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LEGAL MEMORANDUM

TO: The Jacksonville Ethics Commission
Carla Miller, Director of the Office of Ethics, Compliance and Oversight

FROM: Jason R. Gabriel, General Counsel

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RE: General Counsel Binding Opinion 19-02; Application of Ethics Code to Uniformed Employees & Vehicles Appearing in Campaign Advertisements

DATE: March 1, 2019

I. Introduction.

On December 11, 2018, the City Council adopted Ordinance 2018-822-E. This bill made substantial amendments to Section 602.401, Ordinance Code, including creating a new subsection (d), which reads as follows:

> (d) City Officers and employees should recognize their responsibility to protect and conserve City property and resources, and to make an honest effort to use official time and City property only for official business. To that end:
>
> (1) Misuse of property. It is a violation of this Chapter for an officer or employee of the City or an independent agency to knowingly use property owned by the City or any independent agency for his or her personal benefit, convenience or profit, or for the benefit, convenience or profit of others, except in accordance with official written City policies or ordinances.

(2) Misuse of time. It is a violation of this Chapter for an officer, employee of the City or an independent agency to use the official time of a City employee for anything other than official City business.

(3) Misuse of resources for campaigning. It is a violation of this Chapter for an officer, employee of the City or an independent agency to use any City resources, including property, employee time, computers and the Internet, for any political campaigning or campaign fundraising activities.

During this campaign season, various candidates have included uniformed police officers in their campaign advertisements. This has raised the question whether Section 602.401(d)(3) prohibits this activity by uniformed police officers. If such activity is prohibited by Section 602.401, the employee committing such violation would be subject to the penalty provisions contained in Chapter 602. There have been no assertions made of any uniformed police officers engaging in political or campaign activities in person.

II. Questions Presented.

(1) Whether the Jacksonville Ordinance Code prohibits a police officer from wearing his or her uniform in a political advertisement.

(2) Whether the Jacksonville Ordinance Code prohibits the use of a City vehicle in a political advertisement.

III. Short Answer.

(1) No, the Jacksonville Ordinance Code does not prohibit a police officer from wearing his or her uniform in a political advertisement.

(2) No, the Jacksonville Ordinance Code does not prohibit the use of a City vehicle in a political advertisement.

IV. Discussion.

While at first glance, it may appear that the general dictates of Section 602.401(d)(3) prohibits a broad assortment of City "property" from being used in a variety of activities, including an officer wearing his or her uniform in a political campaign activity, particularly since such uniforms are purchased by the Sheriff and issued to the individual officers; however a proper reading of the City's Ordinance Code in conjunction with well-established canons of statutory construction, provides that such activity does not violate the City's Ordinance Code, nor does it run afoul of the City's Charter or the First Amendment.

A. Canons of Statutory Construction.

Pursuant to Section 602.401(d)(3), Ordinance Code, it is a violation of Chapter 602 for any officer or employee of the City or its independent agencies, to use any City resources, including property, employee time, computers and the internet, for political campaigning or campaign fundraising. It has been asserted that a Sheriff's Office uniform falls within the ambit of this provision; thereby making the use of such uniform in a political campaign a violation of that section.

Conversely, Section 350.302(a), Ordinance Code, titled, "Restrictions on campaigning by City employees," prohibits City employees, while wearing a uniform required for his or her employment, from:

> (1) request[ing], *in person*, that any individual contribute any time, money or other thing of value to any candidate . . . ;
>
> (2) solicit[ing], *in person*, support or votes for any candidate . . . ; or
>
> (3) tak[ing] an active part in political management of political campaigns." (Emphasis added).

As such, Section 350.302(a), Ordinance Code, limits those restrictions on City employees' political conduct to activities conducted "in person" while in uniform.

The City has two code provisions applicable to campaigning by City employees that are seemingly in conflict: one that prohibits "City resources, including property" (i.e., a uniform) from being used in political campaigning in any form; and a second provision that is specific to uniforms, which only prohibits "in person" political activities while wearing the uniform. Differing code provisions must be read and interpreted in such a manner as to, if possible, provide meaning to both. The interpretation of one code provision in such a way as to make the other code provision meaningless or superfluous should be avoided. "We are compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.' " *Johnson v. Feder,* 485 So.2d 409, 411 (Fla.1986) (quoting *Patagonia Corp. v. Board of Governors of Fed. Reserve Sys.,* 517 F.2d 803, 813 (9th Cir.1975)); *see also Unruh v. State,* 669 So.2d 242, 245 (Fla.1996).

