UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JAMES BRADY, (Detective, Retired) ***Plaintiff,***	:	
v.	:	**C.A. No. 17-cv-0475**
RICHARD TAMBURINI, individually and in His capacity as CHIEF, JOHNSTON POLICE DEPARTMENT and TOWN OF JOHNSTON, ***Defendants*****.**	:	

PLAINTIFF JAMES BRADY'S
MEMORANDUM OF LAW IN SUPPORT OF HIS
OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Now comes Plaintiff James Brady and hereby submits this Memorandum of Law in support of his Objection to Defendants' Motion for Summary Judgment. Defendants cannot prove they are entitled to Judgment as a matter of law. On the contrary, the undisputed facts show that Plaintiff is entitled to summary judgment because several policies promulgated by the Johnston Police Department ("The Department") are facially unconstitutional. In addition, those same policies are clearly unconstitutional as applied to Mr. Brady. It is undisputed that Brady was disciplined for speaking to the press, as a citizen, on a matter of public concern. Defendants have presented no evidence that their sweeping censorship is supported by a legitimate interest. Accordingly, summary judgment for Defendants must be denied.

Summary of Facts

On or around October 11, 2017, Plaintiff filed a Complaint in the United States District Court for the District of Rhode Island in the above-captioned matter seeking declaratory and injunctive relief, plus damages, costs and attorney's fees pursuant to 42 U.S.C. § 1983, for

violation of his First Amendment rights. See Statement of Undisputed Facts ("SUF") ¶ 1.[1] On or around July 5, 2019, Plaintiff, through his previous attorney, filed a Motion for Summary Judgment on the issue of liability. On July 5, 2019, Defendants filed the instant Motion for Summary Judgment.

At all relevant times, Plaintiff was employed by the Town of Johnston as a Detective for the Police Department. SUF ¶ 2. Plaintiff also served as President of IBPO Local 307 ("Local 307" or "the Union"). At all relevant times to the Complaint, Richard Tamburini served as the Chief of Police for the Department. SUF ¶ 5.

On July 1, 2015, Officer Catamero, a Patrolman and member of IBPO Local 307, was on duty and initiated a traffic stop after witnessing one Ronald Fraraccio speeding. SUF ¶¶ 42-43. Lisa Roberti, the office manager at R&F Auto, owned by Fraraccio, witnessed the incident and attempted to interfere in the traffic stop. SUF ¶ 44. Roberti filed a complaint against Officer Catamero for "conduct unbecoming an officer" after Officer Catamero advised her to "go back inside." SUF ¶¶ 44-45. Roberti's father was a police officer. SUF ¶ 46. As a result of Roberti's complaint, Chief Tamburini suspended Officer Catamero, finding that he violated several policies including "civility, "conduct unbecoming of an officer," and "discourtesy." SUF ¶ 47.

Plaintiff, in his capacity as President of Local 307, filed a grievance against the Town alleging that the suspension did not comport with just cause in violation of the collective bargaining agreement. SUF ¶ 48. The matter proceeded to arbitration and, on July 14, 2016, the Arbitrator found that Officer Catamero had not violated any rule and that Roberti "saw her boss

[1] The Statement of Undisputed Facts refers to Defendants' Statement of Undisputed Facts ¶¶ 1-41 and Plaintiff's Statement of Undisputed Facts ¶¶ 42-101.

being stopped by a police officer and decided to use her connections to help him out." SUF ¶¶ 48-49.

After the arbitration, Catamero faced continued harassment from the Police Department administration and brought complaints to the attention of his supervisor, all to no avail. SUF ¶ 58. On June 8, 2016, Chief Tamburini ordered Catamero to a "fitness for duty" examination with Dr. Stuart Gitlow. SUF ¶ 33. After the examination was initially postponed so Tamburini could speak with the doctor, Dr. Gitlow concluded that Catamero met the criteria for an "Adjustment Disorder with Anxiety" which involves constant or excessive worrying. SUF ¶¶ 59-60. Dr. Gitlow recommended a four-month course of weekly therapy and said he would "be happy to see Patrolman Catamero after several months of therapy to determine if he has regained fitness for duty." SUF ¶ 60. Upon receipt of Dr. Gitlow's report, **Tamburini immediately terminated Catamero from his employment, without giving him his due process rights**. SUF ¶ 61. Catamero's termination occurred on August 4, 2016, less than three weeks after the Town lost the arbitration case involving Officer Catamero. SUF ¶ 52.

On August 31, 2016, Catamero filed a Verified Complaint against the Town of Johnston in Rhode Island Federal District Court. SUF ¶ 53. The complaint alleges Catamero was harassed by members of the Department.

> This harassment included threats to remove Catamero from the list of officers eligible to work the Johnson Accident Reduction Enforcement (JARE) program because, among other things, he (i) failed to write more tickets that would be processed through the Johnston Municipal Court as opposed to the Rhode Island Traffic Tribunal; and (ii) gave tickets to individuals who were related to or friendly with members of the administration of the JPD. In addition, members of the JPD administration encouraged members of the public to file complaints against Catamero in connection with his duties while working the JARE program.

SUF ¶ 55. The complaint further alleges that Catamero's termination was in retaliation for Catamero's claims of harassment by members of the administration, and that said termination

also violated Catamero's constitutional due process rights and the Family Medical Leave Act. SUF ¶ 62.

