DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

In Re:	)	
	)	
Marriage Initiative of 2009	)	Administrative Hearing
	)	No. 09-006
	)	
	)	

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter came before the District of Columbia Board of Elections and Ethics (hereinafter "the Board") during a special hearing on Monday, October 26, 2009 pursuant to the submission of a proposed initiative measure, the "Marriage Initiative of 2009" ("the Initiative"). The Initiative, if passed, would establish that "only marriage between a man and a woman is valid or recognized in the District of Columbia."[1] The purpose of the special hearing was to determine whether or not the Initiative presents a proper subject matter for initiative in the District. Reverend Harry R. Jackson, Jr. ("Rev. Jackson"), the lead proposer of the Initiative, appeared before the Board, and was also represented at the hearing by Cleta Mitchell, Esq. of Foley & Lardner LLP, and Austin R. Nimocks, Esq. of the Alliance Defense Fund.[2] Chairman Errol R. Arthur and Board member Charles R. Lowery, Jr. presided over the hearing.

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[1] Summary Statement, Initiative.

[2] Brian W. Raum, Esq. and Timothy J. Tracey, Esq. also filed Notices of Appearance with the Board on behalf of Rev. Jackson and the other proponents.

II. Statement of the Facts

On July 7, 2009, the "Jury and Marriage Amendment Act of 2009" ("JAMA") was enacted. As a result of JAMA's passage, same-sex marriages entered into and recognized as valid in other jurisdictions are now recognized as valid marriages in the District.[3]

JAMA was the target of an unsuccessful referendum attempt. Sixteen days after the Council of the District of Columbia ("the Council") submitted JAMA to Congress,[4] Rev. Jackson and others submitted to the Board a referendum entitled the "Referendum Concerning the Jury and Marriage Amendment Act of 2009" ("the Referendum"), which sought to suspend the section of JAMA pertaining to same-sex marriages until it had been presented to the registered qualified electors of the District of Columbia for their approval or rejection. On June 15, 2009, the Board ruled that the Referendum was not a proper subject for referendum because it

> would, in contravention of the [Human Rights Act ("HRA")], strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation. Because the Referendum would authorize discrimination prohibited by the HRA, it is not a proper subject for referendum, and may not be accepted by the Board.[5]

On June 17, 2009, the proposers of the Referendum filed with the D.C. Superior Court a petition for review of the Board's decision and for a writ in the nature of mandamus to compel the Board to accept the Referendum. The proposers subsequently filed a motion for preliminary injunction to stay the effective date of JAMA until either the end of litigation, in the event that

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3 *See* D.C. Official Code § 46-405.01.

4 *See* D.C. Official Code § 1-206.02(c)(1) (2006).

5 Board Memorandum Opinion and Order, "In Re: Referendum Concerning the Jury And Marriage Amendment Act of 2009, 09-004 (June 15, 2009) ("Board Referendum Order")

they lost on the merits, or thirty (30) days after the Board provided them with an original petition form for signature collection if they won on the merits. The proposers sought this injunctive relief because it was clear that, in light of the litigation, there was insufficient time for the Referendum to complete the entire referendum process prior to JAMA becoming effective.[6]

In its opposition to the proposers' motion for preliminary injunction, the Board argued, *inter alia*, that the proposers would not be irreparably harmed in the absence of a stay of JAMA's effective date because, even if JAMA were enacted, the proposers "could still avail themselves of the initiative process."[7] The Board referenced the legislative history of the Initiative, Referendum, and Recall Charter Amendments Act of 1978 ("the Charter Amendments Act"),[8] which created the right of initiative and referendum. This legislative history clarified that "[s]hould the citizens desire, basically, to reverse a decision of the Council which has already become law, they would then have the ability to initiate through the initiative process the same measure to the ballot," provided the initiative at issue is a proper subject for initiative pursuant to D.C. Official Code § 1-1001.16(b)(1).[9]

On June 30, 2009, the court issued an order denying the proposers' requests for relief, finding that the "Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act[.]"[10] Specifically, the court determined that, because the

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6 JAMA was scheduled to, and did, complete the Congressional review period on July 6, 2009.

