

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

**COMPLAINT REGARDING
WARD 2 COUNCILMEMBER JACK EVANS**

Statement of Facts

1. Jack Evans (Evans) is a member of the District of Columbia Council (the Council) and has represented Ward 2 on the Council since 1991.
2. On Tuesday, July 9, 2019, the Council met in open session to conduct the Fourteenth Legislative Meeting of Council Period 23, during which it considered Proposed Resolution (PR) 23-434, “Council Period 23 Rules and Investigation Authority Amendment Resolution of 2019.” PR23-434 provided, among other things, for the Chairman of the Council to appoint the law firm of O’Melveny & Myers to investigate “whether, from January 1, 2014 to the present, the official and outside activities of Councilmember Jack Evans relating to NSE Consulting LLC (including the establishment of that entity), any client of NSE Consulting LLC, or any other entity by which Councilmember Evans was employed or for which he consulted, violated the Code of Conduct as that term is defined in section 101(7) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Act of 2011, effective 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(7)) [hereinafter the Ethics Act], or the Rules of Organization and Procedure for the Council of the District of Columbia (‘Council Rules’), including those provisions of the Code of Conduct or the Council Rules that relate to conflicts of interest, outside activities, use of government resources, or use of confidential information.”
3. PR23-434 also amended the Council Rules to dissolve Finance and Revenue Committee, which had theretofore been chaired by Evans for several Council Periods. Chairman Mendelson, the author of the resolution, included this provision after consulting with other Councilmembers who agreed that, at a minimum, Evans should cease to chair that Committee during the pendency of the investigation described in paragraph 2 above. PR23-434 redistributed the jurisdiction of the Committee on Finance and Revenue among several other Council Committees.
4. During Council consideration of PR23-434, three amendments were offered and defeated. Each of these amendments would directly or indirectly have affected Evans’ political, professional, reputational, and personal interests during the pendency of the investigation into his own alleged misconduct described in paragraph 2 above. Yet Evans voted on each of these amendments, and in one case he cast the crucial deciding vote. Specifically:
 - a. Councilmember Grosso offered an amendment that would have removed Evans from all committees on which he serves. The purpose of the amendment, as stated by Councilmember Grosso, was “to restore public trust while active investigations are underway.” The amendment was defeated on a 6-6 tie vote, with Evans casting the deciding vote against it. Had Evans not voted against the amendment, it would have prevailed, and Evans would have been stripped of all his committee assignments.
 - b. Councilmembers Cheh, Silverman, and Nadeau offered an amendment that would have stricken language in PR23-434 reassigning certain agencies from the Committee on Finance and Revenue to other Council committees. The stated purpose of this amendment was to postpone the reorganization of committee jurisdictions until after the Council’s August recess in order to broaden discussion of the reorganization issue to include the full Council. The amendment was defeated on a vote of 4-8. Although Evans’

the Council's August recess in order to broaden discussion of the reorganization issue to include the full Council. The amendment was defeated on a vote of 4-8. Although Evans' vote in opposition was not decisive on this matter, he participated in the vote and thus in the ultimate outcome. He had a personal interest in ensuring this outcome because the lion's share of the Finance and Revenue Committee's jurisdiction would be transferred under the pending resolution to other Committees of which he was a member. In particular, most of Finance and Revenue's tax-related jurisdiction would be transferred to the Committee on Business and Economic Development, on which Evans sat.

c. Councilmember Grosso offered an amendment to accelerate the schedule for the Chairman's appointment of an ad hoc committee of Councilmembers to conduct investigatory proceedings in conjunction with O'Melveny & Myers and to recommend sanctions based on the Evans investigation. The amendment was defeated on a 9-3 vote. Although Evans' vote was not decisive on this matter, he participated in the vote and thus in the ultimate outcome. Evans had a personal interest in not speeding up the timetable for his colleagues' more direct involvement in the investigation.