On September 15, 2016, the Providence Journal ["ProJo"] published an article written by Jacqueline Tempura entitled, "Johnston police officer sues to get his job back." SUF ¶ 63. The article references Roberti's complaint against Catamero, Catamero's suspension by Tamburini and Local 307's ultimate success in overturning Catamero's suspension. SUF ¶ 64. The Article also quotes from Catamero's Federal Court Complaint, which alleges that Catamero was fired, without warning, for giving traffic tickets to people "friendly with members" of the police department. SUF ¶ 65.

The ProJo article also contains statements made by Plaintiff in his capacity as Union President concerning the Union's arbitration case. Plaintiff was quoted, "[Catamero] is a straightforward, all-business kind of guy" that would tell people to "save the tears" if they acted dramatic during a traffic stop. Consequently, high-ranking officers "didn't like the way [Catamero] did things," while working the detail, because he would write traffic tickets for "anybody no matter who they were." SUF ¶ 66. And despite an "unwritten rule" where officers were encouraged to write more tickets that could be processed through the Johnston Municipal Court than through the Rhode Island Traffic Tribunal, he refused to comply — continuing to work by the book. SUF ¶ 66.

Plaintiff was not on-duty when he was interviewed by Ms. Tempera on September 15, 2016. SUF ¶ 67. In fact, Plaintiff spoke with Ms. Tempera after he got out of the shower at his personal residence. SUF ¶ 22. Further, Plaintiff's official duties do not include speaking to the media. SUF ¶ 69. Rather, pursuant to Department policy, Plaintiff is prohibited from speaking to the media on behalf of the Department.

Plaintiff's statements to Ms. Tempera on September 15, 2016, raised the possibility of corruption and misconduct within the Johnston Police Department. SUF ¶ 70. None of the information provided by Plaintiff to Tempera was confidential. SUF ¶ 71.

On October 13, 2016, Brady was interrogated by the Professional Standards Investigator regarding his "September 15th, 2016 communications with Ms. Jacqueline Tempera of the Providence Journal." SUF ¶ 76. The sole basis for the internal investigation was Plaintiff's statements made to the ProJo on September 15, 2016. SUF ¶ 77.

On September 21, 2016, the ProJo published another article by Ms. Tempera, this one entitled, "Johnston police union president investigated for speaking to Journal reporter." SUF ¶ 73. The Article notes that that Brady was called into Chief Richard Tamburini's office and notified that he was the subject of an internal investigation for speaking with The Journal on September 15, 2016. SUF ¶ 74.

In the same article, Steven Brown, Executive director of the Rhode Island Affiliate of the American Civil Liberties Union, opined that the charges brought against Plaintiff for speaking to the media raise serious First Amendment Concerns. SUF ¶ 75.

On October 31, 2016, Chief Tamburini issued a two-day suspension to Plaintiff for speaking to the media. SUF ¶ 80. A Summary Punishment letter written by Chief Tamburini alleges Plaintiff violated the following policies (hereinafter collectively referred to as the Police Rules):

1. #100.04 Section III(D), "Prohibited Conduct," (1)(b) "Conduct Unbecoming an Officer – conduct unbecoming an officer shall include that which brings the Department into disrepute or reflects discredit upon the officer as a member of the Department, or that which impairs the operation or efficiency of the Department of officer." (SUF ¶ 34). [Hereinafter referred to as the "Conduct Unbecoming" Policy].

2. #100.04 Section III(D)(1)(v), Prohibited Conduct, (1)(v) Dissemination of Information. An officer shall treat the official business of the Department as confidential and shall conform to the following guidelines: (1) Information regarding official business shall be disseminated only to those for whom it is intended, in accordance with established Departmental procedures; (2) An officer shall not remove or copy official records, reports or reproductions for a police installation [sic] except in accordance with established Departmental procedures; … (4) An officer shall not release to the press or news medical [sic] information concerning Departmental policy or the evidential aspects of any criminal investigation without prior approval of the Chief or Commanding Officer. Consult with the Chief of Police when in doubt. (SUF ¶ 35). [Hereinafter referred to as the "Official Business" Policy].

3. #520.02, Public Information/Media Relations, Chapter 5-Community Relations and Services, Section III(A)(1), "Persons Authorized to Disseminate Information. The Deputy Chief is designated as the Department's Public Information Officer (PIO). Information, however, may be disseminated by the following personnel after approval by the Chief of Police or his designee: (a) Uniform Division Commander; (b) Investigative Division Commander; (c) Operations and Training Commander; (d) Traffic/Special Services Commander; and (e) Watch Commander. (SUF ¶ 36). [Hereinafter referred to as the "Public Information" Policy].

4. #520.02, Public Information/Media Relations, Chapter 5-Community Relations and Services, Section III(A)(2) "Requests from the news media that are directed to specific members of the police department will be directed to the PIO. Members are prohibited from disseminating information or granting an interview on police related matters without express approval of the Chief of Police or the PIO. (SUF ¶ 37) [Hereinafter referred to as the "Police Related Matters" Policy].

