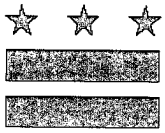
GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



IN RE: Mary Oates Walker and Kiyo Oden Tyson,

Respondents

CASE No.: 1060-001

MEMORANDUM OPINION

I. Introduction

The Board approved and issued a Notice of Violation ("NOV") in this case on February 6, 2014. Respondents Mary Oates Walker and Kiyo Oden Tyson are, respectively, the former Chief Administrative Law Judge and the General Counsel of the Office of Administrative Hearings ("OAH").[1]

The NOV charges Respondent Walker with nineteen separate Code of Conduct violations and Respondent Oden Tyson with ten separate violations. Each Respondent has denied all the respective charges and has filed a motion to dismiss the NOV. The motions are substantially similar, in that they both are based on contentions that the Board[2] lacks subject matter jurisdiction over independent District government agencies such as OAH; that the Board lacks jurisdiction over Respondents because they served as Excepted Service employees at OAH; that certain counts of the NOV violate the *Ex Post Facto* Clause of the United States Constitution; and that the conduct of this case by the Board and the Office of Government Ethics ("OGE") violates Respondents' right to procedural due process. To that extent, the motions will be treated together for purposes of this Memorandum Opinion.[3]

[1] After the issuance of the NOV, the Mayor removed Respondent Walker as the Chief Administrative Law Judge, placing her on administrative leave, and Respondent Oden Tyson was terminated as General Counsel by the OAH Interim Chief Administrative Law Judge. These personnel actions have no bearing on this Memorandum Opinion.

[2] The Board is sometimes referred to in the discussion below as "BEGA."

[3] Respondents also filed an action in the Superior Court, seeking injunctive and declaratory relief to, among other things, prevent the Board from proceeding in this case. Their motion for a temporary restraining order was denied, but, on March 10, 2014, the court granted their motion for a preliminary injunction. An appeal was noted, and the Court of Appeals granted partial relief, staying the preliminary injunction "insofar as it precludes the Ethics Board from ruling upon [Respondents'] motion to dismiss" this case. *See District of Columbia v. Mary Oates Walker*, No. 14-CV-249, Order at 2 (Mar. 4, 2014) (*per curiam*).

For the following reasons, the Board DENIES each Respondent's motion to dismiss.

II. Discussion

A. The Board's Jurisdiction Over Independent Agencies

Both Respondents contend that, for several reasons, the Board lacks subject matter jurisdiction over OAH because it is an independent agency. They point first to section 202(a)(1) and (4) of the Ethics Act (D.C. Official Code § 1-1162.02(a)(1) and (4))[4] and argue that it is silent as to the scope of the Board's jurisdiction.[5] *See* Walker Motion at 1 ("Conspicuously absent from this provision is any statement concerning who or what branches of the government or agencies BEGA has the authority to investigate for violations of the Code of Conduct."); Oden Tyson Motion at 1 ("[T]he BEGA statute is void of any reference as to which agencies fall under the purview of BEGA's jurisdiction in enforcing the Code of Conduct."). Respondent Walker also points to section 101(7) of the Ethics Act (D.C. Official Code § 1-1161.07), which defines the Code of Conduct, and claims that the definition "fails to contain any statement regarding who BEGA has jurisdiction over." Walker Motion at 1.

While the two Ethics Act sections do not state expressly that their provisions apply to any particular District government agencies or employees at all, Respondents' view is too narrow. The sections must be read in the context of the Ethics Act as a whole and the Council's purposes in passing it. *See, e.g., Gondelman v. District of Columbia Dept. of Consumer & Regulatory Affairs*, 789 A.2d 1238, 1245 (D.C. 2002) ("In construing two subsections, we must at the same time give effect to the whole statute in light of its underlying objectives." (internal punctuation and citations omitted)); *Board of Directors, Washington City Orphan Asylum v. Board of Trustees, Washington City Orphan Asylum*, 798 A.2d 1068, 1080 (D.C. 2002) ("The meaning of statutory language must be derived from a consideration of the entire enactment against the backdrop of its policies and objectives." (internal quotation marks and quoted authority omitted)).

The Council declared the purposes of the Ethics Act in a detailed, 45-page committee report.[6] Therefore, a brief discussion of the report is necessary here. *See Mesa v. United States*, 875 A.2d 79, 90 (D.C. 2005) ("Under statutory interpretation principles, a court may refuse to adhere strictly to the plain wording of a statute in order to effectuate the legislative purpose, as determined by a reading of the legislative history or by an examination of the statute as a whole."

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[4] Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*).

[5] Section 202(a) establishes the Board, whose purpose is to, among other things, "(1) [a]dminister and enforce the Code of Conduct" and "(4) [r]eceive, investigate, and adjudicate violations of the Code of Conduct."

[6] Report of the Committee on Government Operations on Bill 19-511, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Act of 2011 (Council of the District of Columbia, December 5, 2011) ("Committee Report"). Significantly, neither Respondent cites to, or discusses, the Committee Report.

(internal quotation marks and quoted authority omitted)); *In re W.M.*, 851 A.2d 431, 441 (D.C. 2004) ("We may discern the purposes and intent of the legislation from the [committee report]." (citations omitted)), *cert. denied*, 543 U.S. 1062 (2005).

