

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY


JOHN COOPER
MAYOR

WALLACE W. DIETZ
DIRECTOR OF LAW



DEPARTMENT OF LAW
METROPOLITAN COURTHOUSE, SUITE 108
P.O. BOX 196300
NASHVILLE, TENNESSEE 37219-6300
(615) 862-6341 • (615) 862-6352 FAX

TO: MEMBERS, BOARD OF ETHICAL CONDUCT

FROM: WALLACE DIETZ, DIRECTOR OF LAW 
NICKI EKE, ASSISTANT METROPOLITAN ATTORNEY

RE: DEPARTMENT OF LAW REPORT – ETHICS COMPLAINTS
AGAINST COUNCILMEMBER GINNY WELSCH

DATE: APRIL 8, 2022

I. BACKGROUND AND RECOMMENDATION

On March 24, 2022, Mr. Tim Tomes and Reclaim Brookmeade Park filed ethics complaints against Councilmember Ginny Welsch.¹ The complaints allege that during a subcommittee meeting, Councilmember Welsch used “racial slurs” directed at the board and supporters of the community action group, Reclaim Brookmeade Park, by referring to them as “white people”, “loud white noise makers”, and other adjectives they deem repulsive and unbecoming of an elected official. The complaints also allege that the Councilmember uses similar terms on her social media account.

For the reasons provided herein, the Department of Law recommends that the ethics complaints filed against Councilmember Welsch be dismissed.

II. DUTY OF THE DEPARTMENT OF LAW

The Department of Law is required to “evaluate the complaint, applying the law of the standards of conduct ... to the facts alleged in the complaint, and shall undertake an investigation as may be deemed necessary, to determine if such complaint alleges facts, which if proven true, could be deemed to be a violation of the” Standards of Conduct set forth in the Metropolitan Code.² Thereafter, the Department of Law issues a report

¹ Exhibit A, March 24, 2022 Complaints of Tim Tomes and Reclaim Brookmeade Park Board.

² Metropolitan Code § 2.222.040(C)(1)(e).

concluding whether the facts alleged in the complaint, if true, would give rise to a violation of the Standards of Conduct, and recommending either that the complaint be dismissed or a hearing be held on the complaint.³

III. ALLEGATIONS IN THE COMPLAINTS

The two ethics complaints were filed against Councilmember Welsch by: (1) Tim Tomes, as an individual; and (2) Tim Tomes, as a board member and on behalf of Reclaim Brookmeade Park.

The complaints allege that at a subcommittee meeting held on February 14, 2022, Councilmember Welsch used “racial slurs” directed at the board and supporters of the community action group, Reclaim Brookmeade Park. The purported “racial slurs” enumerated in the complaints consist of Councilmember Welsch allegedly:

- referring to Mr. Tomes and others as “white people”, “white person”, and “loud white noise makers who are inconvenienced”;
- referring to Mr. Tomes as “a loud white person!”;
- using the term “white people” on her social media account; and
- using the adjectives “loud white people,” “rich white people,” “affluent white people,” and screamers.

The complainants allege that the Councilmember’s “conduct is repulsive and certainly unbecoming of an elected official!”

IV. ANALYSIS OF ALLEGATIONS IN THE COMPLAINTS

The Metropolitan Standards of Conduct were enacted in response to state legislation mandating that local governmental entities adopt ethical standards for all officials and employees of such entities.⁴

³ *Id.*

⁴ *See* Tenn. Code Ann. § 8-17-103.

The intent of the state legislature in requiring the adoption of ethical standards is reflected in Tenn. Code Ann. § 8-17-101 as follows:

It is the intent of the general assembly that the integrity of the processes of local government be secured and protected from abuse. The general assembly recognizes that holding public office and public employment is a public trust and that citizens of Tennessee are entitled to an ethical, accountable and incorruptible government.

The term “ethical standards” is defined in Tenn. Code Ann. § 8-17-102(a)(3) as follows:

“Ethical standards” includes rules and regulations regarding limits on, and/or reasonable and systematic disclosure of, gifts or other things of value received by officials and employees that impact or appear to impact their discretion, and shall include rules and regulations regarding reasonable and systematic disclosure by officials and employees of their personal interests that impact or appear to impact their discretion. The term “ethical standards” does not include personnel or employment policies or policies or procedures related to operational aspects of governmental entities;

The Standards of Conduct, when read in conjunction with the state law requiring the adoption of ethical standards, are intended to protect and secure the processes of local government from abuse and corruption. The state enabling legislation and the Standards of Conduct are aimed at disclosure of interests, financial improprieties, improper influence of officials, and acceptance of benefits by officials.

