

BEFORE THE DIRECTOR
OF THE
OFFICE OF CAMPAIGN FINANCE
D. C. BOARD OF ELECTIONS AND ETHICS
2000 14TH STREET, N. W., SUITE 420
WASHINGTON, D. C. 20009
(202) 671-0550

IN THE MATTER OF)
)
Anthony A. Williams) DATE: June 16, 2000
Mayor) DOCKET NO.: MUR 00-01
)

ORDER

Statement of the Matter

This matter arises out of a complaint filed with the Office of Campaign Finance (OCF) on June 12, 2000^[1], by Dorothy A. Brizill, Executive Director, D. C. Watch, 1327 Girard Street, N. W., Washington, D. C., 20009, against Anthony A. Williams, Mayor, District of Columbia, One Judiciary Square, 441 4th Street, N. W., Washington, D. C., 20001, alleging violations of the District of Columbia personnel regulations at Chapter 18, "Employee Conduct," of the District Personnel Manual (DPM) (Standards of Conduct).

Upon evaluation by the Office of Campaign Finance (OCF) of Ms. Brizill's complaint, it was decided that the statutory and regulatory bases for the resolution of this matter, as it pertains to Mayor Anthony A. Williams, were solely within the Standards of Conduct. In other words, Ms. Brizill did not make a complaint, nor could OCF originate a complaint based upon the allegations herein, against Mayor Williams, the determination of which would be based in the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974, as amended, D. C. Code §§1-1401 et seq. (the Act). Any alleged violation of the Act by Mayor Williams would be predicated upon the premise that Mayor Williams realized personal gain through official conduct. See D. C. Code §§1-1461 and 1-1462. Ms. Brizill's complaint did not present such an allegation herein.

Ms. Brizill alleges that Mayor Williams used and will continue to use District government employees during normal work hours and District government facilities and supplies to

¹ Ms. Brizill initially filed her complaint on June 8, 2000, but it was not notarized. See 3 D.C.M.R. §3701 (June 1998).

assist him in supporting Charter Amendment No. 3, "The School Governance Charter Amendment Act of 2000" (Amendment), which will be the subject of a special election on June 27, 2000. She also alleges that Mayor Williams will financially facilitate this endeavor with public money. Additionally, Ms. Brizill alleges that Mayor Williams announced his support for the Amendment at a press conference that he held on June 8, 2000.

Ms. Brizill further alleges that District of Columbia government employees could be found wearing campaign buttons and distributing campaign materials in support of the Amendment. She states that the alleged campaign buttons and campaign materials failed to include proper committee disclaimer information. Moreover, in her supplementary submission dated June 14, 2000, she alleges certain inaccuracies with regard to the June 9, 2000 Report of Receipts and Expenditures filed by the New School Leadership Committee.

In accordance with established OCF Standard Operating Procedures, all filings are initially referred to our Report Analysis and Audit Division (RAAD). The June 9, 2000 Report of Receipts and Expenditures filed by the New School Leadership Committee has been referred for desk review. If RAAD discovers any omission or inconsistency, the matter will be brought to the attention of the treasurer of the committee with a request to provide additional information thereto.

The items noted by Ms. Brizill, and any other items that may be noted by RAAD, will be quickly forwarded to William Lightfoot, treasurer of the New School Leadership Committee, in view of the abbreviated filing schedule for the Committee. He will be given the opportunity to explain any omission or inconsistency. If Mr. Lightfoot is nonresponsive or if his response is inadequate, RAAD will immediately refer the New School Leadership Committee to the Office of the General Counsel (OGC) for an adjudicatory recommendation, which may ultimately result in the imposition of fines and penalties.

Finally, Ms. Brizill alleges in her June 14, 2000 supplementary filing that a second campaign committee in support of the Amendment, under the aegis of D. C. Agenda, has not filed with OCF. John H. McKoy, president of D. C. Agenda, and members of his staff, directly and through their legal counsel, have been in contact with OCF since the end of May with regard to how to file, or if to file, as a political committee, in connection with the Amendment. As of today, D. C. Agenda advised it will not organize as a political committee. Mr. McKoy submitted a sworn affidavit wherein he stated that D. C. Agenda has not made expenditures in connection with the Amendment and that any checks received by D. C. Agenda, in connection with the Amendment, will be immediately returned. See Attachment A.

