



BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION
MONTGOMERY COUNTY, MARYLAND

Complainant

v.

DANA BEYER

Respondent

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No. 08-010-013

MEMORANDUM AND ORDER

The County alleges that Respondent Dana Beyer violated Section 19A-14(e)¹ of the ethics law, which states: “A public employee must not intimidate, threaten, coerce or discriminate against any person for the purpose of interfering with that person’s freedom to engage in political activity.” The Commission concludes that the County did not sustain its burden of proving that Dr. Beyer engaged in the conduct alleged. Accordingly, the Commission must dismiss the Complaint under § 19A-10(i).

I. BACKGROUND

On October 7, 2008, the Commission received a sworn complaint (with attached affidavits) from Dr. Ruth Jacobs, President of Maryland Citizens for a Responsible Government (MCRG), alleging the following facts: On November 13, 2007, the County Council enacted Bill 23-07. That bill prohibited discrimination in housing, employment, public accommodations,

¹ Unless indicated otherwise, all references are to the Montgomery County Code (2004), as amended.

cable television service, and taxicab service on the basis of “gender identity.” Then-Councilmember Duchy Trachtenberg was a lead proponent of the bill. At the time, Dr. Beyer, herself transgendered, worked as an aide for Councilmember Duchy Trachtenberg.

Opponents of the bill formed MCRG in order to petition the Bill to referendum. The petition process required MCRG to gather signatures from at least 5% of County registered voters—half those signature were due within 75 days of the bill’s enactment (February 4, 2008) and the remaining half was due within 90 days of the Bill’s enactment (February 19, 2008). Montgomery County Charter § 115. Absent a successful petition drive, the Bill would become effective on February 20, 2008.²

MCRG received permission from Giant Food to solicit signatures for the petition outside some of their stores. The Complaint alleged that Dr. Beyer and other Bill proponents interfered with MCRG’s signature-gathering activities at various Giant Food stores by, among other things, yelling and screaming at MCRG volunteers and potential petition signers that they were “bigots;” that by signing the petition they were “for discrimination;” and that the names of those who signed the petition would be “all over the internet.” In one particular incident, at the Arliss/Piney Branch Giant on February 17, 2008, Dr. Beyer allegedly told the Giant manager that she worked for Councilmember Trachtenberg and that the manager would “have problems with the County Council” if he allowed MCRG to stay and gather signatures. The Complaint also alleged that Dr. Beyer intimidated signature gatherers and/or MCRG volunteers by purposefully bumping into them and physically getting between MCRG volunteers and potential petition

² MCRG submitted the signatures it gathered to the County Board of Elections, which certified the petition. Proponents of the Bill filed suit in the Circuit Court for Montgomery County, challenging the Board’s certification. The Circuit Court dismissed that suit as time-barred under the election law and ordered that the Board of Elections place the Bill on the November ballot. But the Maryland Court of Appeals concluded that the complaint was not time-barred and that the Board erred when it certified the petition because (1) it should have include inactive voters in the total number of registered voters and (2) many of the signatures the Board accepted were invalid. Thus, the Bill was never placed on the ballot. *Doe v. Montgomery County Bd. of Educ.*, 406 Md. 697, 962 A.2d 342 (2008).

signers.

The Complaint alleged further that Dr. Beyer used the prestige of her office for personal gain in violation of § 19A-14(a) because, as a transgendered woman, she stood to personally gain from Bill 23-10. MCRG maintained that Dr. Beyer also violated § 19A-14(c) when she used her County position and facilities (e.g., her office computer) in her campaign to thwart MCRG's petition drive and uphold Bill 23-10. Finally, the Complaint alleged that Dr. Beyer's conduct at the Giant Food stores violated § 19A-14(e)'s proscription against intimidating, threatening, coercing or discriminating against any person for the purpose of interfering with that person's freedom to engage in political activity.³

