

Sayers, Margery

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Sent: Monday, February 7, 2022 6:58 AM
To: CouncilMail
Cc: Kuc, Gary
Subject: Withdraw CR4-2022 Keith Ohlinger - Citizens' Election Fund Commission

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Dear Council,

As you are aware, in recent weeks there has been great discussion over the legislative intent regarding the Citizens' Election Fund and when a candidate should receive matching funds. It is very disappointing that a similar analysis has not been applied regarding Keith Ohlinger's ineligibility for appointment to the Citizens' Election Fund Commission.

At the outset, let me be clear, this objection is not a personal one about Mr. Ohlinger. Before the pandemic, I met Mr. Ohlinger on several occasions generally at environmental events. He seems very knowledgeable and friendly. When I first reviewed his resume on this resolution, my reaction was "Wow, that is an impressive list of accomplishments " At this time, I have no other reason to object to Mr. Ohlinger's appointment to the Commission other than based on principle and rule of law: he was a candidate in the prior election cycle. When the current election cycle becomes the previous election cycle on January 1, 2023, Mr. Ohlinger will then be eligible for appointment to the Commission.

Section 10.310(c) lays out the qualifications for membership on the Commission:

(c) Qualifications.

- (1) Each member of the Commission shall be a resident of the County.
- (2) A member of the Commission shall not be a candidate for public office during the previous, current, or next election cycle.
- (3) A member shall not be a lobbyist registered with the County.
- (4) A member shall not be the chair or treasurer for an open campaign account.
- (5) A member shall be a registered voter.

Other than (c)(2), all of the criteria are just in the present tense. However, in clear contrast (c)(2) is a past, present, and future prohibition for three election cycles or twelve years. The Maryland Court of Appeals has said that in interpreting legislation, the legislative body "is presumed to have meant what is said and said what it meant" Therefore, when it said three election cycles, the prior County Council meant three election cycles.

Compare the language of Section 10.310 with that for the Ethics Commission in Section 22.203:

(b) In addition to the qualifications set forth for board and commission members generally in title 6, subtitle 3 of this Code, members of the Ethics Commission shall not:

- (1) * * *
- (2) Hold or be a candidate for any elected or appointed Office of the United States, the State, any political subdivision or incorporated municipality of the State, or of any political party

There the prohibition is only a present one, In other words, Ethics Commission members can be former candidates or

former elected officials and may be candidates as soon as they are no longer members of the Commission. This interpretation is further demonstrated by examining the language in Baltimore County's Fair Election Fund Commission legislation. Section 3-3-2502. MEMBERSHIP (c) which deleted the references to "previous" and "or next" election cycle regarding its commission members.

<https://resources.baltimorecountymd.gov/Documents/CountyCouncil/bills%202021/b10221.pdf>

The definitions in the Howard County Citizens' Election Fund Subtitle do not address the Commission's membership criteria, but instead are focused on the candidates participating in the fund. Thus, one must look to the definitions in the State Election Code. In Section 1-101 (l) Candidate. -- is defined:

- (1) "Candidate" means an individual who files a certificate of candidacy for a public or party office.
- (2) "Candidate" includes:
 - (i) an incumbent judge of the Court of Appeals or Court of Special Appeals at an election for continuance in office; and
 - (ii) an individual, prior to that individual filing a certificate of candidacy, if a campaign finance entity has been established on behalf of that individual.

Mr. Ohlinger, clearly met the definition by filing a certificate of candidacy. Furthermore, he was a candidate because he had a campaign finance entity.

However, in justifying the eligibility of Mr. Ohlinger's appointment, the Office of Law, rather than looking to the definition of "candidate" inexplicably chose to hang its conclusion on a multi-flawed application of Section 5-504(a) of the Election Code:

Our view that Mr. Ohlinger is not precluded from serving on the Citizens Election Fund Commission is based on Section 5-504(a) of the Election Law Article of the Maryland Code, which states, in part, that "[i]f a certificate of withdrawal is filed...the certificate of candidacy to which the certificate of withdrawal relates is void." Therefore, although Mr. Ohlinger filed a certificate of candidacy during the current election cycle as defined by the County Code, that certificate of candidacy was voided by operation of State law, which supersedes County law, when he subsequently filed a certificate of withdrawal.

First, as stated above, an individual becomes a "candidate" before the certificate of candidacy is filed. Second, the Office of Law misinterpreted the effect of withdrawal; it voids the certificate of candidacy but not the existence of having been a candidate. Third, it is factually incorrect to state that "Mr. Ohlinger filed a certificate of candidacy during the current election cycle." It was the previous election cycle and not the current one which is at issue. Fourth, it is not clear what "as defined by the County Code" even means. The County Code does not define "election cycle" but defers to State law: "(m) Election cycle has the meaning stated in Title 1, subtitle 1 of the Election Law article of the Maryland Code." Section 10.300(m).

