

**DISTRICT OF COLUMBIA  
BOARD OF ELECTIONS AND ETHICS**

In Re:

David Mallof, *et al.* v.  
D.C. Office of Campaign  
Finance

Administrative Hearing  
No. 09-003

**MEMORANDUM OPINION AND ORDER**

**Introduction**

This matter came before the D.C. Board of Elections and Ethics (hereinafter “the Board”) pursuant to a request for review of a November 20, 2008 order (“the Order”) of the D.C. Office of Campaign Finance (“OCF”). The Order held that Councilmember Jack Evans did not violate D.C. Official Code §1-1106.51<sup>1</sup>, or any other relevant statutory and regulatory provisions, when he allowed “Evans 2008,” his campaign committee for the September 9, 2008 Primary Election, to place in The Current newspapers a photograph of himself posed with Police Chief Cathy Lanier, in her official Metropolitan Police Department (“MPD”) uniform, under the heading of “Working Together for Ward 2” and noting, among other things, “Vote Jack Evans on September 9.”

Board Chairman Errol Arthur and Member Lenora Cole presided over the matter. David J. Mallof, John D. Hanrahan, and Elizabeth B. Elliott (“the Complainants”) appeared *pro se*, and N. William Jarvis, Esq. appeared on behalf of the Intervenor, Jack Evans (“the Respondent”).

**Background**

On Thursday, August 28, 2008, the Complainants and Ronald Cocome<sup>2</sup> filed a formal complaint against the Respondent alleging violations of D.C. campaign finance law arising from the use of a photo of the Respondent and D.C. Police Chief Cathy Lanier in a campaign ad that ran in The Current newspapers on Wednesday, August 13, 2008. Specifically, the Complainants alleged that the Respondent

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<sup>1</sup> D.C. Official Code §1-1106.51(a) reads, in part, “No resources of the District of Columbia government, including, the expenditure of funds, the personal services of employees during their hours of work, and nonpersonal services, including supplies, materials, equipment, office space, facilities, telephones and other utilities, shall be used to support or oppose any candidate for elected office, whether partisan or nonpartisan[.]”

<sup>2</sup> Mr. Cocome voluntarily withdrew his participation as a co-filer of the request for review with the Board prior to the Board’s hearing on Wednesday, January 14, 2009.

improperly used his own Council office to take photographs of himself with Police Chief Cathy Lanier while she was on duty and in official uniform and then, subsequently – with or without her knowledge – used one of those photos in a campaign advertisement published in The Current newspapers on August 13, 2008 [, and that the] ad, seeking votes for Respondent Evans in the September 9 Democratic primary, implied a clear endorsement of Evans by Chief Lanier, in violation of DCMR and applicable personnel rules.

Complaint at 1.

On Friday, September 5, 2008, OCF initiated a full investigation into whether or not the Respondent used government resources for political purposes in contravention of D.C. Official Code §1-1106.51. This investigation was concluded on November 14, 2008, and the Order that is the subject of the request for review now before the Board was issued on Thursday, November 20, 2008. In the Order, OCF codified its determination that, contrary to the Complainants' assertions, the Respondent did not use government resources for campaign-related purposes "because the photograph [at issue] was not taken for a campaign-related purpose and because Chief Lanier consented to pose with the Respondent in the photograph for a personal, not campaign-related, purpose." Further, OCF rejected the Complainant's contention that the "good name of the MPD and its brand image of civic trust" were "government resources," such that their improper use could give rise to a violation of D.C. Official Code §1-1106.51(a).

On Friday, December 5, 2008, the Complainants filed with the Board a request for review of the Order pursuant to 3 D.C.M.R. §3705.4. The Respondent, by and through his attorney, N. William Jarvis, Esq., filed a motion to intervene which was granted. A pre-hearing conference on the matter was held on January 5, 2009 in the Board's offices. During this proceeding, Board Staff Attorney Terri D. Stroud requested that the parties file briefs addressing two issues: 1) whether the Complainants were "adversely affected" by the OCF Order such that they had standing to bring a request for review of the Order, and; 2) what government resources, if any, were used in connection with the taking of the photo of the Respondent and D.C. Police Chief Cathy Lanier that ran in The Current newspapers, and, whether these resources were used in such a manner that a violation of the statutory and regulatory restrictions against the use of government resources for campaign-related purposes occurred.

On Wednesday, January 14, 2009, the Board heard the parties' arguments with respect to the "adversely affected" question, and now issues its order reflecting its determination that, as the Complainants have not demonstrated that they have been adversely affected by the Order, their request for review of the same is denied.

### **Relevant Statutory and/or Regulatory Provisions**

"Within 7 days after the Board certifies the results of an election, any person who voted in the election may petition the District of Columbia Court of Appeals to review the

election.” D.C. Official Code § 1-1001.11(b).

