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Speech: Philadelphia Prohibition Against Political Contributions by Police is Invalid

Lodge No. 5 of the Fraternal Order of Police v. City of Philadelphia, No. 13-1516 (3d Cir. Aug. 18, 2014).

The Third Circuit has invalidated a long-time Philadelphia prohibition against police officers making political contributions, finding that the restriction impermissibly burdens police officers' First Amendment rights of free expression and association.

Through the 19th and first half of the 20th Century an all-powerful Republican Party ran Philadelphia. The party did not act alone, but rather in concert with the police and even gangsters, and engaged in voter fraud, voter intimidation, and police protection schemes where political patronage was the currency. Many in Philadelphia fought the corruption and the City enacted regulations to curb the problem, but none were successful until the Philadelphia Home Rule Charter was passed in 1951. The law restricted the political activity of City workers and, one section, 10-107(3), prohibited police officers from making contributions for "any political purpose." As interpreted, the rule prevents police donating money to candidates "for use in advocating or influencing the election of the candidate," or donating to "political committee[s], political part[ies], or partisan political group[s]." It is noteworthy that all other City employees may make such political contributions.

The Fraternal Order of Police (FOP) is an incorporated collective bargaining organization representing the police. It also operates a political action committee – COPPAC. Police officers have never been able to donate to this organization because it uses some funds for partisan political purposes, an issue COPPAC says limits its ability to represent officer interests. In 2006, COPPAC had some success when the mayor and the City Council passed an ordinance that specifically authorized payroll deductions for FOP members that chose to contribute to

COPPAC. However, the current mayor has refused to implement the ordinance, arguing it violates the Home Rule Charter. Facing this situation, and in light of the fact that the same political-contribution ban the police are subject to now was held unconstitutional in the Circuit Court as applied to Philadelphia firefighters, COPPAC demanded the City allow the payroll deductions. The City responded that the ban against firefighters was distinguishable, and refused.

COPPAC and four officers thus brought suit challenging the constitutionality of Charter Rule § 10-107(3), arguing it violated their First Amendment right to political expression and association. The City countered that police corruption remains a problem in Philadelphia, that the regulation is still necessary because police have "unique and critically important" duties that must remain above reproach and because public entanglement in politics is damaging to the public trust. The District Court granted the City's motion for summary judgment and dismissed the case, holding *United States v. National Treasury Employees Union (NTEU)*, 513 U.S. 454 (1995), controlled, and that the FOP's interest in making political contributions was outweighed by the public's interest in preventing those contributions from affecting the operation of City government. The FOP appealed.

HELD: The Third Circuit overturned the lower court, holding the ban on contributions violated the First Amendment

DISCUSSION: The Circuit Court agreed with the lower court that *NTEU* was the proper framework under which to evaluate the case, as it clarified how courts should apply the test developed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to *ex ante* prohibitions on speech. *Pickering* demands that courts "balance "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." The *NTEU* decision changed this by heightening the government's burden in *ex ante* prohibition situations because such a prohibition is a wholesale prohibition on all potential speech by a large pool of potential speakers. Thus to prevail, Philidelphia had to show both that the ban "ha[d] "real, not merely conjectural" harms and that "the ban as applied to the FOP Plaintiffs addresse[d] these harms in a 'direct and material way.'" (internal citations omitted).

The Court found that the harms were real and not conjectural. The City had four legitimate interests – 1) that the police enforce the law without favoritism or bias, 2) that advancement in the department is based on merit, not political patronage, 3) that subordinate officers are protected from being forced to support candidates supported by their superiors, and 4) that the City has a general interest in maintaining the efficiency and efficacy of the department as a whole. Not only did the Circuit Court find, based on Philadelphia's specific and storied history that these were legitimate reasons, but that the Supreme Court has also identified these elements as justifying curtailment of public employee speech.

The problem arose with City's failure to narrowly tailor its solution to these legitimate concerns. While the City showed that these issues had historically been deep, ingrained problems, it failed to provide any evidence that these issues had been a problem in the last 60 years. The court also noted that the statutory landscape of the City has significantly changed since the passage of the Home Rule Charter in 1951 – namely, that the City now has a comprehensive civil service framework and collective bargaining arrangements, and that the corruption problems in the City are of a different nature than those that gave rise to the 1951 Charter.