Lastly, as there is nothing in the County Code on the issues what being a "candidate" means for purposes of Commission membership, there is nothing for the State law to supersede. Conversely, Howard County was given authority to regulate public financing in Section 13-505 of the Election Code. This section does not mention a local commission and thus does not specify requirements for its membership. The county's authority was further granted in COMAR Section 33.13.14.05. County Responsibilities. The State law is generally silent on the need for a local commission. The law is more concerned with the operation of the CEF than its administration. In broad terms it states that the county shall "provide the funding and staff necessary for the operation, administration, and auditing of the system of public campaign financing." Section 13-505(a)(2)(ii). To the extent that the Office of Law is making a preemption argument, it is doing so by using a State law out of context. Implied preemption requires that the State occupy the field; instead, the State law is silent on Commission membership criteria.

Furthermore, Section 907 (a)(2) of the Howard County Charter states that the County Council shall "Establish a Citizens' Election Fund Commission consisting of five County residents appointed by the council and two County residents appointed by the County Executive, and provide for the qualifications, terms, and officers of the commission. . ." The

qualifications of the Commission members are solely as specified by the Howard County Code.

All of this is in comparison to the membership for the members of the Alcoholic Beverage Hearing Board. As stated in CR22-2022, "Section 23-205 of the Alcoholic Beverages Article of the Annotated Code of Maryland specifies the requirements for the appointment of members to the Alcoholic Beverage Hearing Board including the term which Section 23-205(e) states is 5 years." Thus, the State law has preempted the County regarding the criteria for the members of the Alcoholic Beverage Hearing Board. There is no similar State provision for the Citizens' Election Fund Commission. Therefore, there can be no preemption for the Commission's membership criteria.

The Office of Law's flawed conclusion is further apparent when Section 13-304 of the Election Code is applied:

(e) Continuing requirement for candidates. -- A campaign finance report prescribed by this subtitle for the campaign finance entity of a candidate is required whether or not:

- (1) the candidate files a certificate of candidacy;
- (2) the candidate withdraws, declines a nomination, or otherwise ceases to be a candidate;
- (3) the candidate's name appears on the primary ballot; or
- (4) the candidate is successful in the election.

In specifying the continuing obligation for candidates, the Code makes clear distinctions between being a "candidate" and a "certificate of candidacy." A CANDIDATE is required to file the campaign finance reports regardless of whether a certificate is ever filed. A CANDIDATE has a continuing obligation after he withdraws or otherwise ceases to be a CANDIDATE, and whether or not the CANDIDATE'S name appears on the primary ballot. In fact, Mr. Ohlinger maintained his campaign finance entity for nearly one month after withdrawing his certificate of candidacy on 08/29/2017. Friends of Keith Ohlinger was not closed until 9/24/2017. <https://campaignfinance.maryland.gov/Public/ShowReview?memberID=5308712%20&memVersID=3%20&cTypeCode=01> Thus, in clear contrast to the Office of Law's erroneous application of Section 5-504, Mr. Ohlinger had a continuing requirement as a CANDIDATE under State law after he withdrew as a Council candidate. Therefore, he was a candidate for purposes of the prohibition on Commission membership AFTER he withdrew.

Moreover, it should not matter that Mr. Ohlinger withdrew before the primary. It should not matter that Mr. Ohlinger raised no funds. It should not matter that Mr. Ohlinger did not have campaign expenditures. Being a candidate does not mean raising funds, expending money, door knocking, sending out mailers, ordering signs and bumper stickers. Being a candidate means having a campaign finance entity and/or filing for office. Mr. Ohlinger met both of these requirements. To allow withdrawal as the Office of Law argues would gut the 12-year prohibition. Moreover, what would stop a current member of the Commission from becoming a candidate? Would it be permissible so long as they withdrew before the primary? Similarly, the Commission members have committed to not becoming candidates in the next election cycle. Would it be permissible if they form a campaign finance entity and file a certificate of candidacy so long as they withdraw before the primary?

As you hopefully vote to correct the "August" technicality for the CEF, please do not create another technicality where there is none. Thus, I urge that at this time the nomination of Keith Ohlinger to the Citizens' Election Fund Commission be withdrawn. In less than eleven months, on January 1, 2023 he will be eligible for membership on the Commission.

However, if the Council persists in approving this appointment, I am considering my options to adjudicate this issue under the County's Administrative Procedure Act.

Sincerely,

Joel Hurewitz