There is a well-established rule of statutory interpretation whereby the more specific code provision controls over the more general, thereby giving meaning to both. "[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute." *McKendry v. State,* 641 So.2d 45, 46 (Fla. 1994); *see also, Heron at Destin West Bch. v. Bay Resort Condo. Ass'n, Inc.*, 94 So.3d 623 (Fla. 1st DCA 2012). Section 602.401(d)(3), Ordinance Code, is generally applicable to all City

resources and property, while section 350.302(a), Ordinance Code, is specifically applicable to employees' campaigning activities while wearing their uniforms. The well-established rule regarding specificity indicates that, regarding the usage of employee uniforms for political purposes, the Ordinance Code must be construed to allow the use of uniforms in political advertisements but prohibit uniforms from being used for in-person campaign or political interactions.

Another rule of statutory interpretation requires the evaluation of a statute's language in such a manner as to make it constitutional, if such is possible. "[S]tatutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." *Lewis v. Leon Cnty.,* 73 So.3d 151, 153 (Fla.2011) (citing *Fla. Dep't of Revenue v. City of Gainesville,* 918 So.2d 250, 256 (Fla.2005)). " 'To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the [L]egislature intended to enact a valid law.' " *Id.* (quoting *Franklin v. State,* 887 So.2d 1063, 1073 (Fla.2004)).

In this case, as discussed below, a strict interpretation of Section 602.401(d)(3), Ordinance Code, may result in an impermissible infringement on the First Amendment rights of certain candidates for public office and other City employees. An expansive interpretation of section 602.401(d)(3), Ordinance Code, would prohibit a currently elected official or a current City employee seeking political office from holding a political rally in a City park, whereby his or her non-employee opponent would be free to do so purely based on the fact that they are not current City employees. Similarly, a City employee could not use a library photocopier or computer, even if paid for, to produce or make copies of campaign flyers; or, a City employee could not rent out a City facility for a campaign fundraiser but his or her opponent could freely do so; or a City employee, using their own laptop computer, could not use City-provided public wifi to work on their campaign but their opponent could do so.

Such a broad interpretation and application of Section 602.401(d)(3), Ordinance Code, would impermissibly infringe on the constitutionally protected rights of a City-employed candidate. Therefore, it is necessary to interpret the Code section in such a way as to insure it is constitutionally applied. To do this with Section 602.401(d)(3), requires a narrow interpretation of the terms "resources" and "property".

B. First Amendment.

First Amendment considerations also impact the interpretation of Section 602.401(d)(3). The First Amendment protects campaign and political speech. As recently stated by the U.S. Supreme Court, "[i]f the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191, 134 S. Ct. 1434, 1441 (2014). This is not to say that the City cannot regulate the political activities of its employees, under some circumstances. "Political speech and activity

are among the categories of employee speech that governments may limit, and the Supreme Court has allowed the government great leeway when it comes to restricting the political speech of its employees. *E.g., Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO,* 43 U.S. 548 (1973); *United Pub. Workers of Am. v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947)." *Breyley v. City of N. Royalton, Ohio,* No. 1:04CV1956, 2005 WL 2233231, at 4 (N.D. Ohio Sept. 14, 2005) (internal quotations and citation omitted). On the other hand, even though the government has the power to regulate employee speech, it cannot do so with an overbroad rule. *Id*. (declaring as overbroad on its face a rule regulating employee campaign speech); *accord, McNea v. Garey*, 434 F. Supp. 95, 108 (N.D. Ohio 1976) (declaring as overbroad a rule that "prohibit[ed] a policeman from discussing religion or politics at any and all times.").

Section 602.401(d)(3) may not prevent as much speech as the rules invalidated above, but it does prohibit employees from engaging in a substantial amount of speech. On its face, it prohibits "an officer [or] employee of the City" from "us[ing] any City resources, including property, . . . , computers and the internet, for any political campaigning or campaign fundraising activities." On its face, the phrase "City property" includes parks and libraries. The phrase "City computers" includes library computers. The word internet includes City-provided wifi available to any member of the public. In this context, the ordinance prohibits employees from campaigning in City parks and other City-owned traditional public forums; it prohibits an off-duty employee from using library computers for campaigning. Section 602.401(d)(3), then, specifically prohibits the use of library computers, i.e. , City computers, and prohibits their use as City Property. These prohibitions likely violate the First Amendment, creating a likelihood that a reviewing court might declare the ordinance unconstitutional pursuant to the overbreadth doctrine.

The solution lies in narrowly construing the ordinance so as to not include uniforms in the term "City property", which a court may already conclude are the property of the employee. This is not to say that the Council cannot regulate the use of uniforms. Instead, such a regulation must not be part of an ordinance which sweeps so much speech within its reach.

C. City Vehicles.

Specific to City vehicles, the question has been raised whether "using" a City vehicle in a campaign commercial in prohibited by City Ordinance Code. The "use" in this case is the filming of officers with a vehicle in proximity and that film being displayed in a political commercial. This, of course, would be the same "use" of City property as filming City Hall, a Council meeting, a park, or the library. As described throughout this memo, on its face, Section 602.401(d)(3) prohibits any City employee from "using," i.e., "filming," any City property for a

campaign commercial.

