

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

In Re:)	
)	Administrative Order
Calvin H. Gurley)	No. 2022-016
Candidate.)	Re: Appeal of Preliminary
)	Determination of Ineligibility

MEMORANDUM OPINION AND ORDER

This matter came before the District of Columbia Board of Elections (“the Board”) on Friday, August 19, 2022, and involved an appeal from an adverse determination of eligibility regarding Calvin H. Gurley’s effort to appear on the General Election ballot as a candidate for the office of Chair of the D.C. Council. Board Chairman Gary Thompson and Board Members Mike Gill and Karyn Greenfield presided over the hearing on this matter.¹ The candidate appeared at that hearing *pro se*.

BACKGROUND

To run as a candidate for Chair of the D.C. Council in the General Election (“Council Chair contest”), Mr. Gurley had to submit to the Board a nominating petition that contained at least 3,000 valid signatures from District registered voters. Nominating petitions are provided to candidates by the Board. The petitions consist of sheets, in the format specified by the Board, upon which voter signatures can be recorded. At the top of each sheet is a section in which the office covered by the petition and the candidate’s name must be entered. That section is followed

¹ Pursuant to D.C. Official Code § 1-1001.05(g), any case brought under the District’s elections laws may be heard by one member of the Board.

by blank lines allowing up to ten registered voters to sign and print their names and addresses. The last section of the sheet consists of an affidavit to be completed by the individual who gathered (*i.e.*, the petition's circulator). That section is set forth below:

CIRCULATOR'S AFFIDAVIT (TO BE COMPLETED BY PERSON CIRCULATING THIS PETITION PAGE)

I, _____ residing at _____,

Printed Name of Circulator

Address of Circulator

swear or affirm : (A) that I am at least 18 years of age; (b) that I am either a resident of the District of Columbia or a resident of another jurisdiction who registered as a petition circulator with the Board prior to the circulation of this petition; (c) that I personally circulated this petition sheet; (d) that I personally witnessed the signing of each signature hereon; and (e) that I have personally inquired from each signor whether he or she is a registered voter in the District of Columbia, and whether he or she is registered in the same party as the candidate.

WARNING: READ THE ABOVE AFFIDAVIT AND MAKE SURE IT IS TRUE BEFORE YOU SIGN BELOW. IF YOU ARE CONVICTED OF MAKING A FALSE STATEMENT, YOU CAN BE FINED UP TO \$1,000 AND/OR JAILED UP TO 180 DAYS [D.C. OFFICIAL CODE SECTION 22-2406].

Date	Signature of Circulator	Circulator's Telephone Number (Optional)
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The Board's staff provides the nominating petition sheets to individuals meeting certain qualifications to run for office, along with instructional materials on the gathering of petition signatures. One of the documents provided to such candidates when they pick up their petitions is titled "Circulating and Filing Nominating Petitions." That Circulating and Filing Nominating Petitions document informs candidates that "it is [their] responsibility to ensure that [their] petition is complete and contains the minimum number of signatures for ballot access before [they] file it with the Board." In addition, the document instructs that candidates should arrive at the Board

“ready to file” and that petition sheets should be “complete, in numerical order, and correctly assembled.”² It further states: “Make sure that the Circulator’s Affidavit on each petition sheet is completed correctly and signed.”³

In addition, candidates (or their agent) must execute a “Statement Of Candidate (Or Candidate’s Agent) Regarding Nominating Petition Circulation Guidelines” form. By that form, candidates acknowledge that they have advised their petition circulators that they must: “Complete and sign, under penalty of perjury, the circulator’s affidavit ... ;” and “Make sure ... that the circulator’s signature and date does not pre-date those of the registered voters who sign the petition sheets[.]”

On June 28, 2022, Mr. Gurley picked up the petition sheets needed for the Council Chair contest. Before leaving the Board’s offices with his Petition and related documents, Mr. Gurley certified that he had received the aforementioned documents by signing a “Receipt of Ballot Access Documents” form.

On August 10, 2022, Mr. Gurley submitted his nominating petition in support of his ballot access effort (“Petition”). As required by the elections laws and regulations, the Board’s staff then

² The document also advises that “[w]hile not required, filing the minimum number of signatures *prior to the filing deadline* can be very helpful. This will give ... time to correct any errors before the deadline” and that candidates “can always file supplemental petition sheets until the deadline once [they] have made the initial filing with the minimum signature requirement.” Emphasis in original.

