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

LINWOOD CHRISTIAN, Plaintiff, v. CITY OF PETERSBURG and W. HOWARD MYERS, Defendants.	)	Civil No. 3:15cv00449

PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF PETERSBURG'S MOTION TO DISMISS

Plaintiff, by counsel, responds to Defendant City of Petersburg's Motion to Dismiss as follows:

INTRODUCTION

On January 20, 2015, Mayor W. Howard Myers, duly presiding over a City Council meeting pursuant to the City Charter and the City Council's rules, banned Petersburg resident Linwood Christian from speaking at the meeting solely on the basis of unpaid fines. Because Mr. Christian's fines bore no relationship to the purposes of a City Council meeting, this action violated his First Amendment right to free speech. The City disclaims responsibility for the Mayor's conduct, asserting that he is not a final decisionmaker with respect to City Council proceedings. Nonetheless, the Complaint makes clear – or at least contains plausible allegations allowing a reasonable inference – that City is liable for the Mayor's misconduct. The City's motion to dismiss should be denied.

STATEMENT OF FACTS

Plaintiff Linwood Christian is a resident of the Petersburg, Virginia. (Compl. ¶ 3.) As such, he is eligible to speak at the "Public Information Period" that is part of every regular Petersburg City Council meeting. (Compl. ¶ 12; Ex. A p. 5.) Defendant W. Howard W. Myers is the Mayor of Petersburg (Compl. ¶ 5), and, in that role, presides over City Council meetings. (Compl. ¶¶ 10, 11; Ex. A.)

On January 20, 2015, Mr. Christian signed up to speak during the Public Information Period at the City Council meeting. (Compl. ¶ 12, 16; Ex. A.) The Mayor, presiding over the meeting, banned Mr. Christian from speaking during the Public Information Period solely because of an unpaid fine owed to the City. (Compl. ¶¶ 17, 21; Ex. B; Ex. C.)

STANDARD OF REVIEW

A complaint must contain "a short and plain statement of the claim showing that the pleading is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss under Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcraft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Factual allegations must be enough to raise the right to relief above the speculative level," *Twombly*, 550 U.S. at 555, with all the allegations in the complaint taken as true and all reasonable inferences drawn in the plaintiff's favor. *Chao v. Rivendell Woods, Inc.,* 415 F.3d 342, 346 (4th Cir. 2005). In deciding a Rule 12(b)(6) motion, "a court evaluates the complaint in its entirety as well as

documents attached to or incorporated into the complaint." *E.I. Dupont de Nemours & Co. v. Kolon Indus.,* 637 F.3d 435, 448 (4th Cir. 2011).

ARGUMENT

I. THE CITY IS LIABLE FOR MR. CHRISTIAN'S EXLUSION FROM THE PUBLIC INFORMATION PERIOD BECAUSE THE MAYOR WAS THE FINAL DECISIONMAKER FOR PURPOSES OF *MONELL* LIABILITY.

In *Monell v. Dep't of Social Services*, the Supreme Court held that municipalities are "person[s]," i.e., eligible defendants, for purposes of 42 U.S.C. § 1983 where the unconstitutional action "implement[ed] or execute[d] a policy statement . . . or decision officially adopted and promulgated by [its] officers." 436 U.S. 658, 690 (1978). The Court later clarified that, although an officially adopted policy often refers to a written plan, the term includes "a course of action tailored to a particular situation and not intended to control decisions in later situations." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-1 (1986). As long as a course of action is taken by a municipality's "authorized decisionmakers," it is a *Monell* 'policy,' and liability attaches for even a single decision. *Id.*

Here, the Petersburg City Council's "Resolution Adopting the Rules of Council" (the "Resolution") attached as Exhibit A to the Complaint, provides that "[a]ll meetings of the Council shall be presided over by the Mayor," unless the Mayor is absent. (Compl. Ex. A p. 2; *see also* City Charter Sec. 3-4 (providing that "the mayor shall preside over the meetings of the council")). Accordingly, the City delegated to the Mayor the authority to make all decisions normally entrusted to the person presiding over a meeting – including recognizing individuals to speak. When the Mayor barred Mr. Christian from speaking, he was acting as the final decisionmaker with respect to that decision.

