David Niles

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

SA'AD EL-AMIN, Plaintiff,	)	
v.	)	Civil Action No. 88-0278-R
ROY A. WEST, et al., Defendants.	)	

JUDGMENT ORDER

This case comes before the Court on the defendants' motion to dismiss or, alternatively, for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, the defendants' motion for summary judgment is hereby GRANTED. There are no genuine issues of material fact remaining in the case and, on this record, the defendants are entitled to judgment as a matter of law.

Accordingly, JUDGMENT is hereby ENTERED in favor of the defendants.

It is so ORDERED. Let the Clerk send a copy of this Order to all counsel of record.

Richard L. Williams
UNITED STATES DISTRICT JUDGE

Maria,
Unpublished.
- First Amendment.
- Freedom of Speech.
- rights to speak at open City Council meeting.

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SA'AD EL-AMIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 88-0278-R
	)	
ROY A. WEST, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case comes before the Court on the defendants' motion to dismiss, or alternatively, for summary judgment. As explained below, the Court concludes that the defendants' motion for summary judgment should be granted.

Plaintiff has filed a complaint naming as defendants the City of Richmond and three members of its City Council, including former Mayor Roy West. He seeks both compensatory and punitive damages, along with declaratory and injunctive relief, based on his claim in Count I that he was improperly curtailed in addressing comments to City Council at its April 11, 1988 meeting. He contends that as a result of continued interruptions and rulings on points of order by defendant West, he "was deprived of a full and complete opportunity to petition his Government; and, his right of free speech and expression." Complaint, ¶ 35.

In Count II, Plaintiff challenges a City Council rule which permits citizens to address the Council at its regular meetings, subject to a restriction on the number of appearances any one

individual may make within defined time periods. The Rule also requires citizens to speak only on "the services, policies and affairs of city government," and prevents them from speaking to campaign for public office or to "engage in personal attacks." The Plaintiff contends that this rule "places an unreasonable limitation on [his] rights to petition his government and his right of free speech." Complaint, ¶ 42. The plaintiff asks the Court to enjoin the City and all persons acting on its behalf from "unduly and unreasonably limiting or otherwise preventing persons from appearing before the Council in respect to the number of times one can appear before Council in any given or specified period." Complaint, 9 at ¶(e).

The factual background is easy to establish, and is not disputed by the parties. A transcript of the meeting at which plaintiff appeared on April 11, 1988, is included in the file and sets forth the undisputed events of the meeting for purposes of this motion. For the reasons set forth below, the Plaintiff's claims are without merit. Accordingly, the defendants are entitled to judgment as a matter of law and their summary judgment motion is hereby granted.

I. Legislative Absolute Immunity

These defendants are entitled to absolute immunity from suit as to any claims raised against them in their legislative capacity. To the extent the defendants Gillespie and Wake are sued for comments they made in the course of the City Council discussion on a point of order, they were engaged "in the sphere of legitimate legislative activity" and are accorded immunity

that is comparable to that granted Congressmen under the Speech or Debate Clause of the U.S. Constitution. Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (state legislators); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731 (1980) (state supreme court justices when acting in legislative capacity). In short, local officials are absolutely immune from suits based upon their legislative actions. Reed v. Village of Shorewood, 704 F.2d 943, 952 (7th Cir. 1983).

In ruling on the point of order, defendant West did nothing more than carry out his assigned responsibility as presiding officer of the legislative body, of which he is a member. See Kness v. City of Kenosha, Wis., 669 F.Supp. 1484, 1490 (E.D. Wis. 1987) (mayor entitled to legislative immunity when sued in capacity as presiding officer). And in enacting and maintaining the Rule limiting appearances during the citizens-information period, the City Council engaged in a legislative function of a most basic type, for which all Council members are immune from suit. See Mears v. Town of Oxford, Md., 762 F.2d 368, 371 n.2 (4th Cir. 1985); Bruce v. Riddle, 631 F.2d 272, 274-80 (4th Cir. 1980); Davis v. City of Portsmouth, Va., 579 F.Supp. 1205, 1211 (E.D.Va. 1983), aff'd mem. 742 F.2d 1448 (4th Cir. 1984). In each of these respects, the defendants must be granted absolute immunity from suit, for their actions were taken in their legislative capacity--falling within the sphere of legitimate activities of the local legislative body.