“Any investigation may commence upon referral by the Board or filing a complaint in writing with the Director.” D.C. MUN. REGS. tit. 3, § 3701 (2007).

“Preliminary investigations may be initiated by any one (1) of the following means:

- (a) Referral by the Board of Elections and Ethics;
- (b) Complaint by any employee or resident of the District of Columbia; or
- (c) Complaint generated by the OCF.”

D.C. MUN. REGS. tit. 3, § 3703.2 (2007).

“Any party adversely affected by any order of the Director [of the D.C. Office of Campaign Finance] ... may obtain review of the order by filing, with the Board of Elections and Ethics, a request[.]” D.C. MUN. REGS. tit. 3, § 3705.4 (2007).

### **Discussion**

D.C. MUN. REGS. tit. 3, § 3705.4 precisely defines which entities may seek Board review of orders of the Director of OCF: “part[ies] adversely affected” by such orders. This regulatory provision makes clear that, in order for a request for review of an OCF order to be granted, the entity filing such request must be both: 1) a *party* to the proceeding which generated the order at issue, and; 2) *adversely affected* by the order at issue. The Complainants, having filed the complaint which resulted in the Order, clearly satisfy the first requirement. The only question that remains, therefore, is whether the Complainants have been adversely affected by the Order.

The phrase “adversely affected” is not ambiguous and must be given its plain meaning. The D.C. Administrative Procedure Act (“APA”) provides guidance as to the plain meaning of the term. That statute provides that “[a]ny person suffering a legal wrong, or *adversely affected or aggrieved* by an order or decision of the mayor or an agency in a contested case, is entitled to a judicial review thereof[.]” D.C. Official Code 2-510 (emphasis added). This language makes clear that one who is adversely affected by an order or decision is aggrieved by that order or decision.

According to Black’s Law Dictionary, “[t]he word ‘aggrieved’ [in the term ‘aggrieved party’] refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation.” *Black’s Law Dictionary* 65 (6th ed. 1991). Taking into consideration this definition, in conjunction with the guidance provided by the District’s APA, it becomes clear that, in order to obtain Board review of an OCF order, a party must show “a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition . . . of a burden or obligation” as a result of the OCF Order. *See id.*

The Complainants argue that they were adversely affected by the Order because they

were the ones who filed the complaint dismissed by the Order. If they had standing to file the complaint in the first place, their argument goes, surely they must have standing to seek review of an order dismissing the same. This argument is without merit. Unlike D.C. MUN. REGS. tit. 3, § 3705.4, D.C. MUN. REGS. tit. 3, § 3701 does not limit the pool of entities which may file complaints with OCF to those who have been adversely affected by violations of the campaign finance statute. Rather, the latter regulation and others indicate that “*any employee or resident of the District of Columbia*” may file a complaint with OCF, regardless of whether or not they have been adversely affected by a violation of the campaign finance statute. *See* D.C. MUN. REGS. tit. 3, § 3703.2(b) (emphasis added). Simply put, an individual need not have “standing” to file a complaint with OCF, and the mere act of filing a complaint with OCF does not render one adversely affected by either a violation of the campaign finance statute, or an OCF order dismissing a complaint alleging such a violation.

The Complainants presumably argue that they are adversely affected by the Order because, it

if allowed to stand, would set a dangerous precedent. The Order provides a major and tragic loophole that would allow any D.C. elected official or candidate for public office to use a photo of the Police Chief, the Attorney General, or any other non-elected city employee any way he or she may choose in a newspaper campaign advertisement without penalty or reprimand for a violation of campaign or personnel regulations.

Complainant’s Response to Request for Clarification at 5.

The potential state of affairs described by the Complainants is not only speculative, but also devoid of any hint of any adverse affect that is personal to them.

It bears noting that the Complainants disclosed what they apparently regard as their true “injury” during the Board’s January 14, 2009 hearing, when Complainant Mallof expressed consternation over the fact that, “[His] guy lost.” If Mallof and the other Complainants can be understood by this statement to assert that they were harmed as a result of their candidate losing an election which they deem tainted as a result of the campaign ad at issue, they had, but failed to take advantage of, the occasion to petition the D.C. Court of Appeals to review the election. *See* D.C. Official Code § 1-1001.11 (b). As a result of the Complainants’ failure to timely file a petition for review of the election at issue, they have foregone their opportunity to obtain any meaningful redress of their perceived harm.

### **Conclusion**

In light of the foregoing discussion, it is hereby

**ORDERED** that the Complainants' request for review of the Order is hereby denied.

January 28, 2009

A handwritten signature in black ink, appearing to read "Errol R. Arthur", written over a horizontal line.

Errol R. Arthur  
Chairman

Dr. Lenora Cole  
Member

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of January, 2009, copies of the foregoing Memorandum Opinion and Order were delivered via first-class mail to the following parties:

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Terri D. Stroud