Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Samuel A. Aylesworth
First Assistant City Solicitor

Assistant City Solicitors
Paul S. Kawai
Keplin K. U. Allwaters
Sean M. McKendry
Megan B. Bayer
Brian A. Schwartz

Public Records Access Officer
Seah Levy

CITY OF CAMBRIDGE
Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

February 25, 2019

Louis A. DePasquale
City Manager
City Hall
Cambridge MA, 02139

Re: Awaiting Report No. 18-105 re: Report on the feasibility of placing a condition in the public bidding documents prohibiting municipal contractors from displaying any signage other than company markers and contact information on vehicles.

Dear Mr. DePasquale:

This legal opinion is provided in response to the above-referenced Awaiting Report item concerning whether the City of Cambridge ("City") may enact a policy that limits the type of signage that independent contractors may display on their work vehicles during the course of their work for the City. For the reasons discussed below, we conclude that any such policy may violate the First Amendment.

I. ANALYSIS

As an initial matter, the United States Supreme Court ("Supreme Court") has held that independent contractors employed by the government are considered public employees for purposes of evaluating a government's regulation of an independent contractor's right to free speech under the First Amendment. O'Hare Truck Services, Inc. v. City of Northlake, 518 U.S. 712, 720 (1996) (protecting independent contractor from retaliation for refusal to support a political campaign); Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 678 (1996) (protecting independent contractor from nonrenewal of contract, in retaliation for exercise of freedom of speech).

The Supreme Court has consistently held that speech by public employees is entitled to protection under the First Amendment to the United States Constitution.[1] "Public employees do not surrender all their First Amendment rights by reason of their employment." Garcetti v.

[1] See also Mass. Const. pt. 1, art. 16 ("The right of free speech shall not be abridged.")

Ceballos, 547 U.S. 410, 417 (2006). "The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Garcetti, 547 U.S. at 417. "Public concern" is defined broadly as "any matter of political, social, or other concern to the community." Connick v. Myers, 461 U.S. 138, 146 (1983). "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict incidentally or intentionally, the liberties employees enjoy in their capacity as private citizens." Garcetti, 547 U.S. at 419 (2006). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." Id. Statements that are made pursuant to the official duties of an employee are not protected under the First Amendment. Id. at 421.[2] Speech is also not protected if it is private speech involving only a matter of a personal interest, such as "a complaint about a change in the employee's own duties." Connick, 461 U.S. at 148-149.

Under the traditional legal standard, when a court reviews the validity of a regulation of speech of a public employee, it must "balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services that it performs through its employees" (the *"Pickering Standard"*). Pickering v. Board of Ed. of Township High School, 391 U.S. 563, 568 (1968). Following the adoption of the *Pickering Standard*, the Supreme Court typically applied it in cases that involved disciplinary action taken in response to speech.

However, in U.S. v. National Treasury Employees Union ("NTEU"), a case involving a broad-based restriction on speech, the Supreme Court modified the *Pickering Standard,* holding that the evidentiary burden of the government is greater with respect to a broad-based restriction on expression than with respect to an isolated disciplinary action. U.S. v. National Treasury Employees Union ("NTEU"), 513 U.S. 454, 465 (1995) (invalidating a prohibition on federal government employees receiving "honoraria," or compensation for unofficial writing and speaking activities). In a challenge to a broad-based restriction, the government would be required to show that the expression's "necessary impact on the actual operation of the government" outweighs the interests of a vast group of speakers and the potential audience. Id. at 468. This modified standard (known as the "*Pickering-NTEU Standard*") applies even when the restriction "neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages." Id. NTEU further held that "when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it

---

[2] In determining whether speech is made as a private citizen or whether it is made pursuant to official responsibilities, a court would consider numerous contextual, non-exclusive factors, including, but not limited to, "whether the employee was commissioned or paid to make the speech in question…the subject matter of the speech…whether the speech was made up the chain of command…whether the employee spoke at her place of employment…whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it "official significance")…whether the employee's speech derived from special knowledge obtained during the course of her employment…and whether there is a so-called '*citizen analogue*' to the speech" (emphasis added.) Decotiis v. Whittemore, et. al., 635 F.3d 22, 32 (1st Cir. 2011) (speech language therapist working as state contractor plausibly alleged that her criticism of the state was protected speech under the First Amendment). Speech has a "*citizen analogue*" if it is "the kind of activity engaged in by citizens who do not work for the government," such as "writing a letter to a local newspaper…or discussing politics with a co-worker." Garcetti, 547 U.S. at 423.

must do more than simply posit the existence of the disease sought to be cured.... It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Id. at 475.

