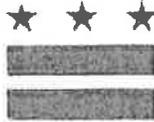


GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



PRIVILEGED AND CONFIDENTIAL
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MEMORANDUM

TO: The Honorable Vincent Orange
Chairman, Committee on Business Consumer and Regulatory Affairs

CC: The Honorable Jack Evans
Chairman, Committee on Finance and Revenue

CC: The Honorable Kenyan McDuffie
Chairman, Committee on the Judiciary

CC: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Karl A. Racine 
Attorney General

DATE: February 4, 2015

SUBJECT: Legality of Hearings on Bill 21-23, the Marijuana Legalization and Regulation Act of 2015

Your staff requested the Office of Attorney General's analysis on whether it would be lawful for you, Council staff, or District government employees to participate in the February 9, 2015 hearing on Bill 21-23, the "Marijuana Legalization and Regulation Act of 2015" ("bill"), or take any other formal action as to the bill pursuant to section 809 of the Financial Services and General Government Appropriations Act, 2015 ("2015 Appropriations Act"), approved December 16, 2014, Pub. L. 113-235. For the reasons discussed below, I reluctantly conclude that it would be unlawful to do so notwithstanding my full support of the sentiments behind your desire to conduct this hearing.

On January 6, 2015, Councilmembers Grosso, Evans, Orange, and Nadeau introduced the bill which would, among other things, establish a comprehensive system for licensing and regulating the cultivation, manufacture, and legal retail sale of marijuana and marijuana products in the District, including the collection of licensing fees, the imposition of taxes, and the designation of the Alcoholic Beverage Regulation Administration ("ABRA") as the regulatory agency for this program. The bill has been referred to the Committees on Business, Consumer, and Regulatory Affairs, Finance and Revenue, Judiciary, and the Committee of the Whole, and it has been scheduled for a hearing on February 9, 2015.

As I noted earlier, I strongly support the will of the District residents as expressed by the vote on Initiative 71, and I wholeheartedly support the criminal justice and civil rights-related sentiment expressed by the Council in seeking enactment of this bill. Moreover, I am fully committed to working with the Mayor and Council to explore every legal avenue to see Initiative 71 fully implemented. And as I have publicly stated the Office of the Attorney General will defend Initiative 71 if it is challenged in court. Here, however, I must caution restraint, and I urge you to reconsider this hearing--at least for now.

The issue here is not whether Initiative 71, which was, in our view, enacted before the 2015 Appropriations Act became effective, but, rather, whether the hearing on this bill--which was not enacted by the time the rider took effect--would violate the rider. We believe it would.

Any such hearings, from my view, would violate federal civil and criminal code provisions. Worse, if your hearing goes forward and FY15 funds are used in furtherance of this process, District employees who participate could be held personally liable for violations of the federal Anti-Deficiency Act, i.e., if their activities are part of the legislative process associated with the enactment of the bill. Accordingly, I urge the Council to avoid this outcome by either 1) delaying the hearing until after the 2015 Appropriations Act is in effect, or 2) by having a public roundtable or similar discussion that addresses the substance of the issues without implicating the formal enactment process.

I. Applicable Law

The Appropriations Act provides in Section 809(b) that "[n]one of the [local] funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801 et seq.) or any tetrahydrocannabinols derivative for recreational purposes." We have concluded that section 809(b) should not prevent the District from using FY15 appropriated local funds to implement Initiative 71, which will legalize the possession of small amounts of marijuana, because this initiative had already been enacted when the Appropriations Act became effective.¹ Section 809(b) directly and squarely prohibits, however, the use of these funds and FY15 appropriated federal funds to enact any measure that

¹ Implementation could begin at the end of the 30-day period of congressional review required by section 601(c)(1) of the District of Columbia Home Rule Act ("Home Rule Act"), approved December 24, 1973, 87 Stat. 813, Pub. L. 93-198, D.C. Official Code § 1-204.46 (2012 Repl.), provided that Congress does not enact a joint resolution disapproving the initiative during that period. The estimated law date is February 26, 2015.

further legalizes marijuana, however. Because the bill does exactly that, the District would violate section 809(b) if it used FY15 appropriated local funds for its enactment.

To determine whether any specific District activities would violate section 809(b), it is necessary to first consider, as a court would, what particular actions constitute “enactment” under local law. A permanent bill or an initiative is finally enacted under the Home Rule Act when the Council adopts the bill after a second reading or the Board of Elections certifies the initiative’s results. *See* section 412 of the Home Rule Act (D.C. Official Code § 1-204.12) and section 2 of Initiative, Referendum, and Recall Charter Amendment Act, effective March 10, 1978, D.C. Law 2-46, D.C. Official Code § 1-204.105 (2012 Repl.).