The Committee on Government Operations began its report by finding that the District's then current ethics laws were "ill-suited to promoting a culture of high ethical conduct." Committee Report at 2. The Committee continued:

> The problems are myriad and involve *fragmented laws, a lack of uniform application*, an overburdened enforcement entity, a tolerant environment, *a piece-meal approach to problem solving*, and outdated laws.... The current ethics framework harms the public's trust, the business environment, and potentially the government's legitimacy.

Id. (emphasis added).[7]

The Committee viewed Bill 19-511 as, among other things, "remedy[ing] the fragmented application of laws by subjecting *all employees* to the code of conduct" and as "clarify[ing] existing law by including *all applicable ethics laws in one location* within [the D.C. Official] Code." *Id.* (emphasis added); *see also id.* at 22 (viewing Bill 19-511 as creating "a *single* source for all ethics laws") (emphasis added).[8]

The Board was seen as the centerpiece of the legislation. "Most importantly, the bill will establish a new entity *charged exclusively* with administering and enforcing the new and enhanced laws and the code of conduct." *Id.* at 2 (emphasis added). Indeed, the Board was established to, among other things, "[a]dminister and enforce the Code of Conduct" and "[i]ssue rules and regulations governing the ethical conduct of employees and public officials." Section 202(a)(1) and (8) of the Ethics Act (D.C. Official Code § 1-1162.02(a)(1) and (8)).

The Code of Conduct itself is defined as being composed of just six elements. See section 101(7) of the Ethics Act (D.C. Official Code § 1-1161.01(7)), which defines the Code to contain the following:

> (A) The Code of Official Conduct of the Council of the District of Columbia, as adopted by the Council;
>
> (B) Sections [1801 (Standards of conduct) and 1802 (Conflicts of interest) of the District of Columbia Government Comprehensive

[7] As if to emphasize the scope of the problem, the Committee repeated this very same language on page 11 of the Committee Report.

[8] The Committee noted that, as used in the Committee Report, "the term 'ethics' [did] not impute any moral or philosophical meaning. Instead, that term refer[red] to the regulation of those behaviors which the government may seek to impose upon itself and its employees by rule of law to prevent government corruption and waste, avoid conflicts of interest, and ultimately to preserve and increase the public trust and with it the legitimacy of the government." *Id.* at 3.

Merit Personnel Act of 1978 (D.C. Official Code §§] 1-618.01 through 1-618.02;

(C) [The Official Correspondence Regulations, effective April 7, 1977, D.C. Law 1-118, D.C. Official Code § 2-701 *et seq.* (2007 Repl. & 2013 Supp.)];

(D) Section [416 of the Procurement Practices Reform Act of 2010, effective April 8, 2011, D.C. Law 18-371, D.C. Official Code §] 2-354.16 [(2011 Repl.) (Contingent fees)];

(E) Chapter 18 of Title 6B of the District of Columbia Municipal Regulations [District personnel regulations relating to employee conduct]; and

(F) Parts C [Conflicts of Interest], D [Financial Disclosures and Honoraria], and E [Lobbyists] of subchapter II, and part F [Constituent Services] of subchapter III of [the Ethics Act] for the purpose of enforcement by the Elections Board of violations of [section 338 of the Ethics Act (D.C. Official Code] § 1-1163.38 [(Constituent services)] that are subject to the penalty provisions of [section 221 of the Ethics Act (D.C. Official Code] § 1-1162.21 [(Penalties)].

While this definitional section does not, on its face, extend the Board's jurisdiction to any particular District employees, it must be viewed, as discussed above, in the context of the entire Ethics Act and the Council's underlying purposes in passing it. Applying the principle here, the Board's core responsibility to administer and enforce the Code of Conduct through rules and regulations governing the ethical conduct of employees and public officials operates to make the Code applicable to all District government employees. This conclusion is supported by the nature of the Code itself. Its six elements reflect, collectively, laws and regulations applicable to the executive and legislative branches of the District government and to both subordinate and independent executive agencies. Indeed, one of those elements, section 416 of the Procurement Practices Reform Act of 2010 (D.C. Official Code § 2-354.16), is expressly applicable to OAH.[9] The elements, then, can reasonably be seen as representative examples of the "fragmented laws" the Council intended to capture in the Code.[10]

Government-wide application of the Code of Conduct is also supported by the expansive definition the Council chose to give the term "employee," that is, a person who, "unless

[9] *See* section 5(e) of the Office of Administrative Hearings Establishment Act of 2001 ("OAH Act"), effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code § 2-1831.02(e)); *see also* section 2(1) and (3) of the Official Correspondence Regulations (D.C. Official Code § 2-701(1) and (3)) (defining, respectively, "agency" to include "all independent boards, commissions, agencies, and other independent agencies," and "Government employee" to include "an officer or employee of any agency when acting in an official capacity").

[10] See also the discussion of Bill 20-412, the "Universal Code of Conduct and BEGA Amendment Act of 2013", in the text below.

otherwise apparent from the context, . . . performs a function *of the District government* and who receives compensation for the performance of such services, or a member *of a District government board or commission*, whether or not for compensation." Section 101(18) of the Ethics Act (D.C. Official Code § 1-1161.01(18) (emphasis added)). In other words, taking the broad definition of "employee" together with the Council's clear underlying intent to subject "all employees to the code of conduct," we reasonably conclude that the Code of Conduct is enforceable against all District government employees, including those who serve in independent agencies. Respondents' arguments to the contrary are unpersuasive.

