**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| ROSLYN J. JOHNSON,<br><br>Plaintiff,<br><br>v.<br><br>JONETTA ROSE BARRAS, *et al.*,<br><br>Defendants. | No. 2007 CA 001600 B<br><br>Judge Gerald I. Fisher<br><br>Calendar 1<br><br>Next event:<br>Initial Scheduling Conference<br>June 1, 2007 |

**MOTION TO DISMISS ALL CLAIMS AGAINST DEFENDANTS DOROTHY BRIZILL, GARY IMHOFF AND DCWATCH**

Pursuant to Superior Court Rule 12(b)(6), defendants Gary Imhoff, Dorothy A. Brizill and DCWatch hereby move for the dismissal, with prejudice, of all claims filed against them on the ground that the complaint fails to state any claim on which relief can be granted.

Plaintiff's counsel has informed the undersigned that the plaintiff does not consent to the granting of this motion.

A memorandum of points and authorities and a proposed order are filed herewith.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion to Dismiss All Claims Against Defendants Dorothy Brizill, Gary Imhoff and DCWatch, and the appended Memorandum of Points and Authorities and proposed Order, were served upon plaintiffs' counsel (David S. Coaxum, Esq., and Brian J. Markovitz, Esq.), upon counsel for defendant Jonetta Rose Barras (A. Scott Bolden, Esq., and Daniel Z. Herbst, Esq.), and upon counsel for defendant District of Columbia (Assistant Attorney General Eden I. Miller), by e-mail via the Court's electronic case filing system, this 7th day of May, 2007.

A copy was served by first-class mail, postage prepaid, upon the following party, who has not yet appeared, at the addresses listed for it in the complaint, to wit:

Talk Media Communications, LLC
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8121 Georgia Avenue, Suite 203
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/s/ *Arthur B. Spitzer*

_____

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS ALL CLAIMS AGAINST DEFENDANTS DOROTHY BRIZILL, GARY IMHOFF AND DCWATCH**

Pursuant to Superior Court Rule 12(b)(6), defendants Gary Imhoff, Dorothy A. Brizill and DCWatch (collectively the "DCWatch Defendants") have moved for the dismissal, with prejudice, of all claims filed against them on the ground that the complaint fails to state any claim on which relief can be granted against them.

## INTRODUCTION

The claims against the DCWatch Defendants must be dismissed because they are barred by an absolute immunity granted by Congress in Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, and because the complaint does not overcome the stringent requirements that the First Amendment imposes on public officials' claims for defamation and related torts.

As explained below, Congress has determined that Internet intermediaries like DCWatch cannot be held liable for the Internet publication of content created by third parties and has explicitly preempted all state laws to the contrary. Because the complaint

asserts liability against the DCWatch Defendants based only on their Internet publication of defendant Jonetta Rose Barras' allegedly defamatory articles in their online newsletter and on their website, it cannot survive this motion to dismiss under Section 230.

Furthermore, the First Amendment imposes a number of stringent standards on a public official asserting claims for defamation or related torts, one of which is the burden of proving that the statements at issue were not substantially true. Here, an official government document of which the Court can take judicial notice — a formal report of the Inspector General of the District of Columbia — demonstrates that the substance of Jonetta Rose Barras' articles was true: Ms. Johnson, a public official, did submit an inflated résumé and was improperly hired for her D.C. government position.

Accordingly, the claims against the DCWatch defendants should be dismissed.

## APPLICABLE LEGAL STANDARD

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, "the complaint must be construed in the light most favorable to the plaintiff, and its allegations taken as true." *Larijani v. Georgetown University*, 791 A.2d 41, 43 (D.C. 2002). However, a motion to dismiss should be granted "when 'it appears beyond a doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" *Herbin v. Hoeffel*, 806 A.2d 186, 194 (D.C. 2002) (quoting *Klahr v. District of Columbia*, 576 A.2d 718, 721 (D.C. 1990)). Although that standard is a stringent one, it is fully satisfied here, where the complaint demonstrates on its face that the DCWatch defendants' activities are protected by an explicit federal statutory grant of immunity, as well as by the First Amendment's broad protection for news reports concerning public officials.

## RELEVANT FACTS

The complaint makes only a few allegations against the DCWatch Defendants, but enough to show that Plaintiff has no viable claims against them.

Defendant Brizill "is the Executive Director of DC Watch [*sic*; the correct name is"DCWatch"]], a government watchdog organization in the District," ¶ 4. Defendant Imhoff "is the Vice President and Webmaster of DC Watch [*sic*], and upon information and belief, is the joint proprietor of the DC Watch [*sic*] publication with Ms. Brizill," ¶ 5. Defendant DCWatch is "a government watchdog group, which publishes articles via its website at www.dcwatch.com." ¶ 6.

The complaint alleges that defendant Jonetta Rose Barras "published a series of libelous articles in The Mail [*sic;* the correct name is "themail"], an online publication controlled, organized, and owned by Defendants DC Watch [*sic*], Ms. Brizill and Mr. Imhoff," and that "DC Watch [*sic*] has published Ms. Barras' defamatory articles on its website and on its weblog, to wit: The Mail [*sic*]." ¶¶ 66, 67. These allegedly libelous articles were "published . . . in The Mail [*sic*], under the authority and approval of the defendants." ¶ 76.

The alleged defamatory statements were that the plaintiff misrepresented and inflated her employment history and prior compensation when applying for a D.C. government job. ¶¶ 70-75 (quoting the allegedly defamatory statements).

Plaintiff further alleges that "[t]he Defendants knew or should have known that the Plaintiff had not committed said misconduct, was truthful, and was qualified to act in her position," and that "[t]he Defendants publicized in both papers [presumably "papers" is intended to refer to the DCWatch website and Jonetta Rose Barras' website, *see*

Complaint ¶ 46] and on radio air ways [*sic*] that Plaintiff had committed misconduct, was untruthful, and not qualified in a reckless manner and with a reckless disregard for the truth as to whether committed [*sic*] any misconduct." ¶¶ 82, 83.

Finally, the complaint alleges that by means of these publications the DCWatch Defendants "intentionally and improperly interfered with the performance of Plaintiff's employment." ¶ 91.

Importantly, however, the complaint does not allege that the DCWatch Defendants played any role in creating the content of the articles signed by Ms. Barras. Nor does it present any facts indicating, or even suggesting, that the DCWatch Defendants had any reason to doubt the truth and accuracy of Ms. Barras' reporting about plaintiff Johnson.

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The complaint notes that the plaintiff was terminated from her employment "due to the nature of the allegations made against Ms. Johnson by Ms. Barras," ¶ 39, but it does not mention the fact that Ms. Johnson was discharged not simply because Ms. Barras made allegations, but because those allegations were found to be *substantially true*. The Inspector General of the District of Columbia conducted an investigation into Ms. Johnson's qualifications and the manner in which she had been hired. This Court can take judicial notice of that public record. *See Bostic v. District of Columbia*, 906 A.2d 327, 332 (D.C. 2006) (court "may take judicial notice of . . . matters of public record" when ruling on a motion to dismiss a complaint). That report concluded that plaintiff Johnson *in fact* "submitted an enhanced resume" to the D.C. government in connection with her job application, which "expanded on her work experience" and

overstated her prior salary. *See* DISTRICT OF COLUMBIA OFFICE OF THE INSPECTOR GENERAL, AUDIT OF THE DEPARTMENT OF PARKS AND RECREATION'S HIRING PRACTICES, OIG No. 06-2-21MA, at 24-26 (regarding "Employee A") (February 8, 2007) (attached hereto as Exhibit A).[1] The Inspector General's Report also concluded that Ms. Johnson was improperly hired in a closed process, instead of through the "open competition" required by law, *id.* at 17, so that there was no assurance "that either the most qualified applicants were appointed . . . or that the maximum amount of consideration was given to District residents." *Id.* at 18. Indeed, because of the unlawful process through which Ms. Johnson was hired, she was the only person considered for appointment to her position. *Id.*

One of the highest purposes of journalism is the exposure of wrongdoing by government officials. By her investigative reporting in this matter, Jonetta Rose Barras served that high purpose. By publishing Ms. Barras' reports on the Internet, the DCWatch defendants likewise served that high purpose. They should be commended for their actions, not sued.

[1] It can be reliably determined from the facts presented in the Inspector General's Report and in plaintiff Johnson's complaint that "Employee A" is plaintiff Johnson. *Compare, e.g.,* Complaint ¶ 20 ("On August 22, 2005, Ms. Johnson was hired by DCOP to hold a temporary appointment pending the establishment of a registered (TAPER) position as Deputy Director of Programs") *with* IG Report at 5 ("on August 22, 2005, DCOP hired employee A on a non-competitive TAPER appointment as the Deputy Director.").

## ARGUMENT

### I. Section 230 Of The Communications Decency Act Bars All of Plaintiff's Common Law Tort Claims Against the DCWatch Defendants.

This case concerns the liability of defendants Imhoff, Brizill, and DCWatch for publishing allegedly tortious remarks made by Jonetta Rose Barras about the plaintiff on the DCWatch website and through themail, an online publication that plaintiff alleges is "controlled, organized, and owned by defendants DC Watch [*sic*], Ms. Brizill and Mr. Imhoff." Complaint ¶ 66. Even if all of the plaintiff's factual allegations are true, her claims against these defendants must fail because they are barred by Section 230 of the Communications Decency Act, which grants absolute immunity to providers and users of interactive computer services from liability for content provided by third parties. 47 U.S.C. § 230)(c)(1). Thus, the DCWatch defendants cannot be held liable — whether for defamation, false light invasion of privacy, intentional interference with contract, or any other tort — for republishing via the Internet content provided to them by others, such as the articles concerning plaintiff Johnson submitted to DCWatch by Jonetta Rose Barras.[2]

Section 230 provides:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> . . .
> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. §§ 230(c)(1); (e)(3).

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[2] Courts regularly grant Rule 12(b)(6) motions when it is clear that Section 230 bars the claims alleged in the plaintiff's complaint. *See, e.g., Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F. 3d 413, 415 (1st Cir. 2007); *Green v. America Online*, 318 F.3d 465, 472 (3d Cir. 2003); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 538 (E.D. Va. 2003), *aff'd*, 2004 WL 602711 (No. 03-1770) (4th Cir. Mar. 24, 2004).

Under Section 230, the people who actually *write* material that is transmitted via the Internet ("information content provider[s]") are responsible for the accuracy of what they write. But the people who *transmit* that material via the Internet — whether by posting on websites, electronic newsletters, chat rooms, bulletin boards, listservs, or the like ("provider[s] or user[s] of an interactive computer service") have "immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

Courts interpreting Section 230 have found its meaning clear and unambiguous: "By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). In the eleven years since Congress enacted Section 230, the courts have consistently applied its immunity broadly, not sparingly, to encourage free speech on the Internet. *See, e.g., Barrett v. Rosenthal*, 40 Cal. 4th 33, 39, 146 P.3d 510, 513 (Cal. 2006) ("These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source.")