Issue

Whether Mayor Anthony A. Williams violated §§1803.1, 1804.1(b) and 1806.1 (in part) of the Standards of Conduct, when he allegedly used, and allegedly maintains that he will continue to use, District of Columbia government employees during normal work hours, facilities and supplies to assist him in his support of the Charter Amendment, which will be the subject of a special election on June 27, 2000.

Background

On June 12, 2000, Dorothy Brizill complained to OCF that Mayor Anthony Williams announced in a press conference that he intended to use District of Columbia government resources, *i.e.*, employees, facilities and supplies, to campaign for the Charter Amendment, the subject of a June 27, 2000 election. Upon review of the complaint, OCF initiated an investigation into this matter, pursuant to the D. C. Office of Personnel Standards of Conduct (Standards). See Attachments B-C.

Also, on June 12, 2000, OCF sent letters to Ms. Brizill and Mayor Williams, through Robert Rigsby, Corporation Counsel, to advise that OCF had commenced an investigation. Additionally, interrogatories were submitted to Mayor Williams. All information relevant to the matter was requested by June 14, 2000.[2]

On June 14, 2000, the parties submitted their responses. See Attachments D-E. Also, on June 14, 2000, the Corporation Counsel was issued a copy of Ms. Brizill's supplementary response. Time was extended until noon on June 15, 2000, for Corporation Counsel to respond to Ms. Brizill's supplementary response. No response was received.

The scope of the OCF investigation encompassed reviewing and evaluating all submitted information, in light of the OCF statute, and OCF and personnel regulations; research; and in-house meetings.

Relevant Statutory and Regulatory Provisions and Case Law [3]

At D. C. Code §1-361 (1992 Repl. Vol.), it reads, in part, "The Corporation Counsel shall be under the direction of the Mayor, and have charge and conduct of all law business of

2 In light of the imminence of the June 27, 2000 election, OCF imposed an abbreviated schedule upon the parties. Also, Mayor Williams was offered the opportunity to present his response during an informal hearing. He declined.

3 Ms. Brizill also recommended numerous authorities for OCF consideration with regard to this matter. See Attachment D. Said authorities were reviewed and were found to be inapplicable.

the said District, and all suits instituted by and against the government thereof. He shall furnish opinions in writing to the Mayor, whenever requested to do so. . . . He shall perform such other professional duties as may be required of him by the Mayor.”

At §1801.2 of the Standards of Conduct, it reads, in part, “When, after consideration of the explanation of the employee, the Board of Elections and Ethics. . .decides that remedial action is required regarding any matter covered under this chapter, appropriate action shall be immediately taken or ordered. Remedial action[4] 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, the President and each Member of the Board of Education, members of boards and commissions as provided in subsection (a) of Section 602 of the District of Columbia Campaign Finance Reform and Conflict of Interest Act. . .; and
- “(b) Employees in the Executive Service, and persons appointed under the authority of D. C. Code §§1-610.1 through 1-610.3 (1981) (and paid at a rate of DS-13 or above in the District Schedule or comparable compensation), or designated in D. C. Code §1-610.8 (1981).

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. . .(f) [a]ffecting adversely the confidence of the public in the integrity of government.”

⁴ “Remedial action,” within the rubric of sanctions for violations of the Standards of Conduct, does not include the imposition of penalties and fines.

At §1804.1, it reads, "An employee may not engage in any outside employment or other activity which is not compatible with the full and proper discharge of his or her duties and responsibilities as a government employee. Activities or actions which are not compatible with government employment include, but are not limited to, the following:

"(b) Using government time or resources for other than official business, or government approved or sponsored activities[.]"

At §1806.1, it reads, in part: "A District employee shall not use or permit the use of government property, equipment, material of any kind, including that acquired through lease, for other than officially approved purposes."

