DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

Bruce V. Spiva, Challenger	)	Administrative Order #22-003
v.	)	Re: Challenge to Qualification for the Office of Attorney General for the District of Columbia
Kenyan McDuffie, Candidate.	)	

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the District of Columbia Board of Elections ("the Board") on April 18, 2022. It is a challenge to the candidacy of Kenyan McDuffie ("Candidate McDuffie") for the office of Attorney General for the District of Columbia ("Attorney General") filed by Bruce V. Spiva ("Mr. Spiva" or "the Challenger"). Chairman Gary Thompson and Board Members Michael Gill and Karyn Greenfield presided over the hearing. Mr. Spiva was represented by Theodore A. Howard, and Candidate McDuffie was represented by attorneys Thorn Pozen, Kevin Hilgers, and Joseph Sandler.

This Memorandum Opinion, which constitutes the Board's conclusions of law, memorializes the oral ruling the Board rendered during the hearing on April 18, 2022.

Background

On March 21, 2022, Candidate McDuffie filed with the Board a Declaration of Candidacy for the office of Attorney General (in which document he attested to meeting the qualifications for that office), as well as a nominating petition and other documents. On March 28, 2022, the Executive Director (taking the attestations as correct) issued a preliminary determination that

Candidate McDuffie met the qualifications necessary to place his name on the primary ballot as a candidate for the office of Attorney General. The notice of the preliminary determination advised that the nominating petition challenge period for the June 21, 2022 Primary Election ("the Primary Election") would begin on March 26, 2022 and end on April 4, 2022.

On March 29, 2022, Mr. Spiva filed with the Board a written "Challenge to a Nominating Petition" ("the Challenge"). The Challenge is signed and witnessed by a Board employee, and there is no dispute as to its authenticity or genuineness on the part of Mr. Spiva. The Challenge, relies on D.C. Official Code § 1-1001.08(o)(1) as a jurisdictional basis, correctly so as noted below.[1] In the Challenge, Mr. Spiva argues that Candidate McDuffie is not qualified to be on the ballot for the office of Attorney General because he does not meet the requirements of D.C. Official Code §1-301.83(a), which is incorporated by reference into the D.C. Charter.[2]

The controlling statute, D.C. Code §1-301.83(a), provides in full:

> (a) No person can hold the position of Attorney General for the District of Columbia unless that person:
>
> (1) Is a registered qualified elector of the District of Columbia;
> (2) Is a bona fide resident of the District of Columbia;
> (3) Is a member in good standing of the bar of the District of Columbia;
> (4) Has been a member in good standing of the bar of the District of Columbia for least 5 years prior to assuming the position of Attorney General; and
> (5) Has been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as:
>
> (A) An attorney in the practice of law in the District of Columbia;

[1] That provision states in pertinent part:

> The Board is authorized to accept any nominating petition for a candidate for any office as *bona fide* with respect to the qualifications of the signatures thereto if the original or facsimile thereof has been posted in a suitable public place for a 10-day period beginning on the third day after the filing deadline for nominating petitions for the office. Any registered qualified elector may within the 10-day period challenge the validity of any petition by written statement signed by the challenger and filed with the Board and specifying concisely the alleged defects in the petition.

[2] *See* D.C. Charter, Sec. 435(d); D.C. Code §1-204.35(d) ("Any candidate for the position of Attorney General shall meet the qualifications of [D.C. Official Code §1-301.83], prior to the day on which the election for Attorney General is to be held").

(B) A judge of a court in the District of Columbia;
(C) A professor of law in a law school in the District of Columbia; or
(D) An attorney employed in the District of Columbia by the United States or the District of Columbia.[3]

The Parties do not dispute that Candidate McDuffie satisfies the requirements of (a)(1), (2), (3), and (4), and further, that Candidate McDuffie does *not* satisfy the requirements of (a)(5)(A), (B), or (C). The Parties also do not dispute that he is employed by the District of Columbia. The issue thus comes down to the interpretation and application of §1-301.83 (a)(5)(D) ("Section "(a)(5)(D)"), namely, has Candidate McDuffie, as a D.C. Councilmember, been "actively engaged…as an attorney employed…by…the District of Columbia." This issue depends on what it means to be "actively engaged" specifically *"as an attorney*."

