

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

Valerie Graham,)	
)	
Challenger,)	
)	
v.)	Administrative Hearing No. 22-014
)	
DC Committee to Build a Better)	Re: Motion to Intervene in
Restaurant Industry;)	Petition Challenge to
Ryan O’Leary, Chairman;)	Initiative Measure No. 82, the
Adam Eiding, Treasurer,)	“District of Columbia Tip Credit
)	Elimination Act of 2021”
Respondents.)	
)	
)	

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter comes before the Board of Elections (“the Board”) following a motion by John Bagwell, a registered D.C. voter, to intervene (“Motion”) in proceedings initiated on a challenge (“Challenge”) filed by Valerie Graham (“Challenger”) to the petition (“Petition”) submitted in support of Initiative Measure No. 82, the “District of Columbia Tip Credit Elimination Act of 2021” (“Initiative”). On May 4, 2022, during a regularly scheduled meeting of the Board, a hearing on the Motion was held before Board Chairman Gary Thompson and Board members Karyn Greenfield and Mike Gill. At the hearing, Mr. Bagwell was represented by Mr. Richard Bianco, Esq., and the Initiative proposer, Ryan O’Leary (“the Proposer”), who opposed the Motion, was represented by Mr. Joseph E. Sandler, Esq. In addition, counsel for the Challenger, Andrew Kline, Esq., appeared. This Memorandum Opinion constitutes the Board’s findings of fact and conclusions of law on the Motion. For the reasons set forth in this opinion and order, the Board denies the Motion.

II. Background

On June 22, 2021, the Proposer submitted the Initiative along with supporting information and documents to the Board. On August 26, 2021, the Board held a hearing to determine whether the Initiative met proper subject requirements specified in the law¹, and on August 31, 2021, the Board issued a decision finding that it did. On September 20, 2021, the Board formulated the short title and summary statement for the Initiative with input from interested parties.²

On October 1, 2021, the formulations for the Initiative were published in the District of Columbia Register for a 10-day challenge period.³ As there were no challenges to the formulations, they were deemed accepted.⁴ On October 13, 2021, the Board issued the Petition with the accepted formulations to the Proposer. The Proposer then had 180 days, beginning on October 14, 2021, to circulate the Petition to obtain the requisite number of signatures for ballot access. Specifically, the Petition needed to contain the valid signatures of at least five percent of all registered District voters, including five percent of the registered voters in at least five of the District's eight wards.⁵

On February 22, 2022, the Proposer filed the Petition, which contained 33,228 signatures. Based on a preliminary review, the Petition was accepted. Three days after the Petition was filed, it was posted for a minimum 10-day review and challenge period (3 D.C.M.R. § 1006.1). Because

¹ D.C. Official Code § 1-1001.16(b).

² D.C. Official Code § 1-1001.16(c).

³ D.C. Official Code § 1-1001.16(d)(2)(B)(I); 68 D.C. Reg. 10431 (Oct. 1, 2021).

⁴ D.C. Official Code § 1-1001.16(e)(2).

⁵ See D.C. Official Code § 1-1001.16(i)-(j). The number of registered voters used to determine whether an initiative petition meets the qualifying percentage and ward distribution requirements (*i.e.*, the denominator) is the “latest official count” of registered voters issued 30 or more days prior to the submission of the signatures for that petition. *Id.* In the case of the Petition, the latest official count was issued on December 31, 2021 (“the December 31, 2021 Report”) and published in the District of Columbia Register on January 21, 2022.

the last day of the 10-day challenge period fell on a Sunday, the Board accepted challenges to the Petition through the close of business on the eleventh day, Monday, March 7, 2022.

On March 7, 2022, the Challenge was timely filed. The Challenge asserted that the Petition does not contain valid signatures from at least five percent of the registered voters in Wards 2, 5, 7, and 8 (Challenge at p. 3, ¶14), and therefore does not meet the statutory requirement that it must contain the signatures of at least five percent of the registered voters in at least five of the District's eight wards. For this reason, according to the Challenge, the Initiative cannot be placed on the ballot.

