Chronology of Violations of the "Jobs for D.C. Residents Amendment Act of 2007" (D.C. Law 17-108, § 101, 54 D.C.R 10993; Mar. 25, 2009, D.C. Law 17-353, § 223(a), 56 D.C.R 1117; and Public Law 101-168, Sec. 110B(a)(2)(A), 103 Stat. 1276-77**)**

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I. Introduction

1. Mr. Barry Weise is bringing legal action against District of Columbia ("D.C." or "the District") for relief from the District's violation of the Jobs for D.C. Residents Amendment Act of 2007 (D.C. Law 17-108, § 101, 54 D.C.R 10993; Mar. 25, 2009, D.C. Law 17-353, § 223(a), 56 D.C.R 1117) and Public Law 101-168, Sec. 110B(a)(2)(A), 103 Stat. 1276-77.

2. Specifically, Mr. Weise challenges the selection process for District Department of the Environment ("DDOE") Special Assistant Grade 14 - Job ID 22727, for which he applied but was not interviewed or selected. Mr. Weise asserts that the way in which the District applies the D.C. residency preference contravenes the purpose of the laws, and allows D.C. officials to ignore the residency preference in order to eliminate qualified candidates, including for political reasons.

3. Mr. Weise worked as Deputy Legislative Director of the Committee on Public Works and the Environment for the District of Columbia City Council ("Council") from November 2005 through May 2008. From June 2008 through September 2008, he served as Legislative Policy Analyst for the District of Columbia Office of Planning ("OP"). Mr. Weise additionally worked for DDOE from October 2008 through August 31, 2012, holding the positions of Legislative & Regulatory Analyst, and Special Assistant. This latter and most recent position was then an Excepted Service equivalent of a Career Service Grade 14-10 position.

4. For nearly seven years, Mr. Weise was responsible for such high levels tasks as advising Council staff on DDOE-related legislative matters, providing oversight of DDOE, and

managing legislative, regulatory, and programmatic functions at DDOE. Mr. Weise drafted and/or marshaled the successful passage through Council of approximately two-dozen pieces of legislation, including eight major environmental bills, and several other environmental bills. In fact, no single person has ever drafted more environmental legislation governing DDOE's environmental mandates than Mr. Weise.

5. During the three years at DDOE when Mr. Weise received annual performance reviews, Mr. Weise's performance reviews averaged 4.4 out of 5. Mr. Weise did not receive any adverse personnel actions during his seven years of service to the District, and he received a series of progressively responsible promotions and raises.

II. Chronology of Events

6. D.C. Law 17-108, the "Jobs for D.C. Residents Amendment Act of 2007," requires District agencies to grant a 10-point preference to all qualified District resident applicants over qualified non-District residents, *for all employment decisions* for positions in the Career Service. According to the bill's Committee Report, the intent of this policy was that of "… ensuring that District residents hold a greater number of District government jobs."

7. District of Columbia's hiring process involves a review stage in which applicants are placed on Certification lists, categorizing them into such groups as "Highly Qualified" ("HQ"), "Well Qualified" ("WQ"), and "Qualified" ("Q"). Only applicants placed on the "HQ," "WQ," or "Q" lists have the chance to be interviewed, further evaluated, and possibly selected for a position.

8. It is the policy of the District of Columbia not to apply the 10-point presence until *after* the Certification lists are determined. Within each category, however, District of Columbia claims the prerogative that hiring managers have no obligation to favor any candidate over

another regardless of the number of points they might have, or whether they are at the top or bottom of the respective category.

9. On July 22, 2013, Mr. Weise applied for the position he held for nearly one year, DDOE Special Assistant Grade 14 - Job ID 22727. On the Certification list dated August 1, 2013, three applicants were ranked "Highly Qualified." The "Rating and Ranking" schedule failed to take into consideration the D.C. residency preference when assembling the "HQ" Certification list.

10. Mr. Weise was not among those ranked "Highly Qualified," but had his ten-point residence preference been included in the calculation, he would have received a score of "93," sufficient to be placed on the "HQ" Certification list. This failure to properly qualify, rank or certify Mr. Weise resulted in his merely being ranked as "well qualified," therefore precluded him from being offered an interview and selected for the position.

