



LEGAL UPDATE

BOARD OF SELECTMEN PUBLIC COMMENT POLICY VIOLATED FREE SPEECH

Barron v. Kolenda, et al., Supreme Judicial Court (March 7, 2023).

RELEVANT FACTS

The Southborough Board of Selectmen, which is subject to the open meeting laws, adopted a public comment policy to be applied during its open meetings. That policy stated, in part, that

“all remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks. Inappropriate language and/or shouting will not be tolerated.”

The plaintiff, a resident of Southborough and “a longtime participant in local government,” attended the board’s meeting on December 4, 2018. At the beginning of the public comment portion of the meeting, Kolenda, the chair of the board, made an announcement that summarized the policy and reiterated that, “remarks must be respectful and courteous, free of rude, personal, or slanderous remarks...”

Barron spoke during the public comment session. She commented on various topics and critiqued the board for prior open meeting law violations. At some point Kolenda interrupted Barron, accusing her of slandering town officials. A heated exchange followed during which Barron twice made comments to the effect that Kolenda was being a Hitler. After the second reference to Hitler, Kolenda ended the meeting.

Barron filed suit against the town and Kolenda. The suit requested that the court declare the public comment policy of the Southborough Board of Selectmen unconstitutional under Art. 19 and Art. 16 of the Massachusetts Declaration of Rights.

For specific guidance on the application of this case or any law, please consult your supervisor or your department’s legal advisor.

DISCUSSION

Art. 19 of the Massachusetts declaration of rights provides:

“The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done the, and of the grievances they suffer.”

The rights established in art. 19 are not without limits. Governmental entities can establish reasonable time, place and manner restrictions on such conduct. Any such restrictions must be content neutral and narrowly tailored to serve the significant governmental interest that required the limitation in the first place. These restrictions must also “leave open ample alternative channels for communication of the information.” *quoting Desrosiers v Governor*, 486 Mass. 369, 391 (2020).

“Reasonable time, place, and manner restrictions could include designating when and where a public comment session may occur, how long it might last, the time limits for each person speaking during the public comment session, and rules preventing speakers from disrupting others and removing those that do.”

In this case, Southborough and Kolenda properly established the time and place for public comment. Requiring comments made at the designated time and place to be respectful and courteous; however, regulates the content of that speech. This they cannot do.

“The content sought to be prohibited – discourteous, rude, disrespectful, or personal speech about governmental officials and governmental actions – is clearly protected by art. 19, and thus the prohibition is impermissible. In sum, the town’s civility code is contradicted by the letter and purpose of art. 19.”

Art. 16 states:

“The liberty of the press is essential to the security of freedom in a state; it is not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.”

The court found that the civility code was directed at political speech and was content based. Requiring comments directed at governmental officials be respectful and courteous is viewpoint discrimination. It allows lavish praise for officials but does not allow harsh criticism. Art. 16 does not allow such viewpoint discrimination.

“In sum, this civility code is unconstitutional under art. 16 as well as art. 19.”

The dismissals were reversed and the public comment policy was declared unconstitutional.

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