5. #520.02, Public Information/Media Relations, Chapter 5-Community Relations and Services, Section III(E)(1), Internal Investigations. No member of the Johnston Police Department will discuss any on-going internal investigation with the press/media. Any and all inquiries relating to internal investigations or crisis situations within the Department and the status of such will be referred to the Chief of Police. (SUF ¶ 38). [Hereinafter referred to as the "Internal Investigation" Policy].

Defendants have failed to enact any criteria governing the type of conduct that "brings the Department into disrepute" or "reflects discredit upon the officer as a member of the Department." SUF ¶ 87. Additionally, the Department failed to enact criteria defining what constitutes "official business." SUF ¶ 89. However, Chief Tamburini apparently determined that

Plaintiff's comments to ProJo on September 15, 2016 involved "official business" and a release of information concerning departmental policy. SUF ¶¶ 90-91.

Defendants have failed to enact criteria governing the Chief's approval of information to the press, or outlined what types of matters are considered "police related" matters. SUF ¶ 92, 96. However, Chief Tamburini apparently determined that Brady's statements to the ProJo on September 15, 2016 involved "police related matters." SUF ¶ 97.

Standard of Review

Summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kessler v. City of Providence*, 167 F. Supp. 2d 482, 484 (D.R.I. 2001). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. In general, these cases require that a party seeking summary judgment make a preliminary showing that no genuine issue of material fact exists. *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

"[C]ross motions for summary judgment neither dilute[] nor distort[] this standard of review.... All facts, and all reasonable inferences therefrom, are reviewed in the light most favorable to the respective non-moving parties.... Cross motions simply require the Court to determine if either party deserves judgment as a matter of law on the undisputed facts." *Rhode Island Council 94 v. Rhode Island*, 705 F. Supp. 2d 165, 172 (D.R.I. 2010), *quoting Wagenmaker v. Amica Mut. Ins. Co.*, 601 F.Supp.2d 411, 416 (D.R.I. 2009) (internal quotation marks and

citation omitted).

Here, there are no material facts in dispute that would preclude judgment in his favor. See Plaintiff's Statement of Undisputed Facts and Plaintiff's Response to Defendants' Statement of Undisputed Facts. Accordingly, the only issue before this Court is whether Defendants are entitled to judgment as a matter of law. For the reasons stated below, Plaintiff, not Defendants, is entitled to judgment in his favor.

Argument

Defendants have failed to prove that they are entitled to judgment as a matter of law as to the facial constitutionality of their policies. In fact, in their sixty-five page memorandum, Defendants spend very little time addressing facial constitutionality.[2] However, the crux of Defendants' argument appears to be that if this Court were to add additional language to the policies, or interpret the policies to apply only to confidential police matters, there would be no infringement on employees' speech. But, this Court must interpret the policies as written, just as Defendants' employees must in deciding whether to express their opinions on matters of public concern. As written, four of the five policies are facially unconstitutional because they restrict employees from speaking as citizens on matters of public concern.[3]

Defendants also argue that Plaintiff's First Amendment rights were not violated when they disciplined him for his speech, erroneously claiming that his speech did not address a matter of public concern. Plaintiff's speech directly addresses corruption and misconduct in the Department. **His speech implies that the Department terminated an employee for refusing**

[2] The majority of their memorandum addresses whether Plaintiff's statements were matter of public concern.

[3] The fifth policy, #520.02, Chapter 5-Community Relations and Services, Section IIIE(1) is unconstitutional as applied to Plaintiff.

to break the rules. Courts have uniformly held that this topic constitutes a matter of public concern for purposes of the First Amendment analysis. Defendants' argument to the contrary lacks merit and should be rejected by this Court. Finally, Officer Tamburini is not entitled to qualified immunity because he violated a clearly established First Amendment right by disciplining Plaintiff for speaking to the press.

I. SUMMARY JUDGMENT SHOULD ENTER FOR PLAINTIFF, NOT DEFENDANTS, BECAUSE THE POLICIES AT ISSUE ARE FACIALLY UNCONSTITUTIONAL

A. *The Policies Are Facially Unconstitutional*

1. *The Conduct Unbecoming Policy is facially unconstitutional because it: (1) creates an impermissible prior restraint on speech; (2) gives unlimited discretion to the Chief of Police to grant or deny permission to speak and contains no time frame within which permission in response to a request to speak may be granted; and (3) is vague.*

i. Prior Restraint

A prior restraint rule "is a government regulation that limits or conditions in advance the exercise of protected First Amendment activity." *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993). Any system of prior restraints of speech "comes to [the] Court bearing a heavy presumption against its constitutional validity." *Id.*, citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

The first step in analyzing an impermissible prior restraint is whether the policy "reaches only speech within the scope of a public employee's official duties, and whether it impacts speech on matters of public concern." *Garcetti v Ceballos*, 547 U.S. 410, 423-24 (2006). This analysis focuses on the text of the policy rather than the conduct of employees. *See Moonin v. Tice*, 868 F.3d 853, 861 (9th Cir. 2017). Regulations governing in advance the time, place or

manner of expression permitted in a particular public forum are valid only if they serve important state interests **by the least restrictive means possible**. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Put another way, a regulation that is directed primarily at conduct or at non-communicative aspects of protected expressive activities is permissible despite an incidental prior burden on expression if it is justified by sufficiently strong permissible government interests. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961). These standards have been stated in terms of a four-part test:

> (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on ... First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

