washington, D.C. 20001

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**NOTICE**

Pursuant to 3 D.C.M.R. §3711.5 (March 2007, as amended), any fine imposed by the Director shall become effective on the 16<sup>th</sup> day following the issuance of a decision and order, if the respondent does not request an appeal of this matter. If applicable, within 10 days of the effective date of this order, please make a check or money order payable to the D.C. Treasurer, c/o Office of Campaign Finance, Suite 433, 2000 14<sup>th</sup> Street, N.W., Washington, D.C. 20009.