Because the complaint alleged facts that would support a reasonable person in concluding that Dr. Beyer did violate the ethics law, the Commission referred the matter to the Office of the County Attorney for investigation on January 23, 2009. § 19A-10(a)(3). On September 8, 2009, the Commission received the investigative report from the County Attorney's Office. Although the Complaint alleged a variety of ethics violations against Dr. Beyer arising out of several different incidents, on November 5, 2009, the Commission found reasonable cause to believe Dr. Beyer violated only one section of the ethics law (§ 19A-14(e)) as to the events that took place at one location (Arliss/Piney Branch Giant on February 17, 2008). The Commission's finding triggered the adjudicatory process set out in § 19A-10.⁴

Following a preliminary scheduling conference, the Commission issued a scheduling order providing for a formal complaint from the County, an answer from Dr. Beyer, and an opportunity for both parties to engage in discovery prior to the evidentiary hearing. At the close

³ MCRG filed a supplemental complaint with the Commission on March 23, 2009.

⁴ The parties did not present the Commission with a consent order under § 19A-10(c), which would have obviated the adjudicatory process.

of discovery, Dr. Beyer filed three motions in limine.

II. PRELIMINARY MATTERS: DR. BEYER'S MOTIONS IN LIMINE

Dr. Beyer filed three motions in limine prior to the hearing. The Commission ruled on those motions verbally, and will now reduce its rulings to writing.

A. Affidavit of Verlon Mason

Verlon Mason was an assistant manager at the Arliss/Piney Branch Giant Food store. MCRG included his affidavit with its complaint and the County identified this affidavit as an exhibit in its prehearing submission.⁵ In his affidavit, signed on February 28, 2008, Mr. Mason described, in pertinent part:

a person looked like a woman. 6' 4". jeans, makeup, blond hair with deep voice. I didn't hear a lot of what the person said. The person mentioned working for county council. They stated that the county council would be upset and that it would cause problems for the giant if they Giant were endorsing the petition. . . . One of the individuals [signature gatherers] came in and said he was being harassed. And I called the police. About 30 minutes later he came in and said the they were still out there and they were pretty upset and he was afraid for his safety that's when told we had called and I asked him to point out the individuals in the parking lot that is when he pointed out. the man with the pony tail, the shim, and two women.

Dr. Beyer requested that the Commission preclude the County from introducing this affidavit as unreliable hearsay.

As an administrative agency, the Commission is not bound by the strict rules of evidence. Section 19A-10(g) states that "[t]he rules of evidence used in judicial proceedings do not apply. The Commission may admit and give appropriate weight to evidence, including hearsay, that possesses probative value commonly accepted by reasonable and prudent persons."

Maryland case law confirms that it is the probative value and reliability of hearsay that is determinative of whether such evidence is admissible in an administrative setting, not merely the

⁵ The County also identified Mr. Mason as a witness and requested a subpoena for his attendance at the hearing.

hearsay nature of proffered evidence. “Indeed, hearsay statements are admissible in an administrative proceeding and if found to be credible and probative, may form the sole basis for the agency’s decision.” *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 412 (1997). Instead, “the evidence’s probative value, reliability, and fairness of its utilization are the principal factors considered in the competency analysis.” *Id.* at 413. It is “improper for an agency to consider hearsay evidence without first carefully considering its reliability and probative value.” *Id.* Statements that are sworn under oath, made close in time to the incident, or corroborated are ordinarily presumed to possess a greater caliber of reliability. *Id.* In addition, a hearsay statement from a disinterested witness tends to be more reliable than a statement introduced through a witness who has an interest in the subject matter underlying the controversy. *Id.* at 417.

Dr. Beyer argued that the Mason affidavit was written by Dr. Jacobs “fully eleven days after February 17, 2008, the date on which the incidents at issue occurred,” and there is no evidence to corroborate Mr. Mason’s affidavit. For its part, the County noted that the affidavit was given “a mere ten days after the alleged incidents that are the subject of this case” from an impartial observer who has no interest in the outcome of this case. Finally, the County noted that while it requested a subpoena for Mr. Mason, Dr. Beyer did not and therefore she cannot complain about a denial of the opportunity to cross-examine Mr. Mason. *Travers*, 115 Md. App. at 418. *See also Rosov. v. Maryland State Bd. of Dental Examiners*, 163 Md. App. 98, 117 (2005); *Tippary v. Montgomery County Police Dept.*, 112 Md. App. 332, 352 (1996).