Both Respondents ascribe significance to section 101(20) of the Ethics Act (D.C. Official Code § 1-1161.01(20)), which defines the term "executive agency," in part, as "[a] department, agency, or office in the executive branch of the District government under the direct administrative control of the Mayor." *See* section 101(20)(A). Respondent Walker, for example, argues that the definition "[demonstrates] statutory intent to exclude independent executive agencies from BEGA's jurisdictional coverage." Walker Motion at 2. However, section 101(20) also defines the term to include two independent agencies, the University of the District of Columbia[11] and the Elections Board,[12] as well as the State Board of Education, whose nine members are all elected.[13] Furthermore, apart from the definitional section, the term "executive agency" appears in the Ethics Act only in section 101(1) (D.C. Official Code § 1-1161.01) as part of the definition of the term "administrative decision," which, in turn, figures into the definition of "lobbying" and prohibitions on certain lobbying activities. *See*, respectively, sections 101(32)(A) and 231(c) and (d) (D.C. Official Code §§ 1-1161.01(32)(A) and -1162.31(c) and (d)). In short, the defined term "executive agency" has no bearing on the scope of the Board's subject matter jurisdiction under the Ethics Act.

Respondent Oden Tyson seeks to distinguish OAH from the definition of "executive agency" by asserting that OAH "was established as an independent agency." Oden Tyson Motion at 2. The OAH Act defines the term "independent agency" as having the same meaning as that set out in section 3(5) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-502(5)). *See* OAH Act section 4(9) (D.C. Official Code § 2-1831.01(9)). That definition is "any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this subchapter, *to establish administrative procedures*, but does not include the several courts of the District and the Tax Division of the Superior Court." (Emphasis added.) However, there is nothing in the definition from which it can be reasonably inferred that the Board lacks subject matter jurisdiction over OAH, nor is there anything in the OAH Act from which one can conclude that

[11] *See* section 201(a) of An Act To reorganize public post secondary education in the District of Columbia, establish a Board of Trustees, authorize and direct the Board of Trustees to consolidate the existing local institutions of public postsecondary education into a single Land-Grant University of the District of Columbia, direct the Board of Trustees to administer the University of the District of Columbia, and for other purposes, approved October 26, 1974 (88 Stat. 1424; D.C. Official Code § 38-1202.01(b)).

[12] *See* section 491 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 810; D.C. Official Code § 1-204.91).

[13] *See* section 402(b) of the Public Education Reform Amendment Act of 2007, effective June 12, 2007 (D.C. Law 17-9; D.C. Official Code § 38-2651(b)).

OAH is excluded from that jurisdiction. OAH is "independent" only to the extent that, by definition in its organic law, it has the authority to establish its own administrative procedures.

Respondents next rely on a provision in a bill currently pending in the Council, Bill 20-412, the "Universal Code of Conduct and BEGA Amendment Act of 2013" ("BEGA Amendment Act"),[14] to argue that the Board's jurisdiction does not extend to independent agencies. *See* Walker Motion at 2-3; Oden Tyson Motion at 2-3. Some background on the legislation is necessary in order to demonstrate the weakness in Respondents' position.

On April 17, 2013, the Board issued its first Best Practices Report ("BPR")[15] and noted that "[t]he Code of Conduct applies to all subordinate and independent District agency employees, all Council staff, all District Advisory Neighborhood Commissioners, members of District Boards and Commissions, and all elected officials." BPR at 21. "To make that clear and to allow for all Code provisions to be included in one place," the Board continued, it recommended that it "be given the opportunity to draft a Universal Code of Conduct explicitly applicable to all of the aforementioned categories of employees and officials." *Id.* The Board stated that, in the alternative, "the Council could accomplish the goal of a Universal Code of Conduct by amending the Ethics Act to include an explicit universal coverage provision for the Code of Conduct and by authorizing BEGA to promulgate the Code as a single Rulemaking." *Id.*

Less than three months later, on July 10, 2013, Councilmember Kenyon McDuffie, along with several of his colleagues, introduced the BEGA Amendment Act. Councilmember McDuffie referred to the BPR "as a springboard for the legislation," in a press release issued the same day.[16] Speaking about the bill itself, he said that "[a] central feature . . . is a mandate that BEGA examine the city's Code of Conduct and develop a consolidated universal code applicable to all employees and elected officials. Currently, the Code of Conduct is enshrined in disparate laws and regulations, making it challenging for employees to know whether they are running afoul of the city's ethics standards." *Id.*

For present purposes, the press release may well be more important for what the Councilmember did *not* say in it, that is, that the BEGA Amendment Act would operate to extend the Board's jurisdiction to independent agencies or, for that matter, to extend its jurisdiction at all. Indeed, the long title of the bill reflects the Council's intent to, among other things, "*clarify* that the Code of Conduct applies to the entire District government and its instrumentalities, while excluding

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[14] Subsequent to the issuance of the NOV, the Council's Committee on Government Operations marked-up the bill and voted it out of committee. The short title was changed to the "Comprehensive Code of Conduct and BEGA Amendment Act of 2014", but the provisions of the bill discussed in the text below, with one noted exception, remained the same. The Council is currently scheduled to vote on the emergency version of the legislation, as well as vote after first reading of the permanent version, on April 8, 2014. The permanent version would get a required second reading, followed by another vote, in May.