Two federal court decisions issued following NTEU highlight the likely focus of a court reviewing the City's proposed policy. In Goodman v. City of Kansas City, MO, a federal court applied the *Pickering-NTEU Standard* to invalidate a regulation that prohibited municipal employees from displaying political signage on their personally-owned motor vehicles in city-controlled parking lots. Goodman, 906 F.Supp. 537, 544 (W.D. Mo. 1995). The court recognized that employees and the public have a strong interest in "[the] unfettered interchange of ideas for the bringing about of political and social changes desired by people." Goodman, 906 F.Supp. at 542, quoting Buckley v. Valeo, 424 U.S. 1, 13 (1976). Additionally, the court noted that bumper stickers and signs are forms of protected speech under the First Amendment. Goodman, 906 F.Supp. at 542, citing City of Ladue v. Gilleo, 512 U.S. 43. In contrast, and of relevance here, the municipality argued that it maintained an interest in operating on an apolitical basis. Goodman, 906 F.Supp. at 543. The municipality also asserted that "the restrictions prevent the public from misinterpreting the display of political bumper stickers or signs as being officially endorsed by the City itself." Id. at 543. However, the court found that the municipality was unable to proffer any factual evidence that the prohibited conduct would result in "an adverse impact on government operations" or that the regulations addressed "real and not merely conjectural harms." Id. at 544. As a result, the policy in Goodman was permanently enjoined by the court. Id. at 545.

In contrast to Goodman, in Parow v. Kinnon, a federal court in Massachusetts held that a content-neutral policy banning advocacy signage on fire station property, including the station and its parking lot, was permissible under the First Amendment. Parow, 300 F.Supp.2d 256, 268-69 (D.Mass. 2004). Although the court in Parow did not specifically apply the *Pickering-NTEU Standard*, it did engage in a similar analysis, evaluating the interests in protecting expressive conduct and its impact on government operations. In Parow, the plaintiff firefighters and their union sought the right to protest a change to the defendant fire department's minimum staffing policy. However, the court upheld the ban, determining that the "display of provocative signs on [fire] station premises questioning the integrity of the policy determination of the Department's leadership has the potential to undermine firefighters' loyalty, discipline and morale." Id. 268, citing Greer v. Spock, 424 U.S. 828, 840 (1976) (federal government may limit speech on a military base, if perceived as a clear danger to "loyalty, discipline or morale"). Indeed, "[c]ourts have traditionally given greater deference to police agencies and fire departments in scrutinizing restrictions on speech than other government employers." Parow, 300 F.Supp.2d at 266; Guilloty Perez v. Pierluisi, 339 F.3d 43, 53-54 (1st Cir. 2003). This interest of the fire department, as well as the location of the ban on fire department property, rendered the ban permissible under the First Amendment. Id. at 269. See also Firenze v. N.L.R.B., 993 F.Supp.2d 40, 54 (D. Mass. 2014) (citing the applicability of the *Pickering-NTEU Standard* for "wide-reaching ordinances or statutes" that prohibit a class of workers from speaking); Silva v. Worden, 130 F.3d 26, 32 (1st Cir. 1997) (declining to reach the question of whether a flat ban on political signs and bumper stickers on vehicles parked in a municipal employees' parking lot would be unconstitutional).

II. CONCLUSION

A policy that would prohibit independent contractors from bidding on City construction jobs if the contractor exhibited political speech on its vehicles could be vulnerable to a legal challenge under the First Amendment. Here, the proposed "broad-based" policy encompasses speech that could be viewed by a reviewing court as having an impact upon expressive conduct on matters of "public concern." Connick, 461 U.S. at 146. Further, an independent contractor may be able to establish that expression on his or her vehicle more closely resembles the speech of a private citizen than an employee, if a reviewing court were to find that signage on vehicles is a common form of expression by citizens, and that "objective observers" would recognize that the speech does not have "official significance," as these are not City vehicles. Decotiis, 635 F.3d at 32. Given the legal standard articulated by the Supreme Court, it could be difficult for the City, if challenged, to demonstrate that prohibiting expression on independent contractors' vehicles will necessarily impact the City's operations to the extent that the City's interest in doing so outweighs an independent contractor's First Amendment interests. NTEU, 513 U.S. at 468. Accordingly, we believe that if the proposed policy were promulgated and subsequently challenged, the City could face considerable legal exposure, including injunctive relief enjoining the enforcement of such a policy, as well as a potential award of damages and attorney's fees.

Very truly yours,

Nancy E. Glowa
City Solicitor