5. Following the defeat of the three amendments above, the Council voted on final passage of PR23-434, which was approved by a vote of 10-2. (The approved resolution was assigned Resolution Number R23-175, effective as of July 9, 2019.) Evans voted against the resolution. Although Evans' vote was not decisive on this matter, he participated in the vote and thus, in effect, signaled his disapproval of the Council's investigation into his own alleged misconduct.

6. On September 17, 2019, the Council met in open session to conduct the Fifteenth Legislative Meeting of Council Period 23, during which time the Council considered, among other items, Proposed Resolution (PR) 23-449, "Subpoena Enforcement Resolution of 2019."

7. PR23-449, among other things, authorized the Council's General Counsel to file petitions in Superior Court to compel the appearance and testimony of witnesses pursuant to subpoenas issued in the aforementioned Evans investigation. The resolution was approved by a vote of 12-1. (The approved resolution was assigned Resolution Number R23-210, effective as of September 17, 2019.) Evans cast the sole dissenting vote on this resolution, once again participating in a matter directly related to discovering the facts and circumstances surrounding his own alleged misconduct. His vote, in effect, signaled a desire to hamstring the Council's investigation into his alleged misconduct by hindering O'Melveny & Myers' ability to enforce its subpoenas.

Relevant Provisions of Law

8. Section 101(7)(B) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(B)) defines the Code of Conduct to include "Sections 1801 through 1802 of the Merit Personnel Act" [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.*)].

9. Section 1801(a) of the Merit Personnel Act (D.C. Official Code § 1-618.01(a)), as amended by section 501(c)(3) of the Ethics Act and incorporated as part of the Code of Conduct, provides 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."

10. Section 501(c)(1) of the Ethics Act amended section 301(14A)(B) of the Merit Personnel Act (D.C. Official Code § 1-603.01(14A)(B)) by defining the term "public official." This definition includes "each member of the Council of the District of Columbia holding office under the District of Columbia Home Rule Act."

This definition includes “each member of the Council of the District of Columbia holding office under the District of Columbia Home Rule Act.”

11. Section 202(a) of the Ethics Act (D.C. Code § 1-1162.02(a)), as amended, provides in relevant part as follows:

“There is established, as an independent agency of the District government, a Board of Ethics and Government Accountability [BEGA], whose purpose shall be to:

“(1) Administer and enforce the Code of Conduct; . . .

“(4) Receive, investigate, and adjudicate violations of the Code of Conduct. . .”

12. Section 221(a) of the Ethics Act (D.C. Code § 1-1162.21(a)), as amended, provides for BEGA, directly or through its Director of Government Ethics, to impose a civil penalty of not more than \$5,000 for each occurrence of a violation of the Code of Conduct. BEGA may also impose a public censure for each such violation in addition to any civil penalty.

Allegations of Misconduct

13. Evans is, and at all times relevant to this Complaint has been, a Councilmember and public official as defined in paragraph 10 above, thus subject to the Code of Conduct provision quoted in paragraph 9 above.

14. Accordingly, at the time of the aforementioned Council votes on July 9 and September 17, 2019, and in accordance with the Code of Conduct, Evans was required *by District statute* “to maintain a high level of ethical conduct in connection with the performance of [his] official duties, and [to] 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.”

15. By his votes in opposition to amendments to PR23-434 – and particularly by casting the deciding vote to defeat the amendment that would have stripped him of his committee memberships pending the outcome of the Council’s investigation – Evans violated the Code of Conduct by:

(a) failing to maintain a high level of ethical conduct in connection with the performance of official duties;

(b) taking official action which would adversely affect the confidence of the public in the integrity of the District government; and

(c) participating in official action which would adversely affect the confidence of the public in the integrity of the District government.