On balance, the Commission found that the affidavit demonstrated sufficient probative value, reliability to warrant admission into evidence. The affidavit is under oath. The fact that Dr. Jacobs prepared the affidavit is of no moment—affidavits are typically prepared by those

who seek their admission. Mr. Mason is a disinterested witness. The affidavit was prepared near in time to the incident at issue. And the County requested a subpoena for Mr. Mason; Dr. Beyer did not. Accordingly, the Commission denied this request.

B. Audio cassette tape Interview of Verlon Mason

After the close of discovery, the County amended its prehearing submission to include a February 28, 2008, audio cassette tape interview of Mr. Mason as an exhibit in its prehearing submission. This audiotape was made by Alberta Bertuzzi, a MCRG member who accompanied Dr. Jacobs to get Mr. Mason's affidavit. Apparently, Ms. Bertuzzi only recently rediscovered this tape. The County's amended prehearing submission also included Ms. Bertuzzi as a new witness.

In the audiotape, Mr. Mason states: "the shim did mention working for the Council . . . [and] the County Council would be unhappy with us endorsing the petitioners." Dr. Beyer moved to have this audiotape excluded, again as unreliable hearsay.

The Commission denied this request, largely for the same reasons applicable to Mr. Mason's affidavit. While it is true that the audiotape is not under oath, it is consistent with the affidavit. The Commission gave Dr. Beyer an opportunity to depose Ms. Bertuzzi and, if desired, to re-depose Dr. Jacobs about the new found audio tape.

C. Testimony Of Craig Koch

The County identified Craig Koch as a witness in its prehearing submission. He was also at the Arliss/Piney Branch Giant on February 17, 2008. In his affidavit, Mr. Koch avers that when a potential petition signer would approach him,

Beyer or one of her group would then physically insert herself between me and the person I was trying to speak to, telling them they should not listen to me, that I was a bigot, that I was trying to take away their rights, or that the county council in their collective wisdom had passed the bill that we were collecting signature to have added to the November ballot and so their signature would not matter so they should not sign the petition. Since this was a referendum petition, signature

did count and in addition to the intimidation, harassment and physically blocking signatures, the information was false and misleading.

If customers agreed to sign our petitioner, Beyer and her group would insult them, calling them bigots, asking them why they wanted to take away their civil rights.

Beyer, together with at least one of her peers, verbally accosted Giant Food customers as they attempted to leave the Giant; in some cases following customers into the parking lots and to their cars.

Dr. Beyer asked the Commission to exclude Mr. Koch as a witness because the County belatedly identified him as a witness and the circumstances under which he emerged as a witness rendered his testimony unreliable. At the Commission's invitation, Dr. Beyer then amended her motion to request that the Commission exclude Mr. Koch because his affidavit did not allege that Dr. Beyer identified herself as a County employee or invoked her position with Councilmember Trachtenberg in her interactions at the Arliss/Piney Branch Giant. The County opposed Dr. Beyer's amended motion, arguing that § 19A-14(e) does not require a nexus to County employment.

The Commission granted the motion as to Mr. Koch because the conduct prohibited by § 19A-14(e) requires a nexus with County employment.(as explained in Part IV).

III. THE HEARING

The Commission held an evidentiary hearing on October 15, 2010.⁶ The County, bearing the burden of persuasion, presented its case first.

Testimony of Dr. Ruth Jacobs

Dr. Jacobs testified that she is the president of MCRG, an organization formed to oppose Bill 23-07. Tr. 14. MCRG obtained permission from Giant Food to conduct petition drives at various locations, including, on February 17, 2008, the Arliss/Piney Branch Giant. Tr. 17.

⁶ The Commission granted Dr. Beyer's request that it open the hearing to the public. § 19A-10(h). The Commission also granted Dr. Beyer's request that it sequester witnesses. Tr. 5.

