Schools, employees displaying political advertisement

Number: INFORMAL

Date: April 20, 2007

Mr. Dirk Smits
Counsel to the Monroe County School Board
Islamorada Professional Center
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Islamorada, Florida 33036

Dear Mr. Smits:

This is in response to your request for assistance in determining whether the Monroe County School Board may adopt a personnel policy prohibiting employees from displaying or distributing political advertisements, including magnetic car signs, t-shirts, buttons, flyers and pens, promoting any candidate on district property.[1]

According to your letter, the school board believes that the display of political advertisements on school property is disruptive, that the display of magnetic car signs or t-shirts by administrative personnel may intimidate other educational personnel, and that district personnel may inappropriately influence parents of school children by displaying their support of particular candidates while on district property. Your question necessarily involves comment upon the constitutionality of such a policy and, while this office will not offer a legal opinion as to the constitutional soundness of the district's action, the following general discussion is offered in an effort to be of assistance.

Initially, I would note that prohibiting expression of one particular opinion, without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.[2] The test, as announced by the United States Supreme Court, is whether a regulation is designed to restrict only that expression which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[3] Because of the transcendent value of constitutionally protected expression, statutes regulating expression must be narrowly tailored to further the legitimate state interest involved.[4]

The home rule authority of district school boards allows them to "exercise any power except as expressly prohibited by the State Constitution or general law."[5] Therefore, in general, absent a statutory or constitutional prohibition, the district school board would be authorized to adopt personnel policies governing conduct on district property. However, in enacting policies relating to political activities, the school district would need to be mindful of infringing upon constitutional guarantees of freedom of expression.[6]

While a review of Florida cases does not reveal one directly on point, several courts have addressed administrative restrictions upon political activities by public employees. For instance, in *Swinney v. Untreiner*,[7] the Supreme Court of Florida upheld the validity of a county's civil service provision affecting the ability of officers and employees in a classified service position to

engage in political activities. The act provided:

"No person holding an office or place in the classified service under the provisions of this act shall seek elective public office, or serve in any elective or appointive position in any political party, or take an active part in any political campaign, or serve as an officer or a member of a committee of any political club or organization, or circulate or seek signatures to any petition provided for in any primary or election law or act as a worker at the polls, or distribute badges, colors, or indicia favoring or opposing a candidate for election or nomination to a federal, state, county or municipal public office, provided, however, that nothing in this act shall be construed to prohibit or prevent any such officer or employee from becoming or continuing to be a member of a political club or organization, or from attendance upon political meetings, or from enjoying entire freedom from all interference in casting his vote."[8]

The Court compared the county's civil service provision to the Hatch Act,[9] the federal law prohibiting officers and employees in the executive branch of the Federal Government from taking "any active part in political management or in political campaigns," and concluded that the county's rules provided more clarity than the federal law in specifying prohibited political activities.[10] While the Hatch Act is not applicable to your specific situation, its underlying proposition that efficiency and integrity in government service may legitimately be promoted by imposing reasonable restrictions on employees' political activities would provide support for crafting a policy affecting such activities.[11]

It is well recognized that First Amendment rights are available to teachers and students, as it has been observed that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[12] When teachers are engaged in speech which members of the public might reasonably perceive to be aligned with the school, however, schools have a greater power to regulate such speech.[13] Moreover, schools have a particular concern to regulate what is presented by their employees in classrooms and other instructional settings.[14]

As in *California Teachers Association v. Governing Board of San Diego Unified School District* ,[15] the appellate court noted:

"Most self-evident is the conclusion that when public school teachers and administrators are teaching students, they act with the imprimatur of the school district which employs them and ultimately with the imprimatur of the state which compels students to attend their classes. . . . The school's imprimatur is not a distinct or easily isolated portion of a teacher's classroom role. . . . In this intimate and deferential environment, public school authorities may reasonably conclude it is not possible to both permit instructors to engage in classroom political advocacy and at the same time successfully dissociate the school from such advocacy."[16]

The court further stated its belief that wearing political buttons was the type of advocacy which a school district could restrict in instructional settings.[17]

Other courts have allowed public organizations to restrict the message on bumper stickers their employees display. For example, in *Ethredge v. Hail*,[18] a civilian Air Force employee challenged an Air Force administrative order that prohibited the employee from displaying, while

on military property, a bumper sticker that disparaged the Commander-in-Chief. The court found that the parking lot was a non-public forum, and thus, the order would be upheld as long as its application was reasonable.[19] The court concluded that the administrative order was reasonable because it did not prohibit "robust criticism of the President; instead it barred only those messages that embarrass or disparage the Commander-in-Chief."[20]

In *Pickering v. Board of Education*,[21] the United States Supreme Court applied a balancing test to determine whether a public school teacher could be disciplined for writing a letter to a local newspaper criticizing the education board and the superintendent of schools for failing to raise adequate revenue. The Court reasoned that a balance had to be struck between the employee's interests as a private citizen to comment on matters of public concern and the interests of the state, as an employer, in promoting legitimate governmental objectives.[22] In formulating the test, the Court stated that if "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be" and his rights as a private citizen are paramount.[23] The Court acknowledged, however, that a governmental entity in achieving its mission may impose restraints on job-related speech of public employees that would otherwise be unconstitutional if applied to private citizens.[24]