Here, the *Conduct Unbecoming Policy* is an unconstitutional prior restraint because it is a Department rule that proscribes protected speech by employees on issues of public concern made in their capacity as citizens. Further, Defendants have offered no justification for proscribing speech made by an employee in their capacity as a citizen on matters of public concern.

a. *The Conduct Unbecoming Policy prohibits speech made by employees in their capacities as citizens*

The *Conduct Unbecoming Policy* prohibits speech that "brings the Department into disrepute or reflects discredit upon the officer as a member of the Department, or that which impairs the operation or efficiency of the Department of officer." SUF ¶ 34. It is generally understood that employees do not speak as citizens for First Amendment purposes when they make statements pursuant to official duties. *Garcetti*, 547 U.S. at 421. However, the Supreme Court has made clear that the critical issue is whether "the speech at issue is itself ordinarily

within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, 134 S.Ct. 2369, 2379 (2014). In essence, just because speech concerns information acquired or related to one's public employment does not mean it is speech pursuant to official duties. *Id*.

A straightforward reading of the *Conduct Unbecoming Policy* shows its broad language is clearly not confined to speech made pursuant to official duties. There is no distinction between speech made as a private citizen and speech made as an employee of the Department.[4] Any language that "brings the Department into disrepute or reflects discredit upon the officer as a member of the Department" (whatever that means) is prohibited.

The *Conduct Unbecoming Policy* can only be understood to forbid, subject to discipline, **any speech** made by employees in their capacities as citizens that may be deemed to bring the Department into disrepute. Thus, Defendants' argument that the Policy is not intended to reach employees who speak as private citizens must fail.

b. *The Conduct Unbecoming Policy prohibits speech on matters of public concern*

"Speech involves matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Lane*, 134 S.Ct. at 2380 (*quoting Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). "Restrictions on speech relating to matters of personal interest to an employee are not subject to the same judicial scrutiny as those which

[4] The Department's interpretation of the policies does not consider the distinction between speech made pursuant to official duties and private speech. In the Summary Punishment imposed on Plaintiff, Chief Tamburini writes, "you maintain that you spoke with Ms. Tempera in your capacity as President of the [Union] and not in your capacity as Detective James Brady. However, *I have determined that your alleged distinction is not applicable in this instance. And it does not exempt you from the departmental rules and regulations*." SUF ¶ 81 (emphasis added).

seek to silence the employee, as a citizen, from commencing matters of public concern." *Kessler v City of Providence*, 167 F.Supp.2d 482, 486 (D.R.I. 2001). Matters that affect the "public health and safety are clearly matters of public concern." *Providence Firefighters Local 799 v. City of Providence*, 26 F.Supp.2d 350, 356 (D.R.I. 1998); *see also Brasslett v. Cota*, 761 F.2d 827, 844 n. 14 (1st Cir. 1985) (stating that fire department matters are "prototypical matter[s] of public interest"). Likewise, police department policies, procedures, and rules that affect, or have the potential to affect, the public health and safety and may qualify as "matters of public concern."

Here, the *Conduct Unbecoming Policy* restricts any speech made about the Department that could conceivably bring it in to "disrepute." The Department does not provide any further clarification on what constitutes disrepute. SUF ¶ 87. The policy is fundamentally flawed because it does not address the wide range of speech on matters of public concern that may necessarily bring the Department into disrepute. The *Conduct Unbecoming Policy* proscribes speech related to Department corruption or malfeasance. This Court has recognized that "an employee's First Amendment interest is entitled to greater weight where he is acting as a whistleblower in exposing government corruption." *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 53 (1st Cir. 2003) (*citing Conaway v. Smith*, 853 F.2d 789, 797 (10th Cir. 1988)); *see O'Connor v. Steeves*, 994 F.2d 905, 915 ("O'Connor's disclosures concerned alleged abuse of public office on the part of an elected official, a matter traditionally occupying the highest rung of the hierarchy of first Amendment values.").

In *Perez*, Plaintiff made statements describing his suspicion that his supervisor was mishandling a potentially important investigation and the possibilities of police corruption and perjury. Those statements, which the Court held were protected by the First Amendment, would

likely be prohibited by the *Conduct Unbecoming Policy.* Such statement clearly brings the Department into disrepute. Because the Policy restrains protected speech, it is unconstitutional on its face.

c. *Defendants have offered no evidence supporting an important state interest*

Defendants have failed to demonstrate that the *Conduct Unbecoming Policy* addresses any potential harms, or advances any substantial government interest, that could not be achieved through less restrictive language. Rather, Defendants focus their Motion for Summary Judgement on the Plaintiff's particular conduct. Like the court found in *Kessler*, Defendants here virtually ignore the balancing of interests test and consequently fail to carry the burden required in a Motion for Summary Judgement. *Kessler,* 167 F.Supp.2d at 488.

"When the Government [] imposes a prior restraint of speech prohibiting the employee from ever uttering the speech, the Court applies the test set out in *United States v. Nat'l Treasury Employees Union* ("NTEU"), 513 U.S. 454, 466–68 (1995)." *Firenze v. N.L.R.B.*, 993 F. Supp. 2d 40, 54 (D. Mass. 2014). The *NTEU* balancing tests asks "whether the government's interest in regulating speech outweighs the interests of both 'present and future employees in a broad range of present and future expression,' and their 'potential audiences.'" *Kessler,* 167 F.Supp.2d at 488 (*citing NTEU,* 513 U.S. at 468).