Although she was not present at the Arliss/Piney Branch Giant on February 17, 2008, Tr. 20 & 34, she spoke to Steven Schall, another MCRG volunteer, who was present and he told her that Dr. Beyer harassed him, threatened him, and “invoked the County Council.” Tr. 21-22, 42. He called Dr. Jacobs several times during the petition drive, with increased panic in his voice each time. Based upon his description of events at the Giant, she surmised that he was complaining about Dr. Beyer, Christine Grewell and James Kennedy.

Sometime after the incident, Mr. Schall told her that the assistant manager at the Giant, Verlon Mason, was willing to give them an affidavit describing what he witnessed that day. Tr. 23. On February 28, 2008, she went to the Giant in order to get Mr. Mason’s affidavit. Alberta Bertuzzi brought a cassette tape record and accompanied her. Tr. 24. They spoke with Mr. Mason in the break room. Tr. 25. The tape was occasionally paused during recording, but “I don’t think we did anything during the pauses that was not integrity, did not have the integrity of what was there.” Tr. 29. “I know that at some point we spoke to Mr. Mason about the word ‘shim’ and I thought that that could potentially be offensive. to people.” Tr. 29.

Dr. Jacobs testified that after their taped conversation they had another conversation which was not taped, that formed the basis of the affidavit she wrote. Tr. 25-27, 37, 43-44. She admitted that during the second, unrecorded conversation, she tried to talk Mr. Mason out using the word “shim” which appears in his affidavit because “she was worried that people would perceive it as a bigoted term.” Tr. 38-40. They then went to a nearby bank where Mr. Mason signed the affidavit in front of a notary. Tr. 28.

Testimony of Steven Schall

Mr. Schall testified that he first met Dr. Jacobs while volunteering for an organization called Citizens for Responsible Curriculum, which was formed to challenge changes the County

Board of Education was making to the sex education curriculum. Tr. 48. At the suggestion of Dr. Jacobs he joined MCRG in its petition drive. Tr. 49. He had never met Dr. Beyer before February 17, 2008. Tr. 49. He testified that he collected signatures for the petition “dozens of times. I mean, probably twice a week for almost a year.” Tr. 50. It was his understanding that the Bill gave transgendered individuals the same “special rights and protections” given to African Americans and others. Tr. 71-72.

When he arrived at the Arliss/Piney Branch Giant on February 17, 2008 he spoke with the manager. Tr. 51-52. “I think his last name was Mason.” Tr. 59. There were already two other people from MCRG there collecting signatures. Tr. 51-52. He arrived at 1 pm and stayed until about 4:30 or 5 pm. Within 30 minutes of his arrival, individuals from an organization that supported the Bill called Teach The Facts arrived. This included Dr. Beyer, the president of Teach the Facts [Christine Grewell], and Jim Kennedy. Tr. 52-53. He testified that the president of Teach the Facts arrived first and began calling him a homophobe and a bigot. Tr. 53-54. This dissuaded shoppers from signing the petition. Tr. 55.

Dr. Beyer arrived about one hour after he got to the Giant. Tr. 49. “He gave me his name and told me that he was a woman and that he had a license that proved he was a woman.” Tr. 56. Nonetheless, throughout his testimony Mr. Schall repeatedly referred to Dr. Beyer with the male pronouns “he” or “him.” E.g., Tr. 50, 55, 56. He testified, “I have no idea what Dr. Beyer is.” Tr. 69-70. But he denied holding any personal animus toward transgendered individuals. Tr. 71.

When Mr. Schall spoke to shoppers, Dr. Beyer would also speak to them and tell them “what they were doing is wrong and that they didn’t have a right to sign the petition. And, that if they signed, the petition they [would] take voting rights away.” Tr. 57. Mr. Schall testified that Dr. Beyer bumped into him, almost knocking him over the railing separating the exit and the

entrance. He yelled at Dr. Beyer to “back off.” Tr. 57-58, 66.