[15] *See* section 202(b) of the Ethics Act (D.C. Official Code § 1-1162.02(b)) ("The Ethics Board shall conduct a detailed assessment of ethical guidelines and requirements for employees and public officials to include a review of national best practices of government ethics law, and produce ... recommendations for amending the Code of Conduct."). Visit http://www.bega-dc.gov/sites/default/files/documents/BEGA_Best_Practices_Report%20%284-17-2013%29.pdf to access the BPR.

[16] Visit http://www.kenyanmcduffie.com/pressreleasejuly10 for the full text of the press release.

the courts." (Emphasis added.) The provision in the bill that would carry out that purpose is section 2(b), which would amend the Ethics Act by adding a new section 201a to read as follows:

> [The Ethics Act] and the Code of Conduct shall apply to all employees and elected officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council of the District of Columbia, boards and commissions, and Advisory Neighborhood Commissions, but excluding the Courts.

Nothing in that language, expressed or implied, belies the Council's intent to clarify – not extend – the Board's subject matter jurisdiction in any respect.

Further, section 2(c) of the bill would amend section 209 of the Ethics Act (D.C. Official Code § 1-1162.09) to require the Board to, among other things, "submit to the Council for its consideration proposed legislation codifying a comprehensive Code of Conduct applicable to all employees and public officials serving the District of Columbia, its instrumentalities, subordinate and independent agencies, the Council of the District of Columbia, boards and commissions, and Advisory Neighborhood Commissions, but excluding the Courts."

In short, the BEGA Amendment Act does not represent what Respondent Walker maintains is the Council's "attempt to amend BEGA's enabling legislation to bring independent agencies within BEGA's jurisdiction." Walker Motion at 2. The bill, rather, reflects a considered response to the BPR. The Council has taken up such clarifying measures before, as have the legislatures in other jurisdictions, to declare the meaning of the original legislation, here, the Ethics Act. *See* 1A Singer & Singer, *Statutes and Statutory Construction* § 22:31 (7th ed. 2009) ("An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted *soon after* the controversy arose concerning the proper interpretation of the statute." (emphasis added; citations omitted)). This approach "has led courts to logically conclude that an amendment was adopted to make plain what the legislation had been all along from the time of the statute's original enactment." *Id.* (citations omitted); *see also Hill v. Gould*, 555 F.3d 1003, 1007 n.2 (D.C. Cir. 2009) (recognizing that "some courts sometimes treat an amendment that clarifies disputed statutory language as an expression of the original act's meaning" (citations omitted)).[17]

Respondent Walker also seeks to support her jurisdictional argument on two additional grounds. The first is based on section 2(d) of the BEGA Amendment Act, which would amend section 211 of the Ethics Act (D.C. Official Code § 1-1162.11) by, among other things, adding a new paragraph (1-b) to subject District government employees and public officials to the penalties under the Ethics Act, if they knowingly and wilfully falsify, conceal or cover up any material fact, or make a materially false, fictitious, or fraudulent statement, in their dealings with the

[17] The Board's jurisdiction was challenged in an earlier case involving an employee of a subordinate office of the Office of the Chief Financial Officer ("OCFO"). The challenge was based on the contention that OCFO is an independent agency. We rejected the contention, finding, as we do here, that the Ethics Act authorizes the Board to enforce the Code of Conduct against employees in the District's independent agencies.

Board in connection with negotiated dispositions and advice giving, as well as with investigations and enforcement proceedings. She asserts that "[t]he proposed amendment illustrates that BEGA does not have the authority to bring [the] charges" underlying Counts 10, 11, 12, 13, 14, and 15 of the NOV.[18] Walker Motion at 3. However, the penalties provision did not survive committee mark-up of the bill. In any event, the counts in question are based, respectively, on either 6B DCMR § 1803.10 or 6B DCMR § 1804.1(i), which regulations are current parts of the Code of Conduct by virtue of section 101(7)(E) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(E)).[19] The underlying charges therefore are lawful, and the argument accordingly lacks merit.[20]

Respondent Walker's second additional ground is based on the rule of lenity. She contends that "because the [Ethics] Act is penal in nature and ambiguous as to whether it applies to independent agencies or the underlying facts in this matter, it must be construed against the government and in favor of the Respondents [sic]."[21] Walker Motion at 4. Her contention is not persuasive for several reasons.

First, the rule of lenity is not a rule of law. *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952). Rather, the rule is "'an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.'" *Washington v. District of Columbia Dept. of Public Works*, 954 A.2d 945, 948 (D.C. 2008) (quoting 3 Singer, *Sutherland Statutory Construction* § 59.2 (6th ed. 2001)).[22]

Second, even to the extent that the rule of lenity is a rule of statutory construction, it is "a secondary canon of construction, and is to be invoked only where the statutory language, structure, purpose and history leave the intent of the legislation in genuine doubt." *Cullen v. United States,* 886 A.2d 870, 874 (D.C. 2005); *see also Barber v. Thomas*, 560 U.S. 474, 488 (2010) ("rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute" (internal quotation marks and quoted authority omitted)); *United States v. Castleman*, No. 12-1371, slip op. at 15 (U.S. Mar. 26, 2014) (quoting *Barber*).