Concurrent with and after the 10-day review and challenge period, the Board was conducting a 30-day petition verification process to determine whether or not the number of valid signatures on the Petition met the qualifying percentage and ward distribution requirements necessary for it to achieve ballot access.⁶ On March 24, 2022, the end of the 30-day process, the Board held a Special Meeting to issue a report on the status of the process. At the meeting, Executive Director Monica H. Evans reported that the Petition contained 26,935 valid signatures, and was thus able to proceed to the random sample signature verification stage of the verification process. She then reported that, based upon the random sample signature verification process to that point in time, the Petition showed acceptance for Wards 1, 3, and 4 (with 95% confidence), rejection for Wards 5, 7, and 8 (for lack of the requisite valid signatures), and “no decision” for Wards 2 and 6 (for lack of achieving a 95% confidence level one way or the other). In accordance with the Board's regulations, the Board moved to draw additional samples of 100 and 150 signatures for verification for Wards 2 and 6 so that a final 95% confidence determination could be reached with respect to those wards. Accordingly, the Board adjourned the meeting until 3:00

⁶ D.C. Official Code § 1-1001.16(o).

pm when it was expected that the verification process for Wards 2 and 6 would be completed.

When the meeting resumed, Executive Director Evans reported that the signatures for Ward 2 had been verified at a 95% confidence level, but that further sampling and testing of Ward 6 was necessary to reach a 95% conclusive result. She recommended that a sample of 150 additional signatures from Ward 6 be drawn for verification so that a 95% confident acceptance or rejection could be reached for Ward 6. The Board accepted the recommendation, and the meeting was adjourned again until 5:30 pm.

Upon reconvening, Executive Director Evans reported that the signatures in Ward 6 still could not be verified to a 95% level of confidence. Based on consultations with the Office of Planning's Data Management Division ("DMD"), she advised that further random samples could be pulled and tested until a conclusive result could be reached, but that it was unlikely that the process would be concluded that day, if at all. She also reported that the DMD had recommended that, alternatively, the Board could process all 4656 valid signatures in Ward 6 (in lieu of the random sampling process) to determine if there are enough valid signatures to meet the 95% level of confidence.

While recognizing that the statute requires a decision regarding the Petition's numerical sufficiency within 30 days of its acceptance, the Board noted that its regulations also require that the review process result in a final up or down determination as to whether the Petition should be accepted or rejected. Despite best efforts, that final determination could not be reached within the 30-day timeframe. Faced with the unprecedented likelihood that continued random sampling even of progressively larger sample sizes would, for statistical reasons related to the narrow margin of signatures over the number required for Ward 6, also generate inconclusive results, the Board ordered that the entire universe of valid signatures for Ward 6 be reviewed for signature

authentication. Acknowledging the time-consuming nature of this process, the Board emphasized the importance of conducting a complete signature verification review for Ward 6 to establish a conclusive final answer for Ward 6 and thus the Petition as a whole.

On March 28, 2022, a hearing on the Challenge was held before the Board. At this hearing, the Challenger and the Proposer, both of whom appeared and were represented by counsel, stipulated that the sole remaining issue to be adjudicated with respect to the Challenge was the sufficiency of the Petition as to Ward 2, and agreed to defer consideration of the Challenge as to Ward 2 pending the outcome of the signature authentication for Ward 6.⁷

Also on March 28, 2022, a few hours before the hearing on the Challenge was to commence, counsel for Mr. Bagwell emailed the Motion to the Board's General Counsel. The Motion states that Mr. Bagwell was denied his right as a voter to access and review the Petition based on the fact that he, relying on the Board's weekday business hours as posted on its website, attempted to access the Board's offices at 8:15 a.m. on Sunday, March 6, 2022, the 10th day of the challenge period, but found the office closed.⁸ The Motion further states that Mr. Bagwell called the Board's offices upon finding it closed and left a message, and that the Board's staff did not respond to the message to inform him that the office had opened and that he could return to review the Petition. The Motion also states that Mr. Bagwell was offered the opportunity to review an electronic copy of the Petition, but such copy was not provided to him until after the close of business on March 7, 2022 when the challenge period had concluded. There is no indication in the

⁷ Given that (1) the Challenge was based on insufficient valid signatures in Wards 2, 5, 7, and 8, but did not challenge Ward 6, and (2) the Board review concurred in the petition's insufficiency as to Wards 5, 7, and 8, the need to consider the Challenge's claims of invalid signatures in Ward 2 could become moot depending on the Board's resolution of Ward 6.

⁸ Neither the election statute nor its supporting regulations prescribe the specific daily opening and closing hours that the Board must keep during weekends for the 10-day challenge period.

Motion that Mr. Bagwell visited the Board's offices on Monday, March 7, 2022 - the last day of the challenge period – or on any other day during the challenge period.