7 Respondent District of Columbia Board of Elections and Ethics' Opposition to Petitioners' Motion for Preliminary Injunction ("Board Preliminary Injunction Opposition") at 21, *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 004350 B slip op. (D.C. Superior Ct. 2009)("*Jackson*").

8 D.C. Law 2-46, 24 D.C. Reg. 199 (1978) (*codified as amended* at D.C. Official Code § 1-204.101 *et seq.*).

9 *Convention Center Referendum Committee v. District of Columbia Bd. of Elections*, 449 A.2d 889, 910 n.38 (D.C. 1991).

10 *Jackson* at 2.

> proposed referendum asks the voters to decide whether the District should recognize same-sex marriages –which are legally indistinguishable from opposite-sex marriages in the jurisdictions in which they were performed – solely on the basis of the person's gender or sexual orientation[, the] measure 'authorizes or would have the effect of authorizing discrimination prohibited under the [DCHRA],' and hence is not a proper subject for referendum.[11]

Moreover, the court agreed that the proposers would not be irreparably harmed if the court did not grant a stay of JAMA's effective date, noting that

> the District's Home Rule Act provides the right of initiative for voters to repeal a law. *Moreover, Petitioners' right to referendum has not been deprived. The Board did not refuse to consider Petitioners' proposed referendum, and this Court has not declined to exercise jurisdiction.* Petitioners' proposed referendum has followed the course contemplated for all referenda pursuant to D.C. Code § 1-1001.16—a course successfully charted by others who have sought to submit District legislation to a direct vote. *Petitioners are entitled to the process outlined in D.C. Code § 1-1001.16. They are not entitled to a favorable ruling on whether their proposed referendum meets the legal requirements established by District law.*[12]

On September 1, 2009, Rev. Jackson, Howard Butler, Melvin Dupree, Rev. Anthony Evans, Rev. Walter E. Fauntroy, Robert King, James Silver, and Rev. Dale E. Wafer ("the Proposers") filed the Initiative with the Board.[13] Also on September 1, the Proposers filed a verified statement of contributions with the D.C. Office of Campaign Finance.[14] On September 10, 2009, the Board's Office of the General Counsel ("the General Counsel") transmitted a Notice of Public Hearing and Intent to Review regarding the Initiative ("the Notice") to the Office of Documents and Administrative Issuances for publication in the D.C. Register.[15] On

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11 *Id.* at 8.

12 *Jackson* at 2 (emphasis added).

13 *See* D.C. Official Code § 1-1001.16(a) (2006).

14 *See* D.C. Official Code § 1-1001.16 (b)(1)(A) (2006).

15 *See* D.C. Mun. Regs. tit. 3 § 1001.2 (2007).

September 10, the General Counsel also sent the Notice to the Mayor, the Chairman of the D.C. Council, the D.C. Attorney General, and the General Counsel for the Council, inviting them to address the issue of whether the Initiative presents a proper subject for initiative. The Notice was published in the D.C. Register on September 18, 2009.

The Board held the proper subject hearing on October 26, 2009.[16] In response to the Board's invitation to comment on the propriety of the Initiative, the Board received written testimony and heard oral testimony during the hearing from numerous individuals and organizations. The Board also held the record open for additional comments until the close of business on October 28, 2009. In all, the Board heard testimony from 60 witnesses and received and considered comments from approximately 29 individuals and/or organizations.

III. Analysis

A. Introduction

The Board shall refuse to accept an initiative measure if it:

> finds that it is not a proper subject of initiative ... under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:
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> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;[17]
> (B) The petition is not in the proper form established in subsection (a) of this section;[18]
> (C) The measure authorizes, or would have the effect of authorizing, discrimination

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[16] *See* D.C. Mun. Regs. tit. 3 § 1001.3 (2007).

[17] The verified statement of contributions consists of the statement of organization required by D.C. Official Code § 1-1102.04 and the report of receipts and expenditures required by D.C. Official Code § 1-1102.06.