For a bill to become law in the District it must pass through a multi-step process defined by District law and the Council’s rules. It must be introduced in the Council and referred to a committee. Rules 401 – 405 of the Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 21 (“Council Rules”).² A fiscal impact analysis must be conducted and a report issued. Section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006, 120 Stat. 2038, D.C. Official Code § 1-301.47a. Finally, a committee must hold a hearing on the bill and issue a report, which must include a certification of the bill’s legal sufficiency by the Council’s General Counsel. Council Rule 803.

The bill must then be scheduled for two legislative meetings, where it must be read, voted on, and approved. Section 412 of the Home Rule Act (D.C. Official Code § 1-204.12). Each step in the legislative process is necessary for the enactment of a permanent measure and, in our view, is part of the enactment of legislation covered by section 809. Holding a hearing on the bill, and/or participating in such a hearing, would therefore involve the expenditure of local funds to enact a measure legalizing marijuana, and would violate the Appropriations Act.

The D.C. Circuit’s opinion in *Marijuana Policy Project v. United States*, 304 F.3d 82, 84-87 (D.C. Cir. 2002) (“*MPP*”), reinforces the conclusion that section 809’s prohibition applies to the entire legislative process. In the *MPP* case, the Court rejected *MPP*’s claim that an appropriations rider almost identical to section 809(b) unconstitutionally restricted the First Amendment rights of individuals supporting a proposed ballot initiative that would have legalized medical marijuana. Based on the rider, the Board of Elections and Ethics (“*BOEE*”) had declined to certify the initiative as a “proper subject” for initiative.

In upholding this decision, the Court found that Congress had removed the subject of marijuana legalization from the District’s legislative authority, and that the rider “shift[ed] the focus of debate...from the D.C. legislative process--the D.C. Council or the ballot initiative--to Congress.” *Id.* at 86-87. The Court’s decision to uphold the *BOEE*’s determination that the entire initiative process was barred by the rider suggests that the congressional ban on the expenditure of appropriated funds to enact legislation applies to the legislative process as a whole.

² The Council adopted these rules pursuant to the “Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 21, Resolution of 2015,” effective January 2, 2015, D.C. Res. 21-1.

In addition, it is unlikely that a court would hold that Councilmembers and Executive Branch employees have First Amendment free speech rights in this situation to conduct and participate in a hearing on the bill regardless of the Appropriations Act prohibition. Courts have consistently rejected the claim that taking legislative action on a measure constitutes speech protected by the First Amendment. In *Nevada Commission on Ethics v. Carrigan*, 131 S.Ct. 2343 (2011), the Supreme Court recently upheld a state recusal law that prohibited a legislator with a personal interest in legislation from voting on or advocating for the legislation. In doing so, the Court held that a legislator's vote on legislation is conduct, not personal expression, and that in casting a vote, a legislator acts not as an individual but as a political representative of his or her constituents executing the legislative process. *Id.* at 2350-51.

It also noted that "a legislator has no right to use official powers for expressive purposes," and that the restriction on advocacy was a reasonable time, place, and manner limitation on speech. *Id.* at 2351, 2347. *See also MPP supra* (removing an initiative from the ballot based on subject matter does not violate the First Amendment); *but see Clarke v. United States*, 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (appropriations rider requiring the Council to enact specific legislation as a condition for budget authority presented First Amendment issues). Committee hearings are part of the legislative process, during which councilmembers act as legislators. Under the line of cases discussed above, councilmembers lack a First Amendment right to speak at a hearing held to consider legislation they have no legal authority to enact.

Finally, we have been advised that the General Counsel to the Council has suggested that section 809 only prohibits the expenditure of those funds necessary for the Council to conduct the second reading and finally approve the bill. By this logic, none of the legislative activities associated with the bill leading up to the second reading constitute enactment, and local funds could be freely spent on them and District employees could participate in a hearing on the bill without concern about the consequences--provided that the bill is never scheduled for a second reading.

For the reasons outlined above, we respectfully disagree and find this legal view unpersuasive. But even under this incorrect analysis, a hearing on this bill will be useless because the Council could not legally vote on the legislation or even obtain a certification from its own Office of General Counsel to allow it to be enacted.

And, as I have suggested above, and as discussed further below in Section III, there are legally valid alternatives for the Council to publicly, and formally, receive testimony on the subject of marijuana legalization and regulation--in effect achieving practically as much of what you would obtain though a hearing on the bill, but doing so lawfully.

For the reasons set out above, our office has concluded the Appropriations Act as reinforced by binding case law prohibits the scheduled hearing on the bill using any FY15 funds.