Immunity under Section 230 requires only: (1) that the defendant is a "provider or user of an interactive computer service," (2) that the claims asserted against the defendant treat the defendant as a publisher or speaker of information over the Internet, and (3) that the allegedly tortious material was provided to the defendant by someone else (the "information content provider"). *Zeran*, 129 F.3d at 330. The allegations of the

Complaint show (1) that the DCWatch Defendants are both providers and users of an interactive computer service; (2) that plaintiff's claims treat the DCWatch Defendants as the publisher of the allegedly defamatory articles; and (3) that the allegedly tortious material was provided by someone else (defendant Barras). Accordingly, the claims against the DCWatch Defendants are barred by Section 230.

### A. The Facts Alleged in Plaintiff's Complaint Establish That the DCWatch Defendants Are Providers and Users of an Interactive Computer Service.

The complaint alleges that "Defendant, DC Watch [*sic*], is an organization formed and operating in the District of Columbia as a government watchdog group, which publishes articles via its website at www.dcwatch.com," Complaint ¶ 6, and that defendants Brizill and Imhoff are "the joint proprietor[s]" of DCWatch. Complaint ¶ 5. The plaintiff alleges that these defendants are liable to her for damages because "DC Watch has published Ms. Barras' defamatory articles on its website and on its weblog, to wit: The Mail [*sic*]." Complaint ¶ 67; *see also* ¶¶ 70-75 (quoting the allegedly defamatory articles written by defendant Jonetta Rose Barras).

The law is clear that dcwatch.com and themail@dcwatch are "provider[s] or user[s] of an interactive computer service" within the meaning of Section 230. The statute contains a specific definition of the term:

> The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]

47 U.S.C. §§ 230(f)(2).

Applying the literal language of the statute, the DCWatch website, like any website, is an "interactive computer service" because it is an "information service" — a

service that provides information — that enables its "multiple users" to "access . . . a computer server" — that is, to access the server that hosts the DCWatch web site. The First Circuit has explained that this is precisely the meaning of the statute:

> A web site . . . "enables computer access by multiple users to a computer server," namely, the server that hosts the web site. Therefore, web site operators . . . are providers of interactive computer services within the meaning of Section 230.

*Universal Communication Systems, Inc.,* 478 F.3d 413, 419 (1st Cir. 2007) (quoting 47 U.S.C. §§ 230(f)(2)); *accord Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006):

> "[I]nteractive computer service" means, in relevant part, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." § 230(f)(2). . . . Because it is a "service" that "enables computer access" by multiple users to a computer server, *see* 47 U.S.C. § 230(f)(2), Max's Web site is a "provider."

*Id.* at 529-530. The courts have consistently adhered to this "expansive definition of 'interactive computer service,'" *Carafano v. Metrosplash.com, Inc.*, 339 F. 3d 1119, 1123 (9th Cir. 2003), *see also Parker v. Google*, 422 F. Supp. 2d 492, 501 n.6 (E.D. Pa. 2006) (same), holding that websites like DCWatch are "interactive computer services" within the meaning of Section 230. *See, e.g., Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (holding that an online newsletter and website were protected under the statutory definition); *Carafano*, 339 F.3d at 1123 (same); *Marczeski v. Law*, 122 F. Supp. 2d 315, 327 (D. Conn. 2000) (host of online chatroom is a provider of an interactive computer service); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40 (Wash. Ct. App. 2001) ("Amazon's web site enables visitors to the site to comment about authors and their work, thus providing an information service that necessarily enables access by multiple users to a server. This brings Amazon squarely within the definition."); *Corbis Corp. v.*

*Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004) (same); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n.7 (Cal. Ct. App. 2002) (eBay website is an interactive computer service). The two courts in this jurisdiction that have had occasion to consider the issue have reached the same conclusion. *See Blumenthal v. Drudge,* 992 F. Supp. 44, 49 (D.D.C. 1998) (Friedman, J.) (AOL immune under Section 230 for republishing allegedly defamatory statements by Internet gossipmonger Matt Drudge); *Ramey v. Darkside Products, Inc.*, No. 02-ca-730, 2004 U.S. Dist. LEXIS 10107 (D.D.C. 2004) (Kessler, J.) (website operator entitled to Section 230 immunity).

Not only are the DCWatch defendants immune from plaintiff's claims as "provider[s] . . . of an interactive computer service," they are also "user[s] of an interactive computer service," which are equally immune under Section 230. The basis of liability asserted against the DCWatch defendants in this action is that they operate a website upon which the allegedly tortious statements were published. *See* Complaint ¶ 67. It is an elementary fact of Internet life that for any "Web site to exist, it must access the Internet through some form of interactive computer service; otherwise, the public could not view it. Thus, [the defendant's] Web site is also the 'user' of an interactive computer service." *Dimeo v. Max*, *supra*, 433 F. Supp. 2d at 529-530.

The Ninth Circuit recognized the same inescapable fact in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), where a defendant named Cremers operated a website and moderated an e-mail newsletter on behalf of the Museum Security Network. *Batzel* at 1021. The facts in *Batzel* are significantly similar to the facts alleged in this case: the plaintiff alleged that Cremers injured her by publishing in his e-mail newsletter and posting on his website a defamatory message that had been sent to him by defendant

Smith. The Ninth Circuit easily concluded that Mr. Cremers and the Museum Security Network were protected by Section 230 immunity. As the court explained:

> There is no dispute that the Network uses interactive computer services to distribute its on-line mailing and to post the listserv on its website. Indeed, to make its website available and to mail out the listserv, the Network *must* access the Internet through some form of "interactive computer service." Thus, both the Network website and the listserv are potentially immune under § 230.

*Id*. at 1031 (emphasis in original).[3] Likewise, in *Donato v. Moldow,* 374 N.J.Super. 475, 865 A.2d 711 (N.J. Super. Ct. App. Div. 2005), the court easily found that the operator of a website was both a provider and a user of an interactive computer service within the meaning of Section 230:

> By the plain language of § 230 it is clear that Moldow fits the definition of a "provider or user of an interactive computer service." This is so under either of two rationales. He is the provider of a website, Eye on Emerson, which is an information service or system that provides or enables computer access by multiple users to a computer server. Alternatively, he is the user of a service or system, VantageNet, the website's electronic host, that provides or enables access by multiple users to a computer server; he is also, of necessity, the user of an Internet service provider (ISP), which provides him access to the Internet. Our conclusion is supported by the case law interpreting the statutory provisions.

*Id.*, 865 A.2d at 718 (lengthy discussion of case law follows).

Thus, under the facts alleged in the plaintiff's complaint, the DCWatch Defendants qualify as providers and/or users of an "interactive computer service." To grant this motion to dismiss, the Court need not decide whether they are providers, or users, or both, because the statute expressly provides both providers and users of an interactive computer service with the same immunity. *See Batzel*, 333 F.3d at 1030 ("the

[3] The court's reference to "potential" immunity related to the question whether the allegedly defamatory material had been created by defendant Cremers or provided by a third party, which the court discussed subsequently in its opinion.

language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services."); *Barrett,* 146 P.3d at 529 ("By declaring that no 'user' may be treated as a 'publisher' of third party content, Congress has comprehensively immunized republication by individual Internet users."). Thus, as in *Batzel*, there is "no need here to decide whether a listserv or website itself fits the broad statutory definition of 'interactive computer service,' because the language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services." *Batzel*, 333 F.3d at 1031.

In order to qualify for Section 230 immunity, it remains only for the DCWatch Defendants to show that that plaintiff's claims are based on their status as the publisher of those articles and that the articles were provided by a third party.

### B. Plaintiff's Allegations Against the DCWatch Defendants Are Based Solely Upon Their Alleged Role as Internet Publishers.

Plaintiff's claims against the DCWatch Defendants meet the second criterion for Section 230 immunity because they arise solely from the defendants' alleged responsibility for publishing material on the Internet. The complaint alleges that the DCWatch Defendants have "*published* Ms. Barras' defamatory articles on its website and on its weblog, to wit: The Mail [*sic*]." Complaint ¶ 67 (emphasis added). The complaint also alleges that "Ms. Barras has published, and has *received authority to publish*, several libelous statements in . . . The Mail [*sic*], under the authority and approval of the [DCWatch defendants]." Complaint ¶ 76 (emphasis added). Plaintiff's allegations against the DCWatch defendants are based solely on the defendants' decision to *publish* the allegedly defamatory articles in their electronic newsletter and on their website.

Those allegations put plaintiff's claims squarely within the bar of Section 230 immunity. As the Fourth Circuit has explained:

> [Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred.

*Zeran*, 129 F.3d at 330; *accord Blumenthal*, 992 F. Supp. at 50 (quoting *Zeran*); *Batzel*, 333 F.3d at 1031 ("The exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message"); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 908, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); *Ramey*, 2004 U.S. Dist. LEXIS 10107 at *16 (same). Indeed, although the complaint in this action makes no allegation that the DCWatch Defendants edited Ms. Barras' articles in any manner, such an allegation —or proof of such facts — would not lessen the defendants' entitlement to immunity. *See Carafano*, 339 F.3d at 1124 ("so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity [under Section 230] regardless of the specific editing or selection process"); *Batzel*, 333 F.3d at 1031 ("the exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message"); *Donato,* 865 A.2d at 719-720 (website operator not liable despite allegations of "selective editing, deletion and re-writing of anonymously posted messages").

Thus, the facts alleged in the plaintiff's complaint demonstrate that the DCWatch Defendants satisfy the second criterion required for Section 230 immunity. It remains only for the DCWatch defendants to show that that the allegedly defamatory material that they published on the Internet was provided by a third party.

### C. Plaintiff's Claims Against the DCWatch Defendants Are Based Solely on the Allegation that they Published Material Provided by a Third Party.

Finally, the allegations of plaintiff Johnson's complaint also show that the third criterion for Section 230 immunity, that the allegedly tortious material was "provided by another information content provider," is satisfied in this case. An "information content provider" is defined by the statute as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

The complaint asserts repeatedly that Ms. Barras provided the allegedly tortious content published in themail and on the DCWatch website. *See* Complaint ¶¶ 57, 66, 67, 79. The complaint does not allege or even suggest that the DCWatch Defendants provided any content for the articles that were published under Ms. Barras' byline. Thus, the third and last criterion required for Section 230 immunity is satisfied, and the DCWatch Defendants are immune from plaintiff Johnson's claims.

Accordingly, the complaint must be dismissed with prejudice as to the DCWatch Defendants.

## II. The First Amendment Protects the DC Watch Defendants From Liability Because Public Records Show that Ms. Barras' Reports Were Substantially True.

In addition to the immunity provided by Section 230, the First Amendment to the United States Constitution requires dismissals of plaintiff's claims against the DCWatch Defendants.