16. By his votes in opposition to final passage of PR23-434 and PR23-449, Evans violated the Code of Conduct by:

(a) failing to maintain a high level of ethical conduct in connection with the performance of official duties;

(b) taking official action which would adversely affect the confidence of the public in the integrity of the District government; and

(c) participating in official action which would adversely affect the confidence of the public in the integrity of the District government.

17. By his presence on the dais during Council consideration of and debate on PR23-434 on July 9, 2019, and on PR23-449 on September 17, 2019, Evans violated the Code of Conduct by:

(a) failing to maintain a high level of ethical conduct in connection with the performance

(a) failing to maintain a high level of ethical conduct in connection with the performance of official duties; and

(b) participating in official action which would adversely affect the confidence of the public in the integrity of the District government.

Discussion

18. The time has come for BEGA to 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.

19. Evans' involvement in consideration of the resolutions and amendments described above reflected a brazen disregard for the Code of Conduct's requirements. Sitting on the Council dais during debate pertaining to (1) commencement of an investigation into his own alleged misconduct, (2) enforcement of subpoenas to compel witness testimony in the investigation, and (3) sanctions or discipline pending the outcome of the investigation – and then (4) voting not only on those resolutions but on amendments specifically pertaining to and affecting him as the target of the investigation – are behaviors that certainly fail to reflect the “high level of ethical conduct” required of a Councilmember by the Code of Conduct. Moreover, by participating in and voting on his own investigative processes and discipline, the stench rising around his votes, and around any direct or indirect communications he may have had with his colleagues on the dais – as well as around the Council's own legislative process – surely undermines the public's confidence in the integrity of their District government, which is the Code of Conduct's other main concern. It 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.

20. These concerns were well encapsulated in a September 18, 2019 Washington Post article by reporter Fenit Nirappil titled, “Why a D.C. Lawmaker Under Investigation Votes on His Own Probe and Discipline.” The article concluded:

“Some critics said the council has damaged the public's trust by allowing Evans to repeatedly vote on the investigation.

“‘If he doesn't even recuse himself on the most obvious conflict of interest, you can't trust him to recuse himself on anything,’ said Laura Fuchs, a teachers union activist. ‘I can't really trust our council has any mechanism to hold anyone accountable if they are clearly ignoring his constant conflicts of interest.’”

Indeed, the attitude of Chairman Mendelson himself toward this situation is notable for its apparent lack of interest in the two key elements of the Code of Conduct: the maintenance of a high level of ethical conduct, and the confidence of the public in the integrity of the District government. According to Nirappil's article, after Evans voted to protect his committee assignments last July, Mendelson stated, “The fact is, he's a member, so he gets to vote.”

21. The fact is, with all due respect to Chairman Mendelson, neither Evans nor any other Councilmember “gets to vote” if doing so would violate the Code of Conduct. Unlike a mere Council Rule, the Code of Conduct is a District *statute*, and as such it has the force of law. When the Council enacted the Ethics Act in 2011 and explicitly included itself in the Code of Conduct, it presumably knew what it was doing. The Council's failure to police itself adequately through its own procedural rules does not excuse Evans from obeying a District statute. There is no rational basis for concluding that refusing to abstain or recuse oneself in the face of an obvious violation of the Code of Conduct is excused merely because the Council Rules have been silent on that procedural issue.

22. On February 25, 2013, approximately one year after the Ethics Act became effective,

22. On February 25, 2013, approximately one year after the Ethics Act became effective, the Council cited and relied in part on violation of the amended version of the Code of Conduct, which at that point explicitly included Councilmembers, in reprimanding the late Councilmember Jim Graham. As a form of discipline, the Council removed regulation of alcoholic beverages from the jurisdiction of the committee he then chaired. Councilmember Graham voted against the resolutions pertaining to these matters. But Graham's approach should not be viewed as an appropriate precedent to be followed. Rather, it should be viewed as an unfortunate aberration to be avoided.

