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MEMORANDUM

DATE: June 29, 2006

TO: Ken Cohen, Acting Town Administrator
CC: Mayor and Councilmembers
FROM: Monroe Kiar, Town Attorney
RE: Control Number 060602
Removal of Planning and Zoning Board Member

You have asked our office to render a legal opinion as to whether or not the Town of Davie will violate the First Amendment of the United States Constitution if it removes Planning and Zoning Board Member, Karen Stenzel-Nowicki (hereinafter, “Ms. Stenzel-Nowicki”) based on a cartoon drawing disseminated by Ms. Stenzel-Nowicki.¹

The United States Supreme Court has held that when a public employee makes a statement pursuant to his or her official duties, then the employee is not speaking as a citizen for First Amendment protection and the Constitution does not insulate the employee’s communications from employer discipline. See, Garcetti v. Ceballos, 126 S.Ct. 1951 (2006). However, when an employee speaks as a citizen about a matter of public concern then, under certain circumstances, the speech may be afforded First Amendment protection. See, Garcetti v. Ceballos, 126 S.Ct. 1951 (2006). In the instant matter, if Ms. Stenzel-Nowicki and the American Civil Liberties Union (hereinafter “ACLU”) files a lawsuit against the Town of Davie and if a court determines that Ms. Stenzel-Nowicki was acting in her official duties when she disseminated the cartoon drawing, then she will

¹It should first be noted that if Ms. Stenzel-Nowicki and the ACLU files suit against the Town on First Amendment grounds, then it would be analyzed under Federal Statute 42 U.S.C. section 1983. As a result, any case setting forth any rule of law in this memorandum interprets 42 U.S.C. section 1983 when determining if a First Amendment violation has or has not occurred.

not be able to prevail on her First Amendment claim. However, if the court determines that she was not acting in her official position as a Planning and Zoning Board member, then the court would be required to make a determination as to whether she can prevail on her First Amendment claim. Assuming that Ms. Stenzel-Nowicki and the ACLU files a lawsuit against the Town of Davie, the remainder of this memorandum will address the standard that the court will apply if it determines that she disseminated the cartoon drawing in the capacity as a private citizen.

The Eleventh Circuit Court of Appeals has held that an unpaid advisory board member is held to the same standard as a traditional salaried public employee for purposes of the First Amendment. See, McKinley v. Kaplan, 262 F. 3d 1146 (Fla. 11th Cir. Ct. App. 2001).² Further, the law is well settled that a public employee's right to freedom of speech is not absolute because the state has an interest as an employer in regulating the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general. See, McKinley v. Kaplan, 262 F. 3d 1146 (Fla. 11th Cir. Ct. App. 2001); Pickering v. Board of Education of Township High School District, 205, 391 U.S. 563 (1968). The law is clear that a four part test is used for the court to determine whether a state actor has retaliated against a public employee based on the employee's protected speech that he or she makes as a private citizen. See, McKinley v. Kaplan, 262 F. 3d 1146 (Fla. 11th Cir. Ct. App. 2001); Pickering v. Board of Education of Township High School District, 205, 391 U.S. 563 (1968). First, the court must determine whether or not the employee's speech can be characterized as speech concerning a matter of public concern. Second, if the employee proves that his or her speech is a matter of public concern, then the court must balance the interest of the employee, as a citizen, commenting upon matters of public concern, with the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees. Third, if the court makes a determination that the employee's interests outweigh those of the Town of Davie, then the employee must meet the third prong of the test by proving that the speech played a substantial part in the government's decision to discharge the employee. Finally, if the speech was a substantial motivating factor in the decision to remove the employee, then the court must decide whether the government has shown by a preponderance of the evidence that it would have discharged the employee regardless of the protected speech. See, McKinley v. Kaplan, 262 F. 3d 1146 (Fla. 11th Cir. Ct. App. 2001); Pickering v. Board of Education of Township High School District, 205, 391 U.S. 563 (1968). All four prongs of this test must be met for Ms. Stenzel-Nowicki and the ACLU to prevail. The remainder of this memorandum will discuss each of these separately.

First, the court must determine whether or not the employee's speech can be characterized as speech concerning a matter of public concern. See, McKinley v. Kaplan, 262 F. 3d 1146 (Fla. 11th Cir. Ct. App. 2001); Pickering v. Board of Education of Township High School District, 205, 391

²Since the Eleventh Circuit Court of Appeals has held that an advisory board member is held to the same standard as a public paid employee, any standard referencing the term "employee" in this memorandum will apply to Ms. Stenzel-Nowicki as a Planning and Zoning Board member.