It is black letter law that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Beeton v. District of Columbia,* 779 A.2d 918, 923 (D.C. 2001) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964)). This protective standard recognizes our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times v. Sullivan*, 376 U.S. at 270. The Supreme Court has recognized that the protections of the First Amendment apply to Internet publications as they would to print media. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

It is clear from the facts alleged in the complaint that the plaintiff was a public official at the time of the alleged events. As Deputy Director of Programs at the Department of Parks and Recreation (Complaint ¶ 24), she held a position of "substantial responsibility for or control over the conduct of governmental affairs." *Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)). *See also Paul v. News World Communications,* 2003 WL 23899002 at *2 (No. 01-CA-

0917, D.C. Super. Ct. 2003) (Burgess, J.) (holding that the Chief Information Officer of the Prince George's County Public School System is a public official for purposes of First Amendment defamation standards). Thus, to prevail on her claims, the plaintiff must meet the high standard of proving that the defendants "made the false publication with a 'high degree of awareness of . . . probable falsity,' or must have 'entertained serious doubts as to the truth of his publication.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (ellipsis in original) (internal citations omitted). Moreover, the defendants' "'"[a]ctual malice" must be proved by clear and convincing evidence.'" *Foretich v. CBS, Inc.*, 619 A.2d 48, 59 (D.C. 1993) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

The plaintiff here has alleged that the defendants published false information about her "in a reckless manner and with a reckless disregard for the truth." Complaint ¶ 83. While no facts alleged in the complaint even suggest that the DCWatch Defendants had any reason to doubt the accuracy of the reporting of Jonetta Rose Barras — a prominent local journalist with a good reputation — the Court must assume this bare allegation of recklessness to be true, for the moment.

But clear and convincing proof of actual malice is not the only barrier that the First Amendment interposes to claims for defamation and allied torts by public officials. Dispositive here is an additional barrier: that the law does not allow the imposition of liability for statements that are fundamentally true. *See Foretich v. CBS, Inc.*, 619 A.2d at 60 (no liability "provided that the defamatory charge is true in substance") (internal quotation omitted) (citing *Liberty Lobby, Inc. v. Dow Jones & Co.,* 838 F.2d 1287, 1296 (D.C. Cir. 1988) (no liability where "[t]he sting of the charge . . . is substantially true"));

*see also* Restatement (Second) of Torts, § 581A comment f (1977) ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."). Moreover, "[w]here a public official is involved, it is the Plaintiff's burden to prove falsity." *Paul v. News World Communications, 2003 supra,* 2003 WL 23899002 at *11 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)).

The gist of plaintiff's claims here is that Ms. Barras defamed her and interfered with her employment by writing that she had inflated her résumé and should not have been hired. *See* Complaint ¶ 70 ("inflated her employment and compensation history"); ¶ 71 ("inflated her resume"); ¶ 72 ("inflated [her] salary and employment history"); ¶ 73 ("inflated her resume"); ¶ 74 ("misrepresented her credentials and salary history on the resume used to secure her position"); ¶ 75 ("misrepresented her employment and salary history"), and that the DCWatch Defendants are liable for those defematory statements because they published Ms. Barras' reports on the Internet. *See id.* and ¶¶ 67, 76. However the D.C. Inspector General, after investigating the facts, concluded that Ms. Johnson had indeed inflated her résumé and was indeed improperly hired. *See supra* pp. 4-5 and Exhibit A.

It may be possible for Ms. Johnson to quibble about some of the details, and of course she may have her own opinion about her motives and intentions, but she cannot hope to prove that the essential points made in Jonetta Rose Barras' reports were false. Even less can she hope to prove that in allowing Ms. Barras to have access to their Internet forum to publish her reports, the DCWatch Defendants acted with a high degree of awareness of the reports' probable falsity, or while entertaining serious doubts as to their truth. Ms. Johnson's effort to do so borders on the frivolous.

The claims against the DCWatch Defendants should never have been filed. It is clear that plaintiff will be able to prove no set of facts in support of her claims that would entitle her to relief against these defendants. Accordingly, those claims should be dismissed.[4]

---

[4] The claim that the District of Columbia violated Ms. Johnson's rights under the D.C. Freedom of Information Act, D.C. Code §§ 2-531 to 2-540 (D.C. FOIA), by disclosing facts about her job application are entirely independent of the tort claims filed against the DCWatch Defendants. However, as government "watchdogs" who use the D.C. FOIA in their work, the DCWatch Defendants support the motion to dismiss filed by the District of Columbia.

The D.C. FOIA (like its federal counterpart) mandates the release of government records upon request, subject to certain exemptions that can be — but need not be — invoked by the government. *See* D.C. Code § 2-534(a) ("The following matters *may* be exempt from disclosure") (emphasis added). It is not a violation of FOIA to release records that *may* be exempt from mandatory disclosure. *See Washington Post Co. v. D.C. Minority Business Opportunity Com'n*, 560 A.2d 517, 521 (D.C. 1989) (FOIA "exemptions are to be narrowly construed, with ambiguities resolved in favor of disclosure"). Indeed, even information about individuals contained in personnel or medical files, which might ordinarily be exempt from mandatory disclosure, must be disclosed where "the information is necessary to 'shed any light on the [unlawful] conduct of any government agency or official.'" *Maydak v. Dep't of Justice*, 254 F. Supp. 2d 23, 37 (D.D.C. 2003) (quoting *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73 (1989) (alteration by the court)). Thus, under the circumstances presented, the release of any records about plaintiff Johnson was not a violation of the D.C. FOIA.

Moreover, the only cause of action created by the D.C. FOIA is an action for equitable relief to compel the release of records improperly withheld; the statute creates no cause of action for damages — neither for the improper withholding of records nor for the improper release of records. *See* D.C. Code § 2-537, *see also Gale v. Dept. of Justice*, 628 F.2d 224, 226 n.4 (D.C. Cir. 1980) ("The Freedom of Information Act does not create a cause of action for damages").

The judicial creation of a cause of action for damages under the D.C. FOIA for the improper release of records would throw a monkey wrench into the operation of the statute, deterring District employees from releasing records except pursuant to court order, for fear of subjecting the District to liability and perhaps subjecting themselves to discipline. This would be contrary to the fundamental purpose and intent of the statute, which is to make citizens' access to government records simple and prompt. *See* D.C. Code § 2-531 ("provisions of this subchapter shall be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information").

## CONCLUSION

For the reasons stated above, the DCWatch Defendants' motion to dismiss should be granted, and all claims against defendants Gary Imhoff, Dorothy A. Brizill and DCWatch should be dismissed with prejudice.

Respectfully submitted,

/s/ *Arthur B. Spitzer*

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May 7, 2007

# Exhibit A

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**OFFICE OF THE INSPECTOR GENERAL**

# DISTRICT OF COLUMBIA
# OFFICE OF THE INSPECTOR GENERAL
# AUDIT OF THE
# DEPARTMENT OF PARKS AND RECREATION'S
# HIRING PRACTICES

**CHARLES J. WILLOUGHBY**
**INSPECTOR GENERAL**

**OIG No. 06-2-21MA** **February 8. 2007**

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Office of the Inspector General**

**Inspector General**

February 8. 2007

Brender L. Gregory
Acting Director
Office of Personnel
441 4th Street, N.W., Suite 300-S
Washington, D.C. 20001

Wanda S. Durden
Interim Director
Department of Parks and Recreation
3149 16th Street N.W.
Washington, DC 20010

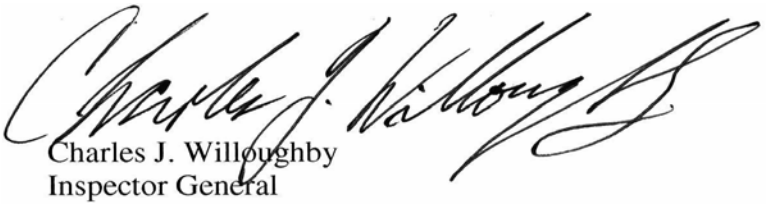
Dear Ms. Gregory and Ms. Durden:

Enclosed is our final report summarizing the results of the Office of the Inspector General's (OIG) *Audit of the District of Columbia Department of Parks and Recreation's (DPR) Hiring Practices* (OIG No. 06-2-21MA).

We addressed 13 recommendations to the Office of Personnel (DCOP) necessary to correct the described deficiencies. The Director of DCOP provided responses to the draft report on January 19, 2007, and the Director of DPR provided responses on January 25, 2007. The DCOP Director was in agreement with all the recommendations made in the draft report. However, the DCOP Director's comments did not provide target dates for completion of planned actions. We consider DCOP's comments responsive; however, we request that by March 15, 2007, DCOP provide us comments regarding any corrective actions taken or planned and their respective target or completion dates. The full text of DCOP's response is included at Appendix 3. Additionally, the Director of DPR agreed to adopt measures to ensure that all Human Resource Employees are provided with appropriate personnel training. The full text of DPR's response is included at Appendix 4.

We appreciate the cooperation and courtesies extended to our staff during the audit. If you have questions, please contact William J. DiVello, Assistant Inspector General for Audits, at (202) 727-2540.

Sincerely,



Charles J. Willoughby
Inspector General

CJW/gs

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Enclosure

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# AUDIT OF THE DEPARTMENT OF PARKS AND RECREATION'S HIRING PRACTICES

## ACRONYMS

| | |
|---|---|
| AQRR | Applicant Qualifications Rating Record |
| DCMR | District of Columbia Municipal Regulations |
| DCOP | District of Columbia Office of Personnel |
| DPM | District of Columbia Personnel Manual |
| DPF | Department Personnel Folder |
| DPR | District of Columbia Department of Parks and Recreation |
| DS | District Service |
| HR | Human Resources |
| OPF | Official Personnel File |
| OIG | District of Columbia Office of the Inspector General |
| MCF | Merit Case File |
| MSS | Management Supervisory Service |
| TAPER | Temporary Appointment Pending Establishment of a Register |

# AUDIT OF THE DEPARTMENT OF PARKS AND RECREATION'S HIRING PRACTICES

## TABLE OF CONTENTS

**Page**

# EXECUTIVE SUMMARY

## OVERVIEW

This report summarizes the results of the Office of the Inspector General's (OIG) Audit of the District of Columbia (DC) Parks and Recreation's (DPR) Hiring Practices (OIG No. 06-2-21MA). The audit was initiated in response to concerns raised by the Director of DPR and the Director of the D.C. Office of Personnel (DCOP) as to whether DCOP and DPR adhered to applicable District personnel policies and procedures when hiring five DPR employees between March 2005 and May 2006. Although our review was limited to the five DPR employees, we believe the conditions discussed in this report have significant system-wide implications at DCOP.

## CONCLUSIONS

We determined that: (1) neither DCOP nor DPR adequately conducted qualification and pre-employment inquiries for the five employees prior to offering them District government employment; (2) DCOP did not comply with District personnel regulations when allowing DPR to hire three of the employees on non-competitive Temporary Appointment Pending Establishment of a Register (TAPER) appointments;[1] (3) DCOP did not document whether the TAPER or term appointees met the minimum requirements for the TAPER appointments prior to offering them employment; (4) DCOP did not solicit "open competition," as required by personnel regulations, when converting two TAPER appointees to full-time Management Supervisory Service (MSS) positions; and (5) DCOP did not seek justification from DPR to extend one TAPER appointee beyond the initial 90-day period.

As such, neither DCOP nor DPR can be assured that the best qualified applicants were selected and appointed to the positions or that District residents received proper consideration for the positions. Additionally, these conditions could convey, at a minimum, the perception that DCOP/DPR gave preferential treatment to the five employees.

[1] Title 6 DCMR § 6-3899 defines a TAPER appointment as: "a time-limited appointment pending the establishment of a register when there are insufficient candidates on a register appropriate for filling a Management Supervisory Service position and the public interest requires that the vacancy be filled before eligibles can be certified."