Because the *Conduct Unbecoming Policy* prohibits protected speech relating to matters of public concern and Defendants have failed to provide any evidence of legitimate interests advanced by the policy, Defendants' motion must be denied.

ii. *The Conduct Unbecoming Policy gives unlimited discretion and time to the Chief of Police to grant or deny permission to speak*

The *Conduct Unbecoming Policy* is also unconstitutional because it (1) gives unlimited discretion to a government decision-maker to grant or deny a member of the Police Department

permission to speak, and (2) contains no time frame within which permission in response to a request to speak may be granted. "[A] any regulatory scheme that grants broad discretion to a government decision-maker, or fails to place specific time limits on the decision making process, runs contrary to the Supreme Court's disapproval of 'similar discretionary provisions that enable the government to control speech' on the basis of the viewpoint expressed." *Kessler*, 167 F.Supp.2d at 489 (*quoting Sanjour v. Envtl. Prot. Agency*, 56 F.3d 85, 97 (D.C. Cir. 1995) (en banc) (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988)). In *Kessler*, this Court held that a police department policy that prohibited employees from speaking on "any information concerning the business of the department…unless authorized by some proper authority []" is unconstitutional due to the unlimited discretion and lack of time frame. *Id*. at 483, 489. Here, the *Conduct Unbecoming Policy* similarly sets **no standards** to guide the decision-making process, does not require an any explanation for a denial of permission to speak, and proposes no time frame for such a grant or denial. After the fact restrictions on discretion do not address the unconstitutional censoring power of the employer before speech occurs. *Id*. at 489. Further, the Department does not define the criteria for disrepute. SUF ¶ 87. The record clearly shows that the *Conduct Unbecoming Policy* gives the Department unlimited discretion and time to censor protected speech.

Thus, the *Conduct Unbecoming Policy*'s "lack of procedural safeguards tips the scale even more heavily in favor of [its] invalidation." *Kessler*, 167F.Supp.2d at 489.

iii. *The Conduct Unbecoming Policy is unconstitutionally vague*

It is a central tenet of constitutional law that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Further, it is well-settled that the prohibition against vagueness extends to administrative regulations affecting conditions of governmental employment as well as to penal statutes, for the former may be equally effective as a deterrent to the exercise of free speech as the latter. *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970); *see, Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969). In both contexts, the policies underlying the proscription against vagueness are applicable:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis, with all the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked'. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972) (Marshall, J.).

Bence v. Breier, 501 F.2d 1185, 1188 (7th Cir. 1974).

In *Bence*, the Seventh Circuit examined a policy nearly identical to the *Conduct Unbecoming Policy*.

> In determining whether the rule 'conduct unbecoming a member and detrimental to the service' conforms with the constitutionally-mandated 'rough idea of fairness,' it is necessary to examine whether the rule creates a standard of conduct which is capable of objective interpretation by those policemen who must abide by it, by those Departmental officials who must enforce it, and by any administrative or judicial tribunal which might review any disciplinary proceeding. *Bence v. Breier*, 357 F.Supp. 231 (E.D.Wis. 1973). On its face, the rule proscribes only conduct which is both 'unbecoming' and 'detrimental to the service.' **It is obvious, however, that any apparent limitation on the prohibited conduct through the use of these qualifying terms is illusory, for 'unbecoming' and 'detrimental to the service' have no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned**. Like beauty, their content exists only in the eye of the beholder. The subjectivity implicit in the

> language of the rule permits police officials to enforce the rule with unfettered discretion, and it is precisely this potential for arbitrary enforcement which is abhorrent to the Due Process Clause. Further, where, as here, a rule contains no ascertainable standards for enforcement, administrative and judicial review can be only a meaningless gesture. There is simply no benchmark against which the validity of the application of the rule in any particular disciplinary action can be tested. The language of the rule additionally offers no guidance to those conscientious members of the Department who seek to avoid the rule's proscription. Assuming that the Department (A) formulated the rule to apply to specific acts which it might constitutionally regulate, while (B) choosing not to regulate or to regulate in the remaining thirty prohibitions other acts which it might also constitutionally regulate, given the language of the rule, whether any particular act could be classified as (A) or (B) would be purely a matter of guesswork for policemen seeking to abide by the Department's rules. **Thus, the rule at issue conforms with the classic definition of vagueness.** See, Amsterdam, The Void-For-Vagueness Doctrine, 109 U.Pa.L.Rev. 67, 76 (1960).

Id. at 1190 (emphasis added).

Like the policy in *Bence*,[5] the *Conduct Unbecoming Policy* offers no criteria to determine what constitutes prohibited conduct. The terms 'unbecoming' and 'detrimental to the service' have no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned. Here, Plaintiff simply answered the reporter's questions regarding the pending arbitration and lawsuit by one of the Union's members. He had no way of knowing that by *speaking* in his capacity as a *Union President* regarding one of his *members* he would be violating a policy prohibiting "conduct unbecoming of an officer." Thus, the *Conduct Unbecoming Policy* is unconstitutionally vague on its face and as applied to Plaintiff.

