

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

In Re:

Elissa for DC, and
Elissa Silverman,

Petitioners.

Administrative Hearing
Docket No. 22-028b
Review of OCF Order
In 2022 FI-006
(Motion for Reconsideration)

MEMORANDUM OPINION AND ORDER DENYING RECONSIDERATION

This matter was addressed on the papers by the Board of Elections (“Board”) at a regular meeting convened on February 1, 2023. The matter concerns a motion filed by the General Counsel for the Office of Campaign Finance (“OCF”) for reconsideration of the Board’s unanimous decision (memorialized by written Memorandum Opinion and Order (“the Order”) dated January 6, 2023) in the above-captioned matter. By that decision, the Board rejected OCF’s finding of a violation of the campaign finance laws in connection with certain poll expenditures made by At-Large Councilmember Elissa Silverman and the Elissa for DC Principal Campaign Committee (“Elissa for DC”) (collectively, “Petitioner(s)”). For the reasons explained herein, OCF’s motion for reconsideration is denied.

The procedural background in this matter is set forth in detail in the Board’s Memorandum Opinion and Order. Petitioners sought *de novo* review of an OCF order finding that they violated the campaign finance laws when they commissioned two polls of voter preferences for candidates in races and a primary election in which Petitioner Silverman (who sought re-election, as an independent, to an At-Large Council seat) was not a candidate. In the course of the proceedings on that substantive question, the parties raised two procedural issues and one evidentiary issue. Following a hearing on the non-substantive issues and a further hearing on the merits, the Board

issued the Order that addressed the three non-substantive matters and the merits issue of whether Petitioners violated requirements that campaign funds be used for the election of the candidate for which the campaign was organized by spending campaign funds on polls of races in which Petitioner Silverman was not a candidate.¹ In the Order, the Board rejected OCF's view that there was a *per se* rule against such expenditures. The Board then explained that the case, therefore, turned on whether OCF had produced substantial evidence that Petitioners had no campaign-furthering purpose for expending campaign funds on the polls. In that regard, the Board observed that Petitioners had offered three campaign-related reasons that motivated their expenditures: (1) to determine which candidate in the other races Petitioner Silverman should endorse (Petitioners maintained that making the most advantageous endorsement was directly related to advancing Silverman's re-election to an At-Large seat); (2) to track the influence of Democrats for Education Reform ("DFER") in the Ward 3 race (as DFER, a well-funded opponent of Silverman's positions, was expected to also influence the At-Large race); and (3) to test two different polling methods to decide which one to use in more extensive citywide polling. The Board pointed out that OCF offered no evidence to rebut Petitioners' claims of campaign benefits from the polling and that the record therefore lacked any evidence, much less the "sufficient evidence" required to find a violation of campaign finance laws.

On January 13, 2023, OCF requested a 20-day extension of time to seek reconsideration of the Board's order. After consulting with the Board, the Office of General Counsel for the Board advised the parties that OCF had to file its request for reconsideration no later than January 20, 2023, and the Petitioners had to submit any opposition to that request no later than January 27, 2023.

¹ The allegedly violated regulations were 3 DCMR §§ 3013.1 and 4209.6.

On January 20, 2023, OCF filed its request for reconsideration. In that request, OCF claims that the Board erred in imposing on OCF the burden to show by “substantial evidence” that there was a violation of the campaign finance laws. The request further stated that the Board did not meet the standard for reversal of OCF’s decision in that it did not find that decision to be arbitrary and capricious. Petitioners timely replied. Counsel for the parties were advised by the Board’s General Counsel that the Board would consider the matter on the papers at a regular meeting scheduled for February 1, 2023.