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[18] The counts are based on allegations that Respondent Walker made material misrepresentations during OGE's formal investigation of this case.

[19] Section 101(7)(E) defines the Code of Conduct as containing, among other things, "Chapter 18 of Title 6B of the District of Columbia Municipal Regulations."

[20] Respondent Oden Tyson makes a somewhat similar argument with respect to Counts 1, 2, 3, 4, 5, and 6, contending that the Board has no jurisdiction to enforce 6B DCMR § 1803.10 and 6B DCMR § 1804.1(i) against her because of her status as an Excepted Service employee. Oden Tyson Motion at 3, 22-25. However, for the reasons discussed below in the text, that argument is equally unavailing.

[21] Respondent Oden Tyson does not rely on the rule of lenity in her motion to dismiss. Therefore, the Board assumes that Respondent Walker's use of the word "Respondents" in the quoted text is a typographical error.

[22] The rule applies to administrative proceedings for civil penalties. *Washington v. District of Columbia Dept. of Public Works*, 954 A.2d at 948; *see also Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1262 (D.C. 1990).

Third, the rule of lenity is not generally employed to resolve jurisdictional issues. *See United States v. Canal Barge Co., Inc.*, 631 F.3d 347, 352 (6th Cir. 2001) (rule "typically invoked only when interpreting the substantive scope of a criminal statute or the severity of penalties that attach to a conviction – not the venue for prosecuting the offense" (citations omitted)). However, inasmuch as Respondent Walker has raised the rule in an effort to buttress her argument, cases such as *Cullen* and *Barber* do suggest, at least, a meaningful analytical context in which to decide the issue here. Looking, then, to the text, legislative history, and purposes of the Ethics Act, as discussed above, there can be no "genuine doubt" that the Council intended the Act to apply to District employees serving in every agency of the government.

In sum, the Ethics Act authorizes the Board, as a function of its subject matter jurisdiction, to enforce the Code of Conduct against OAH and all other independent District government agencies. This conclusion is on all fours with the Council's intent that the Act serve the ultimate goal of "restor[ing] the public's trust in its government"[23] – not just parts of it.

B. The Board's Jurisdiction Over Excepted Service Employees

Both Respondents contend that this Board lacks jurisdiction over them because only the Board of Elections has the authority to enforce the District of Columbia Municipal Regulations ("DCMR") against Excepted Service employees. *See* Walker Motion at 5-6;[24] Oden Tyson Motion at 3. This argument is unpersuasive.

Respondents principally rely on 6B DCMR § 1802(b), or, more accurately, that part of it quoted by Respondent Walker as follows:

> [E]nforcement of this chapter shall, consistent with the regulations set forth herein, be the responsibility of each agency head, except that enforcement for the following persons shall be the responsibility of the D.C. Board of Elections and Ethics:
>
> (b) Employees in the Executive Service, and persons appointed under the authority of D.C. Code §§ 1-610.1 through 1-610.3 (1981).

Walker Motion at 5.

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[23] Committee Report at 2.

[24] Respondent Walker moves to dismiss only Counts 3 – 19 of the NOV on this ground, apparently conceding that the Board has jurisdiction to bring Counts 1 and 2 against her. *See* Walker Motion at 6. Her concession is well-founded. Counts 1 and 2 are based on section 223 of the Ethics Act (D.C. Official Code § 1-1162.23), not any provision of the DCMR, and this Board clearly has jurisdiction to enforce that section. *See* section 401(b) of the Ethics Act (D.C. Official Code § 1-1164.01(b)) (transferring, effective October 1, 2012, matters involving the enforcement of subchapter II, part C, of the Ethics Act, which includes section 223, from the Elections Board "to the Ethics Board").

Several problems flow from Respondents' reliance on the regulation. First, the full text of the lead-in language, up to the word "enforcement," is this – "The provisions of this chapter shall apply to all District employees. In accordance with D.C. Code § 1-619.3(e) (1981), ..." However, D.C. Code § 1-619.03 was recodified in 2001 as D.C. Official Code § 1-618.03, and later repealed by section 501(c)(5) of the Ethics Act.[25] In other words, the statutory authority underlying 6B DCMR § 1802 no longer exits. *See, e.g., Moore v. Gaither*, 767 A.2d 278, 284 (D.C. 2001) ("[A] regulation may properly govern only those matters that the statute authorizes it to govern; statutory coverage thus necessarily limits, and trumps, any purported broader coverage in the regulation.").