# EXECUTIVE SUMMARY

## SUMMARY OF RECOMMENDATIONS

We addressed 13 recommendations to the Director of DCOP to initiate the necessary actions to correct the deficiencies noted in this draft report. The recommendations center on DCOP: (1) developing and implementing consistent and updated operational policies and procedures over the hiring process; (2) providing initial and refresher training to DCOP and agency Human Resources (HR) Representatives to ensure they understand personnel regulations and DCOP policies and procedures; and (3) developing a quality control system to assess whether DCOP HR Specialists and agency HR Representatives comply with personnel regulations governing the hiring process.

A summary of the potential benefits resulting from the audit is included at Appendix 1.

## CORRECTIVE ACTIONS

The Director of DCOP provided responses to the draft report on January 19, 2007, and the Director of DPR provided responses on January 25, 2007. The DCOP Director was in agreement with all the recommendations made in the draft report. However, the DCOP Director's comments did not provide for corrective actions taken or planned or target dates for completion of planned actions. We request that by March 15, 2007, DCOP provide us comments regarding any corrective actions taken or planned and their respective target or completion dates. The full text of DCOP's response is included at Appendix 3. Additionally, the Director of DPR agreed to adopt measures to ensure that all Human Resource Employees are provided with appropriate personnel training. The full text of DPR's response is included at Appendix 4.

# INTRODUCTION

## BACKGROUND

**Department of Parks and Recreation -** DPR provides District residents and visitors with leisure and learning opportunities, safe parks and facilities, and protected and preserved natural resources. DPR operates 360 triangles and neighborhood parks spanning over 900 acres and provides a variety of services ranging from child care to senior citizen activities. DPR provides these services through facilities and programs, such as: swimming pools; basketball courts; sports fields; child care centers; health and fitness programs; youth programs; and various recreation services and programs. To accomplish its mission, in FY 2006, DPR's operating budget was $51.3 million and the agency had 981 employees. Seasonally, DPR employs an additional 750 part time staff members to operate its facilities, provide seasonal services, and carry out approved programs. Additionally, DPR uses a large volunteer cadre to assist the department in providing services.

**D.C. Office of Personnel -** DCOP provides comprehensive human resource management services to agencies subordinate to the Mayor. DCOP provides these services to the agencies to strengthen individual and organizational work performance and to attract, develop, and retain a highly skilled and qualified workforce.

DCOP develops legislation, rules, and civilian personnel regulations for the career service, excepted service, executive service, legal service, and management supervisory service District employee classifications. A major DCOP function and responsibility is the hiring of agency personnel, to include: processing applications; performing suitability checks; arranging background investigations; preparing other required personnel documents; and assembling the Official Personnel Files (OPF) and Merit Case Files (MCF) for each employee. Subordinate agencies rely heavily on the advice and counsel of DCOP throughout the hiring and selection processes. In FY 2006, DCOP's operating budget was $13.5 million and the agency had 137 employees. DCOP serves over 40 agencies, comprising 23,000 employees. DPR is one of the agencies serviced by DCOP.

## OBJECTIVES, SCOPE, AND METHODOLOGY

Our audit objective was to determine whether DCOP and DPR adhered to applicable District personnel policies and procedures when hiring specific DPR employees between March 2005 and May 2006. In response to DCOP's and DPR's request for review and the public interest raised by several local media articles regarding hiring practices at DPR, we limited the scope of our review to the five DPR employees.

To accomplish our objective, we reviewed the five employees' OPF, MCF, and DPR personnel files (DPF) and interviewed responsible DCOP and DPR management and staff to

# INTRODUCTION

determine whether DCOP and DPR adhered to applicable District personnel regulations when hiring the five employees.

Specifically, we reviewed the adequacy of District personnel policies and procedures as they related to the subject matter covered during the audit and the results of DCOP's internal investigation into the hiring of the five employees. We reviewed the five employees' personnel folders to determine whether DCOP or DPR conducted pre-employment inquiries and qualification determinations in accordance with District personnel regulations. Under our supervision, we requested that DCOP review the five employees' resumes to determine whether they met the minimum qualifications for their respective positions (requalification). We contacted previous employers, professional references, and educational institutions to determine whether the information provided on the five employee's resumes was accurate (reconfirmation). Additionally, we sought to evaluate any other criterion that was required by the job vacancy announcements.

A subsequent audit will evaluate the controls over the PeopleSoft application, the District's Human Resource Management System, to ensure that adequate internal/application controls were implemented and to ensure that the system is properly secured from unauthorized access and manipulation of data.

The audit was conducted in accordance with generally accepted government auditing standards and included such tests as deemed necessary to accomplish our objectives. We did not rely on any computer-processed data during this audit.

# FINDINGS AND RECOMMENDATIONS

## FINDING 1: QUALIFICATION REVIEWS AND PRE-EMPLOYMENT INQUIRIES

### SYNOPSIS

Neither DCOP nor DPR adequately conducted qualification reviews and pre-employment inquiries for the five DPR employees prior to offering them District government employment. This condition occurred because DCOP had not developed policies and procedures that provide a clear delineation of responsibilities between DCOP and the agencies when conducting qualification and pre-employment inquiries. Additionally, DCOP had not provided DCOP HR Specialists with initial and refresher training on performing qualification and pre-employment inquiries. As a result, DCOP/DPR had no assurances that the five employees met the minimum qualifications or were suitable for their respective positions.

### DISCUSSION

**Qualifications Criteria** - Personnel regulations allow DCOP to hire TAPER appointees and Term appointees non-competitively provided the applicants meet the minimum qualifications for the respective positions.

Title 6 of the District of Columbia Municipal Regulations (DCMR) § 3812.2 provides that "[a] person appointed to a TAPER appointment shall meet the minimum qualifications standards for the position." In addition, the District of Columbia Personnel Manual (DPM) § 823.5 states that "[e]xcept as provided in § 823.6, a person appointed under this section [Term appointments] shall meet minimum qualification requirements."

The job vacancy announcements for three of the five DPR employees (TAPER appointees) provide that the minimum qualifications are as follows:

> Specialized Experience: Experience that equipped the applicant with the particular knowledge, skills, and abilities to perform successfully the duties of the position, and that is typically in or related to the work of the position to be filled. To be creditable, at least one (1) year of specialized experience must have been equivalent to at least the next lower grade level in the normal line of progression for the occupation in the organization.

The remaining two DPR employees' (Term employees) personnel folders did not contain vacancy announcements. However, under our supervision, we requested that DCOP re-

## FINDINGS AND RECOMMENDATIONS

qualify all five employees to determine whether they met the minimum qualifications for their respective positions. In lieu of the job vacancy announcement, DCOP requalified the two employees based on whether they had at least one year of specialized experience performing their respective positions. Additionally, the job vacancy announcements for three employees required them to submit Ranking Factors, which would be used in the evaluation process.

**Pre-Employment Inquiry Criteria** - DPM § 405.2, which is a part of the DPM's Suitability and Background Investigations requirements, provides:

> Each personnel authority [e.g., DCOP] shall conduct pre-employment inquiries as follows:
>
> (a) Every appointment to a position in one of the services listed in Section 404.1 shall be subject to completion of at least three (3) reference checks to ascertain character, reputation, relevant traits and characteristics, and other relevant personal qualities, and whether the reference would recommend the appointee for the position for which he or she is being considered;
>
> (b) Prior employment checks to verify:
>
> (1) Dates of employment;
> (2) Salary or other compensation received;
> (3) Titles held and nature of duties performed;
> (4) Reasons for leaving employment; and
> (5) Performance.

**Qualification and Pre-Employment Inquiries** - Based on the requalification, we determined that all five employees were qualified for their respective positions; however, we were unable to fully verify previous employment for Employee A and Employee D. Additionally, we determined that DCOP/DPR did not evaluate three of the employees' ranking factors or adequately perform pre-employment inquiries for all five individuals as required by personnel regulations. Table 1 on the following page summarizes the results of DCOP's pre-employment inquiry for the five DPR employees as required by personnel regulations. Table 1 indicates which pre-employment inquiry items were verified by DCOP.

# FINDINGS AND RECOMMENDATIONS

## TABLE 1: DCOP's PRE-EMPLOYMENT INQUIRY VERIFICATION

| DPR EMPLOYEE | (1) Dates of Employment | (2) Salary or Other Compensation | (3) Titles Held and Nature of Duties Performed | (4) Reasons for Leaving Employment | (5) Job Performance | (6) Professional & Personal References |
|---|---|---|---|---|---|---|
| **Employee A** | No | No | No | No | No | No |
| **Employee B** | No | Yes | No | No | No | No[2] |
| **Employee C** | No | No | No | Yes | No | No |
| **Employee D** | No | No | No | No | No | No |
| **Employee E** | No | No | No | No | No | No |

Table 1 shows that DCOP only checked 2 of a possible 30 suitability requirements for the 5 employees. The following subsections provide specific details on each of the five employees.

**Employee A's Employment History -** On July 20, 2005, DCOP offered Employee A an Associate Program Director position, grade MSS-301-16-1, non-competitive TAPER appointment at an annual salary of $101,813. However, on August 22, 2005, DCOP hired Employee A on a non-competitive TAPER appointment as the Deputy Director, MSS 301-16-2. To correct the error made during the initial offer, on August 22, 2005, DCOP changed Employee A's step and pay plan from MSS-301-16-2 to MSS-301-16-1. Our review of the Associate Program Director position description revealed that the position was classified as a DS-301-15 on December 17, 2001. DCOP reclassified the Associate Program Director position to the Deputy Director MSS-188-16 on July 29, 2005.

The vacancy announcement converting the TAPER appointment to a permanent MSS position (Deputy Director of Programs) was advertised on September 9, 2005, and closed on September 16, 2005. DCOP advertised the full-time MSS position as "agency only." The Selection Certificate provides that Employee A was "the only qualified applicant to apply." On October 2, 2005, Employee A's TAPER appointment was converted to a MSS-301-16-1 position at an annual salary of $105,885. On October 12, 2006, Employee A, an at-will employee, was terminated from District employment.

[2] DCOP performed only 2 of the 3 reference check requirements.

## FINDINGS AND RECOMMENDATIONS

*Qualifications Review* - Employee A's Applicant Qualifications Rating Record[3] (AQRR) dated September 23, 2005, indicates that Employee A met the minimum qualifications for the Deputy Director of Programs position. The AQRR also provides that DCOP erroneously gave Employee A full-time credit for her part-time employment with a previous employer.

However, despite DCOP's error, the AQRR indicates that Employee A still met the minimum qualifications for the position based on her full-time employment with a previous employer. The Selection Certificate provides that DCOP rated Employee A as well qualified. Based on the requalification, Employee A met the minimum qualifications for the Deputy Director TAPER appointment.

*Pre-Employment Inquiries* - Our review of Employee A's OPF, MCF, and DPR Departmental Folders revealed that neither DCOP nor DPR adequately conducted pre-employment inquiries on Employee A. Specifically, we did not find any documentation to support that either DCOP or DPR performed any of the pre-employment inquiries as required by District personnel regulations.