This conclusion is bolstered by the statements of both the Mayor and the City Attorney that in prohibiting Mr. Christian from speaking, the Mayor was acting pursuant to authority, granted to him by City Council, to decide who may speak at meetings. *See* Compl. Ex. B, p. 3 (email from City Attorney stating that Mayor was acting pursuant to authority to preside over meetings granted in the Resolution when he precluded Mr. Christian from speaking); Compl. Ex. C (letter from Mayor citing "the authority provided in the City Charter and the Rules of Council for the decision I made – as Chair of the meeting" and claiming that "the Rules of Council elevates [sic] the position of the Mayor to enforce these established rules. . . .").

The City's theory appears to be that the Mayor was not the final decisionmaker because the Resolution limits his authority to remove speakers. The City notes that in describing the Public Information Period, the Resolution provides that "the only eligibility requirements are that participants be a City resident or business owner and sign up to speak before the Public Information Period begins. The only authority delegated to the Mayor is the authority to increase the number of people who may speak and reduce the amount of time each is to speak in order to ensure that the 30 minute total time limitation is followed." (City Mem. at 7.)[1] This argument fails on two counts.

First, the City ignores the Resolution's broad grant of authority to the Mayor to "preside" over City Council meetings. The City cannot seriously contend that the authority to run a public meeting is limited to the specific actions listed in the Resolution. For example, surely a Mayor presiding over a meeting is authorized to remove a speaker who is using profanity, shouting, or otherwise disrupting the proceedings. By appointing the Mayor to preside over public meetings, the City necessarily gave him the power to make such decisions.

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[1] For ease of reference, the Defendants' memoranda in support of their motions to dismiss (Dkt. Nos. 5 and 7) are cited as "City Mem." and "Myers Mem.," respectively.

Second, even if the Mayor's decision to exclude Mr. Christian were in violation of the Resolution, this would not negate the City's liability where the City has entrusted the Mayor with the running of the meeting. *See Turner v. Upton County*, 915 F.2d 133, 137 n.3 (5th Cir. 1990) ("The county contends that it cannot be subject to liability because it did not authorize the sheriff to violate the law. This argument is without merit. Where a final policymaker abuses the powers vested in his position to the detriment of a citizen, that abuse can be the basis for suit being brought under section 1983 . . . .").

Finally, the City incorrectly argues that the Mayor was not the final decisionmaker because the City Charter reserves to City Council the power to regulate its proceedings. But such reservation does not negate the Mayor's role as final decisionmaker. "A municipal governing body may not avoid attribution of policy to itself simply by officially retaining unexercised ultimate authority to countermand a policy or to discipline or discharge the policymaker." *Spell v. McDaniel*, 824 F.2d 1380, 1386 (4th Cir. 1987).

Because the City vested the Mayor with the authority to preside over City Council meetings, it cannot avoid liability when he does so in an unconstitutional manner.

II. THE EXCLUSION OF MR. CHRISTIAN FROM THE PUBLIC INFORMATION PERIOD VIOLATED HIS FIRST AMENDMENT RIGHT TO FREE SPEECH.

The City banned Mr. Christian from speaking during the Public Information Period solely on the basis of unpaid fines owed to the City. The Defendants insist that this arbitrary and vindictive act was consistent with the First Amendment, a baffling position. Both Defendants concede, as they must, that the Public Information Period is a limited public forum. (City Mem. at 8; Myers Mem. at 3.) *See Bach v. Sch. Bd. of Va. Beach,* 139 F. Supp. 2d 738, 741 (E.D. Va. 2001) ("by incorporating a public comment period into its agenda, [government body] created a limited public forum."); *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377,

385 (4th Cir. 2008) (identifying public meeting as a limited public forum); *accord City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76 (1976) (prohibiting government body from barring speakers based on employment status). Neither Defendant, however, has identified any significant or even legitimate government interest for barring Mr. Christian from the forum – let alone an interest that is in any way related to the purposes of that forum.