Where the defendant has acted within the realm of his legislative function, as here, the bar of legislative immunity applies

not only to actions for damages, but to actions for declaratory and injunctive relief as well. Va. Supreme Court v. Consumers Union, 446 U.S. 719, 731-33 (1980). Legislative immunity has been upheld and defended as a protection for legislators, "not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). The purpose of legislative immunity is to insure that the legislative function may be performed independently without fear of outside interference. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-03 (1975). As the Supreme Court recognized in Eastland:

> A private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.

Eastland, 421 U.S. at 503; Consumers Union, 446 U.S. at 732-34 (1980) (holding immunity bars suits for damages and injunctive relief).

Because the plaintiff's claims concern and arise solely from the legislative activities of the individual defendants and City Council as a whole, the defendants should be shielded from the burden of having to defend this action. Thus, all claims against the individual defendants will be dismissed on the grounds of legislative immunity. The case therefore boils down to what it is really all about: the Plaintiff's suit against the City of Richmond attacking the Council's rule that limits the time, number and scope of citizen appearances.

II. Plaintiff's Constitutional Claims

The First Amendment does not guarantee a fundamental right to speak one's mind or "to communicate one's views at all times and places or in any manner that may be desired." Heffron v. Int'l Society for Krishna Consciousness, 452 U.S. 640, 647 (1981). The existence and extent of an individual's rights under the First Amendment vary considerably, depending on the nature of the expressive activity and the character of the public property involved. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

In Perry, the Supreme Court undertook to categorize public venues as forums for First Amendment activity. Public open spaces, such as streets and parks, were recognized as "quintessential public forums" for free assembly and debate. Perry, 460 U.S. at 45. At the same time, the Court affirmed its holdings that the First Amendment does not confer an unrestricted right of access to all public property for the purpose of expressing one's viewpoint. Id., 460 U.S. at 46, citing United States Postal Service v. Council of Greensburgh, 453 U.S. 114, 129 (1981).

The Supreme Court in Perry also discussed an intermediate category consisting of public property which is not a traditional public forum, but "which the State has opened for use by the public as a place for expressive activity." Perry, 460 U.S. at 45. The Court held that so long as the open character of a non-traditional public forum is maintained, the forum is governed by the same First Amendment standards as apply in a traditional

public forum. That is, the State can impose reasonable time, place and manner restrictions on speech in such public forums so long as the restrictions are content-neutral and are narrowly tailored to serve a significant governmental interest. Perry, 460 U.S. at 45-46.

And, of most relevance to our case, the Court indicated that a non-traditional public forum can be created and reserved for limited purposes, and the use of such forums can be made subject to reasonable eligibility restrictions. Id., 460 U.S. at 46 n.7. In so holding and recognizing limited public forums, the Court relied upon its earlier decisions in Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities can be reserved for student use); and Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976) (public forum discussion at school board meeting can be restricted to school board business only).

It is clear that, in the instant case, the Richmond City Council has created a limited-purpose public forum in providing for its citizens-information period. In acting to create the limited forum, the Council has imposed eligibility requirements which limit the number of times a particular citizen may appear before the Council during the information periods, absent special authorization from Council. It has also restricted citizens from making statements that are, in fact, political campaign speeches or advertisements for private concerns. And the Council has prohibited citizens from engaging in personal attacks or the use of vulgar or profane language. Finally, as a premise underlying all

of the particular restrictions, Council has confined the subject matter of citizens' speeches to comments on the "services, policies and affairs of the city government." The reasonableness of these provisions is apparent on their face, and under the present state of the law, the Council can properly impose reasonable and minimal restrictions of this sort.

In Madison School District v. Wisconsin Employment Comm'n, the Supreme Court clearly acknowledged a public body's right to structure the public-discussion portions of its open meetings. The Court stated that: "Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic meetings to transact business." Id., 429 U.S. at 175 n.8 (1976). In his concurring opinion in the case, Justice Stewart referred to a public body's legitimate interest "in trying to best serve its informational needs while rationing its time," and he agreed with the Court that a public body "has broad authority to structure the discussion of matters that it chooses to open to the public." Madison School District, 429 U.S. at 180. In Madison School District, the Court held only that a governmental body, having created a public forum, may not prohibit certain individuals from speaking solely on the basis of their group affiliation or representational interest, where public comment would otherwise have been permitted on the subject matter.

