

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

ROBERT KABEL, Chairman of District of Columbia Republican Committee,)	
)	
)	
Petitioner,)	
)	
v.)	No. 08-AA-1513
)	Re: Petition for Review of
DISTRICT OF COLUMBIA BOARD)	Certification of Election Results
OF ELECTIONS AND ETHICS,)	
)	
Respondent.)	

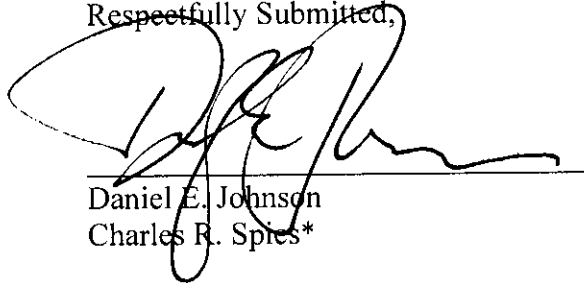
PETITIONER'S CROSS-MOTION FOR SUMMARY REVERSAL

In accordance with D.C. App. R. 27(c), Petitioner Robert Kabel moves this Court for summary reversal of the District of Columbia Board of Elections and Ethics' (hereinafter "the Board") November 24, 2008 certification of the election of Michael A. Brown as an At-large Member of the District of Columbia City Council.

WHEREFORE, Petitioner Robert Kabel moves this honorable Court for an Order summarily reversing the Board's November 24, 2008 certification of Michael A. Brown and for such other relief as the Court may find proper.

Respondent respectfully requests the opportunity to present Oral Argument on the merits of this Motion.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Daniel E. Johnson', is written over a horizontal line.

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* Application for Admission *Pro Hac Vice* filed
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DISTRICT OF COLUMBIA COURT OF APPEALS

APPEAL NO. 08-AA-1513

**ROBERT KABEL, CHAIRMAN OF DISTRICT OF COLUMBIA
REPUBLICAN COMMITTEE**

Petitioner,

v.

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

Respondent.

**BRIEF IN OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY
AFFIRMANCE AND IN SUPPORT OF CROSS MOTION FOR SUMMARY
REVERSAL**

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December 12, 2008

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Pro Hac Vice filed 12/1/08**

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Rule 28(a)(2) Disclosure

The non-government parties to the agency and this appellate proceedings are:

Parties: District of Columbia Republican Committee (Party to Agency proceeding only)
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STATEMENT OF FACTS

This petition is a challenge to the District of Columbia Board of Election and Ethics' ("Board") November 24, 2008 certification of the results of the election of Michael A. Brown to the District of Columbia City Council.

Mr. Brown has been involved in Democratic politics for more than 20 years. (Ex. 9 to Respondent's Motion, Attachments 1, 2 and 3). On or about May 16, 2008, Mr. Brown amended his Party Registration from the Democratic Party to no party/Independent. (Ex. 1) On July 7, 2008, Mr. Brown filed the required Declaration of Candidacy for the office of Council At Large and on the line for "Your Party" wrote the letter "I." (Ex. 2)

Despite his registration status, Mr. Brown campaigned as a Democratic candidate for Council At Large. For example, his campaign literature consistently called him an "Independent * Democrat." (Ex. 7 at Attachment 1) On August 26, 2008, during the midst of his City Council campaign, Mr. Brown attended the Democratic National Convention in Denver, CO and while there appeared on a talk-show as a "Democratic Strategist." (Ex. 7 at 2) Mr. Brown's campaign website noted that he was "a surrogate speaker for the Obama/Biden Presidential Campaign" and his website also noted that he has "been recognized as a national political figure, regularly appearing as a Democratic strategist on national news programs and serving as a surrogate speaker for national political campaigns such as the Obama/Biden, Kerry/Edwards and Gore/Lieberman Presidential campaigns." (Ex. 9 at Attachment 2) Mr. Brown's professional biography on his firm website also stated, "He now serves as a surrogate speaker for the Obama & Biden campaign." (Ex. 9 at Attachment 3)

On October 31, 2008, Mr. Brown ran a political advertisement in *The Washington City Paper* describing himself as an “Independent * Democrat.” (Ex. 9 at Attachment 4) On that same day, *The Washington Post* described Mr. Brown as a “faux independent.” *Bucking a Tide in DC*, Wash. Post, Oct. 31, 2008, at A18. (Ex. 7 at 2)

On election day, November 4, 2008, the Democratic party nominee for the office of At-large Member of the Council, Kwame Brown, received the highest number of votes, 172,272 (Ex. 6), and become the third elected Democrat At-large Member of the Council. Mr. (Michael) Brown, while using campaign flyers describing himself as “Independent * Democrat” (Ex. 9 at Attachment 5), received the second highest number of votes, 71,720,¹ (Ex. 6) and would become the fourth At-large Member of the Council affiliated with the Democratic Party.

