

LCvR 7(m) CERTIFICATION

Counsel for the District and Counsel for the plaintiff have discussed the relief requested herein and have not been able to reach a resolution.

Dated: September 1, 2011

For the District of Columbia

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ERIC PAYNE,

Plaintiff,

v.

DISTRICT OF COLUMBIA, et al.

Defendants.

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Case No: 10-cv-00679-PLF-DAR

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DISTRICT
OF COLUMBIA’S MOTION FOR A PROTECTIVE ORDER ON BEHALF OF MAYOR
VINCENT C. GRAY**

Pursuant to Fed. R. Civ. P. 26(c), the District of Columbia hereby moves for a protective order barring plaintiff from taking the deposition of the Honorable Vincent C. Gray, Mayor of the District of Columbia. Federal Rule of Civil Procedure 26(c) provides:

Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Plaintiff has issued a subpoena for the Mayor’s deposition on September 15, 2011. There is good cause to issue a protective order barring plaintiff from taking Mayor Gray’s deposition.

There are two independent and compelling reasons that the Court should issue a protective order. First, plaintiff cannot demonstrate the type of extraordinary circumstances necessary to justify burdening a high-ranking city official, such as the Mayor, with appearing for a deposition. Although plaintiff has failed to make a specific proffer regarding the Mayor’s testimony, it appears from the allegations in the Complaint and discussion of counsel that plaintiff is seeking information that he could get from other sources. Second, the allegations in the complaint relate to the Mayor’s tenure on the Council of the District of Columbia (“D.C.

Council”). Any inquiry into Mayor Gray’s duties as a councilmember is barred by legislative immunity. For these reasons, which are discussed in further detail below, the Court should issue a protective order preventing the deposition of Mayor Gray.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff worked in the General Counsel’s Office for the Office of the Chief Financial Officer (OCFO) from May 2006 until his employment was terminated on January 9, 2009. *See* Am. Compl. ¶¶ 10, 65. For part of this time, he was the Director of Contracts. According to plaintiff, during his tenure in this position, a number of issues arose concerning the award of a contract for a new gaming system network and platform for the D.C. Lottery (the “Lottery Contract”) in 2007. *Id.* ¶¶ 22 – 47.

Plaintiff oversaw the selection process for the Lottery Contract. *Id.* There were two bidders, W2I (a joint venture between two companies, W2Tech, LLC and Intralot), and LTE, the incumbent (a joint venture comprised of New Tech Games, Inc., Opportunity Systems, Inc., and GTECH Corporation). *Id.* ¶26. Plaintiff claims that W2I had the superior bid, and he issued an award decision to W2I. *Id.* ¶¶ 27 – 28. According to plaintiff, the CFO and the OCFO failed to act to award the contract to W2I and allowed elected and executive officials, including members of the D.C. Council, to have improper input in the award process. *Id.* ¶¶ 29 – 30. Mayor Gray was a member of the D.C. Council during this time.

Plaintiff complains he refused to reconsider the award decision and, as a consequence, he was subjected to a series of retaliatory acts by his superiors. *Id.* ¶¶ 34 – 63. During this period, plaintiff claims that he also reported his concerns internally, to the OCFO’s Office of Integrity and Oversight, and externally, to the Office of the Inspector General. *Id.* ¶¶ 36 – 42. Plaintiff claims that as a result of reporting his concerns, he was demoted, subjected to several internal

investigations, pressured to resign, and ultimately his employment was terminated. *Id.* ¶¶ 37 – 66.

There are several general allegations about the D.C. Council’s approval process for the Lottery Contract. In particular, plaintiff alleges he testified before the D.C. Council and that “Council members repeatedly attempted to challenge the procurement process.” *Id.* ¶ 31.

Plaintiff also contends that when the losing bidder, LTE, challenged the contract award, “Several Council members took the unusual position of wanting to await the outcome of the [challenge] before approving the proposed contract award.” *Id.* ¶33. According to plaintiff, even after the bid protest was unsuccessful, “the D.C. Council still resisted voting on the proposed contract” and only acted after “negative newspaper articles” were published. *Id.* ¶51. The D.C. Council ultimately did not approve the contract that was awarded through the bid process that plaintiff supervised. *Id.*

Plaintiff served Mayor Gray with a deposition subpoena on August 23, 2011, seeking his testimony on September 15, 2011. The notice does not provide any proffer of the testimony that plaintiff seeks from the Mayor. Nor does the Complaint make any specific allegations regarding Mayor Gray. It is defendants’ understanding that plaintiff wishes to take the Mayor’s deposition regarding meetings he may have had with LTE, W2I and their principals during his tenure on the Council.

ARGUMENT

I. As a high ranking official, Mayor Gray should not be burdened by deposition absent extraordinary circumstances that are not present here.

The Court should issue an order barring plaintiff from taking Mayor Gray’s deposition in this matter. “[C]ourts have consistently recognized the undue burden that falls on public officials as a consequence of compulsion to attend depositions.” *Alliance for Global Justice v. District of Columbia*, 2005 WL 1799553, at *5 (D.D.C. July 29, 2005) (collecting cases).