On March 30, 2022, the Board scheduled a prehearing conference between the parties to be held on April 13, 2022. Subsequently, the Board established a briefing schedule for the parties. Pursuant to this schedule, Candidate McDuffie filed a Motion to Dismiss ("Motion to Dismiss") the Challenge on April 6, 2022, and Mr. Spiva filed a Reply & Opposition to the Motion to Dismiss on April 11, 2022 ("Reply"). On April 12, 2022, Candidate McDuffie filed a Motion for Leave to File a Sur-Reply/Reply and Sur-Reply/Reply to the Reply/Opposition to the Motion to Dismiss ("Sur-Reply"). Each of the pleadings in this matter are incorporated by reference into this Order.

In the Sur-Reply (the filing of which is not expressly allowed by Board rules), Candidate McDuffie raised new procedural arguments against the Challenge. Specifically, he asserts that Mr. Spiva "failed to follow the governing procedural requirements for an action before the Board to

[3] Similar language is found with respect to the qualifications to be a D.C. Judge at D.C. Code §11-1501.

challenge candidate qualifications, such as not filing a complaint that was signed and sworn … and notarized, and not serving [Candidate McDuffie] with the complaint."[4]

On April 13, 2022, the Board's Office of the General Counsel ("OGC") convened a prehearing conference in the matter as allowed by 3 DCMR §415.1. During the prehearing conference, the Parties agreed to stipulate that there were no facts that are in dispute, and that an evidentiary hearing was thus unnecessary. The OGC issued a prehearing conference order indicating that the Board hearing scheduled for April 18, 2022 would be converted to oral argument on the Motion to Dismiss, the outcome of which would resolve the issue as a matter of law. The prehearing conference also established that the Board would entertain the Sur-Reply at the hearing.

On April 18, 2022, the Board heard oral argument in the matter, during which the parties in the matter reiterated and expanded upon the contentions made in their respective pleadings. After the argument, the Board entered into executive session to deliberate (as per D.C. Code §2-575(b)), and thereafter announced its determination on the record.

Discussion

The Sur-Reply

In his Motion to Dismiss, Candidate McDuffie does not question Mr. Spiva's assertion that the Board has jurisdiction to determine the issue of Candidate McDuffie's qualifications to serve as Attorney General. Rather, he casts Mr. Spiva's challenge as a "Complaint," and seeks to have it dismissed for failure to state a claim for which relief may be granted. It is not until the submission of the Sur-Reply that Candidate McDuffie asserts, in the alternative, that the "Challenge" approach

[4] Sur-Reply at 3.

is improper and that the failure to file and properly serve a captioned "Complaint" warrants rejecting the improperly styled "Challenge."

As underscored at argument, the Board has the authority under its regulations to waive any of its pleading or technical requirements.[5] In this instance, Candidate McDuffie was not prejudiced by the manner in which Mr. Spiva challenged his qualification, captioned as a "Challenge" instead of a "Complaint." Even prior to the filing of the Challenge, the media disclosed that Mr. Spiva would be raising the instant issue of Mr. McDuffie's qualifications, and there is no dispute that Candidate McDuffie and his counsel received a copy of the Challenge shortly after it was filed on March 29, 2022. Mr. McDuffie did not allege that the timing of actual notice of the Challenge impeded his ability to respond to the Challenge, which he did by April 6, 2022. Since the Parties agreed that no material facts were in dispute, the absence of a complaint's technical averments was of no consequence. Finally, given the authority (discussed below) indicating that a challenge is, in fact, the appropriate vehicle for raising an issue of candidate qualification, Mr. Spiva has good cause for proceeding in this manner. Accordingly, and assuming for the sake of argument that Mr. Spiva should have proceeded by filing a "Complaint," we hereby waive the Board's rules concerning the filing of complaints and allow the Challenge to proceed. In substance, Mr. Spiva timely raised the issue in hand, and the manner in which he did so is of no consequence, let alone prejudice, to the candidate.