This ordinance, if it prohibits the filming of scenes that have Sheriff's Office vehicles within the vicinity, applies that prohibition to any City employee, even those who are not Sheriff's Officers, and even those who do not work for the Sheriff's Office. If this ordinance prohibits filming Sheriff's Office vehicles, it does so only because the vehicles are City property. And, if that is the correct interpretation, it prohibits, as noted above, filming of any City property by a City employee. Applying Section 602.401(d)(3) to the use of City vehicles would violate the First Amendment as being substantially overbroad. *See*, discussion, *supra*.

Further, there is another First Amendment flaw to such an expansive interpretation of the Ordinance Code. On its face, it discriminates between speakers. Recently, the federal First Circuit asked and answered the question, "is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative." Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).[1] Quite clearly, then, a private citizen who runs for office may film Sheriff's Officers and their vehicles and use the film in a campaign commercial. An employee not of the Sheriff's Office does not have that same right. Similarly, a non-employee may use in a campaign ad a news clip which includes Sheriff's Office vehicles. A City employee would not have that same speech opportunity.

[1] The court also listed a number of cases agreeing with its conclusion:

> Our recognition that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts. See, e.g., *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.2000) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.1995) (recognizing a "First Amendment right to film matters of public interest"); *Demarest v. Athol/Orange Cmty. Television*, Inc., 188 F.Supp.2d 82, 94–95 (D.Mass.2002) (finding it "highly probable" that filming of a public official on street outside his home by contributors to public access cable show was protected by the First Amendment, and noting that, "[a]t base, plaintiffs had a constitutionally protected right to record matters of public interest"); *Channel 10, Inc. v. Gunnarson*, 337 F.Supp. 634, 638 (D.Minn.1972) (holding that police interference with television newsman's filming of crime scene and seizure of video camera constituted unlawful prior restraint under First Amendment); cf. *Schnell v. City of Chi.*, 407 F.2d 1084, 1085 (7th Cir.1969) (reversing dismissal for failure to state a claim of suit claiming police interference with news reporters and photographers' "constitutional right to gather and report news, and to photograph news events" under the First Amendment (internal quotation mark omitted)), overruled on other grounds by *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Connell v. Town of Hudson*, 733 F.Supp. 465, 471–72 (D.N.H.1990) (denying qualified immunity from First Amendment claim to police chief who prevented freelance photographer from taking pictures of car accident).

Glik, 655 F.3d at 83

As explained by the United States Supreme Court, speech "restrictions distinguishing among different speakers" are "instruments" used to censor and are "interrelated" content and viewpoint discrimination. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (2010). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." Id. In explaining the similarities between speaker-based restrictions and content-based restrictions, the Court wrote:

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Id. at 340–41. There can be no justification for an ordinance that punishes a City employee for using the same film of a Sheriff's Office vehicle used by a non-employee. Such an expansive reading violates the First Amendment and cannot be enforced by the Ethics Commission. Once more, this is not to say that the Council could not, perhaps, draft a more narrowly drawn ordinance. Further, there are human resource, civil service and collective bargaining issues that are implicated with any such regulation. Some of those pertinent issues are discussed here.

Finally, and most importantly, Section 122.307 Ordinance Code specifically assigns the authority to designate the use of vehicles assigned to the Office of the Sheriff, to the Sheriff. Any use or function related to the use of such vehicles are under the sole purview of the Sheriff, as delegated by the City Council when it enacted Section 122.307.

D. Civil Service.

The City has had a board similar to the Ethics Commission off and on since the beginning of the Consolidated Government. The original Charter made the Civil Service Board the Board of Ethics. Section 20.09, Chapter 67-1320 Laws of Florida. Just a few years later, the Florida Legislature made the Charter's Code of Ethics an ordinance. Chapter 72-1578, Laws of Florida. The next year, the Council repealed Article 20, making it an ordinance. In repealing Article 20, the Council took from the Civil Service Board one of its original roles. Decades later, pursuant to ordinance, the City Council created Chapter 2, Article 1 of the Charter. Ordinance 2010-616-

E. This amendment to the Charter authorized the Council to do what it already had the power to do, to create, by ordinance, an Ethics Commission.