District of Columbia Common Cause v. The District of Columbia and David Rivers, No. 85-3528 (D.D.C. October 21, 1986).

In the Matter of Robert L. Schulz, et al. v. State of New York, et al., 1248 Misc.2d 677, 561 N.Y.S.2d 377 (1990), judgment aff'd, 175 A.D.2d 356, 572 N.Y.S.2d 434 (3d Dep't 1991), appeal denied, 78 N.Y.2d 862, 578 N.Y.S.2d 877, 586 N.E.2d 60 (1991) and appeal transferred, 79 N.Y.2d 955, 583 N.Y.S.2d 186, 592 N.E.2d 794 (1992).

Summary of Evidence

In support of her complaint, Ms. Brizill submits her June 12, 2000, verified affidavit, Attachment B, to which she has appended a May 25, 2000 memorandum to Dr. Abdusalam Omer, Chief of Staff, from Darryl G. Gorman, Senior Deputy Corporation Counsel for the Legal Counsel Division, entitled "Ethics Inquiry Concerning the Use of District Employees for Lobbying Activities Related to the School Governance Referendum," the Standards of Conduct, and OCF investigation regulations at 3 D.C.M.R. §§3700 et seq. (June 1998).

Ms. Brizill also relies upon her supplemental response dated June 14, 2000, Attachment D, to which she has appended a press release issued from the Office of Communications of the Executive Office of the Mayor dated June 8, 2000, entitled "City Leaders Join Parents, Teachers and PTA Members to Urge Voters to Say 'Yes on June 27th'"; a list of D. C. Citizens for Accountability, Leadership and Change; a Neighborhood Action Alert! from the Office of Communications of the Executive Office of the Mayor, which states, inter alia, "Vote Yes on June 27th!"; a 1986 United States District Court for the District of Columbia case entitled District of Columbia Common Cause, et al. v. The District of

Columbia and David E. Rivers; and photographs of various District government employees who allegedly attended the June 8, 2000 press conference at J. O. Wilson Elementary School.

Mayor Williams relies upon his notarized response, Attachment E, to which he has appended answers to OCF interrogatories; a press release issued from the Office of Communications of the Executive Office of the Mayor dated June 8, 2000, entitled "City Leaders Join Parents, Teachers and PTA Members to Urge Voters to Say 'Yes on June 27th'"; a Neighborhood Action Alert! from the Office of Communications of the Executive Office of the Mayor, which states, inter alia, "Vote Yes on June 27th!"; flyers entitled "Vote 'Yes' on Measure #3," "Vote 'Yes' for change, W(sic)e need a strong School Board and better schools for our children." and "Vote 'Yes' on Measure #3," all issued by Ward 7 Councilmember Kevin P. Chavous, 441 4th Street, N. W., Washington, D. C., 20001, (202) 724-8068; a press release entitled "Statement of Congresswoman Eleanor Holmes Norton at Press Conference at J. O. Wilson Elementary School," issued by Congresswoman Norton on June 8, 2000; a list of D. C. Citizens for Accountability, Leadership and Change; a copy of a "sticker" entitled "Vote Yes on June 27 [space] Accountability NOW!!"; and a May 25, 2000 memorandum to Dr. Abdusalam Omer, Chief of Staff, from Darryl G. Gorman, Senior Deputy Corporation Counsel for the Legal Counsel Division, entitled "Ethics Inquiry Concerning the Use of District Employees for Lobbying Activities Related to the School Governance Referendum."

OCF relied upon the Answers to the Interrogatories submitted by Mayor Williams, at Attachment E.