[5] The policy prohibits: "Conduct unbecoming an officer and detrimental to the service." *Bence*, 501 F.2d 1185, fn 1 (7th Cir. 1974).

2. *The Official Business Policy is facially unconstitutional because it: (1) creates an impermissible prior restraint on speech; (2) gives unlimited discretion to the Chief of Police to grant or deny permission to speak and contains no time frame within which permission in response to a request to speak may be granted (3) is overbroad; and (4) is vague*

The *Official Business Policy* treats all "official business of the Department as confidential [,]" and prohibits employees from disseminating information concerning "Departmental policy or the evidential aspects of any criminal investigation" to the press or news media without prior approval of the Chief or Commanding Officer. SUF ¶ 35. The policy broadly prohibits employees from speaking to the press about anything remotely related to the Department without prior approval.

i. *The Official Business Policy is a prior restraint on speech*

This Court has already held that the language like that contained in the *Official Business Policy* constitutes an unconstitutional prior restraint on speech. In *Kessler,* Regulation 200.4 prohibited employees from divulging

> to any unauthorized person, in or out of the department, i.e. (one who does not have an official "need to know") any information concerning the **business of the department** and shall not talk for publication, be interviewed, make public speeches on police business or impart information relating **to the official business of the department unless authorized by some proper authority**.

Id. at 483 (emphasis added). This Court held: "The Police Rules at issue here clearly impose prior restraints on the speech of members of the Providence Police Department. … Regulation 200.4 prohibits members of the Police Department from divulging "any information concerning the business of the department ... *unless authorized by some proper authority.*" (emphasis added). *Id.* at 485.

Here, the Department's *Official Business Policy* prohibits speech on "Departmental policy" to the press and deems all "official business of the Department" as confidential. Like in Kessler,

> The Police Rules clearly require that Police Department employees seek advance permission to speak, as citizens, on matters of public concern. The Rules are not narrowly drawn; they require prior approval before an employee makes a public statement on any topic even remotely related to Police Department matters.

Id. at 487.

Further, like the defendants in *Kessler*, the Department, aside from some general references to maintaining standards of conduct, has failed to demonstrate that the Police Rules address *any potential harms,* or advance *any substantial government interest.* Rather, Defendants' argument focuses almost exclusively on the Policies as applied to the Plaintiff. By focusing on Plaintiff's particular conduct, Defendants virtually ignore the "balancing of interests" test articulated in *NTEU,* and thereby fail to carry their evidentiary burden. *Id.* at 488.

ii. *The Official Business Policy gives unlimited discretion and contains no time frame within which the Chief of Police may grant or deny permission to speak*

In *Kessler*, 167 F.Supp.2d at 489, this Court held that a policy that "sets no standards to guide the decision-making process, does not require any explanation for a denial of permission to speak, and proposes no time frame for such grant or denial" renders the policy unconstitutional. The *Official Business Policy* suffers from the same infirmity. Further, even if there are restrictions on the power to impose punitive sanctions *after the fact,* like the City of Providence's policies, "the Police Rules give the decision-maker virtually plenary power to censor protected speech before it occurs." *Id.*

iii. *The Official Business Policy is overbroad*[6]

Government regulations are unconstitutional under the overbreadth doctrine when "the enactment reaches a substantial amount of constitutionally-protected conduct." *Whiting v. Town of Westerly*, 942 F.2d 18, 21 (1st Cir. 1991). The *Official Business Policy* prohibits employees from speaking as private citizens about departmental policy with the press and media and speaking without authorization on official business of the Department. This restriction prohibits a substantial amount of permissible speech – anything that relates to Departmental policy made to the press or media. The Policy paints with an extremely broad brush; it prohibits potentially all speech even remotely related to the Department. In other words, the Policy prohibits a very substantial amount of otherwise permissible speech. The law in this area is clear:

> Where an ordinance is not narrowly drawn, or is "overbroad," the ordinance's very existence may inhibit or chill the free expression of speech protected by the First Amendment. For this reason, an overbroad ordinance may be struck down entirely even though, as applied, it may prohibit some forms of expression which are not constitutionally protected.

Firefighters, 26 F.Supp.2d at 357 (citing *Broadrick,* 413 U.S. at 611–12, 93 S.Ct. 2908).

In *Kessler*, this Court found a police policy that "prohibits speech involving 'any information concerning the … Department[]'" had a substantial impact on constitutionally protected speech that proved fatal. *Kessler,* 167 F.Supp.2d at 490. "Thus, while the Rules may also prohibit speech that is not constitutionally protected, their substantial impact on

[6] Defendants' argument that overbreadth is not before this court is misplaced. Plaintiff properly pled a claim for overbreadth relating to the Police Rules. The Complaint states that the language of the Police Rules is not clearly defined. Thus, Plaintiff has the opportunity to show the Police Rules prohibit a substantial amount of protected speech. Overbreadth does not need to be explicitly mentioned in a First Amendment complaint. *See Kempner v. Town of Greenwich,* 2007 WL 2154178, at *4 (D. Conn. 2007).

constitutionally protected speech is fatal, and they are void under the overbreadth doctrine." *Id.* at 490.

Similarly, in *Providence Firefighters Local 799 v. City of Providence*, 26 F.Supp.2d 350, 356 (D.R.I. 1998), this Court held that a rule prohibiting employees from speaking on "matters concerning the Department" is unconstitutionally overbroad.