Second, the Board of Elections and Ethics ("BOEE"), at least in name, no longer exists either. In passing the Ethics Act, the Council re-established the BOEE as the Board of Elections.[26] The Council also transferred the BOEE's ethics enforcement authority to this Board. *See* section 401(a) of the Ethics Act (D.C. Official Code § 1164.01(a)) ("Subchapter II [the Ethics Act], parts A [District of Columbia Board of Ethics and Government Accountability Establishment] and B [Director of Government Ethics], of this chapter shall apply as of April 27, 2012, except that neither the Ethics Board or the Director of Government Ethics shall receive, investigate, or adjudicate violations of the Code of Conduct, or issue advisory opinions, conduct ethics training, or issue ethics manuals until October 1, 2012."). The Council did not otherwise limit this transfer of authority, nor is there any reason to suppose that it intended to do so. To the contrary, the Council expressed its intent quite clearly in establishing this Board as the "new entity *charged exclusively* with administering and enforcing the new and enhanced laws and code of conduct." Committee Report at 2 (emphasis added). The Council was equally as clear in expressing its overall purpose:

> By centralizing ethics enforcement in an independent agency, the current BOEE will have the opportunity to focus *solely* on elections and campaign finance. Since 1976[,] when the Board of Elections joined with the Office of Campaign Finance to become the BOEE, ethics enforcement and administration has been an afterthought. Although the Board's name was chanced [sic] to reflect its dual duties, it remained elections-centric. *Removing these duties from the Board of Elections* will create both a more efficient elections and ethics administration.

Id. at 21 (emphasis added).

In short, this Board has jurisdiction to enforce the DCMR against Respondents, even though they served in OAH as Excepted Service employees.

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[25] Section 501(c)(5) of the Ethics Act has not been codified.

[26] *See* section 305 of the Ethics Act (D.C. Official Code § 1-1163.05).

C. The *Ex Post Facto* Clause

Both Respondents contend that certain counts in the NOV should be dismissed against them, respectively,[27] because the *Ex Post Facto* Clause of the Constitution[28] prohibits the Board from sanctioning them for any conduct occurring before the effective date of the Ethics Act on April 27, 2012. Walker Motion at 4-5; Oden Tyson Motion at 4. This argument fails for several reasons.

First, the argument is premature, inasmuch as the Board has not yet sanctioned Respondents. Indeed, the Board is enjoined at this point from doing anything other than decide their motions to dismiss. If there has been no punishment, there clearly has been no *ex post facto* punishment. *See, e.g., FEC v. Lance*, 635 F.2d 1132, 1138-39 (5th Cir. 1981) (affirming the dismissal of an *ex post facto* claim as premature when it challenged an ongoing investigation in which no sanctions had yet been imposed); *United States v. Sudeen*, No. CR.A. 02-062, 2002 WL 1897095, at *1 (E.D. La. Aug. 16, 2002) (where alleged fraud conspiracy straddled effective date of Civil Asset Forfeiture Reform Act, court denied defendants' motion to dismiss forfeiture notice as premature, stating it would "make a determination as to what, if any, assets are subject to forfeiture only in the event there [was] a guilty verdict or a plea of guilty or *nolo contendere*");[29] *People v. Russi*, 258 A.D.2d 346, 347, 685 N.Y.S.2d 661, 662 (N.Y. App. Div. 1999) (claim by parolee that amendments to regulations setting forth penalties and dispositions for parole violators, as applied to him, constituted impermissible *ex post facto* penalties held premature, in absence of final determination of his parole status and applicability of amended regulations). If and when the Board does impose sanctions, Respondents may raise any *ex post facto* challenge as part of an appeal to the Superior Court. *See* section 217 of the Ethics Act (D.C. Official Code § 1-1162.17) ("Appeals of any order or fine made by the Ethics Board . . . shall be made to the Superior Court of the District of Columbia.").

Second, even if their argument were not premature, Respondents fail to recognize the import of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Emergency Act of 2012 ("Emergency Ethics Act"), effective January 29, 2012 (D.C. Act 19-298; 59 DCR 683). The Emergency Ethics Act contained the same substantive provisions as the Ethics Act itself, and it operated to bridge the gap until the Ethics Act became effective on April 27, 2012.[30] *See* section 2(c) of Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Emergency Declaration Resolution of 2012, effective January 4, 2012 (Res. 19-348; __ DCR ___) ("The accompanying emergency measure,

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[27] Respondent Walker points to Counts 1 – 8, 13, and 16; Respondent Oden Tyson points to Counts 9 and 10.

[28] The Board will assume that Respondents rely on U.S. Const. art. I, § 10, cl. 1, which prohibits the states from enacting laws with certain retroactive effects. *See Stogner v. California*, 539 U.S. 607, 611-612 (2003) (discussing *Calder v. Bull*, 3 Dall. 386 (1798), as "providing an authoritative account of the scope of the *Ex Post Facto* Clause").

[29] In opposition to defendants' motion, the United States argued, among other things, that "[t]he notice of fraud forfeiture simply provides Defendants notice that the government will seek forfeiture . . . [but] does not, at this stage in the proceedings, impose any punishment, *per se* on Defendants." *Sudeen* at *1.

[30] The Emergency Ethics Act expired on April 28, 2012.

which mirrors [the permanent version of the Ethics Act] as amended on December 20th, is necessary to allow the implementation of the ethics reforms *as soon as possible*." (emphasis added)). Therefore, any of the counts in the NOV that are based on Respondents' conduct occurring after January 29, 2012 – for example, both Counts 9 and 10 against Respondent Oden Tyson – are beyond the reach of their *Ex Post Facto* Clause argument.