On November 20, 2008, the District of Columbia Republican Committee (“DCRC”), and DCRC Chairman Robert Kabel, challenged the certification of Mr. Brown’s election results on the grounds that he did not meet the statutory requirements necessary to serve in that office, and therefore is ineligible for certification. (Ex. 7) On November 21, 2008, the Board responded to the DCRC’s challenge, asserting that it was beyond the Board’s purview to decline to certify Mr. Brown’s election and that the Board intended to certify the election on November 24, 2008. (Ex. 8)

¹ In each general election, two of the four At-large member of the Council seats are subject to election. The two individuals who receive the highest number of votes are deemed the winners of the election. See D.C. Code Ann. 1-204.01(b)(4).

On November 24, 2008, the DCRC, both orally and in writing, requested that the Board stay the certification of Mr. Brown's election in order to hold a hearing to examine evidence regarding whether Mr. Brown was, on the date of the election, affiliated with the Democratic party. (Ex. 9, Ex. 10 at 27-27; 56-61) The Board, while expressly acknowledging that Mr. Brown's association with the Democratic party was known to the electorate at the time they voted for him (Ex. 10 at 58), nevertheless declined the DCRC's request and, on the same day, certified Kwame Brown and Mr. Brown as the winners of the election in question. (Ex. 10 at 63)

On December 1, 2008, DCRC Chairman Robert Kabel, who voted in this election, filed with this Court a petition for review of the Board's decision to certify the results of this contest. On December 5, 2008 the Board filed a Motion for Summary Affirmance.

ARGUMENT

The Home Rule Act makes clear in plain language that Mr. Brown, if found to be "affiliated with" the Democratic Party, is not eligible to be seated as an At-large Member of the City Council. Mr. Brown would become the fourth At-large Member affiliated with the Democratic Party and therefore is not capable of meeting the statutory requirements to serve in office and the certification of his election should be reversed.

A. THE BOARD IGNORED THE CLEAR STATUTORY LANGUAGE OF THE POLITICAL PARTY AFFILIATION RESTRICTION IN THE HOME RULE ACT AND IS NOT DUE JUDICIAL DEFERENCE

In reviewing an agency's decision that interprets or applies statutory provisions, this Court follows the Supreme Court's two-part *Chevron* test. *Bates v. District of Columbia Board of Elections and Ethics*, 625 A.2d 891, 893 (D.C. 1993)

(citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). The Court must determine whether the meaning of the statute is clear and, if it is clear, then the Court may not defer to the agency's interpretation. *Id.* (citing *Chevron, supra*, 467 U.S. at 842-43).²

In the instant case, the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (Dec. 24, 1973) (the "Home Rule Act" or "D.C. Charter") provides,

Notwithstanding any other provision of this section, at no time shall there be more than three members (including the Chairman) serving at large on the Council who are *affiliated with* the same political party.

D.C. CODE ANN. § 1-204.01(d)(3)(emphasis added).

The threshold question for this Court is whether the statutory language "affiliated with" has a clear meaning and, if so, whether the Board's action is consistent with that clear meaning. This Court has emphasized,

Virtually unanimous authority holds that words of common use are generally construed according to the natural, plain and ordinary meaning, and that where a word has a fixed technical meaning it is to be taken in that sense.

Bates, supra, 625 A.2d at 894 (citations omitted).

The plain and ordinary meaning of the term "affiliated" is "closely associated with." See Merriam-Webster Dictionary, <http://www.merriamwebster.com/dictionary/affiliated> (Nov. 19, 2008) ("affiliated: closely associated with another typically in a

² The Board contends that the Court may reject this Petition because it did not include "allegations" or "argument." Respondent's Br. at 4. The current Court Rules require no such statements in the Petition. D.C. App. R. 15; D.C. App Form 5.

dependent or subordinate position.”). In addition, Black’s Law Dictionary defines “Affiliation” as:

Act or condition of being affiliated, allied, or associated with another person, body, or organization. *Imports less than membership* in an organization, but more than sympathy, and a working alliance to bring to fruition the proscribed program of a proscribed organization, as distinguished from mere co-operation with a proscribed organization in lawful activities, is essential.