³ The Board’s website also has a Candidate Ballot Access Information tab where the Circulating and Filing Nominating Petitions document is posted and which includes links to the Board’s regulations on filing petitions. See <https://www.dcboe.org/dcboe/media/PDFFiles/circulating-and-filing-nominating-petitions-06152022.pdf> for that document and <https://www.dcboe.org/dcboe/media/PDFFiles/Chapter-16-CANDIDATE-NOMINATION-060822.pdf> for the relevant regulations.

preliminarily reviewed the Petition to determine whether, on its face (that is, without investigating whether the signatures were valid because they were made by, for example, registered voters), included the minimum number of required signatures. This preliminary determination is based on counting only those signatures that appear on sheets that contain completed circulator affidavit forms.⁴

By letter dated August 15, 2022, the Board’s Executive Director, Monica Holman Evans, informed Mr. Gurley of her preliminary determination that he did not meet the requirements to have his name appear on the ballot in the Council Chair contest. The letter stated that Mr. Gurley failed to file the number of signatures required pursuant to D.C. Municipal Regulations, Title 3, §§ 1605.3(a) and 1605.4.

On August 18, 2022, Mr. Gurley filed a written appeal of the Executive Director’s adverse determination of his eligibility. As the Board had only three (3) days to decide that appeal (*see* 3 D.C.M.R. § 601.12), a special Board meeting in Mr. Gurley’s matter was scheduled the next day.

⁴ Specifically, the Board’s regulations at title 3 of the D.C.M.R. provide:

1605.3 Within three (3) business days following the petition-filing deadline, the Executive Director or his or her designee shall issue a preliminary determination of petition sufficiency. In order to be determined sufficient, a petition nominating a candidate shall:

(a) Contain the minimum statutory number of signatures required to obtain ballot access for the office sought;

1605.4 In determining whether the minimum statutory number of signatures is contained in the nominating petition, the Executive Director or his or her designee shall not count any signatures submitted on petition pages that fail to include a completed circulator’s affidavit ...

During that August 19, 2022 hearing, the Board’s Registrar of Voters (“Registrar”) appeared and explained the basis for the Director’s preliminary determination to reject Mr. Gurley’s Petition. The Registrar stated that a petition for the office of Council Chair must have a minimum of 3,000 signatures.⁵ While, on its face, Mr. Gurley’s Petition appeared to contain 3,052 signatures, the Registrar noted that twenty-four (24) Petition sheets had circulator affidavits that were incomplete in obvious respects. The Registrar advised that the defects on the circulator affidavits on those twenty-four (24) sheets ranged from the omission of one field, such as the date, to having all fields left blank. Where the circulator affidavit was incomplete, the Registrar advised that all the signatures on the respective sheet could not be counted. Because 236 voter signatures appeared on Petition sheets with incomplete circulator affidavits, the Petition had only 2,816 preliminarily valid signatures, or 184 signatures below the 3,000 needed for ballot access.⁶

Mr. Gurley spoke and advised that, on the deadline for filing his Petition, he had arrived at the Board’s offices around 3 p.m. expecting, based on his past experience with filing nominating petitions, that the Board staff would review his Petition before receiving it and alert him to any defects which he could then correct. He attributed this practice to a Registrar who was no longer with the Board at the time he submitted his Petition and he acknowledged that the new Registrar on staff was not subject to that practice. At the meeting on his appeal and in his August 18, 2022

⁵ D.C. Official Code § 1-1001.08(j)(1); *see also* 3 D.C.M.R. § 1603.2. In full, these provisions state that the signature requirement is the lesser of 3,000 or the number of voters which equates to one and one half percent of the registered qualified electors in the District as of the 144th day before the election (in this case, that day is June 17, 2022). As one and one half percent of the number of voters as of June 17, 2022 (and, indeed, generally) exceeds 3,000 voters, the applicable signature requirement is 3,000.

⁶ The Registrar also stated that Mr. Gurley had failed to properly number his Petition sheets. The Board’s regulations require: “Before the petition is filed: . . . All sheets which comprise the petition shall be assembled and serially numbered.” 3 D.C.M.R. § 1605.1.

written submission (at unnumbered pages 1-3), Mr. Gurley suggested that the defects in his Petition's circulator affidavits should be waived because, were it not for a change in the Registrar's practices, he would have been able to cure those defects at the time of filing. Along these lines, Mr. Gurley stated in his written submission, for example: "The new Registrar's 5 o'clock policy, first time being practice (sic), was a deviation from the BOE's original policy of allowing candidates to go-over, review and complete any loose ends on their petition forms (in the BOE's office) before allowing staff to collect and conduct their desk cursory review."