In any event, the statutory challenge process and case law indicates that candidate qualifications are properly presented under petition challenge procedures. The Board is statutorily charged with conducting elections, delegating to Board officials the authority to carry out the

[5] 3 DCMR §400.5 ("The Board may, for good cause shown, waive any of the provision of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law."

purposes of the elections laws, and issuing regulations, including those necessary to determine that candidates meet the statutory qualifications for office.[6] D.C. Official Code § 1-1001.08(b)(1)(D) provides that "[a]ny candidate for the position of Attorney General shall also meet the qualifications required by § 1-301.83 before the day on which the election for Attorney General is to be held."[7] 3 D.C.M.R. § 601.9. requires the Board's Executive Director to make a preliminary determination as to a candidate's qualifications for the office sought. This preliminary determination does not "preclude further inquiry into or challenge to the eligibility of an individual for candidacy or office made prior to the certification of the election results." 3 D.C.M.R. § 601.9. These and other authorities grant the Board responsibility to determine a candidate's qualifications at any time during the electoral process.[8]

Accordingly, to the extent that Candidate McDuffie's Motion to Dismiss suggests that the correct procedure for addressing the qualification issue is a complaint as opposed to a challenge, *Lawrence* precludes such a strict reading of section 1-1001.08(o)(1).[9] We conclude that the 10-

[6] D.C. Official Code § 1-1001.05(a)(3), (14).

[7] D.C. Official Code § 1-1001.08(b)(1)(D).

[8] *See Kabel v. D.C. Bd. of Elections and Ethics,* 962 A.2d 919, 921 (D.C. 2008) ("we have no doubt the Board could have . . . refused to certify [a candidate] as 'eligible' to take office."); *Best v. Bd. of Elections and Ethics*, 852 A.2d 815, 919 (D.C. 2004) (recognizing the importance of Board's regulation which ensures candidate eligibility) (citation omitted)); *Lawrence, supra, v. D.C. Bd. of Elections & Ethics*, 611 A.2d at 531; *McFarland v. Pemberton*, 530 S.W.3d 76 (Tenn. 2017) (by necessary implication, county election commission had authority to resolve candidate qualification (residency); commission's authority was not merely ministerial and did not violate separation of powers). Having concluded that we have authority to determine whether a candidate is qualified, we do not intend to reach the question of whether the Board has an affirmative duty to investigate candidate qualifications. *McInnish v. Bennett*, 150 So.3d 1045 (Ala.), *cert. denied*, 135 S.Ct. 232 (2014) (dissenting and concurring opinions discussing whether Secretary of State had an affirmative duty to investigate whether Barack Obama qualified as a natural-born-citizen under U.S. Const. Art. II, § 1, cl. 4).

[9] In that case, the D.C. Court of Appeals addressed a residency challenge to the qualifications of a candidate for the D.C. Council. In concluding that that qualifications challenge should be made as part of the petition challenge process, the Court stated:

> [t]hus, we read broadly the provision of § 1-1312(o) [now §1-1001.08(o)] allowing challenges to "the validity" of any petition as establishing a mechanism for review of challenges to the placing of

day period provided under D.C. Official Code § 1-1001.08(o)(1) for bringing challenges to nominating petitions covers challenges based on candidate qualifications as well as on nominating petition insufficiency.

This conclusion obviates the need to address the claims in the sur-reply that Mr. Spiva followed improper procedures in raising his qualification challenge. Insofar as the procedural issues raised for the first time in the Sur-Reply have been effectively rendered moot by our conclusion, and the Sur-Reply's arguments on the merits do not add materially to the discussion, we hereby deny the Sur-Reply.[10]

The Motion to Dismiss

Candidate McDuffie does not claim to have been actively engaged for the requisite time period as either an attorney in "the practice of law" in the District, a judge of a court in the District, or a professor of law in a law school in the District. Mr. Spiva does not contest that Candidate McDuffie is both an attorney and a District government employee. Thus, the precise question before the Board is whether Section (a)(5)(D) requires that a person seeking to qualify under this provision must have been "actively engaged" for the requisite time period "as an attorney employed in the District of Columbia by the District of Columbia."