While the Legislature, by making Chapter 20 an ordinance, granted power to the Council to create and recreate an ethics board, it left in place what is now Article 17. This left in place a critical aspect of separation of powers within the Charter, Civil Service and the Civil Service Board. In General Counsel Opinion 69-165, the General Counsel concluded, "It is thus clear that a strong, firm and efficient Civil Service System is one of the desired goals and aims mandated by the Charter." This Opinion relied on the express provisions of the Charter which set out the distinct roles played by the City Council and the Civil Service Board. The current Section 17.05 of the Charter creates a system for establishing "civil service rules and regulations." Under the Charter, the Personnel Department must create any rule or regulation for employees. The Personnel Department forwards the proposed rule or regulation to the Civil Service Board for review. If the Board approves, then the proposed rule or regulation goes into effect. If, but only if, the Civil Service Board disapproves of the proposed rule or regulation, then the City Council reviews the proposed rule or regulation. On the other hand, if the Civil Service Board approves the rule, then the Council has no authority to intervene. In addition, Section 17.04 of the Charter grants exclusive jurisdiction to the Civil Service Board to "[h]ear and determine appeals initiated by any permanent employee covered by the civil service rules and regulations who is charged with violations of the personnel provisions of the civil service rules and regulations authorized by ordinance or civil service rules adopted pursuant to section 17.05." *See also*, section 30.53, Florida Statutes, preserving civil service systems for Sheriff's offices.

The civil service system limits the Council's power over rules and regulations for employees. The Council may not avoid Article 17 of the Charter by declaring work rules and regulations to be "ethics" rules.[2] Consequently, it may be that the Council has no authority to create a board outside the Civil Service Board to discipline employees for any reason. This memorandum need not, however, delve deeply into the limits of the powers of the Council or the Ethics Commission. Instead, the existence and importance of the civil service system demand that Section 602.401(d)(3) be read narrowly so as not to create questions of conflict with Article 17.

In pertinent part, Section 602.401(d)(3) reads as follows: "It is a violation of this Chapter for an . . . employee of the City . . . to use any City resources, including property . . . , for any political campaigning or campaign fundraising activities." The question is whether a police officer may wear his or her uniform in a campaign advertisement. The answer is in the question.

[2] This memorandum does not suggest the invalidity of Section 350.302(a), Ordinance Code, which regulates the wearing of a City uniform while campaigning. Given that the Council adopted this ordinance nearly a decade ago, it might well be argued that the ordinance has become a "past practice" under collective bargaining law. Inasmuch as Section 350.302(a), prohibits only in-person campaigning while in uniform, it allows wearing a uniform in a campaign advertisement. It might well be argued that because the City previously permitted wearing a uniform in a campaign advertisement, then modifying that rule impacts collective bargaining rights of employees. This is another reason to narrowly construe Section 602.401(d)(3).

If the uniform belongs to the employee, then Section 602.401(d)(3) does not apply. The answer to ownership may not be clear. The officer need not return the uniform upon leaving employment. This suggests that the officer "owns" the uniform. On the other hand, the officer must return certain equipment upon leaving employment, suggesting that at least part of the uniform is "City property" and subject to section 602.401(d)(3). Accordingly, in light of the Civil Service System, the uniform is the property of the officer for the purposes of Section 602.401(d)(3). This avoids the questions of Council authority to adopt conduct rules. Even more so, it avoids the question of whether the Council may grant employee discipline power to a board other than the Civil Service Board.

The foregoing does not suggest that the Council cannot adopt ordinances which impact employees. The conclusion is that if the Council wants to adopt such rules and grant what is arguably Civil Service Board power to another board, it should do so in clear and unequivocal language.

E. Ethics Code to be Construed Most Favorably to the Accused.

Section 600.102, Ordinance Code, provides rules for construing and interpreting the various provisions of the Ethics Code. In subsection (a), it states, "[t]he provisions of this Code and offenses defined by other ordinances shall be strictly construed. When the language is susceptible of differing constructions, it shall be construed most favorably to the accused." As discussed above, there is an apparent conflict between Sections 602.401(d)(3) and 350.302(a), Ord. Code, as to whether an employee can appear in political advertisements or engage in political activities while in uniform. An employee contemplating such activities may read Section 350.302(a) as authorizing the activity, since he or she would not be appearing in person and directly interacting with voters. There is also a lack of clarity as to whether a JSO uniform is considered City property or the employee's personal property. Therefore, the preamble language for the entire Judicial Code (a part of which is Chapter 602, the Ethics Code) requires an interpretation that favors the employee in this situation.

V. Conclusion.

Proper review of Sections 602.401(d)(3) and 350.302, Ordinance Code, Article 17 of the Charter, collective bargaining, the First Amendment, and well-established canons of statutory construction lead to the same result: the recently adopted Section 602.401(d)(3) does not prohibit a police officer from wearing his or her uniform, nor does it prohibit the filming of a City vehicle, in a campaign advertisement. No other applications of Section 602.401(d)(3), Ordinance Code, are addressed by this Memorandum. Each particular application must be reviewed on a case by case basis.