With the exception of the salary for a previous (2002) employer, which was provided in Employee A's first resume, we were able to verify the information provided on both of Employee A's resumes.

**Employee B's Employment History** - On January 23, 2006, DCOP offered Employee B a Program Development and Evaluation Manager, MSS-301-13-3, non-competitive TAPER appointment at an annual salary of $71,043. DCOP classified the Program Development and Evaluation Manager position on January 22, 2004. Prior to the hire, DCOP requested that DPR provide Special Qualifications justification for Employee B because of the disparity between Employee B's previous salary at a previous employer and the DPR offer. On January 10, 2006, DCOP denied DPR's Special Qualifications request for Employee B. On January 17, 2006, through an e-mail, the DPR Director re-iterated to DCOP her request to hire Employee B at the grade MSS-301-13-3 level. On January 17, 2006, the DCOP Deputy Director instructed the HR Manager to hire Employee B at the MSS-301-13-3 grade level as requested by DPR. On March 6, 2006, DCOP hired Employee B on a TAPER appointment.

On March 22, 2005, to convert the TAPER appointment to full-time MSS, DCOP advertised the Program Development and Evaluation Manager position as "agency only." Subsequently, on May 12, 2006, at the request of DPR, DCOP cancelled the initial advertisement and re-advertised the position as "open to the public." DCOP officials stated

[3] The Applicant Qualifications Rating Record is a form prepared for each person who is appointed non-competitively or who applies under the D.C. merit staffing and employment plan to document the rating of eligibility for the position. The form is maintained in the merit staffing case files or in the OPF.

## FINDINGS AND RECOMMENDATIONS

that DPR decided to re-advertise the position because of the recent media scrutiny surrounding DPR's selection and hire of the five employees. While DCOP was attempting to establish a list of eligible applicants for the full-time position, on June 5, 2006, DCOP extended Employee B's TAPER appointment for an additional 90 days.

The July 24, 2006, Selection Certificate provides that Employee B, as well as four other applicants, was qualified for the position. However, Employee B declined to interview for the full-time position and resigned on September 4, 2006.

*Qualifications Review* - Our review of an undated AQRR and a May 8, 2006, AQRR[4] for Employee B indicates that Employee B met the minimum qualifications for the Program Development and Evaluation Manager position. An undated Selection Certificate, which appears to correspond with the first "agency only" vacancy advertisement to convert the TAPER Appointment to a full-time MSS position, revealed that Employee B was qualified and the only applicant to apply for the position. The July 24, 2006, Selection Certificate, which corresponds with the second vacancy announcement for the position, provides that Employee B met the minimum qualifications for the position. Based on the requalification, Employee B met the minimum qualifications for the Program Development and Evaluation Manager position, TAPER Appointment.

*Pre-Employment Inquiries* - Our review of the OPF, MCF, and DPF revealed that neither DCOP nor DPR conducted adequate pre-employment inquiries for Employee B. Specifically, we did not find any documented evidence that DCOP or DPR verified the required number of references, dates of employment, or prior job performance for Employee B. We found a pay stub issued by Employee B's last employer and documentation indicating that DCOP checked two of her references. DPM § 405.2 (a) requires the personnel authority to check at least three references. Based on our reconfirmation, we were able to verify the information provided on Employee B's resume.

**Employee C's Employment History** – According to the offer letter, on September 26, 2005, DCOP offered Employee C a Partnerships Director, grade DS-13-1, non-competitive TAPER appointment at a salary of $57,550. However, DCOP made an error in the offer letter. DPR intended for DCOP offer Employee C a MSS-13-1, Partnerships Director, non-competitive TAPER appointment at $66,649. On October 3, 2005, DCOP hired Employee C on a non-competitive TAPER appointment as the Partnerships Director, MSS-13-1.

DCOP classified the Partnerships Director position on September 30, 2005. On October 17, 2005, to convert from TAPER appointment to full-time MSS, DCOP advertised the Partnerships Director position "agency only." Employee C was the only DPR applicant to

[4] This AQRR was used to convert the TAPER Appointment to a full-time MSS position.

## FINDINGS AND RECOMMENDATIONS

apply for the position. On November 27, 2005, DPR selected Employee C for the appointment to MSS.

*Qualifications Review* - Employee C's AQRR, dated September 15, 2005, provides that Employee C met the minimum qualifications for the Partnerships Director position. The November 22, 2005, Selection Certificate provides that DCOP rated Employee C as Highly Qualified. Based on the requalification, Employee C met the minimum qualifications for the Partnerships Director TAPER appointment.

*Pre-Employment Inquiries* - Our review of Employee C's OPF, MCF, and DPR Departmental Folder revealed that neither DCOP nor DPR adequately conducted pre-employment inquiries on Employee C. Specifically, we found no documented evidence, other than Employee C's reasons for leaving prior employers, that either DCOP or DPR checked Employee C's prior salary, employment history, job performance, or the required personal and professional references. Based on our reconfirmation, we were able to verify all the information provided on Employee C's resume.

**Employee D's Employment History** - On August 5, 2005, DCOP offered Employee D a Staff Assistant position, grade DS-301-11, as a non-competitive Term appointment[5] at an annual salary of $40,384. Employee D was hired on August 8, 2005. DCOP classified the Staff Assistant position on April 10, 2002.

*Qualifications Review* - Based on our review of the OPF, we found no documentation to support that either DCOP or DPR evaluated Employee D's qualifications for the position prior to offering her District employment. DPM § 823.5 provides that the applicant must meet the minimum qualifications for the Term appointment.[6] We did not find a job vacancy announcement for Employee D. Consequently, we could not determine what qualification standards DCOP used to evaluate Employee D. However, based on the requalification, Employee D met the minimum qualifications for the Staff Assistant position.

*Pre-Employment Inquiries* - Our review of the OPF revealed that neither DCOP nor DPR conducted pre-employment checks for Employee D prior to offering her District employment. Specifically, we found no documented evidence that pre-employment inquiries were conducted during the hiring process for Employee D.

[5] DPM § 899.1 defines a "[t]erm appointment as "an appointment with a specific time limitation in excess of one (1) year, but not exceeding four (4) years, unless extended by the personnel authority as provided in § 823.2, or as otherwise provided by statute."

[6] Section 823.5 does allow for one exception to this requirement, which is not applicable here.

## FINDINGS AND RECOMMENDATIONS

Employee D's OPF contained a copy of her college degree. Employee D's resume indicates that she was an Executive Legal Assistant and a Contract Coordinator for two separate firms owned by the same individual. Employee D provided us with her previous employer's business and personal cell phone numbers. However, the previous employer did not respond to any of our attempts to verify Employee D's employment.

**Employee E's Employment History -** Employee E's personnel files did not contain an offer letter for her position. However, according to the personnel action form, on October 3, 2005, DCOP hired Employee E as a Staff Assistant, grade DS-301-9 on a non-competitive Term appointment at an annual salary of $33,492. Employee E's position description was certified and classified on January 22, 2004.

*Qualifications Review* - We found no documentation to support whether either DCOP or DPR evaluated Employee E's qualifications for the position prior to offering her District employment. DPM § 823.5 provides that the applicant must meet the minimum qualifications for the Term appointment. We did not find a job vacancy announcement for Employee E. Consequently, we could not determine what qualification standards DCOP utilized to evaluate Employee E. However, based on our requalification, Employee E met the minimum qualifications for a Staff Assistant position.

*Pre-Employment Inquiries* - Our review of the OPF showed that Employee E was hired non-competitively and that neither DCOP nor DPR conducted pre-employment inquiries in accordance with personnel regulations. Employee E did not have a MCF because she was hired non-competitively. Specifically, we found no documented evidence that either DCOP or DPR verified Employee E's prior salary, work experience, and personal/professional references. Based on our reconfirmation, however, we were able to verify the information provided on Employee E's resume.

**Material Internal Control Weaknesses** - DCOP management and staff provided conflicting testimony regarding who is responsible for conducting qualification and pre-employment inquiries. DCOP management stated that the agencies are responsible for verifying educational requirements, references, and work experience, and that DCOP is only responsible for confirming that the agencies have adequately conducted qualification and pre-employment inquiries. However, some DCOP staff stated that they conduct the qualifications and pre-employment inquiries although they had not been provided any training on conducting qualification and pre-employment inquiries. Pursuant to DPM § 405.2, DCOP is responsible for conducting pre-employment inquiries. We did not find any personnel regulations or DCOP operational policies and procedures that provide a clear delineation of responsibilities between DCOP and the agencies when conducting qualification and pre-employments inquiries.

# FINDINGS AND RECOMMENDATIONS

Additionally, DCOP HR specialists stated that time constraints, agency pressure, and competing priorities among the multiple agencies they are assigned prevents them, on occasion, from adequately performing or confirming whether qualification reviews and pre-employment inquiries have been conducted. Specifically, DCOP HR specialists stated that conducting qualification reviews and pre-employment inquiries can be time consuming and that agency management and staff sometimes pressure them to expeditiously complete the hiring process. HR specialists also stated that some agency directors call them directly to complain or inquire about the hiring process status.

DCOP management and staff also stated that the DCOP Special Qualifications Unit may review selected personnel files to determine whether the agencies or DCOP adequately conducted the qualification and pre-employment inquiries. However, we did not find any operational policies and procedures governing the Special Qualifications Unit.

**RECOMMENDATIONS**

We recommend that the Director of the District of Columbia Office of Personnel:

1. Develop and implement operational policies and procedures that delineate and define DCOP's and the agencies' responsibilities when conducting pre-employment qualification reviews and pre-employment inquiries.
2. Provide initial and refresher training to DCOP HR Specialists and agency HR Representatives to ensure they understand personnel regulations, DCOP processes, and their respective roles when conducting qualification reviews and pre-employment inquiries.
3. Implement a quality control system to ensure that personnel files contain all documentation that supports hiring decisions, as required by DPM § 3107.5.
4. Implement a quality control system to ensure that HR Specialists conduct qualification and pre-employment inquiries.
5. Develop performance standards that allocate time and resources to each task within the hiring process.

# FINDINGS AND RECOMMENDATIONS

## FINDING 2: INITIAL TAPER APPOINTMENTS

### SYNOPSIS

DCOP did not comply with District personnel regulations when allowing DPR to hire Employee A, Employee B, and Employee C on non-competitive TAPER appointments. Additionally, DCOP did not document whether the appointees met the minimum requirements for the TAPER appointments prior to offering employment to the three individuals. These conditions occurred because DCOP had not developed and implemented consistent and up-to-date operational policies and procedures, had not provided initial and refresher training on TAPER appointments, and misinterpreted TAPER appointment regulations. As such, neither DCOP nor DPR can be assured that the best qualified applicants were selected and appointed to the TAPER positions or that District residents received proper consideration for the positions. Further, the public could perceive that DCOP/DPR afforded preferential treatment to each of the TAPER appointees.

### DISCUSSION

DCOP should not have allowed DPR to identify, select, and hire Employee A, Employee B, and Employee C on TAPER appointments because DCOP did not: (1) attempt to establish a list of eligibles[7] prior to making the TAPER appointments, (2) determine that the positions were continuing positions, and (3) determine that the position must be filled immediately. Additionally, prior to offering Employee A and Employee B TAPER appointments, DCOP did not assess whether the two appointees met the minimum qualifications for their respective positions.

