

A RESOLUTION

**Proposed
Resolution
20-418**

To adopt the findings, conclusions, and recommendations from the Committee Report of the Ad Hoc Committee In Re: Marion Barry, to formally censure Councilmember Marion Barry for the conduct referenced in the Committee Report that violated Council Rule 202, several provisions of the Council's Code of Official Conduct, and the District's Ethics Act, and to recommend removal of Councilmember Marion Barry as the Chairperson of the Council's Committee on Workforce and Community Affairs.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Censure of Councilmember Marion Barry Resolution of 2013".

**Censure of
Councilmember
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2013**

Sec. 2. (a) In adopting its first Code of Official Conduct in 2009, the Council of the District of Columbia (the "Council") declared its commitment "to ensure the full public confidence that representative government requires and recognize [sic] that public office is a public trust, to commit the Council to the highest standards of ethics, honesty, openness, and integrity, and to consistent adherence to these values" (the Council Code of Official Conduct Rules Amendment Resolution of 2009, effective September 22, 2009 (Res. 18-248; 56 DCR 7804)). The Council now adopts a Code of Official Conduct (the "Conduct Rules") at the beginning of each Council Period.

(b) Rule 202(a) of the Rules of Organization and Procedure for the Council of the District of Columbia (the "Council Rules") requires Councilmembers and staff to "maintain a high level of ethical conduct in connection with the performance of their official duties" and to "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." Further, "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 both actual and perceived conflicts of interest and preferential treatment."

(c) In 2011, the Council adopted 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 *et seq.*) ("Ethics Act"). to, among other things, create a Board of Ethics and Government Accountability ("BEGA") and codify a Code of Conduct for the District government. Among BEGA's responsibilities is the administration and enforcement of the District's Code of Conduct. BEGA's findings and official actions, including the censure of a Councilmember, are instructive for the Council in the enforcement of its own standards of conduct.

(d) Rule III(a) of the Council's Conduct Rules for Council Period 20 prohibits an employee from soliciting or accepting, either directly or indirectly, gifts from prohibited sources. Conduct Rule III(f)(2) defines a "prohibited source" as:

[A]ny person or entity that (A) Has or is seeking to obtain contractual or other business or financial relations with the District government; (B) Conducts operations or activities that are subject to regulation by the District government; or (C) Has an interest that may be favorably affected by the performance or non-performance of the employee's official responsibilities.

(e) With respect to conflicts of interest, Conduct Rule I(a) prohibits an employee from the following:

[Using] his or her official position or title, or personally and substantially [participating], through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or [attempting] to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

(f) Conduct Rule I(c)(1) establishes the procedures that must be followed when a Councilmember has a conflict of interest with respect to his or her official duties. The rule requires a Councilmember to prepare and deliver a recusal statement. To do so, the Councilmember must make full disclosure of the financial interest, prepare a written statement describing the matter and the nature of the potential conflict of interest, and deliver the statement to the Council Chairman.

(g) Conduct Rule I(c)(3) specifies that upon receipt of such a disclosure, and during a proceeding in which an elected official would otherwise be required to act upon a matter in which he or she is conflicted, the Chairman must: (A) read a statement explaining a member's conflict into the record of proceedings and (B) excuse the elected official from the proceedings.

(h) Conduct Rule I(c)(3)(C) further states that "[n]o Councilmember excused from votes, deliberations, or other actions on a matter shall in any way participate in or attempt to influence the outcome of the particular matter, in a manner that is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee."

Sec. 3. (a) On May 15, 2013, Councilmember Marion Barry submitted to BEGA a public financial disclosure statement indicating that in 2012 he accepted gifts from 2 prohibited sources: \$2,800 from Forney Enterprises, Inc., and \$4,000 from F&L Construction, Inc. Each company, and their principals, is a prohibited source under both District law and the Council's Conduct Rules because they hold contracts with the District of Columbia.

(b) Based on Councilmember Barry's disclosure, BEGA initiated a preliminary investigation to determine whether his actions violated the District's Code of Conduct.

(c) Councilmember Barry cooperated with BEGA's investigation and entered into a Negotiated Disposition Agreement with BEGA on July 11, 2013. In its Negotiated Disposition Agreement, BEGA made the following findings:

(1) Councilmember Barry accepted gifts from 2 prohibited sources, Mr. Keith Forney and Mr. Freddie Winston, in violation of Conduct Rule III(a) (*see also* D.C. Official Code § 1-1161.01(46) and 6 DCMR § B1803.2).

(2) Councilmember Barry failed to disclose to the Council Chairman his conflict of interest stemming from his acceptance of gifts from prohibited sources. He further failed to provide written statements about the nature of his conflict of interest and did not recuse himself from votes, deliberations, and other actions of the Council related to the 2 prohibited sources. These omissions constitute a violation of the Council's Conduct Rules governing conflicts of interest (*see also* D.C. Official Code § 1-1162.23(c)).

(d) Councilmember Barry acknowledged that his conduct violated the District's Code of Conduct and agreed to be censured by BEGA and fined \$13,600.

Sec. 4. (a) Rule 652 of the Council Rules requires the establishment of an ad hoc committee in the event that BEGA censures a member of the Council. An ad hoc committee (the "Committee") was established by the Council Chairman on July 12, 2013. Pursuant to Rule 652, the Committee was charged with reviewing BEGA's findings, conducting an investigation if warranted, and reporting its findings and penalty recommendations, if any, to the Council within 45 days of being convened.