“[H]igh ranking government officials are generally not subject to depositions unless they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere.” *Alexander v. F.B.I.*, 1, 4 (D.D.C. 1998) (emphasis added); *see also Willingham v. Ashcroft*, 226 F.R.D. 57, 65 (D.D.C. 2005). The Mayor of the District of Columbia qualifies as a high ranking official who should not be compelled to attend depositions in the absence of such extraordinary circumstance. *Global Justice*, 2005 WL 1799553 at *5.

These extraordinary circumstances are not present here. Nothing in the complaint demonstrates that Mayor Gray had any personal involvement in the decisions to demote plaintiff or terminate his employment, which are at the heart of plaintiff’s claims. To the extent that plaintiff seeks testimony regarding meetings that the Mayor may have had with the Lottery Contract bidders, plaintiff can obtain that information elsewhere -- from the bidders. Consequently, plaintiff should not be allowed to take the Mayor’s deposition to obtain this information.

II. The District’s Speech or Debate statute provides absolute immunity for legislative activities and Mayor Gray cannot be compelled to provide testimony regarding his legislative activities while serving on the D.C. Council.

Even if plaintiff could show the type of extraordinary circumstances that justify burdening a high ranking official with attending a deposition, legislative immunity would still bar Mayor Gray’s deposition in this action. The District’s Speech or Debate statute provides that “[f]or any speech or debate made in the course of their legislative duties, the members of the Council shall not be questioned in any other place.” D.C. Official Code § 1-301.42. The term “legislative duties” is broadly defined as:

The responsibilities of each member of the Council in the exercise of such member's functions as a legislative representative, including but not limited to:

Everything said, written or done during legislative sessions, meetings, or investigations of the Council or any committee of the Council, and everything said, written, or done in the process of drafting and publishing legislation and legislative reports.

D.C. Official Code § 1-301.41(b).

The District's statute was modeled on the United States Constitution's Speech or Debate Clause. *See Williams v. Johnson*, 597 F. Supp. 2d. 107, 112 (D.D.C. 2009). Like its federal counterpart, "the District's Speech or Debate statute . . . 'was intended to be interpreted liberally so as to protect genuine legislative functions.'" *Id.* (quoting *Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F.Supp. 258, 261 (D.D.C. 1995)). The Speech or Debate Clause provides absolute immunity for all actions within the legislative sphere. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995).

The Speech or Debate Clause is designed to relieve legislators not only from liability for protected activities, but also from the annoyance and burden of defending suits. *See Powell v. McCormack*, 395 U.S. 486, 505 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Consequently, legislative immunity includes an evidentiary privilege that applies where discovery is sought in third party actions. *See Brown & Williamson*, 62 F.3d at 421; *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 14 (D.C. Cir. 2006). This privilege bars plaintiff from taking the Mayor's deposition regarding the legislative activities at issue in this action.

Plaintiff's complaints about the Lottery Contract approval process fall directly within the legislative sphere. Indeed, plaintiff's allegation that "Council members repeatedly attempted to challenge the procurement process" during a hearing, Am. Compl. ¶31, is classic "speech and debate" that is unquestionably within the legislative sphere. The D.C. Council's decisions regarding approval of the Lottery Contract, Am. Compl. ¶¶ 33 & 59, are similarly protected. D.C. Council approval is required for all multiyear contracts and for all contracts in excess of

one million dollars. *See* Section 451 of the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) (now codified as D.C. Code § 1-204.51); *Fairman v. District of Columbia*, 934 A.2d 438, 448 (D.C. 2007) (contracts entered into in violation of § 451 are invalid). Deciding whether to exercise this authority is a core legislative function. *See Dorsey v. District of Columbia*, 917 A.2d 639 (D.C. 2007)(decision to support or reject a bill is legislative activity); *Brewer v. District of Columbia Financial Responsibility and Management Assistance Authority*, 953 F. Supp. 406 (D.D.C. 1997)(introduction of a bill that would have abolished the D.C. Lottery Board is legislative activity); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998)(“policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents” is a “hallmark of traditional legislation”). Thus, plaintiff is not entitled to testimony from Mayor Gray regarding his role in the D.C. Council’s actions on the Lottery Contract.

Meetings that might have informed the Mayor’s decisions during this legislative process are similarly protected. The broad scope of the District’s Speech or Debate statute precludes inquiry into the motivations for actions taken as part of the legislative process. *See Chang v. United States*, 512 F.Supp.2d 62, 66 (D.D.C. 2007). This protection applies even where there are allegations of improper conduct or motive (though there is, in any event, no credible allegation here of such motive). *See Brown & Williamson*, 62 F.3d at 421(immunity applies to all actions “within the ‘legislative sphere,’ even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes.”)(quoting *Doe v. McMillan*, 412 U.S. 306, 312-13, (1973)); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (“[t]he claim of an unworthy purpose does not destroy the privilege”); *Rateree v. Rockett*, 852 F.2d 946, 951 (7th Cir. 1988) (“[a]dmittedly, a particular legislator may

vote for legislation for seemingly improper reasons; nevertheless, the rule of absolute immunity shields this conduct”). Thus, even plaintiff’s veiled allegation of impropriety in the D.C. Council’s contract approval process does not justify a fishing expedition in the legislative pond. The Court should issue a protective order barring the Mayor’s deposition in this action.

CONCLUSION

WHEREFORE, the District of Columbia respectfully requests that this motion for a protective order be granted that the Court bar plaintiff from taking Mayor Gray’s deposition in this action.

September 1, 2011

Respectfully submitted,

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