Third, Respondents' reliance on our February 7, 2013 Memorandum Opinion in *In Re: Jim Graham*, Case No. AI-002-12, is misplaced. In *Graham*, the issue was whether retroactive application of the Board's *enhanced* authority to impose sanctions under the Ethics Act would violate the *Ex Post Facto* Clause. *See* Memo. Op. at 24-26. Here, on the other hand, Respondents' question the Board's authority to sanction them at all for any pre-Ethics Act conduct giving rise to violations of Chapter 18 of the DCMR.[31] For reasons discussed in Section B, above, the Board clearly has that authority. The BOEE's ethics enforcement authority, which was transferred to this Board by the Ethics Act, included Excepted Service employees, and Respondents concede that they were included in that group. Therefore, the Board has the power to sanction Respondents for any pre-Ethics Act conduct[32] that would have violated Chapter 18 of the DCMR.[33]

D. Procedural Due Process

Respondents contend that the actions of the Board and OGE in this case to date have combined to violate their right to procedural due process.[34] Both of them base this contention on the Board's failure to afford them a hearing, prior to the issuance of the NOV, to enable them to present evidence and legal argument. *See* Walker Motion at 6; Oden Tyson Motion at 8. Respondent Oden Tyson also raises two other arguments of her own. The first is based on the fact that this case was initiated after separate investigations by the Office of the Inspector General ("OIG") and the law firm of Leftwich & Ludaway. *See* Oden Tyson Motion at 7. The second is based on alleged *ex parte* communications between OGE and the Board. *Id.* at 8. Each argument lacks merit.

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[31] With the exception of Counts 1 and 2 against Respondent Walker, all of the other counts identified by both Respondents for purposes of their *Ex Post Facto* Clause argument are based on alleged violations of Chapter 18 of the DCMR.

[32] The Board notes that all of Respondents' pre-Ethics Act conduct, as alleged in the NOV, occurred within the applicable five-year statute of limitations. *See* section 221(d) of the Ethics Act (D.C. Official Code § 1-1162-21(d)) ("All actions of the Ethics Board ... to enforce the provisions of [the Ethics Act] must be initiated within 5 years of the discovery of the alleged violation.").

[33] The Board declines, at this time, to address whether the imposition of enhanced sanctions would present a separate *ex post facto* problem in this case. Respondents have not raised the issue, and, as discussed above in the text, their entire *Ex Post Facto* Clause argument is otherwise premature.

[34] Constitutional protections, applicable to the states through the Fourteenth Amendment, although not directly applicable to the District of Columbia, extend to the District through the Due Process Clause of the Fifth Amendment. *See Orange v. Bd. of Elections and Ethics,* 629 A.2d 575, 579 n.5 (D.C. 1993) (citing *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954)).

Both Respondents point to the Board's failure to hold a pre-NOV hearing as the basis for their claim of due process violation. However, they fail to identify any provision in either the Ethics Act or the Board's regulations that would entitle them to such a hearing. Their failure is understandable because there is no such provision. Furthermore, Respondents fail to cite any other authority standing for the proposition that due process requires a pre-charge hearing – much less, as Respondent Walker contends[35] – an adversarial hearing. In fact, the due process sections of Respondents' motions contain no citations to decisional or secondary source authority at all.

There are several other reasons to reject Respondents' argument. In upholding our decision in *Graham*, the Superior Court held that "BEGA's actions did not violate the D.C. Administrative Procedure Act ... or the Due Process Clause of the U.S. Constitution." *Jim Graham v. District of Columbia*, Case No. CA 001484 P (MPA), Memo. Op. at 1 (D.C. Sup. Ct. July 3, 2013). More specifically, the court found that "[t]he statutory requirements that the Board find 'reason to believe' a violation occurred[36] protects potential subjects of investigations from the damage and costs associated with unnecessary formal investigations, and the Board's procedures for formal investigations provide a means for subjects to clear themselves reasonably promptly in the generality of cases." *Id.* at 25. Furthermore, looking ahead to any contested hearing in this case, Respondents would enjoy a full range of due process protections. *See, e.g., Kropat v. F.A.A.*, 162 F.3d 129, 132-33 (D.C. Cir. 1998) (holding that Kropat received due process, where "[his administrative] hearing was in front of a neutral arbitrator; and he had the right to be represented by counsel, the right of cross-examination, and the right to present evidence and witnesses on his own behalf").

Respondent Oden Tyson's first additional due process argument is that "[d]espite two separate investigations by the OIG and [Leftwich & Ludaway], BEGA still insists upon moving forward with an investigation against Respondents [sic]."[37] Oden Tyson Motion at 7. This argument is unpersuasive for two reasons. First, neither OIG nor Leftwich & Ludaway are charged with enforcing the District's ethics laws. As discussed above, the Ethics Act authorizes this Board – and this Board alone – with that responsibility. Second, successive enforcement actions taken by the same agency seeking different forms of relief do not offend due process. *See Blinder, Robinson & Co., Inc. v. S.E.C.*, 837 F.2d 1099, 1106 (D.C. Cir. 1988) (holding that S.E.C. did not violate due process when it initiated administrative proceeding against broker dealer after it had obtained injunctive relief in court).

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[35] Walker Motion at 6 ("This request was denied and therefore the Notice of Violation was issued without any adversarial proceeding or presentation of Respondent Walker's evidence and defenses in violation of Respondent Walker's due process rights.").

[36] *See* section 212(b) of the Ethics Act (D.C. Official Code § 1-1162.12(b)) ("If during or after the preliminary investigation, the Director of Government Ethics has reason to believe that a violation of the Code of Conduct or of this subchapter may have occurred, the Director of Government Ethics shall present evidence of the violation to the Ethics Board. Upon presentation of evidence, the Ethics Board may authorize a formal investigation and the issuance of subpoenas if it finds reason to believe a violation has occurred.").