The types of speech delineated in the complaints do not implicate ethical matters. A careful review of the state enabling legislation and the Standards of Conduct lead to the conclusion that the Board of Ethical Conduct is not the appropriate forum to address the types of speech by a legislator described in the complaints. The complaints are devoid of conduct that fall under the definition of “ethical standards” as intended or set forth in state law and the Standards of Conduct.

The United States Supreme Court has observed that legislators enjoy broad First Amendment rights to express their views on public issues:

The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express

their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964), is that ‘debate on public issues should be uninhibited, robust, and wide-open.’ ... Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected. The State argues that the *New York Times* principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. We find no support for this distinction in the *New York Times* case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. 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.

Bond v. Floyd, 385 U.S. 116, 135–37 (1966). See *Republican Party of Minnesota v. White*, 536 U.S. 765, 781–82 (2002) (“ ‘The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.’ *Wood v. Georgia*, 370 U.S. 375, 395, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).”) See also, *Tri-Corp Hous. Inc. v. Bauman*, 826 F.3d 446, 449 (7th Cir. 2016):

Public officials such as aldermen enjoy the right of free speech under the First Amendment, applied to the states through the Fourteenth. Speech is a large part of any elected official's job, in addition to being the means by which the official *gets* elected (or re-elected). Teddy Roosevelt called the presidency a “bully pulpit,” and all public officials urge their constituents and other public bodies to act in particular ways. They have every right to do so, see *Novoselsky v. Brown*, No. 15–1609, 822 F.3d 342, 2016 WL 2731544 (7th Cir. May 10, 2016), as long as they refrain from making the kind of threats that the Supreme Court treats as subject to control under the approach of *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

First Amendment protection extends to a legislator's speech that is perceived as an insult:

The conduct attributed by the complaint to the legislators is that they made accusations against X-Men, asked government agencies to conduct investigations into its operations, questioned X-Men's eligibility for an award of a contract supported by public funds, and advocated that X-Men not be retained. We are aware of no constitutional right on the part of the plaintiffs to require legislators to refrain from such speech or advocacy.

The First Amendment guarantees all persons freedom to express their views. The scope of permitted expression is broad; "insults that contain neither threats of coercion that intimidate nor fighting words that create the possibility of imminent violence, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), must be tolerated." *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377, 395–96 (2d Cir.1995) (en banc) (Winter, J., joined by a majority of the Court, concurring), *rev'd in part on other grounds*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). And "[i]t is well settled that the Constitution does not permit the imposition of liability for expressing so-called 'false ideas.' " *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 40 (2d Cir.) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)), *cert. denied*, 464 U.S. 892, 104 S.Ct. 237 (1983). "[C]onstitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered,' " for "erroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 445, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)); *see also New York Times Co. v. Sullivan*, 376 U.S. at 279 n. 19, 84 S.Ct. 710 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " (quoting John Stuart Mill, *On Liberty* 15 (Oxford: Blackwell, 1947))).

One does not lose one's right to speak upon becoming a legislator.

X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 68–69 (2d Cir. 1999).

Courts recognize that legislators may express critical views of members of the public even when those views are false:

What the legislators are alleged to have done is to express their views. The only concrete acts ascribed to them are attending meetings, making statements, and writing letters. The statements attributed to the legislators are that they accused X-Men ... of being part of a “hate group” that practiced racism, gender discrimination, anti-semitism, and other religious discrimination, of being fraudulently mismanaged, and of forcing its religious views on the Ocean Towers tenants by distributing religious literature while on duty; and the legislators are alleged to have “ridiculed” HUD findings to the contrary and to have urged that X-Men not be retained. Even if false, as alleged by the complaint, the legislators' statements are entitled to First Amendment protection.

Id. at 70 (internal citations omitted).

The Supreme Court has noted that an elected body’s criticism and censure of its member is also protected by the First Amendment. *Houston Cmty. Coll. Sys. v. Wilson*, --- S.Ct. ----, 2022 WL 867307, 22 Cal. Daily Op. Serv. 2993 (U.S. Mar. 24, 2022).

In summary, the allegations in the complaints do not involve ethical matters as contemplated by the state enabling statute and the Standards of Conduct. The Board of Ethical Conduct is not the proper forum to address the statements in the complaints attributed to Councilmember Welsch, which are protected by the First Amendment.

V. CONCLUSION

It is the opinion of the Department of Law that the allegations in the complaints filed by Mr. Tim Tomes and Reclaim Brookmeade Park, if true, would not give rise to a violation of the Standards of Conduct. Therefore, the Department of Law recommends that the Board dismiss the complaints filed against Councilmember Ginny Welsch in their entirety.