Title 6 DCMR § 3899 provides that a TAPER appointment is "a time-limited appointment pending the establishment of a register when there are insufficient candidates on a register appropriate for filling a Management Supervisory Service position and the public interest requires that the vacancy be filled before eligibles can be certified."

[7] A "list of eligibles" and "register" are synonymous. Eligible applicants are placed on a Selection Certificate for the selecting agency's review. To develop a "list of eligibles," the personnel authority (DCOP) performs the following: (1) advertises the position; (2) receives applications; (3) evaluates applicants; and (4) develops a Selection Certificate.

# FINDINGS AND RECOMMENDATIONS

Title 6 DCMR § 3812.1 provides: "A personnel authority [e.g., DCOP] may fill a vacancy in a continuing position, in the absence of lists of eligibles, by a Temporary Appointment Pending Establishment of a Register (TAPER appointment)."

**List of Eligibles** - DCOP allowed DPR to identify, select, and hire Employee A, Employee B, and Employee C on non-competitive TAPER appointments without DCOP first attempting to establish a list of eligible applicants for the positions. DCOP allows agencies to use TAPER appointments to expeditiously hire specific individuals. Flow Chart 1 represents our analysis of the current DCOP TAPER appointment process.

**Flow Chart 1 - Current DCOP TAPER Appointment Process**


Title 6 DCMR §§ 3899 and 3812.1 require that a continuing position[8] exist and an attempt be made to establish a list of eligibles prior to making a TAPER appointment. Title 6 of DCMR § 3899 presupposes that an attempt has been made to establish a register and a determination made that the candidates did not possess the requisite qualifications, skills, and experience. Then, in the absence of eligible candidates, a TAPER appointment could be granted. Conversely, DCMR § 3812.1 does not presume that a list of qualified applicants should not be sought prior to making a TAPER appointment.

**Continuing Positions** - Based on our review of DCOP and DPR personnel records, position description forms, and interviews with the DPR Director, DPR employees, and the DCOP Classifications Department, we determined that Employee C's and Employee A's positions were not continuing positions but instead were new positions created shortly before the employees' were hired. However, we determined that Employee B was appointed for a continuing position.

Title 6 DCMR § 3812.1 provides that "[a] personnel authority may fill a Management Supervisory Service vacancy in a continuing position, . . . ."

[8] A continuing position is a permanent position within an agency for which a vacancy exists.

## FINDINGS AND RECOMMENDATIONS

Employee A received a verbal offer of employment on July 19, 2005, which on the next day was followed by a written offer for the Associate Program Director position (MSS-301-16). On August 22, 2005, Employee A was hired as the Associate Program Director. Based on our review of the Associate Program Director position description form, we determined that the position is officially classified as a DS-301-15 and not a MSS-301-16 as provided in the offer letter. Further, The Associate Program Director position offered to Employee A was not a continuing position at DPR and had not been classified by DCOP.

Employee B's position, Program Development and Evaluation Manager, was classified on January 22, 2004. Employee B was hired on March 6, 2006. The Program Development and Evaluation Manager position was a continuing position within DPR because it was classified approximately 2 years before DPR employed Employee B.

Employee C's offer letter was dated September 26, 2005. The DCOP Classification Department classified Employee C's position, Director of Partnerships, as a new position on September 30, 2005. As such, the position was not an on-going vacancy, and DCOP offered Employee C a position before the position was officially established.

**Public Necessity of Position** - Prior to offering Employee A, Employee B, and Employee C TAPER appointments, neither DCOP nor DPR documented the determination that "the public interest require[d] that the vacancy be filled" as required by 6 DCMR § 3899.

**Qualifications Determination** - DCOP did not document its assessment of Employee A's and Employee B's qualifications prior to their TAPER appointments. As such, DCOP had no assurances that the applicants met the minimum qualifications for their respective positions prior to offering them TAPER Appointments.

Title 6 of DCMR § 3812.2 provides that "[a] person appointed to a TAPER appointment shall meet the minimum qualifications standards for the position." Although District personnel regulations provide that MSS TAPER appointees must meet the minimum qualifications for the position prior to their appointment. Neither the personnel regulations nor DCOP operational policies and procedures indicate how DCOP shall demonstrate compliance with the requirement. DCOP uses an AQRR to document whether an applicant meets the minimum qualifications for a position.

Employee A received a TAPER appointment on August 22, 2005. DCOP performed an AQRR evaluation on September 23, 2005, when the position was being converted to MSS position. The AQRR evaluation was performed on Employee A approximately 1 month after she received her TAPER appointment. Employee B received her TAPER appointment on March 6, 2006. Employee B's MCF contained two AQRRs. One of the forms was undated

## FINDINGS AND RECOMMENDATIONS

and the other form was dated May 8, 2006, approximately 2 months after Employee B's initial TAPER appointment.

DCOP conducted an AQRR on Employee C on September 15, 2005, and hired her on October 3, 2005. Therefore, DCOP reviewed Employee C's qualifications prior to offering her the TAPER appointment.

DCOP inconsistently processed its pre-employment qualifications evaluations of Employee A, Employee B, and Employee C. This inconsistency occurred because DCOP lacked operational policies and procedures that outline the specific tasks required to implement personnel regulations. Prior to Employee C's TAPER appointment, DCOP conducted and documented its qualifications assessment of Employee C. To document compliance with personnel regulations and for operational consistency, DCOP should have completed an AQRR for Employee A and Employee B.

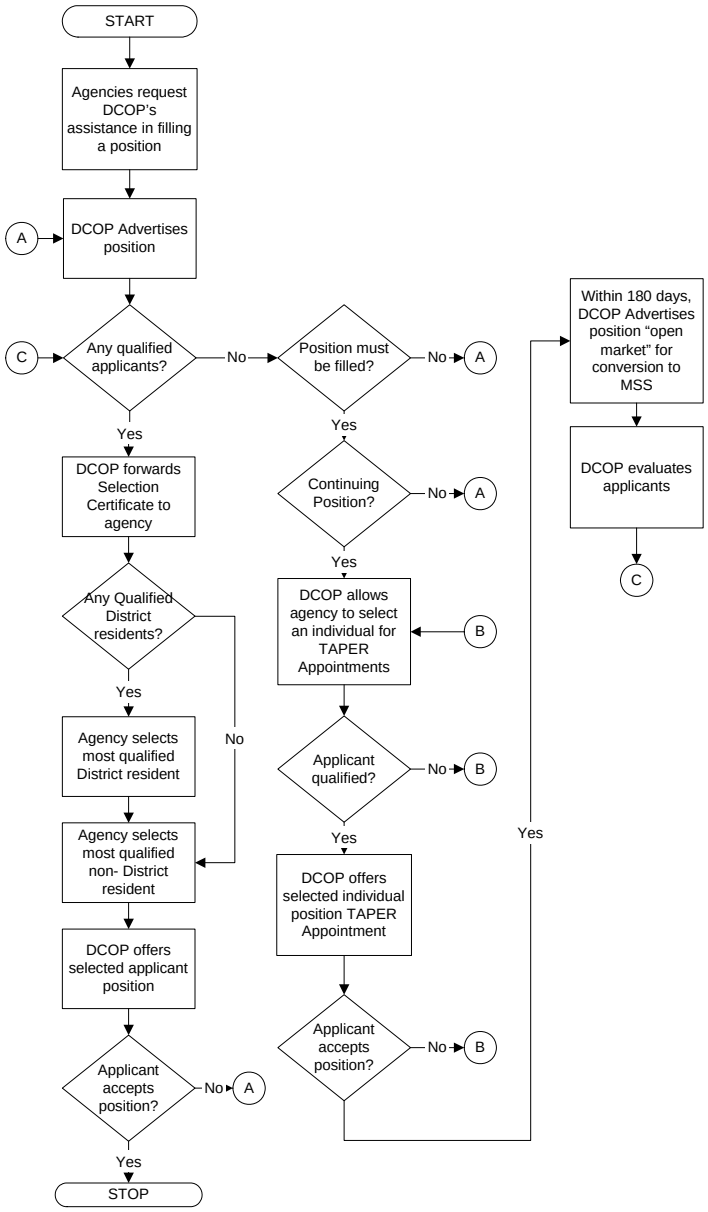
**Conclusion** - The conditions outlined in this finding occurred because DCOP has not developed and implemented consistent and up-to-date operational policies and procedures to implement TAPER appointment regulations or provided initial and refresher training on processing TAPER appointments. We believe that the current TAPER appointment regulations were not intended to allow personnel authorities and agencies the ability to circumvent District personnel regulations. Based on our review of the regulation, we conclude that the TAPER Appointment should be used only after the DCOP has: (1) attempted to determine whether it can obtain a list of qualified applicants (competition); (2) determined that a continuing position exists; (3) determined that the public interest requires that the position be occupied; and (4) documented that the candidate meets the minimum qualifications for the TAPER appointment. DCOP management and staff stated that they have been making TAPER appointments in this manner for years and that their interpretation of the TAPER appointment regulations differed from our interpretation. DCOP management and staff have misinterpreted TAPER appointment regulations and used informal guidance on processing TAPER appointments. Flow Chart 2 describes the proper methodology, based on TAPER appointment regulations, for processing TAPER appointments.

DCOP management recognized that there was no formal methodology or documentation documenting the business processes surrounding PeopleSoft; as such, DCOP hired a contractor to document the processes and transactions surrounding PeopleSoft. The contractor provided DCOP with a Workbook that defines and illustrates DCOP's business processes related to PeopleSoft. The Workbook provides "[it] also serves to identify ways DCOP can add additional value as well as identify gaps between what is occurring and what is supposed to be occurring (e.g., to ensure compliance with documents such as the DPM), so that those gaps can be filled." However, we observed and DCOP staff informed us that

## FINDINGS AND RECOMMENDATIONS

DCOP management had not provided them with the detailed procedures relating to these processes.

### Flow Chart 2 - Correct DCOP TAPER Appointment Process



# FINDINGS AND RECOMMENDATIONS

## RECOMMENDATIONS

We recommend that the Director of the District of Columbia Office of Personnel:

6. Develop and implement operational policies and procedures which require that DCOP, prior to effecting a TAPER: (1) attempt to establish a list of eligibles, (2) determine that a continuing position exists, (3) determine if the public interest requires that the position be filled immediately, and (4) determine if the TAPER appointee meets the minimum qualifications for the position.
7. Provide initial and refresher training to DCOP HR Specialists and agency HR Representatives to ensure they understand personnel regulations and DCOP practices regarding TAPER appointments.
8. Implement a quality control system to ensure that DCOP HR Specialists comply with TAPER appointment regulations.

# FINDINGS AND RECOMMENDATIONS

## FINDING 3: TAPER APPOINTMENT CONVERSIONS

### SYNOPSIS

Even though DCOP should not have allowed DPR to offer the TAPER appointments to Employee A, Employee B, and Employee C, the TAPER appointees were employed at DPR and DCOP either converted or attempted to convert the appointees to full-time positions. We reviewed the TAPER appointees' personnel records to determine if they were converted according to the DCMR. Based on our review, we determined that the DCOP did not solicit "open competition," as required by personnel regulations, when converting two TAPER appointees to full-time MSS positions and did not justify extending one TAPER appointee beyond the initial 90-day period. DCOP management and staff misinterpreted TAPER appointment regulations and, consequently, only posted the positions agency-wide. As a result, DCOP and DPR cannot be assured that either the most qualified applicants were appointed to the TAPER positions or that the maximum amount of consideration was given to District residents.