[37] Respondent Walker does not raise this argument in her motion to dismiss. Therefore, the Board assumes that Respondent Oden Tyson's use of the word "Respondents" in the quoted text is a typographical error.

Respondent Oden Tyson's second additional argument is that "as the investigation and possible settlement discussions occurred, BEGA staff remained in communication with the BEGA Board and upon information and belief provided the Board, the body designated to decide the fate of Respondent Oden Tyson, with information pertaining to the investigation." Oden Tyson Motion at 8. Continuing, she maintains that "[t]his *ex parte* communication to the same body that will serve as decision-maker at the time of a hearing is wholly inappropriate and deprives [her of] meaningful due process and the ability of an impartial hearing." *Id.*

This argument was put to rest in *Withrow v. Larkin*, 421 U.S. 35 (1975), where the Court held that a medical examining board could first conduct an investigatory hearing and then the same board could hear the contested case in order to impose sanctions. In so holding, the Court observed:

> It is . . . very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the [federal] Administrative Procedure Act, and it does not violate due process of law.

Id. at 56; *see also Richardson v. Perales*, 402 U.S. 389, 410 (1971) ("[W]e [are not] persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a government structure of great and growing complexity." (quoted by *Withrow*, 421 U.S. at 49-50)); *Blinder, Robinson & Co., Inc.*, 837 F.2d at 1106 (stating that *Withrow* "stands as a formidable (if not insurmountable) barrier" to Respondent Oden Tyson's type of argument).

The *Withrow* Court also made it clear what a party looking to overcome that barrier would have to do. The party "must overcome a presumption of honesty and integrity in those serving as adjudicators; and [the party] must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 421 U.S. at 47; *see also Citizens Ass'n of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 359 A.2d 295, 297-98 (D.C. 1976) (quoting *Withrow*); *Blinder, Robinson & Co., Inc.*, 837 F.2d at 1106 n.7 ("At the agency level, our law assumes integrity in individual members, and requires direct evidence of bias, or some other personal interest, to overcome that assumption.").

Here, Respondent Oden Tyson – and, for that matter, Respondent Walker – has utterly failed to present any evidence of "actual bias or prejudgment" on the part of any member of this Board. As a result, she stands in no better shoes than the respondents in *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948), where the Court rejected their claim of bias,[38] saying "the fact that the Commission had entertained [the] views [of some of its members] as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably

[38] The *Withrow* Court, 421 U.S. at 47, described *F.T.C. v. Cement Institute* as having presented a "very similar" claim of bias.

closed on the subject of the respondents' basing point practices." *Id.* at 701; *cf. In re Zdravkovich*, 634 F.3d 574, 579 (D.C. Cir. 2011) ("This is not a case in which 'special facts and circumstances [demonstrate] that the risk of unfairness [was] intolerably high.' [quoting *Withrow*, 421 U.S. at 58] To the contrary, there are no such facts or circumstances here.").

In sum, while Respondents may view the proceedings in this case as being unfair, in one sense of the word, they unquestionably have received fair treatment throughout for due process purposes.

IV. Conclusion

Based on the foregoing reasons, it is the decision of the Board to DENY each Respondent's motion to dismiss. Appropriate Orders accompany this Memorandum Opinion.

Robert J. Spagnoletti
Chairman, Board of Ethics and Government Accountability

4/3/14
Date

Deborah A. Lathen
Member, Board of Ethics and Government Accountability

4/3/14
Date

Laura M. Richards
Member, Board of Ethics and Government Accountability

4/3/14
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

IN RE: Mary Oates Walker and Kiyo Oden Tyson, **Respondents**	**CASE No.: 1060-001**

ORDER

THIS MATTER comes on upon the motion of Respondent Mary Oates Walker to dismiss the Notice of Violation filed against her in this case; and

IT APPEARING, for the reasons stated in the accompanying Memorandum Opinion, that the motion is without merit; it is, therefore

ORDERED that Respondent Walker's motion to dismiss the Notice of Violation be, and hereby is, DENIED.

Robert J. Spagnoletti
Chair, Board of Ethics and Government Accountability

4/3/14
Date

Deborah A. Lathen
Member, Board of Ethics and Government Accountability

4/3/14
Date

Laura M. Richards
Member, Board of Ethics and Government Accountability

4/3/14
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

IN RE: Mary Oates Walker and Kiyo Oden Tyson, **Respondents**	**CASE No.: 1060-001**

ORDER

THIS MATTER comes on upon the motion of Respondent Kiyo Oden Tyson to dismiss the Notice of Violation filed against her in this case; and

IT APPEARING, for the reasons stated in the accompanying Memorandum Opinion, that the motion is without merit; it is, therefore

ORDERED that Respondent Oden Tyson's motion to dismiss the Notice of Violation be, and hereby is, DENIED.

Robert J. Spagnoletti
Chair, Board of Ethics and Government Accountability

4/3/14
Date

Deborah A. Lathen
Member, Board of Ethics and Government Accountability

4/13/14
Date

Laura M. Richards
Member, Board of Ethics and Government Accountability

4/3/14
Date