Mr. Schall complained to the Giant manager about this conduct. “I said, well if you talk to them first maybe they’ll just leave. You know, tell them that they’re trespassing and they should leave. But, the people refused to leave so we called the police.” Tr. 58. Mr. Schall testified that when Mr. Mason told Dr. Beyer that the Bill proponents would have to leave, she replied “that he had a right to be there, that he worked for Duchy Trachtenberg, and that if they were kicked out this would cause, you know, the county council would cause trouble for Giant.” Tr. 59-60. Mr. Schall was about five feet away from Dr. Beyer and Mr. Mason when he heard their conversation. Tr. 60, 73-74.

In his affidavit, Mr. Schall testified that Dr. Beyer told the Giant manager that he “would have problems with the County Council if he allowed us [MCRG] to stay.” But, Mr. Schall testified at the hearing that Dr. Beyer told the manager that he would have trouble with the County Council if he kicked out the Bill proponents. Tr. 75-76.

When the Bill proponents refused to leave, both Mr. Schall and the Giant manager called the police. Tr. 59-60. The police arrived and an officer talked to him and the manager. The officer told the Bill proponents that they would have to stay in the parking lot. Tr. 58-59. Dr. Beyer remained in the parking lot after the police left. He did not speak with Dr. Beyer after that. Tr. 60.

Mr. Schall collected only 75 signatures that afternoon, less than the usual 150 he said MCRG would normally collect. He felt that the Bill proponents presence reduced the number of signatures they collected. Tr. 61. He later returned to the Giant to get the name of the manager he had spoken to. Tr. 61-62.

During cross-examination, Mr. Schall testified that the Teach the Facts president held a

sign that said “Decline To Sign” and bumped into him. Tr. 64-65. He said that both the president and Dr. Beyer called the MCRG volunteers bigots and said they were threatening African Americans and that, if they signed the petition “they will take away your rights.” Tr. 65-66.

Mr. Schall acknowledged that he may have spoken with two different Giant managers that afternoon. He also acknowledged that during his deposition, he initially testified that he remained inside the Giant store when the manager went out to ask the Bill proponents to leave. When confronted at the deposition with his prior affidavit (where he averred that he accompanied the manager outside), he corrected his deposition testimony to indicate that he went outside with the manager and heard him ask the Bill proponents to leave. It was at that point he heard Dr. Beyer make the comment about the County Council. Tr. 67-68.

Testimony of Montgomery County Police Sergeant Douglas Cobb

Sgt. Cobb testified he responded to the Arliss/Piney Branch Giant on February 17, 2008, in response to a trespass complaint from one of the managers. Tr. 78. After talking with the manager, he asked a group of people, including Dr. Beyer, to leave the Giant. He told them they could stay in the parking lot so long as they did not block traffic. Tr. 79-82.

Testimony of Aaron Williams

Mr. Williams was an assistant manager at the Giant in February 2008. Verlon Mason was the “front end” manager at that time. Tr. 83-84. Giant Food had a policy of giving permission to groups to pass out literature. Permission was given to one group at a time. Tr. 84-85. On February 17, 2008, a man and a woman came in the store to complain to him and Mr. Mason about what the MCRG volunteers were doing. He identified Dr. Beyer as the woman. He said this second group was “revolted” by what the first group was passing out and they wanted a chance to speak with Giant customers. He explained Giant’s policy of allowing only one group at

a time and told them they would have to come back another time “and we’d be more than glad to let them pass out any literature or speak to customers as they exited the store.” Tr. 86-87.

Mr. Williams described a “confrontation” between the two groups. “I had gotten complaints from the first group stating that they were threatened verbally and that their merchandise or things that they wanted to pass out were being snatched and customers were being yelled at, at the same [time] that they were explaining what their cause was.” Tr. 88. He described the confrontation as “just shouting, people speaking on both sides, speaking to one another and I just wanted them to be separated. But, there was loud talking back and forth.” Tr. 90. Because of this confrontation, the police were called. Tr. 89. He did not witness any physical interaction between the two groups. Tr. 90.

He testified he believed Dr. Beyer said that she was “going to contact someone from the County government and that we would hear back from them because what we were doing [allowing the first group to remain at the Giant] was wrong.” Tr. 89. He did not recall Dr. Beyer identifying herself as a County employee or saying that she worked for a Councilmember. Tr. 94.