Mr. Spiva asserts that in addition to being an attorney (*i.e.*, a member of the D.C. Bar in good standing) and a District employee, the candidate must also be actively engaged "*as an*

> a proposed nominee on the ballot both as to qualifications and to procedural formalities. In this manner, all challenges then formulated can be considered contemporaneously by this court.

Lawrence, supra, 611 A.2d at 531 (footnote omitted).

[10] In any event, we note that the arguments as to service of process were withdrawn during oral argument (although the Challenge was served upon Candidate McDuffie's counsel, as permitted). Moreover, the absence of a formal notarization to the signature on the Challenge (which was witnessed by a BOE employee) is non-prejudicial and waived, especially due to the absence of any question as to its authenticity and the genuineness of the challenge made.

attorney," and since Candidate McDuffie is not, in his capacity as a D.C. Councilmember, engaged "as an attorney," he is ineligible to hold the office of Attorney General. There is no dispute that a D.C. Councilmember need not be an attorney, as indeed, many Councilmembers are not attorneys.

Candidate McDuffie claims that an individual who is an attorney employed by the District need not also be engaged "as an attorney" in his or her position. He contends that qualification under Section (a)(5)(D) requires only that an individual have been a member of the D.C. Bar (in good standing) for the requisite time period, and that they have been employed in the District during that period of time by either the federal or District government, but not necessarily "as an attorney." Candidate McDuffie maintains that as a D.C. Councilmember he utilizes his legal skills and judgment, applying them to the job at hand, such as his time as Chair of the Committee on the Judiciary. Candidate McDuffie maintains that this interpretation would likewise allow any District employee (such as a school teacher) who happens to be an attorney in good standing with the D.C. Bar to likewise run for the office by virtue of being employed by the District, even if not in a capacity "as an attorney."

The Parties do not doubt that District employees who are hired as attorneys and carry the title of attorneys obviously qualify, such as the many Assistant Attorneys within the Office of Attorney General, Counsel for Agencies, or Counsel to the Councilmembers. The "fuzzy" area (as alluded to in oral argument) comes when one steps outside those obvious attorney roles and examines District employees who are neither hired nor function "as attorneys," but nevertheless work in roles where "legal issues" are considered by the District employee.

The Board's task at hand is to interpret the phrase "as an attorney" in the context of Section 1-301.83 as a whole. A basic principle of statutory interpretation is that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or

superfluous, void or insignificant[.]" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal citations omitted). When engaging in statutory interpretation,

> "[w]e start, as we must, with the language of the statute." *Bailey v. United States*, 516U.S. 137, 144, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (*en banc*) (internal quotation marks and citation omitted). "Moreover, in examining the statutory language, it is axiomatic that 'the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.'" *Id.* (quoting *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979) (additional citation omitted)).

Tippett v. Daly, 10 A.3d 1123, 1126-27 (D.C. 2010).

It is also true that

> [a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. United States Postal Service*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006). "The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context." *FDA v. Brown Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Therefore, "we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them." *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 652 (D.C. 2005) (*en banc*). "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey*, 516 U.S. at 145, 116 S.Ct. 501. "Statutory interpretation is a holistic endeavor[.]" *Washington Gas Light Co. v. Public Service Comm'n*, 982 A.2d 691, 716 (D.C. 2009) (internal quotation marks and citations omitted).

Id. at 1127.