Black’s Law Dictionary 58 (6th ed. 1990)(emphasis added).

It is undisputed that Mr. Brown campaigned as a Democrat, including but not limited to through his own campaign material which, as of election day, described him as an “Independent * Democrat.” (See Ex. 7 at Attachment 1 and Ex. 9 at Attachment 5). Whether under the Merriam-Webster dictionary definition of “closely associated with...,” or the Black’s definition of “...allied, or associated with...,” it is clear that, by the plain and usual definition of the term, Mr. Brown was “affiliated” with the Democratic Party on election day. In fact, the Board, in the course of its vote to deny the DCRC’s challenge to certification, found that “[t]here is no evidence that Mr. Brown’s association with the Democrats and the Democratic Party was a factor that was not known to the electorate at the time that they voted for him.” (Ex. 10 at 58)

Because the definition of affiliation is clear, and Mr. Brown is, by that definition affiliated with the Democratic Party, the District of Columbia Code provides that the Board may not certify Mr. Brown as the winner:

If after the date of an election and prior to the certification of the election results, the qualified candidate who has received the highest number of votes dies, withdraws, or *is found to be ineligible to hold the office...*the Board shall declare no winner, and the office shall become vacant as of the date of the beginning of the term of office for which the election was held.

D.C. CODE ANN. § 1-1001.10(b)(1)(emphasis added).

B. THE BOARD HAS NOT ADOPTED A PERMISSIBLE CONSTRUCTION OF THE PARTY AFFILIATION STATUTORY REQUIREMENT

If this Court determines that the statutory term “affiliated with” is not clear, but instead ambiguous, then the determination for this Court is whether the Board’s decision is based upon a permissible construction of the statute. *Bates, supra*, 625 A.2d at 893 (citing *Chevron, supra*, 467 U.S. at 842-43). The Board now asserts that “affiliation” means “party registration as indicated by Board voter registration records.” Respondent’s Brief at 6. The Board presents no dictionary (or any other) definition to support this argument, but instead divines this definition through the Board’s interpretation of certain selected “contextual clues.” *Id.* This interpretation is not correct.

The Board’s interpretation is wrong because the clues the Board looks to in support of its argument are all found in the wrong part of the statute: the voter registration section of the law. The Board notes that, for the purpose of voting in a party election, the voter registration form “shall indicate his or her political party affiliation.” D.C. CODE ANN § 1-1001.7(a)(2). In addition, the Board notes that, if a person uses the Department of Motor Vehicles application form to register to vote,

On a separate and distinct portion of the form, to be used for voter registration purposes, the applicant shall: (i) Indicate a choice of party affiliation (if any); (ii) Indicate the last address of voter registration (if known); and (iii) Sign, under penalty of perjury, an

attestation, which sets forth the requirements for voter registration, and states that he or she meets each of those requirements.

D.C. CODE ANN. § 1-1001.07(c)(1)(F)(i). In the Board's estimation, the third "most significant clue" regarding the meaning of "affiliated" is the language describing the requirements for being "nominated directly" (as opposed to being elected by a political party in a primary). In that clause, only those who are not "registered to vote as affiliated with a party qualified to conduct a primary election" may be nominated directly for office. D.C. CODE ANN. § 1-1001.08(j)(3).

In each one of the three statutory sections that the Board cites to as contextual clues, the term "registration" or "voter registration" merely modifies - *but does not define* - "affiliated" or "affiliation." Thus, those uses shed no light on the definition of "affiliation" when not used in the voter registration context. More importantly for the case before the Court, D.C. CODE ANN. § 1-204.01(d)(3) does not use the term "registration" to modify or limit the term "affiliated with" and therefore the usage in the voter registration context is not instructive here.

In addition, because registration is mentioned in other areas of the statute, but not here, it may be inferred under the *expressio unius est exclusion alterius* (expression of one thing suggests the exclusion of others) canon of statutory interpretation that Congress did not intend for voter registration to be the standard in this case. *See e.g. Swierkewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (Court uses *Expressio unius est exclusion alterius* to reason that, since Federal Rule of Civil Procedure 9(b) makes no mention of municipal liability or employment discrimination, complaints need only satisfy the simple requirements of Rule 8(a)).