Here, the *Official Business Policy* restricts a substantial amount of protected speech by prohibiting speech related to "official business of the Department" and "information concerning Departmental policy[.]" SUF ¶ 35. Like the policies in *Kessler* and *Local 799*, the *Official Business Policy* is unconstitutional.

iv. *The Official Business Policy is unconstitutionally vague*

For the same reasons the *Conduct Unbecoming Policy* is unconstitutionally vague, the *Official Business Policy* is also void for vagueness. The lack of criteria for what is prohibited speech under "official business of the Department" and "information concerning Departmental policy" presents the same threat of chilling protected speech.

3. *The Public Information Policy (1) creates an impermissible prior restraint on speech; (2) gives unlimited discretion to the Chief of Police to grant or deny permission to speak and contains no time frame within which permission in response to a request to speak may be granted; and (3) is overbroad*

The *Public Information Policy* prohibits the dissemination of "information" without the prior approval of Chief of Police or Public Information Officer ["PIO"]. Further, only the following employees may disseminate information: the Chief; the Deputy Chief; the Uniform Division Commander; Investigative Division Commander; Operations and Training Commander; Traffic/Special Services Commander; and Watch Commander. SUF ¶ 36.

i. *The Public Information Policy is prior restraint on speech*

While courts have found that police regulations designating an official spokesman to be a constitutional restraint on employee speech, the *Public Information Policy* does not merely regulate "official statements." *See Bates v. Mackay*, 321 F.Supp.2d 173, 182 (D. Mass. 2004). Rather, it prohibits the dissemination of any "information" shared by a member *in any capacity* without prior approval.

For the same reasons as the *Official Business Policy*, the *Public Information Policy* is unconstitutional on its face as a prior restraint on speech.

ii. *The Public Information Policy gives unlimited discretion and contains no time frame within which the Chief of Police may grant or deny permission to speak*

The *Public Information Policy* gives unlimited discretion to the Chief of Police to grant or deny permission to speak and contains no time frame within which permission in response to a request to speak may be granted. Like the *Official Business Policy*, the Public Information Policy lacks the procedural safeguards from unlimited discretion and lack of time frame, which tips the scale in favor if its invalidation.

iii. *The Public Information Policy is overboard*

Like the *Official Business Policy*, the *Public Information Policy* is overbroad by prohibiting a substantial amount of protected speech. This policy is even broader than the policies in *Kessler* and *Local 799* in that it prohibits the dissemination of any "information."

4. *The Police Related Matters Policy (1) creates an impermissible prior restraint on speech; (2) gives unlimited discretion to the Chief of Police to grant or deny permission to speak and contains no time frame within which permission in response to a request to speak may be granted; and (3) is overbroad*

Under the *Police Related Matters Policy*, "members are prohibited from disseminating information or granting an interview on police related matters without express approval of the Chief of Police or the PIO." SUF ¶ 37.

i. *The Police Related Matters Policy is a prior restraint on speech*

The court in *Kessler* noted that it could not imagine any sufficient justification for a policy that prohibited all speech related to a police department. *Kessler,* 167 F.Supp.2d at 488. The *Police Related Matters Policy* does just that – it prohibits members from "disseminating information or granting an interview on police related matters." SUF ¶ 37. This rule reaches into protected speech of employees made in their capacities as private citizens relating to any matter of the Department. Like the *Conduct Unbecoming Policy* and *Official Business Policy*, the *Police Related Matters Policy* is an unconstitutional prior restraint on employees' speech,

Defendants try, but fail, to distinguish the *Police Related Matters Policy* from the unconstitutional policy in *Local 799* that this Court struck down. [7] Instead of undertaking a facial

[7] *Providence Firefighters Local 799 v City of Providence*, 26 F.Supp.2d 350, 352, 357 (D.R.I. 1998) (court found the following department rules unconstitutional prior restraint:

> In accordance with the Rules and Regulations governing the Department this General Order is issued to serve notice to all members that only the Chief of Department has the authority to discuss for publication, *matters concerning the Department*. This general order is also to serve notice that only the Chief of Department may deliver any address, lecture or speech on Providence Fire Department matters. Members shall not participate in the above stated activities without the approval of the Chief of Department. Failure to comply with these stated Rules and Regulations of the Department shall result in the preferral of Departmental Charges.

That order augmented the already-existing Rules and Regulations that provided, in part:

analysis, the Defendants attempt to distinguish the *Police Related Matters Policy* by focusing on the content of the Plaintiff's speech. Def. MSJ at 22. However, as outlined above, a facial analysis of the *Police Related Matters Policy* shows that it is impermissibly broad and nearly identical to the facially unconstitutional policy in *Local 799*.

ii. *The Police Related Matters Policy gives unlimited discretion and contains no time frame within which the Chief of Police may grant or deny permission to speak*

Like the previous policies, the *Police Related Matters Policy* lacks the procedural safeguards to protect from unlimited discretion and contains no time frame within which permission in response to a request to speak may be granted. Like the other policies, the *Police Related Matters Policy* is unconstitutional for this reason.

iii. *The Police Related Matters Policy is overbroad*

Similar to the policies in *Kessler* and *Local 799*, the *Police Related Matters Policy* is unconstitutional on its face because of the "clumsy and overbroad restrictions on all speech about the [] department." *Local 799*, 26 F.Supp.2d at 356.