In the present case, the Plaintiff has not been denied an opportunity to address City Council on the basis of any opinion or viewpoint he may hold, nor on the basis of his associational or representational interests. The restrictions which he chal-

lenges are content-neutral and apply to all persons seeking to use the short period of time allocated to the citizen-information period on Council's agenda. These restrictions simply confine citizens to speaking on the "services, policies or affairs of city government," and on those topics, Plaintiff can say anything he pleases--so long as he does not engage in personal attacks or personal campaigning for office.

Moreover, the limitation on appearances during the citizen-information period does not affect Plaintiff's opportunity to address Council during the separate public hearing that is held on any ordinance or resolution upon which Council proposes to take action. With respect to the items of business actually pending before Council at its regular meetings, the Plaintiff's right to speak is subject only to reasonable time restrictions. See Rule 3, Section 3.

The Rule limiting appearances during citizen-information periods thus only restricts the Plaintiff's ability to address the Council at any or every meeting, on whatever subject he may choose. City Council clearly has no constitutional obligation to accomodate the Plaintiff, or any individual, as often as that individual may wish to be heard. See Green v. City of Moberly, 576 F.Supp. 540, 542 (E.D. Mo. 1983) (no right to "orally address the City Council while it was in session").

City Council can reasonably expect the Plaintiff and all other citizens to accomodate Council's interest in attending to its legislative docket, which is of primary importance and concern to Council at its regular meetings. See Tannenbaum v. City

of Richmond Heights, 663 F.Supp. 995, 997 (E.D. Mo. 1987) (content-neutral time limitations on the "citizen comment" period of city council meeting, are valid and enforceable); Princeton Educ. Ass'n v. Princeton Bd. of Education, 480 F.Supp. 962, 969 (S.D. Ohio 1979) (content-neutral restrictions on speech may be imposed at public meetings, to enable the school board to efficiently conduct its business). Indeed, the Plaintiff has readily available other means of addressing Council members. Council's members are accessible to citizens at times and places other than Council's formal meetings. And there are several channels of communication, in addition to the citizens-information period, by which the Plaintiff can make his viewpoint known to the Council members. Thus, he does not have a compelling need to address Council at its meetings, during its citizens-information periods, in violation of Council's rules. Green v. City of Moberly, 576 F.Supp. at 542 (E.D. Mo. 1983).

It is well within the City Council's power, therefore, to ration and allocate the time that it spends hearing from citizens on matters of general interest, so long as it does so in a fair and even-handed manner. Through its current rules, the Council allocates its time reasonably and in nondiscriminatory and even-handed way. With respect to Count II, the plaintiff has failed to state a claim that his constitutional rights have been violated. Count II must accordingly be dismissed.

Finally, the defendants concede that, as public officers, they are open to fair criticism regarding the performance of their official duties. New York Times Co. v. Sullivan, 376 U.S.

254, 270 (1964). However, nothing in the First Amendment gives the plaintiff the right to engage in personal attacks upon any member of Council, on the floor of Council's chambers, during a public-comment portion of Council's formal meeting. Under the circumstances, Plaintiff's comments were quite properly confined to the "services, policies and affairs" of the City government and, in particular, to the subject matter on which he had signed up to speak.

The Supreme Court has spoken on the limitations of First Amendment activity in this context, through the opinion of Chief Justice Burger for the Court in Bethel School District No. 403 v. Fraser, 478 U.S. ---, 92 L.Ed.2d 549 (1986). While lengthy, the Court's discussion bears setting forth in substantial part:

> The fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others .... Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.
>
> In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "no person is to use indecent language against the proceedings of the House." The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any State. Senators have been censured for abusive language directed at other Senators.

Bethel School District, 92 L.Ed.2d at 557-58 (citations ommitted).

The decision itself concerned impertinent and lewd comments made by a student during a presentation at a school assembly. Chief Justice Burger thus concluded the above discussion with the following question, by way of analogy: "Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?" Id., 92 L.Ed.2d at 558. In the present case, the same question can be put as well: Must a Council member, on the floor of the Council chambers, endure insults and personal attacks from a citizen when such comments would be intolerable even if made by a fellow member of Council? The answer, clearly, must be "No."

Accordingly, none of the Plaintiff's rights were violated by the City Council's rules or by the way those rules were enforced against him at the meeting on April 11, 1988. For the foregoing reasons, the defendants are all entitled to judgment as a matter of law. Because the transcript and other submissions are in the record, the Court will grant summary judgment for the defendants under Rule 56, instead of a pure dismissal for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P.

Richard L. Williams

DATE

UNITED STATES DISTRICT JUDGE