The Board's argument that "affiliated with the same political party" should be defined as whether the candidate is simply "registered" with that political party would lead to an absurd result. Under the Board's logic, a candidate need only file his candidacy forms with the Board, check "independent" on these voter registration and candidacy forms. He could then explicitly affiliate with a political party up to and on election day (much as Mr. Brown did in this instance) and the Board would be helpless to enforce the Home Rule Act's statutory purpose of ensuring minority representation on the Council. *Hechinger v. Martin*, 411 F.Supp 650, 651 (D.D.C. 1976). The United States Court of Appeals for the Federal Circuit has explained, when evaluating the independence of an Alexandria City Council candidate for Hatch Act purposes,

Most important, reducing the factual inquiry into "independence" to an examination of a person's registration card and ballot billing would exalt form over substance and permit circumvention of the substantive congressional policy of keeping partisan politics out of the routine administration of the laws and the running of the bureaucracy.

Campbell v. Merit Sys. Prot. Bd., 27 F.3d 1560, 1568 (Fed. Cir.1994).

A guiding principle for examining contextual clues and the Board's statutory construction is whether that proposed construction is consistent with the purpose of the statute. *Best v. District of Columbia Bd. of Elections and Ethics*, 852 A.2d 915, 918 (D.C. 2004)("We will not uphold an interpretation by the Board, even an interpretation of one of its own regulations, if that interpretation is 'plainly wrong or inconsistent with the legislative purpose' [citation omitted] or if the interpretation would yield an 'absurd result'" (citing *Allen v. District of Columbia Bd. of Elections & Ethics*, 663 A.2d 489, 495 (D.C.1995))). The purpose of the relevant language of

the Home Rule Act is to ensure that members of minority parties in the District have some representation on the D.C. Council due to the overwhelming Democratic majority in the city (seventy-six percent at the time of the Home Rule Act's passing). *See Hechinger*, 411 F.Supp. at 651-52 ("purpose of the limitations contained in the sections at issue is to ensure minority representation on the Council"). Consequently, the Act uses the broad term "affiliated with" -- rather than simply "voter registration" -- as the standard. The narrow standard that the Board advocates is simply inconsistent with the statute's purpose and is a road-map for candidates and political parties to circumvent -- and eviscerate -- the minority party representation purpose of the statute.

It is worth noting that, in other sections of the Home Rule Act that address partisanship as a factor in eligibility to hold office, there is a narrower restriction. For example, when describing the requirements for Board of Elections members, the Act states that the Board shall be "...composed of three members, no more than two of whom shall be of the same political party..." D.C. CODE ANN. § 1-1001.03(a). Congress did not use this narrow party "member" language, or the even narrower "registered to vote as affiliated with a party" language that the Board cites when Congress crafted § 1-204.01(d)(3). Instead, Congress used the broad language, "affiliated with the same political party," D.C. CODE ANN. § 1-204.01(d)(3), and that is the law the Board must enforce.

C. BROWN WAS NOT CAPABLE OF MEETING THE STATUTORY REQUIREMENTS NECESSARY TO SERVE IN OFFICE AS OF ELECTION DAY SO HE MAY NOT SERVE

The Board is charged with the certification of election results, D.C. CODE ANN. § 1-1001.15(11), and is authorized to issue implementing regulations. D.C. CODE ANN. § 1-1001.15(14). The Board's regulations explain that, for a candidate to be "eligible," and consequently meet the qualifications required for office, he or she must meet "or [be] capable of meeting those statutory requirements necessary to serve in a particular office by the date of the election in which he or she seeks the office." 3 D.C. Mun. Regs. tit. 3, § 600.2(d). The Board has failed to enforce the statute and regulations.

As the Board notes, the District's election statute provides that

[i]n response to [a petition for review of an election], the Court may set aside the results certified and declare the true results of the election, or void the election in whole or in part. ... The court shall void an election only if it:

(A) Determines that the candidate certified as the winner of the election does not meet the *qualifications required for office*; or

(B) Finds that there was any act or omission, including fraud, misconduct, or mistake serious enough to vitiate the election as a fair expression of the will of the registered qualified electors voting in the election.

D.C. CODE ANN. § 1-1001.11(b)(2)(emphasis added). The Board then argues, however, that this Court may only look to the subpart (B) "fraud, misconduct, or mistake" provision when assessing a petition for election review, citing to the *Scolaro* case which provides analysis of the subpart (B) provision. *Scolaro v. District of Columbia Board of Elections and Ethics*, 433 A.2d 1102, 1104 (D.C. 1981).