11. Two of the three "HQ" applicants were qualified for a residency preference, and the third was not. The individual hired had less environmental experience than Mr. Weise.

12. District of Columbia's practice of applying the residency preference late in the process subverts the intent of D.C. Law 17-108, the "Jobs for D.C. Residents Amendment Act of 2007." It was clear when the legislation was discussed during the Workforce Development and Government Operations Committee hearing Chaired by Councilmember Schwartz on June 4, 2007, that then D.C. HR Director Brender L. Gregory intended to apply the ten preference points to the "*rating and ranking score*" used to determine whether the applicant is Qualified, Well Qualified, or Highly Qualified, in a manner that "would greatly increase the chances of District residents being placed on the certificate of eligible applicants and also have the opportunity to be interviewed for positions" (Committee Report, Gregory testimony pp. 3-5).

13. Since an applicant only has a chance to be interviewed and possibly selected for a position if placed on a "HQ," "WQ," or "Q" certificate of eligible applicants, for this statement to have meaning, the ten preference points *must* be added to the 100 point score *before* candidates are assigned to a ranking category, as Mr. Gregory described. If added before the "HQ," "WQ," or "Q" lists are tallied, the additional points could theoretically boost a D.C. resident from a WQ list to an "HQ" list or a "Q" list to a "WQ" list, thereby greatly increasing his or her chances to be interviewed and potentially selected.

14. Any addition of preference points *after* candidates are assigned to a category renders the preference points mandated by the D.C. Council meaningless in practice, as within each category, hiring managers have no obligation to favor any candidate over another regardless of the number of points they might have.

15. Mr. Weise also failed to receive several other D.C. government jobs to which he applied, even though his qualifications and residency status should have secured him the position: (1) Legislative & Regulatory Analyst Grade 14 - Job ID 20981, a position that he previously and successfully held at DDOC for three years; (2) DDOE Environmental Protection Specialist Grade 13 - Job ID 21274; (3) DDOE Program Analyst Grade 13 - Job ID 21457, in DDOE's Environmental Protection Administration; (4) Re-advertised DDOE Program Analyst Grade 12 position - Job ID 22640; (5) DDOT Legislative Analyst Grade 13 - Job ID 21632; (6) DDOE Program Analyst Grade 13 - Job ID 22814; and (7) D.C.R.A. Legislative and Public Affairs Officer Grade 14 – Job ID 23529.

16. In 2005, the United States Department of Justice, the EPA, the District of Columbia Water and Sewer Authority ("D.C. Water"), environmental stakeholder groups, and District of Columbia entered into a Consent Decree pursuant to the Clean Water Act, 33 U.S.C.

§§ 1251, *et seq*. (Consent Decree, *Anacostia Watershed Society v. D.C. WASA*, No. 1:00-CV-0183 (TFH) (D.D.C. Mar. 25, 2005)). The 2005 Consent Decree established a Long Term Control Plan, which called for D.C. Water to build a system of underground storage tunnels and pumping stations to manage stormwater within 20 years.

17. Sometime in 2011 or 2012, D.C. Water sought to reopen the Consent Decree to make modifications thereto in a proposed partnership agreement entitled "Green Infrastructure Partnership Agreement" ("GIPA"). D.C. Water did not involve DDOE or other key stakeholders in its negotiations with the EPA to reopen the Consent Decree.

18. On July 20, 2012, then Director of DDOE, Christophe Tulou and members of his staff at DDOE learned from EPA that D.C. Water was engaged in ongoing furtive negotiations with EPA to reopen the Consent Decree.

19. On July 23, 2012, for the first time EPA, not D.C. Water, provided a copy of the proposed GIPA to DDOE, *and EPA requested that DDOE provide comments on the agreement*. On or about July 31, 2012, D.C. Water gave DDOE a different version of the proposed GIPA, along with several large technical documents of approximately 400 pages.

20. D.C. Water's proposed GIPA made little mention of the District's role in devising or implementing future plans for stormwater management. The purpose of the agreement was to permit D.C. Water to manage stormwater through various alternative low-tech "Green Infrastructure" approaches *as a complete or partial alternative* to installing underground storage tunnels, as required by the 2005 Consent Decree.