Testimony of Alberta Bertuzzi

Ms. Bertuzzi testified that she was a member of MCRG in February 2008. She was not at the Arliss/Piney Branch Giant on February 17, 2008. But she met Dr. Jacobs there on February 28 when Dr. Jacobs went to get Mr. Mason’s affidavit. She brought a tape recorder with her. Tr. 95-97. She may have paused the tape recording when another Giant Food employee came into the back office to talk with Mr. Mason. Or the tape recorder’s automatic voice activation feature may have paused the recording whenever there was a pause in the conversation. Tr. 99. Nonetheless, she believes she captured all of Mr. Mason’s conversation with Dr. Jacobs. Tr. 100. The tape sat in her desk draw for about two years and she eventually forgot about it until she

turned it over to Dr. Jacobs. Tr. 101-102.

Testimony of Dr. Dana Beyer

Dr. Beyer testified about the role she played in drafting the Bill as Councilmember Trachtenberg's senior advisor. Tr. 111-13. As a supporter of the Bill, she went out on various occasions to supermarkets "to counteract to educate the shoppers . . . as to what exactly this petition was about." Tr. 114. She denied ever identifying herself as a County employee or staff member for Councilmember Trachtenberg when discussing the petition with County residents. Tr. 115-16.

When she arrived at the Arliss/Piney Branch Giant around between 11 am and noon (Tr. 119, 125) on February 17, 2008, she saw the MCRG volunteer collecting signatures with a big poster board that said "Just the Facts." Tr. 114-15. She denied screaming at any of them, explaining that "after my transition, the changes that have occurred have impacted my vocal apparatus and I cannot yell or scream." Tr. 117. She testified the only physical contact she had with any of the MCRG volunteers was when Mr. Schall leaned into her and she resisted. Tr. 117, 126. She told shoppers that MCRG was misrepresenting what the Bill stood for, that civil rights should not be petitioned to a vote, and that this was an extension of civil rights similar to that for other groups that have occurred in the County and the country. Tr. 117. She denied telling anyone that their names would be posted on the internet as homophobes or bigots. She denied telling any shoppers of her County employment. Tr. 117-18. She said that Mr. Schall yelled that "people like me should be institutionalized, should be in mental institutions and you know." Tr. 123.

She said that she went with Mr. Kennedy inside the Giant to speak with Mr. Williams and that he (Mr. Williams) asked them "to tone it down, make sure that we wouldn't get into any

kind of confrontation, which is what we did.” Tr. 118. She did not speak with anyone else from Giant and no one from Giant came out of the store to talk with her. Tr. 118-19. She again denied telling Mr. Williams or anyone else that she was a County employee or that there would be consequences for Giant from the County Council if Giant allowed MCRG to stay. “The whole concept is ludicrous.” Tr. 119, 127-31.

Sergeant Cobb and another officer arrived around 1 pm and asked the Bill proponents to stay out in the parking lot. They complied with the request. Tr. 120. She left the Giant after two or two and one half hours. Tr. 125. The Bill proponents did not have prior permission from Giant Food to be on site. Tr. 125.

Testimony of Andrea Kline

Ms. Kline testified that she is on the board of Teach the Facts and was previously vice-president. Tr. 132-33. When she arrived at the Giant she obtained the manager’s permission to pass out flyers and hold a sign. Tr. 134-35. She said that one of the MCRG volunteers called her a fascist and that “I should have been aborted.” Tr. 135. She said one of the MCRG volunteers shoved her. Tr. 135. After one of the MCRG volunteers went inside the Giant, a manager came out and told her that he had never spoken to her, didn’t give her permission to be there, and that she had to leave. No one else from Teach the Facts was there at that time. Tr. 136. She did not see any Giant Food manager come out to speak with Dr. Beyer. The police eventually came and told them to move to the parking lot, which they did. She never heard Dr. Beyer identify herself as a County employee or threaten anyone with County action. Tr. 137. She didn’t see Dr. Beyer make physical contact with anyone or yell at anyone. Tr. 137-38.