(b) The Committee reviewed BEGA's findings and case file and interviewed the Director of Government Ethics and his staff regarding BEGA's investigation. The Committee also interviewed Councilmember Barry and Mr. Keith Forney, principal of Forney Enterprises, Inc. The other prohibited source, Mr. Freddie Winston, owner of F&L Construction, Inc., declined through counsel to be interviewed by the Committee.

Sec. 5. (a) On September 16, 2013, the Committee unanimously approved the proposed resolution, the Censure of Councilmember Marion Barry Resolution of 2013. The Committee also unanimously approved the committee report (the "Report").

(b) In the Report, the Committee made the following findings:

(1) In 2012, Councilmember Barry received gifts of cash totaling \$6,800 from Mr. Keith Forney and Mr. Freddie Winston. The Committee concluded that the value of Mr. Forney's cash gifts totaled \$2,800 and Mr. Winston's cash gifts totaled \$4,000. The Committee concluded that all gifts in question were provided in cash. Report at 4.

(2) Mr. Forney, Forney Enterprises, Inc., Mr. Winston, and F&L Construction, Inc. were prohibited sources when Councilmember Barry accepted the gifts. A number of contracts awarded to both Forney Enterprises, Inc., and F&L Construction, Inc., came before the Council for approval between 2011 and 2013. The Committee therefore concluded that

Councilmember Barry violated Conduct Rule III(a) prohibiting the acceptance or solicitation of gifts from prohibited sources. *Id.* at 6.

(3) The Committee found insufficient evidence to conclude that there was a quid pro quo arrangement associated with the gifts of cash from either prohibited source. *Id.* at 5.

(4) Because Councilmember Barry received gifts from Mr. Forney and Mr. Winston, he had a conflict of interest with respect to official matters affecting these individuals and the businesses they owned. *Id.* at 7.

(5) Due to his conflict of interest, Councilmember Barry was prohibited from voting on or advocating for the approval of contracts benefitting Mr. Forney and his business interests, and Mr. Winston and his business interests, because doing so would have had a direct and predictable effect on the financial interests of individuals closely affiliated with him. Mr. Forney and Mr. Winston can be considered closely affiliated with Councilmember Barry by virtue of their gift-giving relationships. *Id.* at 7.

(6) In May 2013, the Mayor transmitted to the Council 2 change-order and payment approval contracts (the “Forney Change Orders”) and corresponding emergency resolutions authorizing payment to Forney Enterprises, Inc., for work already completed on the Simon and Leckie elementary schools in Ward 8. *Id.* at 8.

(7) The Forney Change Orders and corresponding emergency resolutions were referred to the Council’s Committee on Government Operations, which has oversight over the construction of public school facilities managed by the Department of General Services. The Committee on Government Operations is chaired by Councilmember McDuffie. *Id.* at 9.

(8) Councilmember Barry’s staff contacted the Government Operations Committee Director to request that Councilmember Barry’s name be added to the Government Operations Committee memorandum that would be circulated to the Council requesting that the Forney Change Orders be placed on the June 4, 2013, legislative meeting agenda. As a result, Councilmember Barry’s name appeared on the meeting agenda as a movant of the Forney Change Orders and emergency declaration resolutions. *Id.* at 9, Attachment E.

(9) At the June 4, 2013, legislative meeting of the Council, Councilmember Barry was recorded as voting “Yes” in favor of the 2 emergency declaration resolutions authorizing the payment to Forney Enterprises, Inc. Councilmember Barry was recorded as voting “Present” on the underlying Forney Change Order contracts (CA19-0361 (Simon Elementary School) and CA19-0349 (Leckie Elementary School)). *Id.* at 9.

(10) Councilmember Barry’s vote of “Yes” on the emergency declarations and “Present” on the underlying contracts is a violation of the Conduct Rules I(a) and (c)(3), which prohibit a Councilmember from voting on a matter in which he or she has a conflict of interest. *Id.* Voting “Present” is not considered a recusal.

(11) The Committee also concluded that, with respect to the Forney Change Orders and emergency declaration resolutions, Councilmember Barry did not comply with the disclosure and recusal requirements of Council Conduct Rule I(c)(1) and I(c)(3)(A)-(B). Although he reported the gifts from Mr. Forney to BEGA in his May 15, 2013, public financial disclosure statement, Councilmember Barry failed to disclose his conflict of interest to the

Council Chairman. Councilmember Barry did not provide a written statement outlining the nature of his conflict of interest, and he failed to recuse himself from votes, deliberations, and other actions on matters before the Council relating to Forney Enterprises, Inc. *Id.* at 9-10.

(12) The Committee also concluded that in co-moving the Forney Change Orders and participating in the vote, Councilmember Barry's actions had the effect of influencing the process of approving the bills where a party to the underlying contract had provided unlawful cash payments to him in the past in violation of Conduct Rule I(a). *Id.* at 10.

Sec. 6. The Council adopts the findings and recommendations in the Report.

Sec. 7. To maintain the confidence of the public in the integrity of the legislative branch of government, the Council:

(1) Expresses its disapproval of the actions of Councilmember Marion Barry as detailed in the Report and BEGA's Negotiated Disposition Agreement, and hereby censures Councilmember Marion Barry for committing acts in violation of the standards embodied in the Council's Conduct Rules and the District's Ethics Act; and

(2) Recommends that Councilmember Barry be removed as Chairperson of the Committee on Workforce and Community Affairs and be deemed ineligible to chair another committee for the remainder of Council Period 20.

Sec. 8. The Council shall transmit a copy of this resolution, upon its adoption, to Councilmember Marion Barry.

Sec. 9. This resolution shall take effect immediately.