21. DDOE, which has the statutory duty to oversee stormwater management for the District, D.C. Code §§ 8-152.01, *et seq*., sought to provide necessary input on behalf of the District to ensure that the District was properly involved in future planning and to protect the

District from possible lawsuits.

22. DDOE identified two major areas of concern. First, D.C. Water's proposal relied on unproven methods of stormwater management and could delay by eight years the time for D.C. Water to come into compliance with the CWA. DDOE did not agree that an extension was appropriate and expressed the opinion that no deadline should be extended unless and until it was demonstrated that the alternative approach could achieve the same environmental improvements as the tunnels contemplated under the Consent Decree. Second, D.C. Water's proposal did not adequately address liability issues, maintenance issues, and technical issues related to the multiple interests in the public right of way, and the District's and the public's roles in future planning and decision making.

23. In March 2012, Mayor Vincent Gray sent a letter to EPA Administrator Lisa Jackson supporting low-tech Green Infrastructure projects and the re-opening of the 2005 Consent Decree. DDOE was only subsequently informed of the letter by environmental groups. On or about August 7, 2012, Warren Graves (Chief of Staff to City Administrator Allen Lew) presented to Mayor Vincent Gray a second letter also supporting the low-tech Green Infrastructure projects, which was then signed by Mayor Gray and sent to Lisa Jackson. Graves presented this letter to the Mayor without consultation with DDOE, despite the fact that DDOE is the District agency with the authority and technical expertise in matters involving the implementation and enforcement of the CWA and related stormwater management initiatives, and that *the GIPA proposal required 400 pages of complex technical details*. In contrast, by then Council Chairman Mendelson and the environmental groups had withdrawn their support of the GIPA proposal.

24. Lew, in addition to being the D.C. City Administrator, had served as a Principal

Member of D.C. Water's Board of Directors for two years prior to be being appointed Chairman of the Board in December 2012. Lew's central role as D.C. Water's Chairman of the Board and at the same time as DDOE's reporting superior in his role as City Administrator, creates a conflict of interest for Lew when DDOE, the agency that has the statutory duty to oversee stormwater management for the District, has serious reservations about major changes to the Consent Decree being put forward by D.C. Water.

25. On August 8, 2012, DDOE sent the proposed comments to Lew, Graves, and Christopher Murphy (Chief of Staff to the Mayor), for their review.

26. On August 9, 2012, with Tulou's approval, DDOE shared the comments with the EPA and D.C. Water. This sharing of comments was DDOE's usual practice, as the EPA was a party to the Consent Decree to which the proposed GIPA was addressed, and as such EPA should be apprised of all comments on the agreement. DDOE's comments were not a "public document" and were only shared with EPA and D.C. Water, and not environmental groups.

27. Sometime early in 2012, Janene Jackson, the Director of the Mayor's Office of Policy and Legislative Affairs ("OPLA"), told Mr. Weise that she believed DDOE was "over-regulating the environment." Zachary Weaver, OPLA staff assigned to DDOE, later repeated this view to Mr. Weise. Additionally, Tony Robinson, spokesman for Lew, stated in a September 7, 2012 *Washington Business Journal* article, "I do think it would be fair to say the city administrator is taking a look at the agency to ensure that it's working the way it's supposed to… in that it's carrying out its regulatory responsibility but also at the same time *it's not overstepping its role as regulator and moving into the role of advocate* [emphasis added]."

28. On August 16, 2012, Mr. Weise received an email from Jackson suggesting that DDOE's submission of comments and participation in the EPA proceedings was inappropriate.

According to Jackson, DDOE improperly provided the comments to the EPA without first clearing them with OPLA.

29. Given that Jackson contacted Mr. Weise first with her concerns about DDOE's comments to EPA, it appears that she believed that Mr. Weise was also involved in the preparation and submission of the comments.