Testimony of Christine Grewell

Ms. Grewell is the president of Teach the Facts. She was the treasurer in February 2008.

Tr. 142. She arrived at the Arliss/Piney Branch Giant on February 17, 2008, at about the same time as Dr. Beyer. Teach the Facts vice-president Andrea Kline was already there. Tr. 144. She did not hear Dr. Beyer raise her voice, “but I did see her did stand her ground. She sort of planted her feet firmly and didn’t take to the jostling that was going on.” She saw her go into the store with James Kennedy. Tr. 145. She did not see anyone from the Giant come outside to talk with Dr. Beyer. Tr. 146, 148-49. She never heard Dr. Beyer say she worked for the County Council or that the Council be unhappy with Giant for allowing MCRG volunteer to collect signatures. Tr. 146-47.

Testimony of James Kennedy

Mr. Kennedy is the treasurer of Teach the Facts. Tr. 150. When he arrived at the Arliss/Piney Branch Giant on February 17, 2008, Andrea Kline was already there, in the parking lot. He caravanned over with Christine Grewell. He did not see Dr. Beyer interact with any of the MCRG volunteers and did not hear her raise her voice. Tr. 151-52. He went into the store and talked with the manager, Aaron Williams, who explained that the MCRG volunteers had prior permission to be there but the Teach the Facts volunteers did not so they would have to stay in the parking lot. Dr. Beyer was with him for at least part of this conversation. He never say anyone from Giant come outside. Tr. 153. He never heard Dr. Beyer mention that she worked for the County Council or that the County Council would be unhappy with Giant’s association with MCRG. Tr. 153-54.

Over objection, the Commission received two County exhibits into evidence—Verlon Mason’s affidavit (County Exhibit 1) and the audio cassette tape of Mr. Mason’s interview (County Exhibit 2).⁷ Tr. 37. Dr. Beyer did not offer any exhibits. Tr. 157. Both parties waived

⁷ Because of the unavailability of cassette tape players, the Commission also received a transcript of the audio cassette tape.

closing argument. Tr. 157.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The ethics law is not an unbounded general code of civil conduct for county employees. Rather, the ethics law is concerned with the way employees conduct County business; the law addresses employees' private conduct only where the conduct intersects with their public employment. Accordingly, inherent in § 19A-14(e)'s proscription against a public employee's intimidating, threatening, coercing or discriminating against any person for the purpose of interfering with that person's freedom to engage in political activity is a nexus with County employment. In order for § 19A-14(e) to be violated, the employee's conduct must be on the job, include self-identification as a public employee, or otherwise entail the prestige of office.

Assuming that Dr. Beyer did confront MCRG volunteers, Giant Food managers, and patrons, there is no credible evidence that she invoked her County position while doing so. The Commission found Mr. Schall's testimony, as well as Verlon Mason's audiotape and affidavit, unpersuasive. Mr. Mason's use of the derogatory term "shim" when referring to Dr. Beyer, evidences a bias against transgendered individuals. Similarly, Mr. Schall displayed a palpable and unapologetic disdain for transgendered individuals which, in the Commission's judgment, makes his testimony not credible.

On the other hand, the disinterested witnesses do not support the charge. Montgomery County Police Sergeant Douglas Cobb did not testify to any confrontation, let alone conduct that might violate § 19A-14(e). And while Giant manager Aaron Williams testified that there was a "confrontation," "shouting," and "loud talking back and forth," he would not identify what, if any, role Dr. Beyer played in this confrontation.

It is apparent to the Commission that MCRG and Teach the Facts have very political

agendas and this is reflected in their support or opposition to the Bill. There may, in fact, have been harsh words exchanged at the Arliss/Piney Branch on the day in question. But it was not proved that Dr. Beyer violated § 19A-14(e) by intimidating, threatening, coercing or discriminating against any person's freedom to engage in political activity as a function of being on the job, self-identifying as a public employee, or entailing the prestige of office.

V. CONCLUSION

The complaint is dismissed.



March 8, 2011

Nina Weisbroth, Chair
Montgomery County Ethics Commission

Date

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