At the Board’s regular meeting on February 1, 2023, the Board Chair made a motion to deny OCF’s request for reconsideration. That motion was seconded and approved by a majority vote and with one member abstaining.²

Discussion

Citing a Board regulation and a provision of the D.C. Administrative Procedure Act (“APA”) that place the burden on the proponent of a claim, OCF argues, for the first time,³ that

² In the interim between the Order’s issuance and OCF’s request for reconsideration, one of the three members of the Board, Michael Gill, who had participated in the earlier proceedings and who agreed to hold over at the expiration of his term pending appointment of his successor, stepped down to allow that successor to be sworn in. As former member Gill’s successor, J.C. Boggs, did not participate in the earlier proceedings, he opted to abstain from voting on this reconsideration matter, although he did read the pleadings submitted regarding the motion for reconsideration. The Chair and Board Member Greenfield concurred in denying reconsideration.

³ OCF was put on notice at the outset of a December 12, 2022 hearing on the merits of the standard of review and burden of proof. Specifically, the Board Chair advised:

Our three-member Board reviews the OCF order on a “de novo basis,” which means that our standard of review is new. It’s on a blank slate without any presumptions or deference to any findings below.

The OCF will have to rebuild its case on the record today. In that regard, the OCF has the burden of proof as stated in Section 424, and Section 423.5 specifically says that the OCF has the “burden of proving a violation with reliable, probative, and substantial evidence.”

Section 423.8 also has that there shall be substantial evidence adequate to support pertinent and necessary findings of fact.

Transcript of 12/12/2022 meeting at pp. 13-14. Throughout the remainder of the hearing, during which time OCF’s General Counsel had multiple opportunities to speak, no comment was made on the Board Chair’s description of the burden that OCF bore. In this regard, Petitioners argue that we should not consider on reconsideration the new OCF argument regarding allocation of the burden. *See* Petitioners Opposition at 1. Petitioners rely on (1) a court case finding

the Board improperly required it to prove a campaign finance law violation by substantial evidence. OCF also asserts that prior Board decisions and our treatment of the non-substantive issues in this case are inconsistent with that allocation of the burden. Further, as noted above, OCF states that “the standard for reversal of Administrative Orders issued by an agency is a finding that the Order’s issuance was arbitrary and capricious ... [and] there is no evidence that OCF’s issuance of the order falls within that category.”⁴

For their part, Petitioners rely on a Board regulation that provides that OCF bears the burden of showing campaign finance violations by substantial evidence (*i.e.*, 3 DCMR § 423.5) to argue that the Board correctly imposed the burden on OCF. Petitioners also contend that OCF’s claim of an arbitrary and capricious standard for Board review is meritless given that OCF cites no authority for that new proposition and that the regulations provide for Board review under a *de novo* standard.

As indicated above, the parties read the Board’s regulations and application of the APA differently. In determining which reading is correct, we apply rules of statutory and regulatory construction. These rules require, among other things, that specific provisions govern over general ones,⁵ and that the provisions be “construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous[.]”⁶ Applying these principles of construction, we note that the APA in relevant part provides:

that, where the party pressing new arguments could not justify the failure to present them earlier, the judge was not required to consider such arguments and (2) the fact that the record is closed. Our regulations (*see* 3 DCMR § 429), however, provide that a party to a contested matter may file for reconsideration of a Board order. While we agree that OCF should have raised its concern with the allocation of the burden at the December 12, 2022 hearing, we have discretion to consider the merits of OCF’s untimely claim. We take this opportunity therefore to address OCF’s claim regarding the burden of proof.

⁴ *See* OCF’s reconsideration motion at p. 4.

⁵ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-26 (1989).

⁶ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citations omitted).

In contested cases, *except as may otherwise be provided by law . . .* the proponent of a rule or order shall have the burden of proof.

. . .

Every decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law. . . . Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence.^[7]

The Board’s relevant regulations provide:

In any conflict within this chapter between the general and specific provisions, the specific provisions shall govern.^[8]

The party who asserts the claim bears the affirmative duty of establishing the truth of the assertion.^[9]

In *all cases* involving violations of the Campaign Finance Reform and Conflict of Interest Act, the Office of Campaign Finance has the burden of proving a violation with reliable, probative and substantial evidence.^[10]

There shall be substantial evidence adequate to support pertinent and necessary findings of fact.^[11]

In any conflict between [the Board’s procedural regulations] and the D.C. Administrative Procedure Act, . . . the D.C. Administrative Procedure Act shall govern.^[12]

Under the statutory and regulatory construction principles discussed above and pursuant to 3 DCMR § 400.2, the Board regulation that specifically addresses OCF campaign finance violations (*i.e.*, 3 DCMR § 423.5) is controlling over the other general provisions regarding the

⁷ D.C. Code § 2-509(b) and (e) (emphasis added). OCF’s memorandum in support of its request incorrectly formats this citation as “§ 2.509(b)[.]” OCF qualifies under the APA’s definitions as an agency. D.C. Code § 2-502(1)(b).