30. However, prior to this email, as the opening of the Consent Decree was a matter under the jurisdiction of the Office of the Attorney General and therefore did not fall under Mr. Weise's job responsibilities, Mr. Weise had no working knowledge of the existence of the GIPA proposal, and he had no other involvement in the GIPA such as policy discussions or the drafting of DDOE Office of the General Counsel's ("OGC") GIPA comments. Mr. Weise could not have sought approval from OPLA for the GIPA comments, as he was unaware that the comments were being drafted or that they were being sent to EPA or D.C. Water.

31. DDOE's OGC's normal course of business was to sign agreements with EPA without approval from OPLA. DDOE OGC did not include OPLA in its response to EPA or seek OPLA's approval because that procedure was not DDOE's or OPLA's normal protocol.

32. More importantly, DDOE's OGC was already in communication with more senior staff than OPLA at the Executive Office of the Mayor and the City Administrator, such as Lew, Graves, and Murphy. Not only does OPLA simply lack the legal expertise to handle agreements relating to cases such as the 2005 Consent Decree, additionally, OPLA had not in the past requested to be included on negotiations relating to court cases, as such endeavors are clearly under authority of the Office of the Attorney General.

33. On August 31, 2012, Tulou was called in to a meeting with Lew, Graves, Barry Kreiswirth (Program Manager/Legal Advisor for the District of Columbia), and Shawn Stokes

(director of the D.C. Department of Human Resources). Lew told Tulou that he was being terminated. Graves and Lew incorrectly had alleged that the comments provided by Tulou and DDOE contradicted the Mayor's letter in support of the use of Green Infrastructure. The District of Columbia then publically stated that it discharged Tulou for a "breach of protocol" in his provision of comments to the EPA "without approval."

34. On the same afternoon, the District of Columbia dismissed Mr. Weise. While the District has never provided any explanation for the termination of Mr. Weise's employment, the timing of the dismissal and other circumstances strongly suggest that Mr. Weise was also dismissed for being perceived as being involved in the provision of comments to EPA. Mr. Weise was not dismissed "for cause."

35. After discharging Tulou and dismissing Mr. Weise, Lew began a campaign of intimidation of DDOE employees, apparently intended to muzzle DDOE's normal course of business communications with EPA.

36. On September 6, 2012, Lew called a meeting of all DDOE staff and warned, "You guys are really lucky I'm the City Administrator because if Warren Graves was in charge, there would be a lot more collateral damage…". In subsequent comments, Lew joked about how a colleague said Lew had gone to the "Attila the Hun School of Management." Lew also said that Graves had suggested that Lew ought to manage by fear. Lew further remarked on what he thought was an "incestuous relationship" between DDOE and the EPA.

37. Notwithstanding the fact that DDOE is the District agency with the authority and technical expertise in matters involving the implementation and enforcement of the CWA and related stormwater management initiatives for the District, the clear implication of Lew's statements in the meeting was that any further comments DDOE employees might make to EPA,

even those in the normal course of business, would be made at jeopardy to their jobs.

38. On September 27, 2012, Christophe Tulou filed a complaint against the District of Columbia, asserting violations of the employee protection provisions of the Water Pollution Control Act ("FWPCA," commonly called the Clean Water Act), 33 U.S.C. § 1367. On July 3, 2013, the complaint was dismissed on the grounds that "[a]s the FWPA does not define the term 'employee' and otherwise contains no plain statement that cabinet-level officers of state and local governments are 'employees' entitled to the statute's whistleblower protections, it is OSHA's view that cabinet-level officers such as Mr. Tulou are excluded from those protections."

39. On November 7, 2012, at a Sustainable D.C. Working Group evening meeting held at All Souls Church Unitarian on 1500 Harvard Street NW, D.C., Mr. Weise privately discussed with then Interim DDOE Director Anderson, Weise's prospects for future employment with the D.C. government. During the conversation, Anderson confirmed Mr. Weise's belief that Janene Jackson would not permit Anderson to hire Mr. Weise, at least not at DDOE and not in the foreseeable future.

