



BY FACSIMILE

May 9, 2011

Mr. David B. Baker
Sussex County Administrator
2 The Circle
P.O. Box 509
Georgetown, Delaware 19947

Re: Sussex County Council Rule 17.6

Dear Mr. Baker:

I write regarding Sussex County Council Rule 17.6, which makes Sussex County residents who wish to address Council during the Additional Business portions of its meetings agree in writing that they will not “criticize one or more members of Council or county employees or subcontractors for matters that [are] related to personnel decisions or that are personal in nature.” Council requires each person seeking permission to address Council to agree that they will “abide by said policy at all times.” We were contacted about the rule by a resident who believes it violates the First Amendment of the United States Constitution. Having researched the issue and concluded that Council’s imposition of the requirement is a clear Constitutional violation, I write to ask you to advise Council that it must rescind the requirement.

Political Speech is Highly Protected by the First Amendment.

As the Supreme Court has repeatedly demonstrated, the First Amendment's protection of free speech, made applicable to the states through the Fourteenth Amendment, extends to a broad range of speech and expressive conduct. *See, e.g. Hurlley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Speech on public issues and political matters lies at the heart of protected speech. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 343-44 (1992) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position....”) (Stevens, White and Blackmun, JJ. concurring); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (citation omitted) (“There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“debate on public issues should be uninhibited, robust, and wide-open”).

The First Amendment Limits Council’s Right to Restrict Speech.

Section B of Rule 17.6 confines the topics that may be addressed during the Additional Business portion of Council meetings to certain content: matters within the jurisdiction of Council and matters of legitimate Sussex County business. That

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is constitutionally permissible. *See, Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004). But Council's right to permit only speech addressing matters of legitimate county business does not mean it may permit only some of that relevant speech, which addresses such matters. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995) (holding that once the state establishes a limited forum it "must respect the lawful boundaries it has itself set"). Thus, if County Council permits the public to address matters within the jurisdiction of Council and matters of legitimate Sussex County business during the Additional Business portion of its meetings, it must allow all such speech. Council may not prohibit only criticism. That would be impermissible viewpoint discrimination. *See, e.g., Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006), *cert. denied*, 549 U.S. 820 (2006) (ruling in the case of a man who had been prevented from speaking at a city council meeting that if the city council president "acted with an intent to suppress [his] speech on the basis of view-point, she violated clearly established law and [was] not entitled to qualified immunity"). These relevant Third Circuit Court of Appeals and the Supreme Court rulings are binding on Sussex County Council and its members.

These principles were applied by the federal court in New Jersey to void a bylaw provision that authorized the Board of Education's presiding officer at Board meetings to "[i]nterrupt, warn, or terminate a participant's statement when the statement is ... personally directed" *Moore v. Asbury Park Board of Education*, 2005 WL 2033687, *8 (D.N.J., Aug. 23, 2005)¹. The Board of Education's bylaw restricting personally directed speech is legally indistinguishable from Rule 17.6's prohibition of speech relating to personnel decisions or matters that are personal in nature. Thus, it is worth looking at the *Moore* decision in detail.

The court first reviewed how the First Amendment applies to the meetings of public bodies. It explained that plaintiffs, who were seeking a preliminary injunction:

must demonstrate a reasonable probability of success on the merits of their claim that the Board's policy is an impermissible restraint on speech. The standard we use in reviewing restrictions on speech, such as the Bylaw, depends on the type of forum where the speech is restricted. *Bach v. Sch. Bd. of the City of Virginia Beach*, 139 F.Supp.2d 738, 741 (E.D.Va.2001). The parties agree that the forum here, the Board meeting, is a limited public forum. (*See* Pl.'s Br. at 7-8; Def.'s Br. at 11-13.) *See Leventhal v. Vista Unified Sch. Dist.*, 973 F.Supp. 951, 957 (S.D.Ca.1997) (finding open school board meetings to be limited public fora, *i.e.*, "fora open to the public in general, but limited to comments related to the school board's subject matter") (quotations and citations omitted); *see also Bach*,

¹ The bylaw in question also permitted the presiding officer to prevent speech that was "too lengthy," "abusive, obscene, or irrelevant." Those provisions were not challenged. *Id.*

139 F.Supp.2d at 741 (same).

In limited public fora like the Board meetings,

content-neutral regulations may be drawn to restrict the time, place, and manner of protected speech, as long as the regulation is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communication. Content-based regulations, however, are subject to a more exacting standard of scrutiny and must be narrowly drawn to achieve a compelling state interest.

Moore at *9.

The court then ruled that the bylaw's prohibition of "personally directed" comments was unconstitutional:

This provision of the Bylaw cannot withstand such scrutiny. Assuming arguendo that the limitation on personally directed comments is tied to the limited subject matter of the Board meetings, we find that the provision is not neutral as to viewpoint within that limited subject matter. The Bylaw, as applied by the Board, limits the expression of one viewpoint, *i.e.*, negative criticism of the Board president, but does not limit the opposing viewpoint. Viewpoint-based regulations are improper. *Eichenlaub*, 385 F.3d at 281 n. 3.

"[T]he ability to question the fitness of the community leaders, including the administrative leaders in a school system, especially in a forum created specifically to foster discussion about a community's school system," is an important public interest. *Bach*, 139 F.Supp.2d at 743. A policy that "deters individuals from speaking out on an issue of public importance violates the First Amendment." *Bach*, 139 F.Supp.2d at 743. We find that the words "personally directed" as they appear in paragraph 5(a) of the Bylaw and as applied by the Board are a content-based restriction on speech. We find that these words have the effect of an impermissible viewpoint-based restraint and are unconstitutional. Because we find the challenged provision to be an unconstitutional restraint on speech in a limited public forum, we find that plaintiffs have demonstrated a substantial likelihood of success on the merits of their challenge to this provision of the Bylaw.

The provision in Sussex County Council Rule 17.6 will fare no better if it is challenged in court. Thus, I ask that you bring this issue to Council's attention, so that this unconstitutional provision can be deleted from its rules.

Sincerely yours,

A handwritten signature in cursive script that reads "Richard H. Morse".

Richard H. Morse

cc: J. Everett Moore, Esq. (By Email)

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