

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



IN RE: JACK EVANS

Respondent

CASE No.: 20-0004F

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On October 28, 2019, Alan Roth (the “Complainant”) submitted a formal complaint (“Complaint”) to the Office of Government Ethics (“OGE”) alleging that former Councilmember Jack Evans (the “Respondent”) violated the District’s Code of Conduct by voting on two proposed resolutions and their related amendments that related to an investigation into allegations of misconduct against the former Councilmember.¹

After reviewing the Complaint, conducting an investigation into this matter, and considering applicable District statutes and rules, the Board dismisses 20-0004F In re: Jack Evans because there is insufficient evidence to determine that Respondent failed to maintain a high level of ethical conduct when performing his official duties by voting on the proposed resolutions at issue in this matter.

¹ When the Complainant filed his complaint, he issued a press release announcing the Complaint. It was also contemporaneously published on various social media websites. *See* <https://twitter.com/AndrewGiambrone/status/1189973648133763072/photo/1>. Last accessed March 3, 2020.

II. SUMMARY OF INVESTIGATION

OGE reviewed the Complaint according to our standard complaint intake and processing procedures. Given the absence of a factual dispute, the Complaint relied on legal argument in support of the allegation that the Respondent's votes violated the District's Code of Conduct. OGE then reviewed the D.C. Council's public Legislative Information Management System (LIMS) to confirm the voting history alleged and the Council Procedural Rules for Period 23. OGE also confirmed with the D.C. Council's Office of General Counsel ("OGC") that Councilmembers do not receive any additional compensation for service on a committee or chair positions, to confirm that that the Respondent did not have any apparent direct financial conflicts of interest regarding the votes at issue.

In his Complaint, the Complainant argues that the Respondent's participation in the deliberations and subsequent votes on the resolutions at issue violated Section 101(7)(B) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(B)) of the District's Code of Conduct. Section 101(7)(B) incorporates sections 1-618.01 and 1-618.02 of the Merit Personnel Act² ("MPA"), which relate to employee conduct, into the definition of the District's Code of Conduct. Specifically, the Complainant alleges that by participating and voting on the resolutions at issue, the Respondent failed to maintain a high level of ethical conduct and adversely affected the confidence of the public in the integrity of the District government in violation of §1-618.01(a) of the MPA.

On December 11, 2019, OGE received a letter from Council Chairman Phil Mendelson regarding "Whether D.C. Official Code §1-618.01(a) can be read to prohibit a Councilmember from voting on a matter that will likely impact a non-financial personal interest."

On December 23, 2019, the Complainant submitted an additional 17-page supplemental brief "intended to serve as a legal memorandum in support of the authority of [BEGA] to adjudicate and enforce" D.C. Official Code § 1-618.01(a). The Complainant's supplemental brief also argued that the standards set forth in section 1801(a) are not constitutionally overbroad or vague.³

OGE also reviewed the Code of Conduct, relevant District Statutes, Council Rules, and prior Board decisions in determining the factual background and findings described below.

² District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*)

³ At OGE's November 21, 2019 Performance Oversight Roundtable Hearing, OGE's former Director referenced potential constitutional issues that may be raised by the Complaint. OGE investigates and imposes administrative civil penalties for employee violations of the District's Code of Conduct. In light of the evidence presented and applicable legal standards at issue here, the Board did not need to consider whether this provision of the Code of Conduct is constitutionally overbroad or vague.

III. FACTUAL BACKGROUND

On July 9, 2019, Chairman Mendelson introduced the “Council Period 23 Rules and Investigation Authority Amendment Resolution of 2019,” or PR-23-434. This resolution authorized, among other things, a law firm to conduct an investigation into “whether, from January 1, 2014, to the present, the official and outside activities of Council Member Jack Evans relating to NSE Consulting LLC...or any other entity by which Council Member Evans was employed or for which he consulted, violated the Code of Conduct” PR-23-434 also proposed restructuring the Council’s committees and stripping the Respondent of his chairmanship of the Finance and Revenue Committee.⁴ The Respondent was present for, and publicly voted against, the resolution and the proposed amendments.

On September 17, 2019, the Council voted on the “Subpoena Enforcement Resolution of 2019,” or PR-23-449. This resolution would authorize Council’s OGC to file petitions in D.C. Superior Court to compel witnesses who have refused to obey subpoenas issued by outside counsel as part of their investigation of the Respondent to cooperate under penalty of contempt. The Respondent was present for this legislative session, and publicly voted against the resolution.