23. Indeed, then-Councilmember Marion Barry *abstained* from voting on PR18-750, in which the Council censured him and removed him from the chairmanship of the Committee on Housing and Workforce Development and from membership on the Committee on Finance and Revenue. Notably, PR18-750 cited and relied in part on violation of the original 1979 version of the Code of Conduct, applicable to "[e]ach employee of the District government," and yet Barry's abstention occurred almost two years before the Council explicitly included itself and its members in the statutory Code of Conduct. (Nirappil's article was inaccurate in this regard.)

24. For purposes of this Complaint, BEGA must distinguish the substantive criteria for determining whether a "conflict of interest" *per se* exists from the situation presented by Evans' participating in and voting on his own misconduct investigation, discipline, or procedures relating thereto. While section 223(a) of the Ethics Act (D.C. Code § 1-1162.23(a)) spells out, for example, the legal standard for determining whether an employee, including an elected official, has a financial conflict of interest, *that is not the inquiry called for under the Code of Conduct*. The Code of Conduct instead relies on an entirely different two-prong test:

- Did the public official's action "maintain a high level of ethical conduct in connection with the performance of official duties"?
- Did the public official "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"?

If Evans failed either prong of this two-part test under the circumstances described above, he has violated the Code of Conduct. BEGA must take enforcement action with respect to that violation.

25. There are strong public policy reasons for insisting a Councilmember abstain or recuse himself or herself from voting on matters pertaining to investigations into his or her own alleged misconduct, or on discipline or other sanctions resulting therefrom. As the subject of an investigation or proposed investigation, it is virtually impossible for a Councilmember to participate in or vote on such matters while still maintaining the independence and impartiality members of the public would expect of their elected officials in such circumstances. It would likewise be difficult for the average member of the public to imagine a Councilmember not attempting to steer his or her own colleagues' consideration in a more favorable direction. Indeed, even his or her presence on the dais during debate could be used by an affected Councilmember to communicate directly or indirectly with colleagues – and potentially even to intimidate them. It is difficult to believe under these circumstances that the confidence of the public in the integrity of their government would not be adversely affected by such proceedings.

Conclusion

26. The misconduct allegations against Evans in paragraphs 13 through 17 above can proceed directly to investigation, adjudication, and enforcement by the Office of Government Ethics (OGE) and BEGA, respectively, notwithstanding the stay currently in place with respect to other BEGA cases pending against him (#1101-003, #18-0006-P). The facts, the law, and the public policy on which this Complaint rely are entirely independent of the matters at issue in those other cases. Acting on the issues raised by this Complaint will in no way interfere with the law enforcement investigations that led to the stay.

those other cases. Acting on the issues raised by this Complaint will in no way interfere with the law enforcement investigations that led to the stay.

27. In this case, in full view of the public and on the record, Evans participated in consideration of and cast votes on resolutions to provide (or not) for investigation by the Council of his own alleged misconduct; to have the timetable for that investigation accelerated (or not); to have his Council colleagues brought into that investigation at an earlier time (or not), and to empower the Council's attorneys to enforce their witness subpoenas (or not). Most abhorrently, Evans cast the deciding vote to save himself from being stripped of considerable legislative power and authority as a consequence of the serious allegations against him.

28. Neither OGE nor BEGA need to look beyond the Council's own website to find the evidence of these Code of Conduct violations. Evans himself has handed BEGA all the evidence needed to find he has violated both prongs of the Code of Conduct. On July 9 and September 17, 2019, in open meetings of the Council, during consideration of resolutions pertaining to Evans' own alleged wrongdoing and the consequences thereof, Evans failed to (1) maintain the high level of ethical conduct expected of a public official in the performance of his official duties, or (2) "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," or both.

29. In all these respects, Evans violated the Code of Conduct and should be sanctioned by BEGA pursuant to section 221(a) of the Ethics Act (D.C. Code § 1-1162.21(a)).

Respectfully submitted,

[signed] Alan J. Roth
Alan J. Roth

October [28], 2019