

***Raymond McKay v. City of Warwick, 14-139-ML***

**I. INTRODUCTION**

The issue in this case is whether the City of Warwick’s ordinance prohibiting classified employees from running for political office violates the United States Constitution’s First Amendment or Equal Protection Clause, or whether it is preempted by federal law.

These types of ordinances enacted by state and local governments have been referred to as “Little Hatch Acts” or “Baby Hatch Acts,” after similar prohibitions on federal employees’ involvement in political activities called the Hatch Act.<sup>1</sup>

The U.S. Supreme Court has explained that:

A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government.<sup>2</sup>

This case is presently before this Court on Plaintiff Raymond McKay’s Motion for Temporary Restraining Order. He seeks an order prohibiting the Defendant City of Warwick from enforcing an ordinance against him in connection with his potential candidacy for the U.S. Senate. The City of Warwick opposes his motion.

**II. STANDARD OF REVIEW**

In deciding whether to grant a preliminary injunction, this Court weighs four factors:

- (1) the likelihood of success on the merits;
- (2) the potential for irreparable harm [to Mr. McKay] if the injunction is denied;

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<sup>1</sup> “The Hatch Act, 5 U.S.C. §§ 7321-7326, limits certain political activities of most executive branch employees. For example, the law prohibits employees from engaging in political activity while on duty or in the Federal workplace. It also prohibits them from soliciting or receiving political contributions.”

<http://www.oge.gov/Topics/Outside-Employment-and-Activities/Political-Activities/> (3/23/14).

<sup>2</sup> *U. S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973).

- (3) the balance of relevant impositions, *i.e.*, the hardship to the [City if it is] enjoined as contrasted with the hardship to [Mr. McKay] if no injunction issues; and
- (4) the effect (if any) of the court’s ruling on the public interest.<sup>3</sup>

The first factor, “likelihood of success on the merits,” is the “critical” factor that begins a court’s analysis.<sup>4</sup>

In deciding this case based on U.S. Supreme Court precedent, this is not even a close call.

### **III. ANALYSIS**

An analysis of legal precedent from the U.S. Supreme Court and the U.S. Court of Appeals for the First Circuit shows that Mr. McKay has failed to establish a likelihood of success on the merits.

The Warwick Ordinance at issue is Section 48-107. It states, in relevant part, that “No classified employee . . . shall seek the nomination of or be a candidate for any elective office.”

#### **A. First Amendment**

Mr. McKay first challenges the ordinance on the basis that it violates the First Amendment’s prohibition on “abridging the freedom of speech.”

Although seeking political office is a freedom under the First Amendment, the U.S. Supreme Court has definitively ruled that it is not a fundamental right.<sup>5</sup> It is well established that a government may, consistent with the First Amendment, place restrictions on the partisan

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<sup>3</sup> *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 46 (1st Cir. 2005) (citing *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004)).

<sup>4</sup> *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991) (“Our analysis begins with probability of success, as we have often found this furcula to be critical.”).

<sup>5</sup> *Bullock v. Carter*, 405 U.S. 134, 142-43 (U.S. 1972) (“The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review.”); *Clements v. Fashing*, 457 U.S. 957, 963 (U.S. 1982) (“Far from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’”).

political activities of its employees, including restrictions on the rights of public employees to run for offices. The U.S. Supreme Court has reaffirmed this proposition on many occasions.

Two leading U.S. Supreme Court cases on this issue are *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The *Letter Carriers* case upheld the validity of a section of the Hatch Act prohibiting federal employees from taking “an active part in political management or in political campaigns.” The U.S. Supreme Court stated that “neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.” The U.S. Supreme Court “recognized that the government’s interest in regulating both the conduct and speech of its employees differs significantly from its interest in regulating those of the citizenry in general.”<sup>6</sup>

In *Broadrick*, the U.S. Supreme Court upheld an Oklahoma statute that prohibited “classified” service employees from, among other things, being “a candidate for nomination or election to any paid public office.” In *Broadrick*, the U.S. Supreme Court noted that “even-handed restrictions on the partisan political conduct of state employees . . . serve valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from ‘political extortion.’”

This Court does not rely on *Cummings v. Godin*, 377 A.2d 1071 (R.I. 1977), a R.I. Supreme Court case cited by Mr. McKay. The *Cummings* opinion is no longer good law. That case analyzed a First Amendment challenge to provisions in Woonsocket’s Charter that

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<sup>6</sup> *Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977) (citing *Letter Carriers*).

prohibited city employees from holding elective office. The *Cummings* court employed a heightened standard of review that is no longer the law.

Because of the subsequent U.S. Supreme Court decision, *Clements v. Fashing*,<sup>7</sup> the R.I. Supreme Court retreated from the “high level of judicial scrutiny” in *Cummings*’s analysis.<sup>8</sup> The R.I. Supreme Court has explained — more than once<sup>9</sup> — that “candidacy for public office is not a fundamental right” and “[t]here is no per se fundamental right to government employment.”<sup>10</sup> Since the rights are not fundamental as determined by the U.S. Supreme Court and acknowledged by the R.I. Supreme Court, the heightened standard applied in *Cummings* is not good law and will not be applied in this case.