The Complainant does not dispute that the Respondent was permitted by the “Rules of Organization and Procedure for the Council of the District of Columbia” (“Procedural Rules”) to vote on matters relating to the proposed investigation of ethics allegations against himself, nor does he allege that the District’s Official Code, nor Council’s effective Procedural Rules, required the Respondent to recuse himself from either vote. OGE was not presented with any evidence suggesting that the Respondent’s former colleagues raised concerns or objections to his votes on the resolutions at issue.⁵

IV. DISCUSSION

A. The Standard of Conduct set forth in the Merit Personnel Act Applies to the Respondent’s Conduct.

OGE’s jurisdiction over the conduct of District employees and public officials is set forth in the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 (“Ethics Act”). The District’s Code of Conduct establishes the ethical

⁴ District Council Members do not receive additional compensation for committee chairmanships or memberships. So, there is no dispute as to whether the Respondent had a financial interest in the votes at issue.

⁵ It appears that the “idea of recusal — that the lawmaker should decline to act on a matter that would directly affect him — was never broached by Evans or his colleagues on the D.C. Council” “Why a D.C. lawmaker under investigation votes on his own probe and discipline,” by Fenit Nirappil, published on September 18, 2019). https://www.washingtonpost.com/local/dc-politics/why-a-dc-lawmaker-under-investigation-votes-on-his-own-probe-and-discipline/2019/09/18/a2e3051a-da35-11e9-ac63-3016711543fe_story.html

standards for government employees and requires employees to act ethically while engaging in their official duties.⁶

In promulgating the Act, the Council subjected themselves to the following specific provisions of the Code of Conduct. For the Council, the Code of Conduct is defined as D.C. Official Code § 1-1161.01(7):

- (A) For members and employees of the Council, the Code of Official Conduct of the Council of the District of Columbia, as adopted by the Council;
- (B) Sections 1-618.01 through 1-618.02; (*MPA*)
- (C) Chapter 7 of Title 2 [§ 2-701 et seq.];(*governs mailings and correspondence*)
- (D) Section 2-354.16; (*addresses accepting commissions or contingency fees when negotiating contracts*)

The Complaint alleges that Respondent violated section 1-1161.01(7)(B), which incorporates the standard of conduct for employees set forth in Sections 1-618.01(a). The full text of which is as follows:

Each employee, member of a board or commission, or a public official of the District government must at all times maintain a high level of ethical conduct in connection with the performance of official duties, and shall refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government.⁷

The Complainant is correct, the MPA’s standard of conduct applies to the Respondent’s conduct. Moreover, the Council’s own “Rules of Organization and Procedure for the Council of the District of Columbia” (Procedural Rules), which also apply to the Respondent’s conduct, adopts the standard of conduct set forth in section 1-618.01(a) of the MPA. Specifically, Procedural Rule 202(a), states that:

Councilmembers and staff shall *maintain a high level of ethical conduct in connection with the performance of their official duties and shall refrain from taking, ordering, or participating in any official action that would adversely affect the confidence of the public in the integrity of the District government.* In connection with the performance of official duties, Councilmembers and staff shall strive to act solely in the public interest and not for any personal gain or take an official action on a matter as to which they have a conflict of interest created by a *personal, family, client, or business interest, avoiding*

⁶See D.C. Official Code § 1-1161.01(7) (Defining statutes and rules that comprise the Code of Conduct).

⁷ D.C. Official Code §1-618.01(a)

both actual and perceived conflicts of interest and preferential treatment. (emphasis added).

The Council's Procedural Rules go beyond the MPA standard of conduct by additionally directing Councilmembers to avoid actual and perceived personal and financial interests when taking official action.

Although BEGA agrees that it has jurisdiction over and authority to sanction the Respondent's conduct with respect to his votes at issue here, the Board must reject the Complainant's contention that BEGA must "step up and make clear that the Council's failure to enact abstention or recusal requirements as part of its own procedural rules does not exempt Councilmembers from abstaining or recusing themselves when such abstentions or recusals are otherwise required by the *statutory* Code of Conduct."⁸ In addition, the Complaint argues that "[i]t is well past time for BEGA, as an independent agency, to fill the void left by the Council's own deafening silence here on the issues of abstention and recusal."⁹