Findings of Fact

Having reviewed the allegations and respondent's answers, I find:

1. Mayor Anthony A. Williams is an employee of the District of Columbia. See Attachment E.
2. On May 25, 2000, Dr. Abdusalam Omer, Chief of Staff to Mayor Williams, queried Darryl G. Gorman, Senior Deputy Corporation Counsel for the Legal Counsel Division, as to ". . .the lawfulness of District government employees performing functions in support of the forthcoming school governance charter referendum scheduled for June 27, 2000." See Memorandum at Attachments D & E.
3. Mr. Gorman advised Dr. Omer in a May 25, 2000 memorandum thereto that "[a]s the school governance referendum is to amend the District Charter, the public can

essentially be viewed as the legislative body and thus those employees who would normally lobby the Council could lobby the public"[; and, as a result thereof,] "District employees may lobby in general 'get-out-the-vote' campaigns or more specific campaigns to encourage votes in favor of the proposed school governance referendum." Id.

4. Acting on the advice of Corporation Counsel, Mayor Williams, in his official capacity as Mayor of the District of Columbia, authorized his employees to arrange a press conference, where he would discuss, inter alia, ". . .the need for voter approval of the proposed school governance Charter amendment." See Answer to Interrogatory No. 1 at Attachment E.
5. Also acting on the advice of Corporation Counsel, Mayor Williams, in his official capacity as Mayor of the District of Columbia, authorized his employees to prepare press kits, which each included flyers and statements identifying support of the Charter Amendment by, inter alia, Mayor Williams, Ward 7 Councilmember Kevin Chavous and Delegate to the House of Representatives Eleanor Holmes Norton. See Answer to Interrogatory No. 2 at Attachment E.
6. Mayor Williams decided upon J. O. Wilson Elementary School as the site for the press conference and obtained authority for its use from the D. C. Public Schools. See Answer to Interrogatory No. 7 at Attachment E.
7. On June 8, 2000, at J. O. Wilson Elementary School, Mayor Williams spoke at the planned press conference, held between 1:45 p.m. and 2:45 p.m., and discussed the need for voter approval of the proposed school governance Charter amendment. See Answer to Interrogatory No. 1 at Attachment E.

Conclusions of Law

Based upon the record and evidence, I therefore conclude:

1. As an employee of the District of Columbia, Mayor Williams is subject to the enforcement provisions of the Standards of Conduct.
2. As Mayor of the District of Columbia, the responsibility for enforcing the provisions of the Standards of Conduct against Mayor Williams rests with the Board of Elections and Ethics.

3. Mayor Williams used government employees and supplies in preparation for and during his press conference urging support of the Charter Amendment on June 8, 2000 for official business because he sought and relied upon advice from the Corporation Counsel.
4. Mayor Williams properly used J. O. Wilson Elementary School on June 8, 2000 for his press conference urging support of the Charter Amendment because he received permission for its use from the D. C. Public Schools under the auspices of an officially approved purpose.
5. Whether or not the activities of Mayor Williams with regard to his support of the Charter Amendment at the June 8, 2000 press conference, may be characterized as "lobbying" is irrelevant inasmuch as Mayor Williams was using the resources of the District of Columbia government to influence the outcome of the June 27, 2000 election on the matter of the Charter Amendment.
6. By using the resources of the District of Columbia Government to influence the outcome of the June 27, 2000 election on the matter of a Charter Amendment, Mayor Williams, at the least, created the appearance of "affecting adversely the confidence of the public in the integrity of government"; and violated the Standards of Conduct.
7. As the agency entrusted with enforcement of the Standards of Conduct against Mayor Williams, OCF has the authority to advise Mayor Williams to immediately terminate all action aimed at influencing the outcome of the June 27, 2000 election on the matter of the Charter Amendment.

Recommendation

I hereby recommend that the Director advise Mayor Anthony A. Williams to immediately terminate all action involving the use of the resources of the District of Columbia Government to influence the outcome of the June 27, 2000 election on the matter of a Charter Amendment.

June 16, 2000
Date

Kathy S. Williams
Kathy S. Williams
General Counsel

ORDER OF THE DIRECTOR

By virtue of the provisions of §1802 of the Standards of Conduct, the District of Columbia Board of Elections and Ethics is responsible for the enforcement thereof for the Mayor, the Chairman and each Member of the Council, the President and each member of the Board of Education, members of Boards and Commissions, employees in the Executive Service, and persons paid at the rate of a DS-13 and in the Excepted Service. Because public service is a public trust, Chapter 18 of the D.C. Personnel Regulations prescribes the standards of conduct which all District employees must adhere to in the execution of their official responsibilities.