The U.S. Court of Appeals for the First Circuit has examined *Letter Carriers* and *Broadrick*, two leading U.S. Supreme Court decisions. In *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977), the First Circuit analyzed a challenge to a Pawtucket Charter provision that prohibited city employees from becoming a candidate for any city office, and, applying an “interest balancing approach,” concluded that the city’s “important interests” were “enough to outweigh the employees’ First Amendment rights.” First Circuit upheld the Charter provision.<sup>11</sup>

This U.S. Supreme Court in *Clements* explained that a government has an interest in maintaining its integrity by ensuring that its employees “will neither abuse [their] position[s] nor neglect [their] duties because of [their] aspirations for higher office. The demands of a political campaign may tempt [employees] to devote less than [their] full time and energies to the responsibilities of [their] office[s].”<sup>12</sup>

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<sup>7</sup> *Clements v. Fashing*, 457 U.S. 957 (1982).

<sup>8</sup> *In re Advisory From the Governor*, 633 A.2d 664 (R.I. 1993).

<sup>9</sup> *Id.* and *Whitehouse v. Moran*, 808 A.2d at 626, 630 (R.I. 2002).

<sup>10</sup> *In re Advisory From the Governor*, 633 A.2d at 67-.

<sup>11</sup> Due to the state of the record, the case was remanded to the district court for consideration of the overbreadth challenge

<sup>12</sup> *Clements v. Fashing*, 457 U.S. 957 (1982)

The U.S. Supreme Court has consistently, clearly, and definitively said that local governments can prohibit its employees from running for partisan political offices. It has consistently ruled that governments are constitutionally permitted to prohibit their employees from running for partisan political offices because governments have sufficiently important interests — such as the interest in visibly fair and effective administration and the interest in ensuring that employees are free from both coercion and the prospect of favor from political activity — that outweigh any First Amendment rights asserted by an employee. As previously noted, the right to run for office is not a fundamental right and there is no per se right to government employment.

In this case, the City of Warwick by ordinance restricts its classified employees' ability to run for office. In fact, the federal government and all 50 states have passed some type of restriction on partisan activity by its employees.<sup>13</sup>

It is not this Court's job to second guess a government entity's decision and I do not review the wisdom of the Warwick City Council in passing this ordinance. This ordinance is not targeted to a particular political party, or a group that holds a particular political point of view. The ordinance seeks to regulate political activity in an even-handed and neutral manner. It is a proper exercise of the local government's ability to control its workforce, and in light of U.S. Supreme Court and First Circuit precedent, it does not violate Mr. McKay's First Amendment rights. The ordinance is not irrational, arbitrary, or lacking in a rational legislative purpose.

There is no question whatsoever that this ordinance is a proper exercise of a city's right to regulate its workforce.

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<sup>13</sup> *Broadrick*, 413 U.S. at 604 n.2, and *Letter Carriers*, 413 U.S. at 563.

## B. Equal Protection

Mr. McKay also alleges that the ordinance violates his right to Equal Protection because the ordinance applies only to “classified” employees and not to “unclassified” employees. However, the U.S. Supreme Court twice has rejected this argument.

The Equal Protection Clause in the Fourteenth Amendment states that “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

In confronting an equal protection challenge to a statute that “singl[ed] out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions,” the U.S. Supreme Court in *Broadrick* explained that that “the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated.”<sup>14</sup> The *Broadrick* Court further explained that “a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.”

Again, in *Clements v. Fashing*, the U.S. Supreme Court analyzed an equal protection challenge. This time the challenge was to “two provisions of the Texas Constitution that limit a public official’s ability to become a candidate for another public office.”<sup>15</sup> The *Clements* Court explained that “[u]nder traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State’s goals and only if no grounds can be conceived to justify them.” The U.S. Supreme Court applied the “rational basis” standard of review and upheld the challenged provisions.

Mr. McKay again seeks to employ a higher standard of review than current law provides when he cites the First Circuit case of *Mancuso v. Taft*, 476 F.2d 187, 197 (1st Cir. 1973). The

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<sup>14</sup> *Broadrick*, 413 U.S. at 607 n.5.

<sup>15</sup> *Clements*, 457 U.S. at 959.

court in *Mancuso* applied a heightened “strict scrutiny” standard of review that is no longer good law.

While Mr. McKay deems the distinction between classified and unclassified employees “arbitrary,” as long as the City of Warwick has a rational basis for drawing the distinction, then the ordinance passes the Equal Protection analysis. The U.S. Supreme Court has already found that the distinction drawn between classified and non-classified municipal employees in its prohibition on seeking partisan political office is a constitutionally valid distinction that does not violate the Equal Protection clause of the U.S. Constitution.

### **C. Preemption**

Mr. McKay’s third and final argument is that the Warwick ordinance is preempted by the U.S. Constitution. Mr. McKay does not have a likelihood of success with this argument.

It is correct that States cannot impose other conditions on Federal Senate candidates, but the ordinance at issue does not impose conditions. The ordinance does not say, for example, that you have to be a classified Warwick employee to run for U.S. Senate. That would be imposing a condition. What the ordinance does is say that you cannot run if you are a classified Warwick employee. This in no way imposes an additional qualification on a U.S. Senate candidate.

## **IV. CONCLUSION**

In conclusion, the Court finds that Mr. McKay has failed to meet his burden of showing a likelihood of success sufficient for the court to issue a temporary restraining order. His Motion for a Temporary Restraining Order (ECF No. 4) is therefore DENIED.

This matter will be returned to Judge Lisi for further litigation and for a decision on a preliminary injunction.