[18] D.C. Official Code § 1-1001.16 (a) provides that initiative measure proposers must file with the Board "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title of the measure to be proposed in an initiative."

prohibited under Chapter 14 of Title 2;[19] or

(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[20] [21]

Based upon the written and oral opinions submitted to the Board regarding the propriety of the Initiative, the Board's own research and consideration of the matter, and the D.C. Superior Court's ruling in *Jackson*, the Board now concludes that the Initiative does not present a proper subject of initiative because it would authorize discrimination prohibited under the Human Rights Act ("HRA").

B. JAMA and the Referendum

As of July 2009, the District now recognizes same-sex marriages entered into and recognized as valid in other jurisdictions. Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire currently permit, or are set to permit, same-sex marriages. From June 2008 until November 2008, California also authorized same-sex marriages. In November of 2008, California voters voted in favor of Proposition 8, an initiative constitutional amendment banning same-sex marriages. However, same-sex marriages performed prior to the enactment of the proposition are still recognized as valid in California. Additionally, Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden allow same-sex marriages. Accordingly, if a same-sex couple entered into a marriage in any one of the aforementioned jurisdictions during a time when same-sex marriage was recognized as valid in that jurisdiction, that marriage

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[19] Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act. *See* D.C. Official Code § 2-1401.01 *et seq.* (2006 Repl.).

[20] D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

[21] D.C. Official Code § 1-1001.16 (b)(1) (2006 Repl.).

is now recognized as valid in the District, provided it is otherwise lawful under District law.[22]

As discussed above, the Board had occasion to consider whether or not the section of JAMA pertaining to same-sex marriages was susceptible to referendum. In its Board Referendum Order, which the D.C. Superior Court affirmed, the Board held that it was not because it represented a legislative effort to abolish in the District distinctions between valid marriages entered into in other jurisdictions on the basis of sexual orientation. As such, JAMA was covered by the HRA, the stated purpose of which is to

> secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.[23]

The Board further noted that JAMA comported with "[e]xisting District law [which] requires the recognition of marriages that were valid at their place of celebration,"[24] and that it

> unequivocally declares that the District is a jurisdiction that affords full faith and credit to valid same-sex marriages[;] [25] [that it was] consistent with recent efforts by the Council to eradicate impermissible discrimination on the basis of same-sex discrimination by putting same-sex couples on a par with heterosexual couples in

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22 *See* D.C. Official Code §§ 46-401 – 403. Marriages are not lawful in the District if they are: incestuous or bigamous; have been judicially declared null and void; or contain at least one individual who is not of the age of consent, is unable to consent to marriage due to mental incapacity, and/or has been forced or fraudulently tricked into consenting to the marriage.

23 D.C. Official Code § 2-1401.01 (2006 Repl.).

24 Letter from Brian Flowers, General Counsel, Council of the District of Columbia, to Kenneth J. McGhie, General Council, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 9, 2009)("Flowers Letter") at 6 (discussing laws and cases supporting proposition that "the District has recognized marriages valid in the state in which they were solemnized, unless the marriage was between persons domiciled in the District at the time of the marriage and the marriage would have been expressly prohibited by one of the provisions contained in D.C. Official Code § 46-401 through 46-404, or the marriage is in violation of the 'strong public policy' of the District.").

25 "This amendment makes clear what is already the law: to recognize marriages duly performed in other jurisdictions, including officially sanctioned marriages between persons of the same-sex." Amendment offered by Councilmember Phil Mendelson to Bill 18-10, Disclosure to the United States District Court Act of 2009 (Committee Print) (April 7, 2009).

> numerous provisions of District law[, for *e.g.*, the] Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, a partial aim of which was to "formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law,"[26] [and] ... Council efforts to remove gender-specific references in statutes pertaining to marriage and/or the rights and responsibilities thereof[.][27] [28]

Finally, the Board considered the impact of *Dean v. District of Columbia ("Dean")*[29], a case cited by both proposers and opponents of the Initiative, on the matter. In *Dean*, the D.C. Court of Appeals ruled, *inter alia*, that the practice of denying marriage licenses to same-sex couples did not violate the HRA. The court reasoned that the HRA, though "a powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation,"[30] was not intended to prohibit discrimination of *every* kind. Specifically, it was not intended to "change the ordinary meaning of the word 'marriage'"[31] such that impermissible discrimination occurred when marriage licenses were not granted to same-sex couples along with heterosexual couples.