⁸ 3 DCMR § 400.2.

⁹ 3 DCMR § 424.1

¹⁰ 3 DCMR § 423.5 (emphasis added).

¹¹ 3 DCMR § 423.8.

¹² 3 DCMR § 400.3.

allocation of the burden to any proponent. To conclude otherwise would improperly render the words “[i]n *all cases*” in 3 DCMR § 423.5 superfluous. Along these lines, applying that regulation in the instant case in no way renders other provisions that place the burden on the proponent superfluous or insignificant. With respect to the APA provision that allocates the burden to the proponent, that provision by its own terms (specifically the phrase “*except as otherwise provided by law*”) is trumped by any alternative allocation of burden; therefore, the provision that allocates the burden to the proponent cannot govern where, as here, there is a regulation that otherwise provides that the burden is allocated specifically to OCF in campaign finance matters.¹³

For similar reasons, placing the burden on OCF does not circumvent the Board’s regulation that provides that the APA governs in the case of a conflict between the Board’s regulations and the APA. That is because there is no such conflict, given that the Board regulation that specifically allocates the burden on OCF falls within the APA’s phrase “*except as otherwise provided by law*,” and so is an APA-permitted exception to the APA’s default allocation of the burden on the proponent. In other words, the APA’s allocation of the burden to the proponent does not apply and thus cannot conflict with the Board’s procedural regulations.

Moreover, OCF’s position is untenable insofar as the Board could not possibly find, as required by law, substantial evidence that Petitioners violated the campaign finance laws unless OCF brings such substantial evidence to the Board. OCF’s position means that, inconsistent with the regulatory scheme that relegates an investigatory role to OCF, the Board would have to conduct its own investigation and generate additional evidence to ensure that, on *de novo* review, a Board

¹³ *National Mining Association v. Office of Hearings And Appeals, et al.*, 777 F.Supp.2d 164, 176-77 (D.D.C. 2011) (interpreting identical language in the Federal APA and concluding that it did not apply where statute governing defendant’s procedures placed the burden elsewhere); *Nat’l Mining Ass’n v. Chao*, 160 F.Supp.2d 47, 70 (D.D.C. 2001), *rev’d in part on other grounds*, *Nat’l Mining Ass’n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (“[t]he burden of proof mandated by the [Federal] APA is a default rule that applies ... only in the absence of an express statutory or regulatory provision to the contrary.”).

finding of a campaign finance violation is supported by substantial evidence.¹⁴ Yet, on reconsideration, OCF offers no explanation of how the Board could find substantial evidence (and sustain OCF's decision that the polls were not conducted in support of Silverman's re-election) when OCF has offered no evidence to counter Petitioners' evidence that the polls furthered Silverman's campaign.

Nor, contrary to OCF's claims, do the Board's prior decisions conflict with the allocation, in the instant case, of the substantial evidence burden on OCF. Rather, in the two prior cases relied upon by OCF, the petitioners *conceded* the conduct constituting a violation.¹⁵ Therefore, those cases do not suggest that OCF does not have the burden of proving a violation of the campaign finance laws by substantial evidence. Rather, they represent instances where, *de facto*, OCF met its substantial evidence burden. Indeed, in one of those cases, the Board explicitly notes that petitioner's concession satisfied OCF's substantial evidence burden.

Finally, OCF argues that our allocation of the burden to Petitioners to prove their non-substantive claims of procedural defect shows that OCF did not have the burden of proof by

¹⁴ We do not mean to suggest that the Board could not conduct its own investigation should it elect to do so as our review is *de novo*. On the contrary, in the event that OCF failed in its investigatory duties, the Board would arguably be obligated to launch its own investigation.