Contrary to the Board's interpretation, however, the statute uses the mandatory term "shall" prior to subpart (A) to provide that this Court also must void the election if the winner of the election does not "meet the qualifications required for office." One of those qualifications for office that the winner must meet is to be, as of the date of the election, "capable of meeting the statutory requirements necessary to serve" in office. 3 D.C. Mun. Regs. tit. 3, § 600.2(d). The fact that the *Scolaro* ruling discusses subpart (B) of the statutory provisions does not mean that subpart (A) can be disregarded, as is recognized in the language of *Pendleton*, also cited by the Board. The court in *Pendleton* notes, "Our purpose in reviewing elections is merely to insure...that the Board performed its duty in a constitutionally and statutorily correct manner." *Pendleton v. District of Columbia Board of Elections and Ethics*, 433 A.2d 1102, 1104 (D.C. 1981). Upholding *all* of the statutory qualifications and eligibility for office is certainly part of the Board's duty. As of election day, Mr. Brown was affiliated with the Democratic Party, and therefore he was not capable of meeting that statutory non-affiliation requirement necessary to serve in office. Because he did not meet the qualifications required for office, this Court must void his election.

After first arguing that this Court can only look to "fraud, misconduct, or mistake" (and therefore reading out subpart (A) of D.C. CODE ANN. § 1-1001.11(b)(2)), the Board then argues that, if this Court does look to a candidate's eligibility to serve in office, it must look only to the four specified criteria in the "Qualifications for holding office" section at D.C. CODE ANN. § 1-204.02 to determine whether Mr. Brown is eligible to hold the office of member of the Council.

It is correct that the Board must evaluate these four criteria when assessing a candidate's Declaration of Candidacy and Affidavit of Qualifications, but nowhere in the statutory scheme is there any indication that these criteria are the only statutory qualifications for office that the Board or this Court may enforce. The Board's regulations refer to "those statutory requirements necessary to serve in a particular office by the date of the election," 3 D.C. Mun. Regs. tit. 3, § 600.2(d), which would be an impossibly inquiry for the Board to make if the Board only evaluates criteria at the time of the candidate's voter registration and declaration of candidacy, but not on the date of the election.

In addition, the Regulations clarify that:

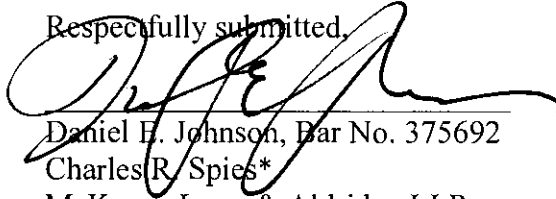
The preliminary determination of eligibility shall in no way be deemed to preclude further inquiry into or challenge to the eligibility of an individual for candidacy or office made prior to the certification of election results by the Board and based upon evidence which was not known to the Board at the time of the preliminary determination or upon evidence of changed circumstances.

3 D.C. Mun. Regs. tit. 3, § 602.7. This regulatory language contemplates the exact situation at hand. The Board's preliminary determination was that Mr. Brown met the qualifications for candidacy and was eligible to serve in office. But the evidence of changed circumstances (such as the evidence in the Record that Mr. Brown campaigned as a Democrat up to and on election day, and so was affiliated with the Democratic Party) showed that Mr. Brown became ineligible to be certified and serve in office. The Board refused to consider this evidence and improperly certified the Mr. Brown's election.

CONCLUSION

Michael Brown campaigned as a Democrat and, as of the date of his election, was affiliated with the Democratic Party. Allowing the Board to certify Mr. Brown's election to take office would create, on its face, a violation of the Home Rule Statute and Mr. Brown therefore is not eligible to hold office. Consequently, the Court should deny the Board's Motion for Summary Affirmance and grant Petitioner's Cross-Motion for Summary Reversal.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'D. E. Johnson', is written over the typed name and the first two lines of the address.

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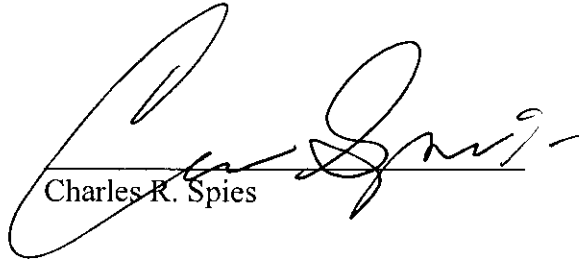
*Application for Admission

Pro Hac Vice filed 12/1/08

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing Brief In
Opposition To Respondent's Motion for Summary Affirmance And In Support Of
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