U.S. 563 (1968). If the speech is not a matter of public concern, then it is not protected speech and any lawsuit filed by the employee will fail. See, Watkins v. Bowden, 105 F.3d 1344 (Fla. 11th Cir. Ct. App. 1997); Morgan v. Ford, 6 F.3d 750 (Fla. 11th Cir. Ct. App. 1993); Eldridge v. Morrison, 970 Supp. 928 (M.D. Ala. 1996); Tasadfoy v. Ruggiero, 365 Supp. 2d 542 (S.D. N.Y. 2005). The law is clear that for an employee's speech to rise to a level of public concern so as to be protected by the First Amendment, it must relate to a matter of political, social, or other concern to the community. See, Watkins v. Bowden, 105 F.3d 1344 (Fla. 11th Cir. Ct. App. 1997); Morgan v. Ford, 6 F.3d 750 (Fla. 11th Cir. Ct. App. 1993); Eldridge v. Morrison, 970 Supp. 928 (M.D. Ala. 1996); Tasadfoy v. Ruggiero, 365 Supp. 2d 542 (S.D. N.Y. 2005). Further, in determining whether the employee's speech is on a matter of public concern so as to be protected by the First Amendment, the court considers the content, form and context of the statements, the employee's attempts to make the concerns public, and the employee's motivation in speaking. See, Watkins v. Bowden, 105 F. 3d 1344 (Fla. 11th Cir. Ct. App. 1997). Finally, whether the speech relates to a matter of public concern is a question of law for the court. See, Holland v. Rimmer, 25 F. 3d 1251 (4th Cir. Court of Appeals 1994).

In the instant case, in order for Ms. Stenzel-Nowicki to succeed in the first prong of the test, it must be proven to the court that her speech was a matter of public concern. Since this is a question of law for the court, our office cannot render a definitive answer as to whether the dissemination of the cartoon drawing would be considered public concern. If the court determines that the cartoon drawing is not a matter of public concern and was only disseminated by Ms. Stenzel-Nowicki in furtherance of her own private interests, then Ms. Stenzel-Nowicki cannot prevail. However, if the court determines that the speech is a matter of public concern, then Ms. Stenzel-Nowicki must prove the second prong of the test.

If Ms. Stenzel-Nowicki proves that her speech is a matter of public concern, then the second prong of the test requires the court to balance the interests of Ms. Stenzel-Nowicki, as a citizen, commenting upon matters of public concern, with the interests of the Town, as an employer, in promoting the efficiency of the public service it performs through its employees. See, McKinley v. Kaplan, 262 F. 3d 1146 (Fla. 11th Cir. Ct. App. 2001). The McKinley case, which is binding law on any Federal District Court where Ms. Stenzel-Nowicki and the ACLU file suit, is very similar to the instant matter and based on the facts and rule of law established in that case, it appears that the Town's interest as an employer most likely outweighs Ms. Stenzel-Nowicki's right to free speech. In the McKinley case, the Appellant served as a voluntary, unpaid member of the Miami Dade County Film, Print, and Broadcast Advisory Board. The Film, Print and Broadcast Advisory Board was one of several advisory boards whose purpose it was to advise and make recommendations to the County Commission. The Appellant made a statement that was adverse to the beliefs of the County Commission and as a result, the County Commission removed the Appellant on the basis of her speech. The Court held that on the Appellant's side of the scale in the balancing test is her interest in voicing her opinion on a controversial County resolution and the County Commission's interest is its need to maintain loyalty, discipline, and good working relationships with those employees and board members they appoint and supervise. The Court held that there were several factors that tipped the First Amendment balance in favor of the County. First, the Court held that governments have a strong interest in staffing their offices with employees that they fully trust, particularly when the

employees occupy advisory or policy making roles. Second, the Court held that the fact that Appellant's duties required her to serve in an advisory capacity with input on policy issues is a factor that the Court believed gave the County a greater interest in removing her based on her speech. Third, the Court held that the Appellant's role on the Film, Print and Broadcast Advisory Board involves some public contact on behalf of the County and that contact was also a factor that tipped the balance in favor of the government. Fourth, the Court also held that the employee could be removed at anytime for any reason from her board and finally, the Court held the most important factor that balanced the test in favor of the government was the fact that the Appellant served as an appointed representative of the County Commission and that she failed to support its interests. As a result, the Court ruled that the County properly removed the Appellant from her advisory board position without violating the First Amendment.³

As in McKinley, Ms. Stenzel-Nowicki is not elected to the Planning and Zoning Board and rather, is an appointed representative of the Town of Davie. Further, as in McKinley, Ms. Stenzel-Nowicki, as a Town of Davie Planning and Zoning Board Member, may be removed by the Town Council at any time and may be replaced with another appointee of its choosing. Further, as in McKinley, the speech disseminated in the instant matter does not represent and is adverse to the policies and beliefs of the Davie Town Council. As a result, based on the holding in the McKinley case, the court would most likely rule that the interests of the Davie Town Council outweigh the interests of Ms. Stenzel-Nowicki and as such, any lawsuit brought by Ms. Stenzel-Nowicki and the ACLU on First Amendment grounds will most likely fail.⁴