¹⁵ In *Kathy Henderson v. OCF*, BOE Case No. 22-027 (issued 10/06/2022), where the violation was the failure to timely file a report of receipts and expenditures, we stated: "Ms. Henderson did not deny that she filed her March 10th report late on April 12, 2022. *As it is undisputed that Ms. Henderson's March 10, 2022 report was filed late, OCF has sufficiently demonstrated a violation.*" *Id.* at p. 14 (emphasis added). This language was followed by a footnote citing 3 DCMR § 423.5 and expressly noting that OCF has the burden of proving a violation with "reliable, probative, and substantial evidence." Thus, not only does *Henderson* not stand for the proposition alleged by OCF, that case should have put OCF on notice that the Board holds OCF to the substantial evidence burden even in cases where OCF is the respondent. In *Landry et al. v. OCF*, BOE Case No. 22-027 (issued 12/04/2020), where the alleged violation was the misuse of government resources (a Twitter account) to support a candidate, the petitioners admitted that the resource essentially belonged to the government and that they used it, but argued that they did not intend any misuse. The Board sustained the OCF's violation finding noting that intent was not a defense. Ignoring the reasoning of the Board's published decision in *Landry*, OCF relies on a cursory remark by the Board's General Counsel during the hearing in that matter that petitioners bore the burden. In the context of the petitioners' admissions that the Twitter account was a government resource, those remarks, however, are properly understood as reflecting that OCF had met its *prima facie* burden and that petitioners needed to counter the existing substantial evidence of a violation.

substantial evidence with respect to the allegation of a campaign finance violation. As the foregoing recitation of the APA provisions and Board regulations underscores, however, the party tasked with the burden depends on the nature of the claim. In the case of a claim of a campaign finance violation, that burden is specifically allocated to OCF. In the case of, for example, evidentiary or procedural claims, the proponent of the ruling generally carries the burden. For all these reasons, we find OCF's position that it was not required to provide substantial evidence of a campaign finance violation to be without merit.

With regard to OCF's claim that the Board lacked authority to disturb OCF's conclusion of campaign finance violations absent a finding that that conclusion was arbitrary and capricious, as Board Chair Thompson noted during the December 12, 2022 hearing, the "Board reviews [OCF orders] on a 'de novo basis,' which means that [its] standard of review is new [and] on a blank slate without any presumptions or deference to any findings below." Indeed, the Board's non-deferential, *de novo* review standard has been recognized by the D.C. Court of Appeals.¹⁶ Accordingly, OCF's claim that the Board cannot disturb OCF's findings unless the Board concludes that those findings are arbitrary and capricious is without merit.

In the Order, we emphasized that the issue before the Board was an evidentiary one and that the OCF had produced no evidence, much less substantial evidence, to counter Petitioners' evidence of their campaign-furthering purposes for the poll expenditures.¹⁷ On reconsideration, OCF again offers no evidence. Instead, OCF's position seems to be that it should not have been required to produce such evidence because the burden was improperly assigned. As we have found meritless OCF's position with regard to the allocation of the burden and OCF has not offered any

¹⁶ *Mallof v. D.C. Board of Elections & Ethics*, 1 A.3d 383, 386 (D.C. 2010).

¹⁷ In this regard, our ruling is not inconsistent with Petitioners claim (at 4) that the Board need not even reach the question of whether there was a lack of substantial evidence given that OCF failed to produce "minimally sufficient" evidence.

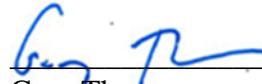
new evidence, we deny the request for reconsideration on the merits for the same reasons stated in the Order.

Accordingly, it is hereby,

ORDERED that the request for reconsideration of the Board's December 12, 2022 decision as memorialized in the Order is hereby **DENIED**.

The Board issues this written order today, which is consistent with its oral ruling rendered on February 1, 2023.

Date: February 7, 2023



Gary Thompson
Chair
Board of Elections