The contours of the government's power to restrict speech in a limited public forum are well defined. A limited public forum has two levels of First Amendment analysis: the "internal standard" and the "external standard." *Goulart v. Meadows*, 345 F.3d 239, 250 (4th Cir. 2003) quoting *Warren v. Fairfax County*, 196 F.3d 186, 193-194 (4th Cir. 1999) (en banc). The internal standard applies when "the government excludes a speaker who falls within the class to which a limited public forum is made generally available." *Id.* quoting *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Such exclusions are subject to strict scrutiny; the government may only "enforce regulations of the time, place, and manner of expression which are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Goulart*, 345 F.3d at 248 quoting *Perry Educ. Ass'n Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

The external standard "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened." *Goulart,* 345 F.3d at 250 (quoting *Warren,* 196 F.3d 194). "[T]he selection of a class by the government must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum." *Id. Accord*, *Steinburg,* 527 F.3d at 385; *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062, 1067-68 (4th Cir. 2006). The government may impose reasonable

restrictions related to time, place, and manner in conducting limited public forums. *Steinburg*, 527 F.3d at 385.

In this case, the internal standard applies, because Mr. Christian, a Petersburg resident, is unquestionably a member of the class generally permitted to use the forum. *See* Compl. Ex. A p. 5 (speakers during Public Information Period must be residents or business owners in the City). Neither Defendant has asserted any significant governmental interest to which the exclusion of Mr. Christian was "narrowly tailored." Even applying the more deferential external standard, Mr. Christian's exclusion from the public comment period violates the First Amendment because it bore no relationship to the purpose of the forum.

The purpose of a comment period in a public meeting is to allow residents and business owners to inform City Council matters of public concern.[2] Thus, courts have held that the government may limit speech to specific agenda topics, limit the duration of speech, and cut off speech that is reasonably perceived to threaten or disrupt a meeting. *Steinburg,* 527 F.3d at 390. When necessary, the government may impose reasonable measures to conduct limited public forums in a fair and orderly manner. *Id.*; *Adams v. City of Wellsburg,* 2008 U.S. Dist. LEXIS 45444 (N.D. W. Va. June 6, 2008).

That is not what happened here. Rather, the City banned Mr. Christian from speaking at the City Council meeting solely on the basis of unpaid fines owed to the City. Such a reason has no relation whatsoever to the purpose of the Public Information Period, let alone a reasonable

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[2] The free speech concerns here are magnified because speaking to City Council on matters of public concern is "core" speech that goes to the heart of the First Amendment. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)."[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The Supreme Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). *Connick v. Myers*, 461 U.S. 138, 145 (1983).

one. Otherwise, any resident with an unpaid parking ticket could be barred from speaking at City Council meetings. The City has not and cannot explain how Mr. Christian's unpaid fine makes him any less qualified than any other individual to state an opinion to a government body.

Defendant Myers suggests that barring Mr. Christian from speaking was reasonably related to the City's interest in collecting his unpaid fines. (Myer Mem. at. 4.) Even if this were a viable means of collecting unpaid fines – a dubious proposition at best – doing so would still violate the First Amendment. A restriction on speech in a limited public forum is not valid because it serves *some* government interest; it must be related to the *purpose of the forum*. Since the purpose of this forum is to allow residents to express views to City Council, rather than to collect outstanding debts, Mr. Christian's exclusion does not meet this requirement.[3]

Defendant City of Petersburg argues that its exclusion of Mr. Christian was constitutional because it did not amount to viewpoint discrimination. (Def. City Mem. At 9). While the defendant is correct that viewpoint neutrality is a requirement for restrictions on speech in a limited public forum, it is not the *only* requirement. As explained above, exclusion of an eligible speaker must also be narrowly tailored to serve a compelling government interest, or, applying the more deferential external standard, reasonably related to the purpose of the forum. Even viewpoint-neutral restrictions are unconstitutional if they lack such a relationship. If viewpoint neutrality were the only standard, the City could bar left-handed people from speaking at meetings, as long as the rule applied equally to Republican and Democratic southpaws.

[3] More generally, the notion that the government may use a person's rights as leverage to compel performance of a completely unrelated duty is abhorrent to the Constitution. Under such a theory, the government could prohibit a citizen from voting until he registered his vehicle, or bar someone from attending a rally until he filed his overdue tax return.

In sum, Mr. Christian was excluded from the Public Information Period for no valid reason relating to the purpose of that forum. Instead, his exclusion was based on an "ad hoc parliamentary ruling by [a] presiding official[]," *Steinburg*,527 F.3d at 385, in violation of First Amendment standards for limited public forums.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be denied.

Dated: September 11, 2015

Respectfully submitted,

LINWOOD CHRISTIAN

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2015, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically serve an electronic copy on all counsel of record.

/s/ Rebecca K. Glenberg