According to the Motion, Mr. Bagwell was aware of the efforts of the Challenger, and had sought access to the Petition so that he could search for additional Petition defects to supplement the Challenge. The Motion asserts that supplementing the Challenge was important given the narrow margin of signatures needed to validate the Petition. Attached to the Motion was a letter dated March 7, 2022 from Mr. Bagwell's counsel to Executive Director Evans in which Mr. Bagwell's counsel makes allegations regarding efforts by Mr. Bagwell and his counsel to review the Petition on Sunday, March 6, 2022.⁹ The Motion claims that the purpose of the letter was to demand an opportunity to review the Petition for a consecutive 10-day challenge period.

While presented as an intervention request, the Motion seeks not only intervenor status for Mr. Bagwell, but also essentially equitable relief in the form of re-opening of the challenge period for another ten days. It states that there would be no prejudice from granting intervention because the Petition had not yet been certified and in light of the time before the primary and general elections.

On April 4, 2022, counsel for the Proposer filed an opposition (“Opposition”) to the Motion. The Opposition asserts that the Motion does not satisfy the Board's regulation at 3

⁹ The letter states that, because the Board's website stated that the Board's hours of operations are “Monday through Friday” from 8:15 a.m. to 4:15 p.m., he and his client decided that they would visit the Board's offices early Sunday morning. Mr. Bagwell's counsel did not attempt to contact the Board's staff before close of business on Friday (or even Saturday) about reviewing the petition on Sunday. According to counsel, he arrived with his client at the Board's offices at 8:20 a.m. on Sunday March 6 (the day before the 10-day review period closed), with the intention of reviewing the petition signatures and, if merited, pursuing a challenge. The two found the office building closed and they ascertained from a security guard that no Board staff were in the building. As described by Mr. Bagwell's counsel, the two waited until about 8:30 a.m. and, after observing no one entering or exiting, left. The motion to intervene elaborates that the Board's General Counsel responded to Mr. Bagwell's counsel's letter via email to explain that staff were present on Sunday March 6 and that the office hours posted on the Board's website applied only to Monday to Friday.

D.C.M.R. § 414.1, which provides for intervention, upon timely application, when (1) unless the intervenor's interest is adequately protected by an existing party, the disposition of the action will impair or impede the intervenor's ability to protect an interest he has in the disposition of the action; or (2) the intervenor's claim or defense has a common question of law or fact with the pleadings).

Subsequently, the additional Ward 6 testing was completed and the report on the status of the Petition verification process was set for the Board's April 6 regular meeting. At that meeting, Executive Director Evans announced that the results of further testing of Ward 6 showed sufficient valid signatures for that ward. Accordingly, the Board found the Petition signatures to be numerically sufficient in five of the eight wards, and certified the Initiative for ballot access in the November 8, 2022 General Election, subject to the outcome of the Challenge as to Ward 2.¹⁰

In light of the resolution of the petition verification process, which resulted in the Challenge moving forward, the Board scheduled action on the Motion for its May 4, 2022, regularly scheduled meeting. At the May 4, 2022 meeting, the Board heard argument from Mr. Bagwell's counsel, Richard Bianco, as well as counsel for the Proposer and the Challenger. Mr. Bianco reiterated the position set forth in the Motion, and the Challenger's counsel voiced support for granting the Motion.¹¹ Counsel for the Proposer reiterated the position set forth in his Opposition. At the conclusion of the meeting, the Board went into executive session to consider the Motion.

¹⁰ The Proposer had sought to have the Initiative placed on the June 21, 2022 Primary Election ballot, but that was not possible due to the unprecedented need to test the universe of Ward 6 signatures before a determination on ballot access could be reached.

¹¹ During argument, Mr. Bianco emphasized that there may have been other members of the public who were deprived of an opportunity to review the Petition because the Board's hours on Sunday, March 6 were not the same as its hours of operation Monday through Friday. Mr. Bianco, however, could point to no such person and we are not aware of any other member of the public who has claimed an inability to review the Petition.

The Board then reconvened on the record and announced that it was denying the Motion and that a written order memorializing the Board's decision would be issued subsequently.