Although Mr. Gurley stated during the hearing at one point that he was the circulator of his Petition, he noted that his spouse and a neighbor had also helped gather signatures. While he did not disagree with the finding that twenty-four (24) sheets had incomplete circulator affidavits, he indicated that, where the defect was the omission of his address, such omission should be waived because, as he was also a candidate living at a designated address, the address associated with his name was established. He requested that the defects in the circulator affidavits on the twenty-four (24) Petition sheets be waived. Mr. Gurley acknowledged that he was familiar with the petition instructional materials that are provided to candidates when they pick-up their petitions.

After hearing from Mr. Gurley and Board staff, the Board went briefly into executive session to discuss the resolution of Mr. Gurley's appeal. When the Board reconvened, the members voted unanimously to deny that appeal. Although Mr. Gurley was advised that the Board would be issuing a written memorandum and order that would elaborate on the reasons for the denial of his appeal, Board Chair Thompson noted that not all of the incomplete circulator affidavits were sufficiently defective to warrant discounting the voter signatures which appeared on the respective affidavit's page. Nevertheless, Chair Thompson explained that the number of sheets that contained circulator affidavits with defects that were serious enough (such as, an

omitted circulator signature) to necessitate discounting all the voter signatures on the sheet resulted in the Petition being numerically insufficient.

ANALYSIS

As indicated above, once a petition is submitted to the Board, it is reviewed preliminarily to determine whether, on its face, it has a sufficient number of voter signatures; and, for the purposes of that review, voter signatures appearing on pages with incomplete circulator affidavits are not counted. 3 D.C.M.R. §§ 1605.3(a) and 1605.4. The requirements for a complete circulator affidavit are set forth in D.C. Official Code § 1-1001.08(b)(3). That provision mandates that each nominating petition shall contain an affidavit, made under penalty of perjury and “*signed by the circulator*” of the petition which shall note that the circulator personally circulated the petition and personally witnessed each person sign the petition.

“As the Board [has] recognized, the circulator’s role in gathering signatures for a nominating petition is critical to ensuring the integrity of the collection process.” *Williams v. District of Columbia Bd. of Elections and Ethics*, 804 A.2d 316, 318-19 (D.C. 2002). Along these lines, the D.C. Court of Appeals in *Williams* instructed: “A genuine and complete affidavit, then, undergirds the presumptive validity of voter signatures on a petition. ... The upshot is that the presumption of validity of petition signatures depends heavily on the role of the circulator and on the truthfulness and completeness of the representations made in the circulator’s affidavit.”

Admittedly, the Board has, where the integrity of the signature is bolstered by extrinsic evidence, excused minor defects in circulator affidavits. *See Gant v. Douglas*, Administrative Order #22-005 (issued April 22, 2022) (excusing marked-up/written over circulator affidavit dates and citing *Moore v. Butler*, Administrative Order #20-024 (issued Sept. 4, 2020) (waiving as formal error pre-signed circulator affidavit); *compare Brousseau v. Fitzgerald*, 675 P.2d 713, 715

(Ariz. 1984).⁷ In Mr. Gurley’s case, thirty (30) Petition signatures were on sheets where the only defect in the circulator affidavit was the omission of the date on which the circulator signed the attestation. Given that Mr. Gurley provided at the hearing sworn testimony that he did indeed circulate those sheets, we waive as formal error the circulator affidavit defect of the date omission and conclude that those thirty signatures should be counted toward the numerical sufficiency of his petition.⁸

We have never sanctioned, however, the acceptance of petition sheets where the circulator affidavit is unsigned. To do so would be directly contrary to the statutory requirement of a signed affidavit. Notably here, eighty-six (86) Petition voter signatures were on sheets where the circulator affidavit was not signed. The omission of circulator signatures goes to the heart of the integrity of the signature gathering process. Because the Petition had only fifty-two (52) signatures over the 3,000 needed, the Petition sheets with these statutorily deficient circulator affidavits resulted in the Petition lacking enough signatures to qualify for ballot access.⁹

⁷ In *Brousseau*, the court distinguished between petition defects that are matters of form and procedure and serious matters involving more than a technicality.