In reaching this conclusion, the *Dean* court engaged in the analysis it had employed in *National Organization for Women v. Mutual of Omaha Insurance Co., Inc.*[32] In *NOW*, the court

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[26] Report of the Committee on Public Safety and the Judiciary on Bill 18-66, the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 at 9 (Council of the District of Columbia, March 10, 2009).

[27] Flowers Letter at 8 (discussing fact that several statutory provisions "have been amended by the Council to remove the gender-specific references as part of a systemic effort to employ gender-neutral language throughout the D.C. Official Code statutes pertaining to marriage and the rights, benefits, and obligations incident to marriage.").

[28] Board Referendum Order at 10.

[29] 653 A.2d 307 (D.C. 1995).

[30] *Id.* at 319.

[31] *Id.* at 320.

[32] 531 A.2d 274 (D.C. 1987) ("*NOW*").

considered whether or not the defendant insurer's practice of charging higher health premiums for women violated the HRA. The court noted that

> [i]t is true that it can be argued with some persuasion that the "plain language" of the [HRA] prohibits discrimination based on gender in the services offered by insurance companies. Significantly, however, the [HRA] contains no language purporting explicitly to regulate insurance premium practices. If the Council had intended to effect such a dramatic change in insurance rate-setting practices, it is reasonable to assume that there would have been at least some specific reference to it in the language of the [HRA] or, at least, within its legislative history. Under the circumstances, therefore, we think it appropriate to look to the [HRA's] statutory context and its legislative history to ascertain whether its scope extends to actuarial pricing practices.[33]

The court further observed that, in instances where the legislative history of the HRA is silent as to a particular topic, "courts can sometimes find guidance by reading it in conjunction with other statutes relating to the same subject."[34] Accordingly, the court read the HRA in conjunction with the statute that allowed the gender-based differential in insurance rates that the *NOW* petitioners alleged violated the HRA, and which had existed prior to the HRA, and examined its relationship with the same.

In reaching the conclusion that the insurance practice was not in conflict with the HRA, the court afforded "great weight"[35] to the fact that the District's Corporation Counsel[36] had advised the D.C. Council, pursuant to a request for an opinion on the matter, that life insurance set-backs for women did not violate the HRA, as well as the fact that the Council relied upon this opinion when it subsequently increased life insurance set-backs for women from three years to

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[33] *Id.* at 276 (citations omitted).

[34] *Id.* at 277.

[35] "We add that the Corporation Counsel's interpretation of the [HRA], while not binding on this court, is entitled to great weight." *NOW*, 531 A.2d at 278 (*citing Jordan v. District of Columbia*, 362 A.2d 114, 118 (D.C. 1976).

[36] The District's Attorney General was formerly referred to as the Corporation Counsel.

six years. Clearly, the court wrote,

> the Council did not enact the insurance set-back provisions in ignorance of their potential conflict with the [HRA]. ... Rather, it did so only after consulting the Corporation Counsel and expressly considering the potential impact of the [HRA] on those provisions. In such a situation, it is proper to view the later act "as a legislative interpretation of the earlier act ... in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting." ...We should construe the two statutes to be in harmony if reasonably possible. ...To do so requires us to conclude that the Council did not intend the Act to include gender-based insurance pricing within its scope.[37]

Applying the analysis in *NOW*, the court in *Dean* looked at the legislative history of the HRA in conjunction with District laws concerning marriage as they existed when *Dean* was decided. The court determined that same-sex marriage could not possibly be within the scope of the HRA, and would necessarily be missing from its legislative history, because "by legislative definition – as we have seen – 'marriage' requires persons of opposite sexes; there cannot be discrimination against a same-sex marriage if, by independent statutory definition extended to the [HRA], there can be no such thing."[38] The court held that it could not "conclude that the Council ever intended to change the ordinary meaning of the word 'marriage' simply by enacting the [HRA],"[39] and that, therefore, the denial of marriage licenses to same-sex couples did not contravene the HRA.