III. Discussion

The Board's rules grant the Board discretion to allow intervention where a timely motion to intervene is filed under certain circumstances. 3 D.C.M.R. §§ 408.5 and 414.1. The relevant circumstances under the regulations are where (1) unless the intervenor's interest is adequately protected by an existing party, the disposition of the action will impair or impede the intervenor's ability to protect an interest he has in the disposition of the action; or (2) the intervenor's claim or defense has a common question of law or fact with the pleadings. 3 D.C.M.R. § 414.1(a) and (b) respectively.

As to the first ground for allowing intervention, the interests of Mr. Bagwell and of the Challenger are to show a sufficient number of invalid Petition signatures to cause the denial of ballot access. The Motion admits that Mr. Bagwell's intention behind seeking to review the Petition was not to file his own challenge but rather to supplement the Challenge. Motion at ¶ 16. Thus, the interests of the Challenger and Mr. Bagwell are "for all intents and purposes identical" and "[t]his is not a case where the absent party 'is without a friend in [the] litigation.'" *Dist. of Columbia v. American Univ.*, 2 A.3d 175, 185 (D.C. 2010) (affirming decision to deny intervention where the intervenor's interest were adequately represented by an existing party and citing *inter alia Vale Props., Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 15 (D.C.1981) (trial court may deny motion to intervene under Rule 24(a)(2) "when an existing party seeks the same ultimate objective as the [absent party]")). Accordingly, Mr. Bagwell should not be permitted to intervene under 3 D.C.M.R. § 414.1(a).

As to the second ground for permitting intervention (*i.e.*, that the intervenor's claim or defense has a common question of law or fact with the pleadings), the Motion does not specify the question of law or fact that Mr. Bagwell shares with the Challenger. Rather, the Motion makes clear that Mr. Bagwell seeks to re-open the challenge period, a claim not made by the Challenger. The Motion's claim is based on a new theory not argued by the Challenger. This is impermissible, however, as intervenors "may not broaden the scope of contested issues." *Dankman v. D.C. Bd. of Elections*, 443 A.2d 507, 516 (D.C. 1981). Accordingly, Mr. Bagwell cannot be permitted to intervene under 3 D.C.M.R. § 414.1(b) so that he can raise new issues related to re-opening the challenge period.¹²

Finally, we note that an untimely motion to intervene *must* be denied. *See Emmco Ins. Co. v. White Motor Corp.*, 429 A.2d 1385, 1386-387 (D.C. 1981) (addressing Super. Ct. Civ. R. 24(b)); *see also NAACP v. New York*, 413 U.S. 345 (1973). Timeliness is determined based on the length of the intervenor's delay; the reason for the delay; the stage to which the litigation had progressed when intervention was sought; the prejudice that the original parties may suffer if the application is granted; and the prejudice that the intervenor may suffer if its application is denied. *Emmco*, 429 A.2d at 1387. The review of a petition must be completed in a tight timeframe. Mr. Bagwell knew of his interest in intervention when the challenge period closed on March 7. Nevertheless, he waited until after the Board had spent weeks reviewing challenges to the Petition and had determined the Petition's sufficiency in seven of the eight wards to raise the issue of his being

¹² It is not the case that Mr. Bagwell was denied access to the Petition within the 10-day challenge period simply because Board staff was not present at the office at 8:15 a.m. on Sunday, May 6. In any event, and assuming for the sake of argument we could waive the statutory requirement of a single 10-day challenge period, because the Board's offices were, in fact, open to the public for more than the minimum 10-day challenge period, Mr. Bagwell and his counsel's unsuccessful efforts to access the Board's offices prior to 8:42 on Sunday morning and their decision to forgo taking advantage of the additional day for reviewing the Petition on Monday, March 7, or to have attempted to review the Petition at any other time would be insufficient to entitle Mr. Bagwell to an equitable-type remedy of another 10-day challenge period.

denied access to the Petition on March 6 and insist that he therefore should be granted another 10-day challenge period. The Motion offers no reason, given the statutory time limits on petition review, for failing to seek to intervene immediately. Because the Challenger adequately represents Mr. Bagwell's interests, and he cannot as an intervenor assert claims beyond those of the Challenger, he will not be prejudiced by a decision denying him intervenor status. Accordingly, we find the Motion to have been untimely filed.

IV. Conclusion

In light of the foregoing, we exercise our discretion and decline to grant Mr. Bagwell the status of intervenor in this matter. Accordingly, it is hereby:

ORDERED that the Motion is **DENIED**.

The Board issues this written order today, which is consistent with its oral ruling rendered on May 4, 2022.

Dated: May 9, 2022



Gary Thompson
Chairman Board of Elections