### DISCUSSION

As required by personnel regulations, DCOP did not solicit "open competition"[9] when converting Employee A and Employee C from TAPER appointments to full-time MSS employees. In addition, DCOP did not document its justification for allowing Employee B's appointment to extend beyond the initial 90-day appointment expiration date.

Title 6 DCMR § 3812.3 provides:

> A TAPER appointment shall be terminated as soon as lists of eligibles for Management Supervisory Service appointment can be established by open competition in accordance with this chapter; shall not exceed ninety (90) days; and may be extended for an additional period of ninety (90) days only upon determination that a list of eligibles cannot be created.

[9] Title 6 DCMR § 3899 defines "open competition" as "the use of examination procedures that permit application and consideration of all persons without regard to current or former employment with the District government."

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This regulation provides the internal controls to ensure that adequate competition and residency preference occur.

**TAPER Appointment Advertisement** - The vacancy announcements for Employee A, Employee B, and Employee C, initially, were "agency employees only." According to personnel regulations, before a non-competitive TAPER appointment is converted to a full-time MSS position, the position should be advertised as "open competition." Table 2 provides the results of our review of the TAPER appointment vacancy announcements when converting three appointees to full-time positions.

**TABLE 2: TAPER APPOINTMENT ADVERTISEMENT**

| NAME | AD POST DATE | AD CLOSE DATE | NO. OF WORK DAYS | AREA OF CONSIDERATION |
|---|---|---|---|---|
| Employee A | 09-Sep-05 | 16-Sep-05 | 6 | Agency Employees Only |
| Employee B | 22-Mar-06 | 30-Mar-06 | 7 | Agency Employees Only |
| Employee B (Readvertised) | 12-May-06 | 26-May-06 | 11 | Unlimited |
| Employee C | 17-Oct-05 | 21-Oct-05 | 5 | Agency Employees Only |

DCOP allowed DPR to convert Employee A and Employee C from non-competitive TAPER appointments to full-time MSS positions by advertising "agency only." As a result, Employee A and Employee C received their MSS appointments without the benefit of open competition. DPM Chapter 8, Appendix A. Merit Staffing Plan, section A.4 provides that advertising in-house is the minimum area of consideration and "unlimited" is open to anyone wishing to make an application. By allowing DPR to advertise the positions as "agency only," DCOP limited the pool of qualified applicants and possibly excluded District residents. For example, no other applicants but the incumbents made the Selection Certificates for Employee A's or Employee C's positions.

With regard to Employee B, initially the advertisement for TAPER appointment conversion to full-time MSS was in-house; however, the "agency only" advertisement was cancelled and changed to "open to the general public." The DCOP HR Representative for DPR stated that DPR requested that the area of consideration be changed from "agency only" to "open to the general public" because of the recent media attention and scrutiny surrounding DPR's selection and hiring activities. When DCOP advertised the position as "agency only," Employee B was the only applicant to make the Selection Certificate. Conversely, four other applicants made the Selection Certificate after DCOP made the position advertisement "open

## FINDINGS AND RECOMMENDATIONS

to the general public." Employee B declined to be interviewed for the position, and DPR did not select any of the other applicants. Employee B resigned from DPR in September 2006. DCOP management and staff stated that the TAPER appointment regulations allow DCOP to advertise positions "agency only" when converting TAPER appointments to full-time positions. However, 6 DCMR § 3812.3 clearly states that when a MSS TAPER appointment is converted to a full-time position, it must be advertised to the general public.

Employee B's Not-To-Exceed (NTE) date was June 5, 2006. Other than a Standard Form 50 (SF 50), we did not find any documentation in the personnel records to justify Employee B's extension. The SF 50 form was approved on June 29, 2006, and processed on July 3, 2006. The SF 50 noted that the effective date of the personnel action was June 5, 2006. The SF 50 form indicates that DCOP extended Employee B's TAPER appointment after she had exceeded her to NTE date.

**Conclusion** - DCOP's current practice when hiring TAPER appointees non-competitively and converting TAPER appointees to MSS allows an agency to disregard residency preference and open competition requirements. For example, DCOP allowed DPR to hire Employee A, Employee B, and Employee C (all Baltimore residents and former employees of the DPR Director) on non-competitive TAPER appointments. As such, Employee A's, Employee B's, and Employee C's positions were never subject to "open competition." Subsequently, DCOP allowed DPR to convert Employee A and Employee C from TAPER appointments to MSS by advertising "agency only." Employee B's "agency only" vacancy announcement was changed to "open to general public" only because of media scrutiny. These conditions, at a minimum, could give the appearance that Employee A, Employee B, and Employee C received preferential treatment for their TAPER appointments.

### RECOMMENDATIONS

We recommend that the Director of the District of Columbia Office of Personnel:

9. Develop and implement operational policies and procedures that require DCOP to advertise all non-competitive TAPER appointment conversions to full-time positions as open to the general public, in accordance with personnel regulations.
10. Provide initial and refresher training to DCOP HR Specialists and agency HR Representatives to ensure they understand DCOP TAPER appointment conversion regulations.
11. Implement a quality control system to ensure that DCOP HR Specialists comply with the personnel regulations for making TAPER appointment conversions.

# FINDINGS AND RECOMMENDATIONS

## FINDING 4: TERM APPOINTMENTS

### SYNOPSIS

DCOP did not assess Employee D's or Employee E's qualifications before they were offered Term appointments. DCOP representatives stated that qualification checks had been conducted on Employee D and Employee E; however, we could not verify this assertion. DCOP had no documented assurances that the Term appointees met the minimum qualifications for their respective positions.

### DISCUSSION

DCOP did not complete an AQRR for Employee D and Employee E to document that DCOP assessed their qualifications prior to offering them Term appointments.

DPM § 823.4 provides that "[a]n agency may give [an individual] a non-competitive term appointment to a position at or below the DS-12 level or equivalent . . . ." Further, DPM section § 823.5 states that "[e]xcept as provided in § 823.6, a person appointed under this section shall meet minimum qualification requirements."

A DCOP HR Specialist stated that she was confident that qualification reviews were conducted on Employee D and Employee E, and suggested that the documentation was lost or taken out of the folders during DCOP's internal review. We did not observe any documents in the OPF to verify that DCOP assessed the Term appointees' qualifications prior to offering them employment.

Personnel regulations allowed DCOP to offer Employee D and Employee E temporary employment non-competitively, provided they met the minimum qualifications for the positions. However, neither the personnel regulations nor DCOP operational policies and procedures indicate how DCOP shall demonstrate compliance with the minimum qualifications requirement. DCOP uses an AQRR to document whether an applicant meets the minimum qualifications for a position. Without the AQRR, an independent reviewer could not determine whether DCOP assessed Employee D's and Employee E's qualifications prior to or after offering them Term appointments. Considering that Term appointments can be made non-competitively, DCOP should have documented its qualifications assessment of Employee D and Employee E. The absence of such control measures deprives the District of the assurances needed to verify that a prospective employee is qualified and the best candidate for the position.

# FINDINGS AND RECOMMENDATIONS

## RECOMMENDATIONS

We recommend that the Director of the District of Columbia Office of Personnel:

12. Develop operational policies and procedures that require HR Specialists to document their qualifications determinations and assessments of Term appointees.
13. Implement a quality control system to ensure that DCOP HR Specialists document their qualification assessments of Term appointees.

# APPENDIX 1 - SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT

| Recommendation | Description of Benefit | Amount and Type of Benefit | Status |
|---|---|---|---|
| 1 | Internal Control, Economy and Efficiency, and Compliance. Provides clear delineation of responsibility between DCOP and the agencies when conducting pre-employment inquiries. Additionally, facilitates compliance with personnel regulations. | Nonmonetary | Open |
| 2 | Internal Control. Improves compliance with personnel regulations and consistency in operations. | Nonmonetary | Open |
| 3 | Internal Control. Provides feedback on compliance with personnel regulations. | Nonmonetary | Open |
| 4 | Internal Control. Provides feedback on compliance with personnel regulations. | Nonmonetary | Open |
| 5 | Program Results. Establishes a clearly defined process with mechanisms used to measure performance of hiring procedure tasks. | Nonmonetary | Open |
| 6 | Internal Control and Compliance. Facilitates compliance with personnel regulations and consistency in operations. | Nonmonetary | Open |
| 7 | Internal Control. Improves compliance with personnel regulations and consistency in operations. | Nonmonetary | Open |
| 8 | Internal Control. Provides feedback on compliance with personnel regulations. | Nonmonetary | Open |

# APPENDIX 1 - SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT

| Recommendation | Description of Benefit | Amount and Type of Benefit | Status |
|---|---|---|---|
| 9 | Internal Control and Compliance. Facilitates compliance with personnel regulations. | Nonmonetary | Open |
| 10 | Internal Control. Improves compliance with personnel regulations and consistency in operations. | Nonmonetary | Open |
| 11 | Internal Control. Provides feedback on compliance with personnel regulations. | Nonmonetary | Open |
| 12 | Internal Control and Compliance. Facilitates compliance with personnel regulations. | Nonmonetary | Open |
| 13 | Internal Control. Provides feedback on compliance with personnel regulations. | Nonmonetary | Open |

# APPENDIX 2 - ANALYSIS OF DCOP'S INTERNAL INVESTIGATION REPORT

The Director of Personnel requested that the DCOP Program Administrator conduct an internal investigation into specific TAPER appointments DCOP allowed DPR to make for Applicant A, Applicant B, and Applicant C. Additionally, the Director of Personnel requested that the DCOP Program Administrator investigate the allegation that the DPR HR Specialist made inappropriate transactions in the District's personnel and payroll system (PeopleSoft Application). The allegation regarding the DPR HR Specialist was referred to the OIG's Investigations Division.

We reviewed the formal report that resulted from DCOP's internal investigation (Report) to become familiar with its contents and to address the findings and allegations made in the report. The following details provide the Report's conclusions and the results of our analysis of the Report on Employee A, Employee B, and Employee C.

**Employee A -** The Report provides that Employee A: (1) failed to note that periods of her employment were part-time; (2) incorrectly cited her salary; (3) did not meet the minimum qualifications for the Deputy Director of DPR; (4) should have been classified as Excepted Service instead of MSS; and (5) incorrectly received full-time credit from DCOP for part-time experience.

*Our Analysis of Conclusions 1 and 5* - Based on our review of Employee A's first and second resume and District Government Employment Application (DC 2000), we determined that Employee A did not disclose whether the work experience listed on her resume was full-time or part-time and that DCOP gave Employee A full-time credit for part-time experience.