II. Anti-Deficiency Act Exposure for District Employees

If the Council proceeds to expend FY15 funds on a hearing on the bill in violation of the Appropriations Act and, therefore without appropriations authority, any individuals involved in the hearing could be subject to potential liability for participating in the enactment of the bill. Compensated work time spent in connection with the hearing, including analysis of the operational effects of the bill, the drafting and delivery of testimony, and related clerical staff activity, would unavoidably involve the expenditure of FY15 appropriated local funds in support of the Council's enactment of the bill. These expenditures would contravene section 809 and constitute a violation of the federal Anti-Deficiency Act. *See* 31 U.S.C. §§ 1341, 1342, and 1349 to 1351.³

Under section 446 of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 801, Pub. L. 93-198, D.C. Official Code § 1-204.46 (2012 Repl. and 2014 Supp.),⁴ principles of federal appropriations law, including the federal Anti-Deficiency Act, apply to the District and govern the use of all appropriated funds. A District official or other government employee who knowingly and wilfully spends or obligates funds, among other things, for a purpose for which they have not been appropriated, is subject to criminal prosecution with a penalty of up to two years imprisonment and a \$5,000 fine, or both, and potential employment discipline. 31 U.S.C. §§ 1349 and 1350.⁵

In this case, District employees who participate in the legislative process implicated by the proposed hearing on the bill would be seen as obligating the District to pay for their involvement in activities for which Congress has expressly prohibited the use of appropriated funds. Because the federal Anti-Deficiency Act applies personally to the individuals who spend the funds or

³ 31 U.S.C. § 1341 states, in pertinent part:

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

⁴ This section states "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act." Section 603(e) of the Home Rule Act (D.C. Official Code § 1-206.03(e)) also makes the District government subject to the federal Anti-Deficiency Act.

⁵ It is a basic principle of federal appropriations law that appropriated funds may only be spent for the purposes for which they are appropriated. *See generally, Principles of Federal Appropriations Law*, Third Edition, Volume I (January 4, 2004), pp. 4-9 – 4-35. Often, appropriations questions require an analysis of whether a particular expenditure falls within the purpose of an appropriation. In this case, such analysis is not even necessary because section 809 directly prohibits the proposed expenditure.

make the obligations, Executive Branch staff could be personally at risk if they participate in these activities or authorize the participation of others who are equally proscribed.⁶

III. Possible Future Action

If the Council decides to take actions discussed here in connection with the bill, individual employees will be required as part of their job responsibilities to risk a federal Anti-Deficiency Act violation. This would be both illegal and unfair. However, District employees could, if the Council elects to do so, safely engage in a more general discussion of marijuana legalization. This may be done at a Council hearing or otherwise, so long as that discussion is not associated with the enactment of a particular bill.

Under the Council Rules, the Council and the Committee of the Whole have the authority to hold a hearing on any matter relating to District affairs. Council Rules 231(d) and 501(a)(1). Other committees may hold hearings on any matter relating to District affairs that is within the committee's jurisdiction. Council Rule 501(b). The further legalization of marijuana clearly relates to District affairs, and section 809 does not prohibit the District from using its local funds to conduct more generalized hearings or to further consider this issue.

In the *MPP* case referenced above, the D.C. Circuit suggested that, in light of the appropriations rider, individuals wishing to promote marijuana legalization should direct their efforts to Congress. *See MPP*, 304 F.3d at 85. There is nothing in section 809 that prohibits the Council from considering different policies relating to marijuana legalization, either for possible future legislation in the absence of an appropriations rider or to support a proposal to submit to Congress for its affirmative enactment.

In our view, the federal Anti-Deficiency Act would not be violated if District employees were to participate in such a hearing. In the future, Congress could curtail the Council's power to conduct these types of hearings, either generally or with respect to marijuana. However, to date, the language of section 809 does not establish that intent.

Conclusion

After careful review, and for the reasons outlined above, we conclude that the scheduled hearing on the bill, if it goes forward using FY15 funds, would be unlawful. I respectfully urge the Council to proceed lawfully, whether by delaying the hearing until after the 2015 Appropriations Act is in effect or by having a public roundtable or similar discussion that addresses the substance of the issues without providing a formal hearing on the bill or any other aspect of the formal enactment process. My staff and I are available to further discuss this matter with you and your colleagues. The Office of the Attorney General stands ready to assist the Council's decision-making process on this issue going forward.

⁶ It should be noted that, to our knowledge, no one has ever been criminally prosecuted for violating the federal Anti-Deficiency Act. That, however, does not make a violation of this criminal provision lawful nor could it insulate any individual if the federal government chose to go forward in response to what was perceived as an intentional violation of the Act.