Although unlikely, if the court finds some reason to distinguish the binding law set forth in McKinley and makes a determination that Ms. Stenzel-Nowicki's interests outweigh those of the Town of Davie, then Ms. Stenzel-Nowicki must meet the third prong of the test by proving that the speech played a substantial part in the Town's decision to remove Ms. Stenzel-Nowicki from the Planning and Zoning Board. See, McKinley v. Kaplan, 262 F.3d 1146 (Fla. 11th Cir. Ct. App. 2001). Whether or not Ms. Stenzel-Nowicki could prove this prong of the test would be a question of law for the court to decide and as such, our office cannot render a definitive legal opinion concerning this prong of the test. Regardless of this fact however, the court would probably not address this

³It should be noted that it appears that based on the Supreme Court's 2006 ruling in the Garcetti v. Ceballos case mentioned above, if the McKinley case were to be brought today, the Appellant would most likely not have been given the benefit of the four prong Pickering test because she acted in her official capacity when she spoke on a matter of public concern. As a result, if the case were brought today, it appears that the Appellant in McKinley would have no basis for recovery because she spoke in her official capacity. However, because the court in McKinley analyzed the Appellant's contention pursuant to the Pickering test, it is safe to assume that if Ms. Stenzel-Nowicki and the ACLU bring suit in the instant matter and if the Court finds that Ms. Stenzel-Nowicki was not acting in her official capacity as a Planning and Zoning Board member, then the Court would apply the Pickering test in the manner set forth in McKinley.

⁴Further, the case of Rash Aldridge v. Ramirez, 96 F.3d 117 (Fla. 5th Cir. Ct. App. 1996), although not binding in our district, is also helpful to the instant matter. The Court held that a city council properly removed an appointed member of a metropolitan planning organization without violating the First Amendment because her speech did not represent the views of the city council.

prong of the test because based on the law set forth in McKinley, which is more thoroughly detailed above, any legal action brought by Ms. Stenzel-Nowicki and the ACLU on First Amendment grounds will likely be disposed of by the second prong of the test.

Finally, if the court finds that the speech was a substantial motivating factor in the decision to remove Ms. Stenzel-Nowicki, then the court must decide whether the government has shown by a preponderance of the evidence that it would have discharged the employee regardless of the protected speech. In the instant matter, if Ms. Stenzel-Nowicki, although unlikely, prevails on each of the three prongs of the test set forth above, then the Town would have to show that it would have removed Ms. Stenzel-Nowicki regardless of her speech. If the Town meets this burden, then any cause of action brought by Ms. Stenzel-Nowicki will fail. Regardless of this fact however, the court would probably not address this prong of the test because based on the law set forth in McKinley, which is more thoroughly detailed above, any legal action brought by Ms. Stenzel-Nowicki and the ACLU on First Amendment grounds will likely be disposed of by the second prong of the test.

In conclusion, the law set forth above dictates the standard that will be applied by the court if the Town of Davie removes Ms. Stenzel-Nowicki from the Planning and Zoning Board. If Ms. Stenzel-Nowicki and the ACLU file suit against the Town, even though our office cannot render a definitive opinion on how a court would rule, it appears that based on the McKinley case detailed above, the Town of Davie would likely prevail in any action brought on First Amendment grounds.⁵ Attached is a copy of the McKinley case for your review.

If you have any questions concerning this Memorandum, please call me at my office.

⁵It should be noted that our office has also been asked to render a legal opinion concerning the potential liability and potential recovery of attorney's fees. Our office has been advised by Dan Lutzke, the Director of Risk Management, that if Ms. Stenzel-Nowicki and the ACLU bring suit under 42 U.S.C. section 1983, then SERMA, as the Town's insurance provider, will assume full responsibility for the lawsuit. As a result, if Ms. Stenzel-Nowicki does not represent herself pro-se and, although believed to be unlikely as indicated above, if Ms. Stenzel-Nowicki and the ACLU prevail in any lawsuit brought by Ms. Stenzel-Nowicki and the ACLU, then Ms. Stenzel-Nowicki would most likely be entitled to the repayment of her attorney's fees by SERMA pursuant to Federal Statute 42 U.S.C. section 1988. If the Town prevails in the 42 U.S.C. section 1983 First Amendment action, then SERMA is not guaranteed attorney's fees pursuant to 42 U.S.C. section 1988 but SERMA may be awarded attorney's fees pursuant to case law if the Court determines that Ms. Stenzel-Nowicki's claim is frivolous, unreasonable or without foundation. See, Popham v. City of Kennesaw, 820 F.2d 1570 (11th Cir. Ct. App. 1987).

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