On July 6, 2005, the DPR HR Specialist e-mailed Employee A and instructed her to complete the following sections of the DC 2000: (1) Personal Data, (2) D.C. Employment History and Availability, (3) Residency, (4) Background Information, and (5) Signature section. The DPR HR Specialist also instructed Employee A to notate in the Work Experience section of the DC 2000 "See Resume." On July 6, 2005, Employee A provided DCOP/DPR her signed DC 2000 and first resume. At DCOP's request, on July 13, 2006, Employee A submitted a second resume to DCOP, which provided more details on her work experience.

DCOP accepted Employee A's resume in lieu of requiring that she complete the DC 2000 Work Experience section. The DC 2000 Work Experience section provides data entry fields for the average hours per week worked for each previous employer. Employee A's resume did not indicate whether her work experiences were full-time or part-time. DCOP is responsible for ensuring that the resume contains all the requisite information and that the DC 2000 is complete and properly signed. DCOP gave Employee A full-time credit for all the work experience listed on her resume. DCOP should not have assumed that all the work

# APPENDIX 2 - ANALYSIS OF DCOP'S INTERNAL INVESTIGATION REPORT

experience listed on Employee A's resume was full-time. DCOP should have either disqualified Employee A's application and resume for incompleteness or made inquiries to determine what work experience was full-time or part-time.

*Our Analysis of Conclusion 2* - Employee A's first resume provides that she was employed by Company A from 1999 to 2002 and earned $101,000 as the Regional Director. Additionally, the first resume indicates that she was a SAT tutor/teacher at Company A from 1998 to 2003; however, the resume does not indicate a salary for this employment. DCOP informed the DPR HR Specialist on July 12, 2005, that based on Employee A's DC 2000 and resume, she was not qualified for the salary grade MSS-301-16. In response to the request from DCOP and DPR, on July 13, 2005, Employee A submitted an enhanced resume, which expanded on her work experience. Employee A's second resume provided that her salary at Company A from 1999 to 2002 was $84,637 and not $101,000 as the first resume provided. Employee A's second resume also indicates that she was a SAT tutor/teacher at Company A in 2002 and did not provide a salary for this employment.

Employee A stated on the first resume that she took her earnings for a pay period and multiplied that amount by 12, (the number of months in a year). Employee A stated that she realized that this methodology was flawed because her Company A monthly pay varied from month to month depending on how many classes she taught, the day the class was taught, and other variables.

Employee A provided us with a 2002 W-2 and 1099 to support the 2002 Company A salary indicated on her second resume. Employee A started with Company B on September 2, 2002. Employee A's 2002 W-2 and 1099 indicate that she made approximately $63,450, or approximately $7,930 per month, for the 8-month period preceding her employment with Company B. Based on this analysis, Employee A would have made approximately $95,160 ($7,930 x 12 = $95,160) in 2002 had she worked the entire year for Company A.

We contacted the owner of Company A by phone and in writing to confirm Employee A's salaries and work status. The owner stated that Employee A made approximately $90,000 per year. However, despite repeated requests, the owner did not provide us with written confirmation for her Company A salaries. With the exception of the Company A 2002 salary provided on the first resume, we were able to verify the information contained on Employee A's first and second resume.

We could not determine whether Employee A erred or intended to inflate the Company A salary provided on her first resume. However, when Employee A submitted her first resume and DC 2000 her salary information for Company A appears to have been incorrect.

# APPENDIX 2 - ANALYSIS OF DCOP'S INTERNAL INVESTIGATION REPORT

Employee A should have known exactly what she earned from Company A in 2002 and should have submitted tax information that would have definitively provided 2002 Company A salary. The DC 2000 provides the following:

> YOU MUST SIGN THIS APPLICATION. Read the following carefully before you sign. I understand that a false statement on any part of my application may be grounds for not hiring me, or for firing after I begin work (D.C. Official Code § 1-616.51 et seq.) (2001). I understand that the making of a false statement on this form or materials submitted with this form is punishable by criminal penalties pursuant to D.C. Official Code § 22-2405 et seq. (2001). I understand that any information I give may be investigated as allowed by law or Mayoral order. I consent to the release of information regarding my suitability for District of Columbia Government employment by employers, schools, law enforcement agencies, and other individuals and organizations, to investigators, personnel staffing specialists, and other authorized employees of the District of Columbia government. I certify that, to the best of my knowledge and belief, all of my statements are true, correct, and complete.

DCOP and DPR instructed Employee A to enhance her resume. As such, Employee A opines that DCOP should have replaced her first resume with the second resume. A DCOP staff member stated that they would not discard a previously submitted resume because it was a part of the employment file and history. DCOP gave Employee A an opportunity to change her resume. However, the Report holds Employee A accountable for the first resume. If the $101,000 salary, which was indicated on the first resume, was problematic, DCOP had approximately 4 business days to review, evaluate, and scrutinize Employee A's second resume before they offered Employee A the position and salary on July 19, 2005.

*Our Analysis of Conclusion 3* - We determined that Employee A met the minimum qualifications for her position. Refer to page3, Finding 1 for specific details

*Our Analysis of Conclusion 4* - DPR did not have an excepted service slot for Employee A; therefore, the Report's conclusion was baseless.

**Employee C** - The Report provides that: (1) Employee C was competitively converted from a TAPER Appointment to MSS, (2) DCOP did not verify the salary from Employee C's last employer, and (3) Employee C should be terminated because her appointment gives the strong suggestion of preferential treatment, which is in violation of DPM Chapter 18 §§ 1803.1(a)(2) and (6).

# APPENDIX 2 - ANALYSIS OF DCOP'S INTERNAL INVESTIGATION REPORT

*Our Analysis of Conclusion 1* - Employee C's position was not competed in accordance with District personnel regulations. The Report provides that Employee C was competitively converted from TAPER Appointment to MSS. Title 6 DCMR § 3812.3 requires that non-competitive TAPER Appointment conversions to MSS be advertised through open competition. According to the external posting description DCOP advertised Employee C's position as "agency only" when converting the TAPER Appointment to MSS.

*Our Analysis of Conclusion 2* - We reviewed Employee C's OPF, MCF, and DPR personnel folder. We did not find any documentation to verify that DCOP or DPR verified her previous BRP salary. DPM § 405.2 provides that DCOP will conduct appropriate suitability checks, to include previous employer salary verification.

*Our Analysis of Conclusion 3* - The Report provides that "Employee C's appointment does give the suggestion that she was given preferential treatment by DP&R, in violation of the DPM, Chapter, Chapter 18- Section 1803.1(b) & (f), and her appointment to the MSS should be terminated." The Report did not provide any basis or support for this conclusion. While there is no support for DCOP's conclusion, based on our review of Employee C's personnel files, we concluded that DCOP did not follow personnel regulations when allowing DPR to hire Employee C. Further, considering our review of personnel records, employment histories, residency locations, and interviews, the perception could be conveyed to outside parties that Employees A, B, C, D, and E received preferential treatment.

**Employee B -** The Report provides that Employee B failed to meet all of the criteria for Superior Qualifications, and her salary was not justified. DPM Instruction 11B-37, dated March 25, 2005, provides that DCOP can allow agencies to hire an employee up to step 4 at grades 7 and above (representative rate) without a Special Qualifications Review. Employee B was hired as a MSS 13-3. Consequently, District personnel regulations did not require DPR to perform a Special Qualifications justification for Employee B. DCOP representatives stated that they requested DPR develop a Special Qualifications justification for Employee B because of the disparity between the salary DPR offered and her previous employment salary. Employee B's salary at Company B was approximately $54,000 and DPR offered Employee B $71,043. We did not find any District personnel regulations that require DCOP or DPR to perform a Special Qualification justification or review based on salary disparity or variance.

# APPENDIX 3 - DCOP'S RESPONSE TO DRAFT REPORT

**GOVERNTMENT OF THE DISTRICT OF COLUMBIA**
**OFFICE OF PERSONNEL**

Office of the Director

January 19, 2007

Mr. Charles Willoughby
Inspector General
717 14th Street, NW, 5th Floor
Washington, DC 20005

Dear Mr. Willoughby,

Regarding your letter dated January 4, 2007 as transmittal to the draft report on the Audit of The District of Columbia Parks and Recreation's Hiring Practices" (OIG Control Number 06-2-21MA, I am providing response.

Recommendations outlined in the draft report include creation of standard operating procedures, quality control procedures, internal staff training, and performance standards including quantitative metrics to which employees are expected to adhere. In my new role as the Acting Director of the Office of Personnel (DCOP) I have conducted interviews with my managers and staff to better understand the problems DCOP is experiencing and I am in agreement with the recommendations outlined in the OIG draft report.

Should you have any questions, please feel free to contact my office at (202) 442-9600 and I will be happy to assist you.

Sincerely,

Brender L. Gregory
Acting Director DCOP

CC: Dan Tangherlini
City Administrator

# APPENDIX 4 - DPR'S RESPONSE TO DRAFT REPORT

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**Department of Parks and Recreation**

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ENTERED 722

January 25, 2007

Charles J. Willoughby, Esq.
Inspector General
District of Columbia Office of the Inspector General
717 14th Street, Northwest
Fifth Floor
Washington, DC 20005

Re: OIG No. 06-2-21MA
Audit of the Department of Parks and Recreation Hiring Practices

Dear Mr. Willoughby:

Your draft report summarizing the results of the Office of the Inspector General's (OIG) *Audit of the District of Columbia Department of Parks and Recreation's (DPR) Hiring Practices* (OIG No. 06-02-021MA) has been reviewed.

We appreciate the efforts of your Audit Team and we have carefully reviewed the Findings and Recommendations presented. We note that all of the recommendations presented in your draft report are directed to the District of Columbia Office of Personnel (DCOP). Notwithstanding this, we believe that as DCOP's customer, we must also fully understand the District's hiring processes and requirements in order to preserve the integrity of the hiring process. It should be noted that DPR intends, within the next few weeks, to post a vacancy notice for a *Human Resources Administrative Specialist.* Additionally, we will seek appropriate training for all DPR human resources staff moving forward.

If you require any additional information, please do not hesitate to contact me at 202-673-7665 or wanda.durden@dc.gov.

Sincerely,

Wanda S. Durden

Interim Director

cc: Brender L. Gregory, DCOP

*Join in the Fun!*

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

| | |
|---|---|
| ROSLYN J. JOHNSON,<br>Plaintiff,<br>v.<br>JONETTA ROSE BARRAS, *et al.*,<br>Defendants. | No. 2007 CA 001600 B<br>Judge Gerald I. Fisher<br>Calendar 1 |

[Proposed]
**ORDER**

Upon consideration of the Motion to Dismiss All Claims Against Defendants Dorothy Brizill, Gary Imhoff and DCWatch, and the Memorandum of Points and Authorities in support thereof, and plaintiff's opposition thereto, it is hereby

ORDERED that the motion is granted and this action shall be, and it hereby is, DISMISSED WITH PREJUDICE as to defendants Gary Imhoff, Dorothy A. Brizill and DCWatch.

Dated: _____, 2007

_____
Gerald I. Fisher
Associate Judge
Superior Court of the District of Columbia

Copies of the foregoing Order shall be served on:

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Brian J. Markovitz, Esq.
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Greenbelt, MD 20770
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Talk Media Communications, LLC
c/o Torrence E. Thomas
8121 Georgia Avenue, Suite 203
Silver Spring, MD 20910
*Defendant to be served by mail*