Of significance to the instant proceeding, §1806.1 prohibits a District employee from "using or permitting the use of government property, equipment, or material of any kind, including that acquired through lease, for other than officially approved purposes." In pertinent part, at §1804.1(b), it prohibits a government employee from "using government time or resources for other than official business, or government approved or sponsored activities". Further, §1803.1(f) requires an employee 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".

Where a violation of the Standards of Conduct occurs, the Board of Elections and Ethics may take remedial action immediately to address the proscribed conduct, pursuant to §1801.

In this case, the complainant alleges that the use of government employees, facilities, and supplies to launch the "Yes on June 27th" Campaign on June 8, 2000 at the J.O. Wilson Elementary School, in support of the proposed Charter Amendment Act, "The School Governance Charter Amendment Act of 2000"(the "Charter Amendment"), was illegal. The respondent asserts to the extent District government employees in the Executive Office of the Mayor assisted in preparing for and holding the June 8th press conference, they did so as part of their official functions; and that the same is true with respect to the use of District facilities, equipment, and supplies in conjunction with the press conference. Further, respondent states that the use of the resources of his office as Mayor to support the proposed Charter Amendment, would be consistent with the Opinion of the Office of the Corporation Counsel dated May 25, 2000, (AL-00-311). The Office reached the following conclusions concerning the use of government employees for "lobbying" activities related to the Charter Amendment:

1. The Hatch Act does not prohibit District employees from participating in activities concerning the school governance referendum given the non-partisan nature of the referendum and definition of "political activity" as defined in the Hatch Act regulations.
2. Employees should ensure that they do not violate relevant sections of the District's Employee Conduct rules set forth in Chapter 18 of the DPM.
3. The Mayor may accept a poll or research concerning the school governance from an individual or group as long as the item does not violate the provisions of §1803.2 of the DPM.
4. Employees may participate in school governance referendum activities during their work hours if their authorized job functions involve lobbying for legislation, or, if they are detailed to an office whose authorized mandate involves lobbying and appropriated funds have already been authorized for those job functions or offices. If the authorized functions of the employee or the office do not involve lobbying, the employee or office may not be used for that purpose.
5. Other facilities and supplies may be used for lobbying to the same extent that the employee using the office or supplies is authorized to lobby.
6. Individuals not employed by the District government may not use District facilities or supplies to direct lobbying activities of District employees regarding the school governance referendum nor may they use District facilities or supplies for that purpose.

The Office of Campaign Finance agrees with the Corporation Counsel that the phrase "political activity", as defined by 5 CFR, §734.101, and used in the Hatch Act, does not appear to preclude District Government employees from participating in activities concerning the Charter Amendment. However, we acknowledge and defer to the exclusive jurisdiction of the Office of Special Counsel to render advisory opinions in this area. See 5 CFR, §734.102(a). We concur that the Mayor may accept the poll as long as it does not violate the provisions of §1803.2 of the DPM, but caution that the Conflict of Interest Statute, as codified in D.C. Code §1-1461 (1999 Repl. Vol.), prohibits the receipt of gifts under certain circumstances, and the Financial Disclosure Statute, as codified in D.C. Code §1-1462, requires the disclosure of gifts received from businesses doing business with the District, in excess of \$100. We also recognize the responsibility of employees to be aware of the Standards of Conduct, and the restrictions imposed thereby on their activities.

We do not agree, however, that because the purpose of the school governance referendum is to amend the District Charter, the public can be viewed as the legislative body, and thus, those employees who would normally lobby the Council could lobby the public on this issue.