⁸ The hearing convened on August 19, 2022, also covered an appeal of a preliminary determination to reject another petition. That other matter, *In re: Earle Douglass*, Administrative Order 22-017 (issued August 22, 2022), we likewise waived, in light of extrinsic evidence of the timing of the circulator’s signature, the circulator affidavit defect of an omitted date.

⁹ The remaining circulator affidavit defect resulted in the Registrar discounting 120 Petition signatures. That remaining defect consisted of signed affidavits that did not include the printed name of the circulator and also did not include the circulator’s address. These name and address omissions place us in the somewhat untenable position of deciphering the signature on the sheet and creates uncertainty as to the identity of the circulator. In such circumstances, acceptance of the signatures on the sheet may turn on the nature of the extrinsic evidence provided. Because, in this case, the affidavits that are invalid as a matter of law due to the lack of a signature render the Petition numerically insufficient, we do not opine one way or the other on whether the circulator affidavit defects as to these other 120 signatures should be waived.

With regard to Mr. Gurley's contention that the defects in his circulator affidavits should be excused because he relied on a prior policy that would have provided him an opportunity to cure those defects, we decline to grant Mr. Gurley what would in effect be an extension of time to file his Petition. As a matter of law, signatures on petition sheets with unsigned circulator affidavits cannot be accepted. As those sheets render the Petition here numerically insufficient, correcting the legal deficiency would presumably involve having the circulator affidavit signed at some future point. Petitions, however, must by statute, be filed with the Board "not less than 90 days before the date of [the] general election" (D.C. Official Code § 1-1001.08(j)(1)) and that deadline has passed. Accordingly, we cannot conceive how the fatal defect of unsigned circulator affidavits can be remedied without violating the statute's deadline for filing petitions.

Moreover, the Board's regulations clearly state that, on the respective deadline, "[t]he nominating petition and supporting affidavits ... shall be filed in-person at the Board's office no later than 5:00 p.m." The written materials provided to Mr. Gurley notified him that it was his responsibility to have at the time of filing his petition ready and to have completed circulator affidavits. Although Mr. Gurley arrived at the Board's offices around 3 p.m. on the filing deadline date, his petition was still unprepared by 5:00 p.m. as it at had at least twenty-four (24) facially defective circulator affidavits, including several sheets where every field on the affidavit form was blank.¹⁰ Therefore, assuming for the sake of argument that we have the authority to waive the statutory deadline for filing petitions (a proposition that we highly doubt), there is insufficient cause to do so here. *White v. D.C. Bd. of Elections & Ethics*, 537 A.2d 1133, 1135-36 (D.C. 1988)

¹⁰ As noted above, the Petition's sheets were also not properly serially-numbered as required by the Board's regulations.

(election certification appeal filed one day late denied as untimely notwithstanding petitioner's reliance on Board staff allegedly misrepresenting the date of such certification).

Accordingly, we find that the Board's Executive Director properly discounted the Petition sheets which had the material circulator affidavit defect of an omitted circulator signature. Given that discounting the signatures on these sheets left the Petition numerically insufficient, the Director correctly found that the Petition could not be accepted.¹¹

CONCLUSION

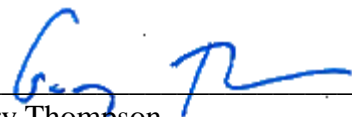
For the reasons set forth in this opinion, the Board of Elections concludes that the nominating Petition submitted in support of the candidacy of Calvin H. Gurley for the office of Council Chair failed to contain, on its face, a sufficient number of signatures.

Accordingly, it is therefore

ORDERED that Calvin H. Gurley be denied ballot access in the Council Chair contest in the General Election.

The Board issues this written order today, which is consistent with the oral ruling which was announced at the hearing on August 19, 2022.

Dated: August 22, 2022



Gary Thompson
Chairman Board of Elections

¹¹ At the hearing, Mr. Gurley did not pursue a point he raised in his written submission that the Board cut short the time for gathering petition signatures by five days. While, for that reason, his point is arguably waived, we note that it is without merit. The date upon which petitions may be circulated is set by the elections laws. *See* D.C. Official Code § 1-1001.08(j)(1) (requiring that the number of petition signatures be determined 144 days prior to the election and that no petition signature be dated before that date).