Accordingly, pursuant to its home rule power, the school district may enact personnel policies to address political activities by teachers and administrative personnel on school property. It is the responsibility of the district, however, to determine a narrowly tailored means of accomplishing its purpose, without infringing upon the free speech rights of its employees.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] You question whether pursuant to ss. 104.31 and 112.313, Fla. Stats., the school district may prohibit all passive political expression or, alternatively, limit such expression in local or school district elections. Questions involving interpretation of s. 104.31, Fla. Stat., would need to be addressed to the Division of Elections within the Florida Department of State, *see* s. 106.23(2), Fla. Stat.; those questioning application of s. 112.313, Fla. Stat., should be considered by the Florida Commission on Ethics, *see* s. 112.322(2), Fla. Stat.

[2] *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (U.S. 1969).

[3] *Id.* at 513.

[4] *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *McCall v. State*, 354 So. 2d 869 (Fla. 1978).

[5] *See* s. 1001.32(2), Fla. Stat., and Art. IX, s. 4(b), State Const.; *and see* Ops. Att'y Gen. Fla. 03-40 (2003), 86-45 (1986), 84-95 (1984) and 84-58 (1984), in which this office recognized the variant of "home rule" power conferred upon district school boards.

[6] *See* Amend I and Amend XIV, s. 1, U.S. Const.

[7] 272 So. 2d 805 (Fla. 1973).

[8] Section 23, Ch. 67-1370, Laws of Fla.

[9] 5 U.S.C. s. 7324, provides:

"(a) An employee may not engage in political activity--
(1) while the employee is on duty;
(2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;
(3) while wearing a uniform or official insignia identifying the office or position of the employee; or
(4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

(b) (1) An employee described in paragraph (2) of this subsection may engage in political activity otherwise prohibited by subsection (a) if the costs associated with that political activity are not paid for by money derived from the Treasury of the United States.
(2) Paragraph (1) applies to an employee--
(A) the duties and responsibilities of whose position continue outside normal duty hours and while away from the normal duty post; and
(B) who is--
(i) an employee paid from an appropriation for the Executive Office of the President; or
(ii) an employee appointed by the President, by and with the advice and consent of the Senate, whose position is located within the United States, who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws."

[10] 272 So. 2d 809.

[11] *See United States Civil Service Commission et al. v. National Association of Letter Carriers, AFL-CIO, et al.*, 413 U.S. 548; 93 S. Ct. 2880; 37 L. Ed. 2d 796 (1973). *See also United Public Workers of America (C.I.O.) et al. v. Mitchell* et al., 330 U.S. 75, 67 S. Ct. 556, 91, L. Ed. 754 (1947), *Oklahoma v. U.S. Civil Service*, 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 794 (1947), and *Northern Virginia Regional Park Authority v. U.S. Civil Service Comm.*, 437 F.2d 1346 (C.A. 4th 1971).

[12] *Tinker, supra. at* 506.

[13] *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

[14] *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

[15] 45 Cal. App. 4th 1383; 53 Cal. Rpt. 2d 474 (1996).

[16] *Id. at* 479.

[17] *Id. See also U.S. Dept. of Justice v. FLRA,* 955 F.2d, 998, 1006 (5th Cir. 1992) (border patrol agents may be prohibited from wearing union pins on uniforms); *Smith v. United States*, 502 F.2d 512, 517 (5th Cir. 1974) (psychologist employed by Veterans' Administration could be disciplined for wearing peace button while treating wounded veterans).

[18] *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995).

[19] A nonpublic forum is "public property which is not by tradition or designation a forum for public communication." *See Perry Education Association v. Perry Local Educators' Association et. al.,* 460 U.S. 37, 46 (1983).

[20] *Ethredge at* 1328. *See also Connealy v. Walsh*, 412 F. Supp. 146, 152 (W.D. Mo. 1976) (policy limiting what social workers could display on their vehicles upheld; "although the effect of a partisan political bumper sticker cannot be generalized, under some circumstances depending on the nature of the bumper sticker and the person receiving the counseling, a partisan political bumper sticker could have an adverse impact on the efficiency of the social worker").

[21] 391 U.S. 564 (1968).

[22] *Id. at* 568.

[23] *Id. at* 573-574.

[24] *Id. Cf. Green Township Education Association v. Rowe,* 328 N.J. Super. 525, 746 A. 2d 499 (2000) (school district policy prohibiting active campaigning on school property on behalf of any candidate or actively promoting any opinions on voting issues and prohibiting display of political materials on election day where school was official polling place should be reworded to proscribe such activities in the presence of students; policy prohibiting teachers from wearing political buttons not unconstitutional).