



BOARD MEMBER RIGHTS

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First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[applicable to political subdivisions through the 14th Am.]



Bond v. Floyd

385 U.S. 116 (1966)



SO –

*HOW DOES THIS APPLY TO
SCHOOL BOARD MEMBERS ???*



U.S. Supreme Court

- *“...the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.”*
- *"debate on public issues should be uninhibited, robust, and wide-open."*



U.S. Supreme Court

“Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.”



However,

not all speech is protected by 1st Amendment.

- Examples – libel, slander, threats, bullying and harassment, including sexual harassment



- So do school board members have 1st Amendment freedom of speech ???
- And if so, how much or how little ???



MATTOX v. CITY OF FOREST PARK

6th Circuit, 1999



“Mattox, a political figure, staked out a controversial position on a political issue in her town, and it cost her political capital and, ultimately, a re-election bid.”

“As an elected public official, Mattox voluntarily placed herself open to criticism of her actions and views on political matters.”



“A deliberate attempt to discredit Mattox, especially if initiated in retaliation for her actions in investigating the fire department, is perhaps an inappropriate and unfortunate occurrence, but on the facts of this case, it is not the type of ‘adverse action’ against which the First Amendment protects.”



“We do not think it would deter a public official of ordinary firmness from exercising his or her right to speak under the First Amendment. Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views.”



ISSUE

Whether restrictions upon an elected official's vote are restrictions upon that person's 1st Amendment rights speech?

Nevada Comm'n on Ethics v. Carrigan
131 S.Ct. 2343 (2011)



U.S. Supreme Court

“The answer is that a legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it...A legislator casts his vote ‘as trustee for his constituents, not as a prerogative of personal power.’”



- SDCL 3-23-8
- SDCL 6-1-17
- Hanig v. City of Winner [*“public policy demands that officials normally disqualify themselves when they have a business or personal interest in the subject on which they must vote”*]



Blair v. Bethel Sch. District

Blair v. Bethel Sch. Dist., (9th Cir. 2010)

Blair, a school board member, was removed from his position as vice president by his fellow board members after he made denigrating comments about the district's superintendent in the local newspaper.



9th Circuit

Blair's 1st Amendment free speech rights were not violated because he was challenging an action taken by his peers in the political arena. The other board members wanted a VP who shared their views, Blair did not, so they removed him by a procedurally legitimate vote.



The action taken by the other board members a “*rather minor indignity.*” Blair was “*removed from a position on a school board by the very people who elected him to the position in the first place.*”



All Board members have a “*protected interest in speaking out and voting their conscience*” on important school issues. Blair had a right to criticize the superintendent, his fellow Board members had the corresponding right to replace Blair with someone who, in their view, represented the majority perspective of the Board.



“Disagreement is endemic to politics, and naturally plays out in how votes are cast. While the impetus to remove Blair as [school board] vice president undoubtedly stemmed from his contrarian advocacy against [the Superintendent,] the Board’s action did not amount to retaliation in violation of the First Amendment.”



Dillaplain v. Xenia Cmty. Schs. Bd. of Educ.

(S.D. Ohio Oct. 21, 2013)



- The Board went into executive session and discussed the complaints against Dillaplain.
- It got heated during the executive session.
- While in the executive session, the BOE directed its general counsel to draft a resolution of censure against Dillaplain.



- 3.11.13 - BOE voted on the resolution for public censure without presenting evidence to the public regarding the statements about Dillaplain.
- Resolution -- it was the opinion of BOE members that Dillaplain's conduct and statements were *“demeaning, insulting, abusive, veiled threats, discriminatory and inappropriate”* for a BOE member.



- Dillaplain was publicly censured.
- Dillaplain filed lawsuit alleging violation of his 1st Amendment right to free speech and his 5th and 14th Amendment rights to due process, along with state claims.



District Court

- Courts generally believe that *“[a] retaliation claim is not the proper vehicle for the resolution of quotidian [every day] disputes among elected officials.”*
- *“Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views.”* Accordingly, public officials *“must tolerate more significant actions taken in response to [their] exercise of First Amendment rights than an average citizen would before the actions are considered adverse.”*



“The Board’s speech in expressing its opinion and publicly censuring Dillaplain is not conduct arising to a level that would deter a person of ordinary firmness from continuing to engage protected speech, at least with regard to a public official engaged in the political process.”



CONSTITUTIONAL RIGHTS

FREEDOM OF SPEECH

and

FREEDOM OF RELIGION

{Establishment Clause}



DOE

v.

SCHOOL DISTRICT of the CITY OF NORFOLK

340 F.3d 605 (8th Cir. 2003)



8th Circuit

“There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”



“The issue before us involves the constitutional rights of a parent who is also a member of the School Board.”



“We believe that the informal policy which allowed Scheer to address the audience, the facts surrounding his speech, and the contents of the speech itself indicate sufficient separation between Scheer and his membership on the School Board to warrant a determination that his remarks were private and were not made in his representative capacity as an official of the School District.”



“Scheer undeniably took advantage of his School Board membership to gain access to a forum in which he could espouse his personal views. However, private speech is constitutionally protected, even though it occurs at a school related function.”



So do school board members have 1st
Amendment freedom of speech
protection??? **YES**

How much (or how little) ???
DEPENDS ON THE SPECIFIC FACTS !!!



**WHAT IS THE TOPIC
AND
WHAT/WHERE IS THE FORUM
??**



TOPICS

- Tax opt out
- Building project
- Reorganization
- Transgender Policy/legislation

FORUM

- Board meeting
- School function
- Private conversation
- Letter to the editor



RECOMMENDATION

- *distinguish between personal views and those of the school board when making public comments regarding school district matters in direct or indirect public statements;*
- *respect the legitimacy of the goals and interests of other school board members and respect the rights of other school board members to pursue goals and policies different from their own;*



COMMENTS

or

QUESTIONS ??