The decisions in *Dean* and *NOW* are instructive. They both clarify that, in order to determine whether or not a particular form of discrimination is of the kind that the HRA is intended to prohibit, both the Board and the courts should consider the legislative history of the HRA, the current statutory context, and legislative intent. A consideration of these factors

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37 *Id.* at 278 (citations omitted).

38 *Dean*, 653 A.2d at 320.

39 *Id.*

demonstrates that the Initiative is not a proper subject for initiative in the District.

While neither the HRA nor its legislative history explicitly mentions same-sex marriage, it is without question that the HRA must "be read broadly to eliminate the many proscribed forms of discrimination in the District."[40] Since JAMA's enactment, the District recognizes same-sex marriages that have been properly entered into, performed, and recognized by other jurisdictions. This did not exist when *Dean* was decided. Consequently, couples who fall within JAMA's purview are entitled to the same benefits of marriage that are afforded heterosexual married couples, and the denial of these benefits to married couples on the basis of the sexual orientation of the individuals who comprise the couples now constitutes a "proscribed form of discrimination." It is clear that this result is the intent of the Council, which voted 12-1 to pass JAMA. The Initiative seeks to deny recognition to JAMA marriages on the basis of the sexual orientation of the individuals who comprise the couples. As a result, the Board finds, and both the District's Attorney General and the General Counsel for the Council agree, that the Initiative authorizes or would authorize discrimination proscribed by the HRA and is therefore not a proper subject for initiative.

Counsel for the Proposers have argued before the Board that the Board is collaterally estopped from finding that the Initiative is not a proper subject for initiative because the Board argued in the D.C. Superior Court that "[i]f the Court denies the Petitioners' request for injunctive relief and [JAMA] becomes law by way of the expiration of the Congressional review period, they may still avail themselves of the initiative process."[41] This argument is without merit. Stating that a party may avail themselves of the initiative process is not the equivalent of

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40 *Id.*

41 Board Preliminary Injunction Opposition at 21.

asserting that the party is entitled to actually have the initiative appear on the ballot; in addition to meeting all other prerequisites for ballot access, a proposed initiative measure must be a proper subject for initiative or it must be refused by the Board. The Proposers have done exactly what the Board said they may do – they have availed themselves of the initiative process. They submitted a proposed initiative measure that the Board considered in its customary fashion. Because "the Board did not refuse to consider" the Initiative, the Proposers' "right to [initiative] has not been deprived."[42]

IV. Conclusion

Under current law, the District recognizes same-sex marriages validly performed in other jurisdictions[43]. The proposed Initiative seeks to prohibit the District from continuing to recognize these same-sex marriages. The Initiative instructs that "only marriage between a man and a woman is valid or recognized in the District of Columbia."[44] If passed, the Initiative would, in contravention of the HRA, strip same-sex couples of the rights and responsibilities of marriages currently recognized in the District.

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42 *Jackson* at 2.

43 D.C. Code §46-405.01 (added by §3(b) of the Jury and Marriage Amendment Act of 2009).

44 Summary Statement, Initiative.

The District's Initiative, Referendum and Recall Procedures Act requires the Board to refuse to accept referenda and initiatives which violate the HRA. Because the Initiative would authorize discrimination prohibited by the HRA, it is not a proper subject for initiative, and may not be accepted by the Board.[45]

Accordingly, it is hereby:

ORDERED that the Initiative is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Official Code § 1-1001.16(b)(2).

November 17, 2009
Date

Errol R. Arthur
Chairman, Board of Elections and Ethics

Charles R. Lowery, Jr.
Member, Board of Elections and Ethics

[45] The Proposers and other supporters of the Initiative have requested that the Board accept the Initiative and thereby allow voters to be heard on the issue of the recognition of same-sex marriage in the District. As it stated during the proceedings concerning the Referendum, the Board, as an entity responsible for ensuring the integrity of a very critical aspect of the democratic process, is particularly sensitive to issues of fairness and due process. However, the Board must also act in a manner which adheres to its statutory obligations.