The Board is attuned to the concerns that compel the Complainant to ask BEGA to develop a bright line rule with respect to when a Councilmember must abstain or recuse, however, we cannot accede to this request. The issue of the Respondent's participation in votes relating to his own alleged misconduct has been covered by media reports and addressed by the Council's Chair, Phil Mendelson. When asked why the Respondent is allowed to vote on such matters, the Chair stated, "It has always been the practice of the council, modeled after Congress."¹⁰ Indeed, "voting on matters before the House is among the most fundamental of a Member's representational duties, and historical precedent has taken the position that there is no authority to deprive a Member of the right to vote."¹¹ "Thus, as a general matter, the decision on whether to refrain from voting on a particular matter rests with individual."¹²

Based on the allegations in the Complaint regarding the conduct at issue here, the Board is able to determine whether the Respondent's conduct with regard to the votes at issue violates the Code of Conduct without establishing a bright line rule that would mandate abstention or recusal from voting whenever a Member has a personal interest in a vote relating to their own discipline.

⁸ Complainant's December 23, 2019 supplemental submission to OGE at p. 4.

⁹ *Id.* at p. 5.

¹⁰ "Maybe Jack Evans Wasn't Supposed To Vote On His Own Punishment After All," Rachel Kurzius, published on Nov. 12, 2019 <https://dcist.com/story/19/11/12/maybe-jack-evans-wasnt-supposed-to-vote-on-his-own-punishment-after-all/>

¹¹ House Committee on Ethics, "Member Voting and Other Official Activities." <https://ethics.house.gov/outside-employment-income/member-voting-and-other-official-activities#empfnote106> (last visited May 21, 2020).

¹² *Id.*

As the Council Chair also stated, “If the council is going to discipline a member it should be such a clear majority that the member’s vote does not affect the outcome. Also, the assumption behind the question is that the member is guilty of the alleged violation, but it is conceivable that it may not always be the case, and the member should be able to defend him/herself by voting against the discipline.”¹³ The Board also notes that the Respondent himself has previously voted in favor of his own reprimand with respect to emails sent relating to his outside business activities while using Council resources.¹⁴ It is not clear that every time a member votes on matters relating to their own misconduct, that the vote would clearly violate the statutory Code of Conduct. However, the Board concurs with the Complainant’s belief that general ethical principles and historical practice dictate that there are instances when a Councilmember should abstain or recuse from voting on a particular matter.

In this case, the Board is tasked with determining whether the Respondent violated the Code of Conduct by voting on resolutions relating to investigation of his own alleged ethical misconduct. Thus, considering the allegations about the facts in the matter, the Board must determine whether the Respondent’s conduct failed to maintain a high level of ethical conduct and whether his conduct adversely affected the confidence of the public in the District’s integrity. This determination does not require BEGA to establish standards for when Councilmembers must abstain or recuse from voting.

B. The Board Does Not Find That the Respondent’s Votes on the Resolutions at Issue Violated the Code of Conduct.

The Complaint alleges that by deliberating on and voting on resolutions relating to investigation into his own alleged ethical misconduct, the Respondent was “brazen” in his disregard of an “obvious” Code of Conduct violation, and thus failed to maintain a high level of ethical conduct. The Complaint further asserts that the “stench” surrounding both the votes at issue “as well as around the Council’s own legislative process – surely undermines the public’s confidence in the integrity of the District Government.” In sum, the Complaint argues that the Respondent’s votes in light of his own obvious personal interest objectively failed to maintain a high level of ethical conduct and unquestionably undermined the public’s confidence in the integrity of the District government and thus, the Respondent violated the Code of Conduct.

Although the Complaint does cite to a Washington Post article that refers to “critics” of the Respondent’s votes and quotes citizens critiquing the Respondent’s integrity for participating in the votes at issue,¹⁵ the allegation that the Respondent failed to maintain a high level of ethical

¹³ “Maybe Jack Evans Wasn’t Supposed To Vote On His Own Punishment After All,” Rachel Kurzius, *supra* at Note 10.

¹⁴ D.C. Council Resolution 23-49, March 19, 2019.

¹⁵ See “Why a D.C. lawmaker under investigation votes on his own probe and discipline,” by Fenit Nirappil, published on September 18, 2019), *supra* at Note 5.

conduct is mainly supported by the Complainant's characterization of the Respondent's conduct and stated dissatisfaction with the Council's rules on abstention and recusal. The Complainant asks the Board to find that because the Respondent voted on a matter in which he had a personal interest, even if that vote was permissible, he undoubtedly failed to maintain a high level of ethical conduct.