40. The failure to select Mr. Weise was likely in retaliation for his incorrectly perceived role in submitting DDOE's GIPA comments to EPA, or the perceived nature of his relationship with Christophe Tulou and Tulou's progressive environmental policies (the former DDOE Director and Mr. Weise's former supervisor, who was dismissed for his role in the GIPA comments to EPA). After Mr. Weise filed a grievance based on improper ranking due to said retaliation, DDOE further retaliated by not selecting him for a position for which he was highly ranked and interviewed, but also revealed to the interview panel his filing of a grievance.

41. Mr. Weise now challenges the selection process for the DDOE Special Assistant Grade 14 - Job ID 22727 position. Had DDOE not violated D.C. residency preference laws for

political reasons, Mr. Weise would have been selected for the position given his extensive policy, legislative, regulatory, and program experience in the D.C. Executive branch, the D.C. Council, and the private sector.

42. District of Columbia is in flagrant violation of D.C. Law 17-108 in its bait and switch failure to implement the law in a manner that would do anything that would result in "… ensuring that District residents hold a greater number of District government jobs."

43. Furthermore, in violation of Public Law 101-168, Sec. 110B(a)(2)(A), 103 Stat. 1276-77, D.C. regulations (6 DCMR B301.9), and the standard required in DC HR's own District Personnel Manual (Chapter 3 of the E-DPM – Residency 3.4(b)), the person selected for the Special Assistant position was not a residency preference candidate, and therefore could not be selected over the two other "highly qualified" candidates who did qualify for residency preferences. Nor could this candidate have been selected over Mr. Weise who does qualify for a residency preference, had Mr. Weise's application been properly qualified, ranked, or certified.

44. Moreover, the District of Columbia's practice of issuing waivers to allow the hiring of non-District residents over District residents in the same ranking category eviscerates the sole remaining component of the D.C. residency preference, which requires that a resident be chosen over a non-resident in the same ranking category. It is in clear violation of the intent of D.C. Law 17-108 and the letter of D.C. HR's own regulations. Despite this fact, the District of Columbia created out of whole cloth a convoluted exception to federal law and Council approved regulations, and D.C. HR's Personnel Manual, which states: "**While there are no provisions for a waiver of the residency preference**, in cases of suitability, or when there are clear qualifications issues, a hiring official may submit written justification to the personnel authority requesting selection of a NRP candidate." Electronic-District Personnel Manual (E-DPM)

Chapter 3, 3.4B (emphasis in manual).

45. The District of Columbia might call this "justification" something other than a waiver, but if it looks like a waiver, swims like a waiver, and quacks like a waiver, then it *is* a waiver. And as the E-DPM is subordinate to the D.C. Municipal Regulations, which in turn are subordinate to federal and D.C. law, and neither the law nor regulations permit waivers to the D.C. residency preference, there is no statutory authority for the hiring of a non-D.C. resident over Mr. Weise or another D.C. resident for this position. Even if there were some justification for this waiver, Mr. Weise's exemplary seven years of service to the District precludes any claims of "suitability" or of "qualifications issues" that could possibly justify a "waiver".

46. Finally, not only is there no statutory authority for the waiver, the D.C. Council specifically rejected any inclusion of a waiver in the final version of D.C. Law 17-108. The bill as originally introduced included the following in Section 709(c): "(c) Each subordinate agency head shall be authorized to grant non-resident employment waivers. Waivers of the hiring preference shall be exercised only in exceptional circumstances for hard to fill positions." Despite the fact that then Director Bender supported the waiver for "only in exceptional circumstances for positions designated as hard to fill," the law as sent to the Council by the Workforce Development and Government Operations Committee and ultimately passed by the Council *was stripped of waiver authority*.

47. Thus, not only does neither federal law, the D.C. Official Code, nor the D.C.M.R. provide for waivers of the D.C. preference requirement, but as the Council specifically rejected the waiver provision of the bill as introduced, there is no room for arguing any "ambiguity" in the letter or intent of the law that would permit the "justification" found in E-DPM Chapter 3, 3.4B. Clearly, this policy of liberally granting waivers on an "as needed" basis for three of the

positions to which Mr. Weise applied (not limited to "exceptional circumstances for hard to fill positions"), is yet another example of District of Columbia's subversion of the intent of D.C. Law 17-108, the "Jobs for D.C. Residents Amendment Act of 2007" and the letter of the D.C.M.R.