In examining the meaning of the language in Section (a)(5)(D), we start by stating what we believe it does *not* mean. In light of D.C. Official Code § 1–301.83(a)(5)(A), which establishes "[a]n attorney in the practice of law in the District of Columbia" as an alternative requirement for Attorney General, we do not believe that Section (a)(5)(D) requires an attorney who claims eligibility under that provision to be engaged in the "practice of law" (*i.e.* an attorney engaged by a client to perform legal services for consideration). Interpreting Section (a)(5)(D) to require

attorneys who are government employees to engage in the "practice of law" would render Section (a)(5)(A) superfluous and deprive it of adequate meaning. That said, Section (a)(5)(D) still requires an individual who claims to be eligible to serve as Attorney General pursuant to that provision to be employed "as an attorney" by either the federal or District government. The plain language of that provision, which requires one to have been, for the requisite time period, "actively engaged … as … an attorney employed in the District of Columbia by the … District of Columbia[,]" necessitates this result.

We acknowledge, as does Mr. Spiva, that Candidate McDuffie is an attorney and that he is employed in the District of Columbia by the District government. However, we find that more is required to be eligible to serve as the Attorney General under Section (a)(5)(D). We observe that the phrase "actively engaged" in the context of the statute refers to individuals serving or having served in specific positions: attorneys, judges, and law professors. We see no basis upon which to interpret Section 5(A)(D) such that it does not require individuals in this category to have served or be serving in the position of attorney. That is exactly what the provision states: "as an attorney"

Ultimately, we are persuaded by Mr. Spiva's argument, articulated in his Reply, that:

> [r]eading the [statute] to cover all D.C. Bar members who are employed by the District of Columbia government in any role whatsoever renders the phrase actively engaged … as … an attorney' superfluous. … While an attorney in practice, a judge, or a professor of law all must hold law degrees and apply their legal skills and experience to perform their daily work out of necessity, the same is not true for all District of Columbia government employees – unless of course they are employed as attorneys in positions where active D.C. Bar membership is a prerequisite. The only interpretation that gives meaning to all of the words of the statute and reads them as a cohesive whole is to read [Section (a)(5)(D)] as applying only to attorneys employed as attorneys, in roles where D.C. membership is a prerequisite.

We are also concerned by the implications of venturing outside the box of those District employees who are hired and act "as attorneys" and considering, on a case-by-case basis, arguments by those who are not actively engaged "as attorneys" that they are nevertheless the "functional equivalent" because their job entails reading laws, interpreting laws, and the like. If the door is opened for a D.C. Councilmember, who clearly need not be an attorney and does not hold a position "as an attorney," then why not open the door to all Council staff members who happen to be attorneys although are not acting as such, or any District agency employee so long as they happen to be a member of the D.C. Bar in good standing. During oral argument, no counsel could articulate how to "draw the line" on this slippery slope such that the Section (a)(5)(D) provision would essentially be reduced to adding one new requirement only (in addition to being a member of the D.C. Bar): a government employee, regardless of whether or not the person is "actively engaged…*as an attorney*."

The sounder approach, and one that gives effect to the plain language of Section (a)(5)(D) and the statute as a whole, is to interpret it exactly as it reads: that in addition to being a member of the D.C. Bar in good standing and employed by the government, the candidate must also be "actively engaged…*as an attorney*." Much as a Councilmember might benefit from being an attorney (like many government jobs), many Councilmembers are not attorneys, and it cannot be concluded, at least in this case, that being a Councilmember is enough to take the place of the express language of the provision that one must be "actively engaged…as an attorney."

Conclusion

Given our requirement to honor the plain and ordinary wording of the statute, we find that Candidate McDuffie has not, for the requisite time period, been "actively engaged . . . as . . . [a]n attorney employed in the District of Columbia by the United States or the District of Columbia."

For these reasons, he does not meet the qualification requirements to serve as Attorney General. Accordingly, it is hereby

ORDERED that Motion to Dismiss is denied, and it is further

ORDERED that the Challenge is upheld, and Candidate McDuffie is denied ballot access as a candidate for the office of Attorney General in the Primary Election.

Dated: April 18, 2022

Gary Thompson
Chair, Board of Elections