Unfortunately, adopting the Complainant's position would require the Board to ignore relevant facts related to the votes at issue here that suggests the Respondent's vote was permissible under current standards of ethical conduct. The Respondent's vote was permissible under the Council's Code of Conduct and the Council's Procedural Rules, which dictate that Councilmembers should refrain from voting on a matter in which they have a personal or business interest.¹⁶ Most significantly, Councilmembers are sometimes called upon to consider legislation that would have a direct effect on their personal, non-financial interests and are not expected to abstain or recuse themselves. For example, Councilmembers can vote on resolutions appointing themselves to other bodies or vote on resolutions regarding committee chairmanships and memberships. Furthermore, past Councilmembers have voted on matters related to their own alleged misconduct.¹⁷ Moreover, the Respondent's personal interest in this matter was so evident to his peers and the public, that they could assess his deliberations and votes with full knowledge of his personal interests. His peers were not concerned enough about the Respondent's personal interest to demand that he abstain or recuse himself or even raise an objection to his participation. In consideration of the totality of these additional facts related to the Respondent's vote, the Board does not find that the Respondent's vote failed to maintain a high level of ethical conduct, and thus violated the Code of Conduct.

Although the Board does not find that that Respondent's permissible votes failed to maintain a high level of ethical conduct, the Board will also address whether the Respondent's votes "surely" undermined the confidence of the public in the integrity of the District government. OGE concedes that it would be difficult to assess whether and to what degree the public's confidence was undermined by the Respondent's permissible votes. However, BEGA has

¹⁶ In order to implement the standard of conduct set forth in the MPA, the Mayor and the Council have authority to promulgate more specific regulations to address misconduct. See D.C. Official Code §1-618.01(b). The legislative history of the Ethics Act states that this provision of the Merit Personnel Act was never intended to be used to sanction public officials or employees, rather it was intended to establish aspirational standards for ethical self-regulation of District employees. See Committee Report on Bill 19-511, p. 9, December 5, 2011. The Committee report acknowledges that employees (and now public officials) must: "at all times maintain a high level of ethical conduct and refrain from adversely affecting the public trust. But there are no penalties for violating this policy." *Id.*

¹⁷ See "Why a D.C. lawmaker under investigation votes on his own probe and discipline," by Fenit Nirappil, published on September 18, 2019), *supra* at Note 5 (noting that former councilmembers Jim Graham voted against his punishments relating to ethical misconduct.).

previously addressed this question in *In re: Jim Graham* (“Graham”).¹⁸ In *Graham*, BEGA concluded that the Councilmember’s conduct adversely undermined the public’s confidence in the integrity of the District government in violation of the Code of Conduct.¹⁹ However, in that matter, there was ample evidence that supported a finding that the Councilmember had clearly violated other distinct provisions of the Code of Conduct. In this matter, it is not clear that the Respondent’s permissible votes objectively violated the Code of Conduct.

V. CONCLUSION

Although the Complainant’s argument that the Respondent *should* have recused himself and refrained from voting on the matters at issue is compelling, the Board is unable to find that Respondent’s votes objectively violated the statutory standard of conduct set forth in the MPA. However, the Board is very sympathetic to the Complainant’s frustration with the Council’s rules on abstention and recusal. The Board is concerned that the Council’s current Procedural Rules and practice of allowing members to vote on their own disciplinary matters may ultimately undermine the public’s confidence in the Council’s integrity. The Board has urged the Council to pass a proposed Comprehensive Code of Conduct (“CCC”), which would expand the definition of the statutory conflicts of interest restrictions to include both financial and personal interests. Thus, the Board would expect that the passage of the CCC would further encourage members to recuse on certain votes in which a member has a personal interest because that vote could also violate the revised statutory conflicts of interest provisions.

After considering the totality of the circumstances, including facts that demonstrate that the Respondent’s vote was permissible and that members are sometimes called upon to vote upon matters in which they have a clear personal interest, the standard of conduct set forth in the MPA, and OGE’s precedent, the Board does not conclude that the Respondent failed to maintain a high level of ethical conduct or adversely affected public confidence in the integrity of the District government by voting in accordance with Council Rules.

Accordingly, the Board dismisses the Complaint in matter 20-0004-F *In re: Jack Evans*. An Order dismissing this matter accompanies this Memorandum Opinion.

¹⁸ See *In re: Jim Graham*, No: AI-002-12, January 13, 2014.

https://bega.dc.gov/sites/bega/files/publication/attachments/Jim_Graham_-_Memorandum_Opinion.pdf

¹⁹ Although the Board concluded that Councilmember violated the Code of Conduct, it was unable to sanction the conduct due to *ex post facto* principles.