The term "lobbying" as defined by D.C. Code §1-1451(7)(A) means "communicating directly with any official in the legislative or executive branch of the District of Columbia government with the purpose of influencing any legislative action or an administrative decision". The term "official in the legislative branch" as defined by D.C. Code §1-1451(10) means any "candidate for Chairman or member of the Council in a primary, special, or general election, the Chairman or Chairman-elect or any member or member-elect of the Council, officers and employees of the Council. . ." "Legislative action" as defined by D.C. Code §1-1451(6), includes any activity conducted by an official in the legislative branch in the normal course of carrying out his or her duties as such an official, and relating to the introduction, passage, or defeat of any legislation in the Council".

To characterize activity, the purpose of which is to influence the outcome of an election, as "lobbying", is to distort the meaning of a "campaign". See Webster's Ninth New Collegiate Dictionary (Merriam-Webster Inc., 1985) 1999. Webster's defines the term "campaign" as a "connected series of operations designed to bring about a particular result". Otherwise, an uneven playing field would be created in the political arena under the guise of "lobbying". It is inherently unfair to the opponents of a ballot measure to allow government to open the floodgates and use its wealth of resources to urge the public to ratify the Charter Amendment. Moreover, there is no viable basis upon which to distinguish this matter from the initiative process because the act at issue is a charter amendment. In the final analysis, both processes require presentation of the proposed acts to the electorate at an election for their approval or disapproval, notwithstanding their origins may differ.

In District of Columbia Common Cause, et al., v. The District of Columbia, *supra*, the District of Columbia's expenditure of public funds and use of District of Columbia employees to promote the defeat of a ballot question initiated through the initiative process was held to violate the rights of District of Columbia voters under the First and Fifth Amendments to the United States Constitution. The Court found that the government aligned itself in the political fray as being opposed to the enactment of the measure, providing groups who shared their viewpoint with the use of government resources, thereby "unfairly tipping the scales of the electoral balance in favor of one side of the initiative election." The Court opined the "government has an obligation to remain neutral and not spend public funds advocating or opposing an initiative on the ballot".

Consistent therewith, although not binding on this jurisdiction, in In the Matter of Robert L. Schulz, et al. v. State of New York, *supra*, the Governor of the State of New York was enjoined from the expenditure of state funds to promote the passage of a Bond Act. The Court declared that government could only expend funds where it sought to educate, inform or urge the electorate to vote. Public funds could not be used to attempt to persuade the electorate either to approve or disapprove the bond issue. The Court would not enjoin the public officials from making public statements about the act, recognizing that public officials have the right of free speech, and in fact, have a responsibility to express their views on any issue, which affects the electorate, they serve.

Based on the foregoing, we submit public officials may properly express their views on the Charter Amendment, engage in activities, which encourage citizens to vote on this Charter Amendment, and take steps to educate and inform the electorate of the purpose of the measure. Public officials must refrain, however, from conveying specific messages, which encourage the registered qualified electors of the District of Columbia to vote in favor of the Charter Amendment. We find that the purpose of the June 8, 2000 government sponsored activity, was to promote voter ratification of the Charter Amendment. This activity ran afoul of §1803.1(f) of the D.C. Personnel Regulations because it affected adversely the confidence of the public in the integrity of government where government was one sided in its presentation of a ballot issue to be decided by the electorate.

As such, Mayor Williams is to immediately terminate all action involving the use of the resources of the District of Columbia Government to influence the outcome of the June 27, 2000 election on the matter of a Charter Amendment.

This Order may be appealed to the Board of Elections and Ethics within 15 days from issuance.

June 16, 2000
Date

Cecily E. Collier-Montgomery
Cecily E. Collier-Montgomery
Director

SERVICE OF ORDER

This is to certify that I have been served with a true copy of the foregoing Order.

The Honorable Anthony A. Williams
Mayor
District of Columbia
One Judiciary Square
441 4th Street, N. W.
Washington, D. C. 20001

Dorothy A. Brizill
Executive Director
D. C. Watch
1327 Girard Street, N.W.
Washington, D. C. 20009

Pursuant to 3 D.C.M.R. §3711.5 (1999), any fine imposed by the Director shall become effective on the 16th 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 check or money order payable to the D. C. Treasurer, c/o Office of Campaign Finance, Suite 420, 2000 14th Street, N. W., Washington, D. C., 20009.