Like the *Official Business Policy*, the *Police Related Matters Policy* prohibits a substantial amount of permissible speech – anything that relates to a police matter. Thus, like the *Official Business Policy*, the *Police Related Matters Policy* is unconstitutionally overbroad.

> 23. Members shall not discuss for publication matters *concerning the Department* without the approval of the Chief of Department.
>
> 24. Members shall not deliver any address, lecture or speech on *Providence Fire Department matters* without the approval of the Chief of the Department. Request for such approval shall be forwarded through official channels.

(emphasis added).

B. *Defendants' Remaining Arguments Regarding The Facial Constitutionality of their Policies Lack Merit*

Defendants misstate the threshold inquiry regarding the facial constitutionality of its policies as "whether [Plaintiff's] speech may be characterized as that regarding a matter of public concern." Def. MSJ at 39. However, in analyzing the facial constitutionality of a government's restriction on speech, "a plaintiff's individual circumstances are largely irrelevant." *Kessler*, 167 F.Supp.2d at 488. "The relevant question [] is whether the government's interest in regulating speech outweighs the interests of both 'present and future employees in a broad range of present and future expression,' and their 'potential audiences.'" *Id*. (*quoting NTEU*, 513 U.S. at 468). With regard to each policy above, Defendants fail to offer legitimate interests.

In Defendants' analysis of *Kessler*, they draw a non-existent distinction between their policies and the Providence Police Department's policies. Def. MSJ at 30. Specifically, Defendants erroneously claim that the express language of the Providence rules restricts an officer from speaking as to "any matters," not just "police related or Departmental matters," and further restrict members concerning statements of "public concern." *Id*. In fact, the relevant Providence Department rules do not apply to "any matter;" rather, the regulations provide that employees should not speak on "police business" or "official business of the department[.]" This Court found those rules facially unconstitutional. *Kessler*, 167 F.Supp.2d at 483, 490. The same result should obtain here.

Defendants advance another flawed argument by comparing their policies with those in *Kessler* – because the Police Rules do not *explicitly* prohibit speech on matters of public concern, Defendants assert that matters of public concern are outside the scope of the prohibited speech. *Id*. at 34. Common sense, along with this Court's precedent, does not require that a policy

explicitly include "matters of public concern" to find that a policy reaches into matters of public concern. *See Local 799*, 26 F.Supp.2d at 352.

Defendants further suggest that the Police Rules are merely guidelines rather than rules. Def. MSJ at 31-32. Defendants' choice of label is largely irrelevant; it is an undisputed fact that Plaintiff was disciplined pursuant to the five policies listed in the Summary Punishment letter. SUF ¶ 45. Further, there is nothing on the face of the policies that indicate they are merely guidelines.

As noted above, Defendants fail to assert legitimate government concerns or demonstrate harms that the Police Rules seek to prevent. In *Local 799*, the fire department argued that it "must speak with one voice; that the department is a paramilitary organization; and that said speech would compromise the 'efficiency, integrity and discipline' of the department." *Local 799*, 26 F.Supp.2d at 356. However, the court in *Local 799* held none of the Defendants' "assertions amount[] to an ounce on the *NTEU* scale." *Id.* at 356. Here, Defendants have offered Department's interests to "maintain control, efficiency and consistency in the conduct of [] officers, and the Department's communications with and the release of information to the public, press and news media." Def. MSJ at 26. Defendants' interests are nearly identical to those in *Local 799* and are equally insufficient in articulating a real harm that the Police Rules address in a direct and material way. Because Defendants lack a basis or argument for the blanket censorship contained in the Police Rules, their motion must be denied.

As Defendants admit, "[l]imiting the [] police officers from speaking on matters of 'public concern,' is in direct contravention of the well-established First Amendment protections." Def. MSJ at 30. This is precisely what the Police Rules do. There are no exceptions in the Police Rules that protect matters of public concern. The plain language of the

Police Related Matters Policy prohibits employees from speaking on any police related matter. A reasonable jury could interpret the Police Rules as prohibiting speech on issues including staffing, taxes, and finances – all matters of public concern.

The cases Defendants cite are distinguishable from the present facts and instead, support Plaintiff's claim. In *Bates v. Mackay*, 321 F.Supp.2d 173, 181 (D. Mass. 2004), the court found a policy designating the Chief of Police as the official spokesman for the department on all police matters was not facially unconstitutional. The court noted that the "requirement that the Chief of Police act as the 'official spokesman' for the police department does not impinge upon the right of police officers to speak *unofficially*." *Id*. at 182 (emphasis in original). Here, however, #100.04 and #520.02 do limit "unofficial" speech. The *Police Related Matters Policy* prohibits all speech by employees, speaking officially or unofficially, relating to police related matters without prior approval. The Police Rules reach beyond the members' speech pursuant to official duties and prohibit speech made in their capacity as private citizens.

Likewise, Defendants' citation to *Kotwica v. Tuscon*, 801 F.2d 1182, 1184 (9th Cir. 1986) is misplaced because there, plaintiff was disciplined for speech made pursuant to official police duties. There is no evidence to suggest that the Police Rules here apply only to speech made pursuant to official duties. On the contrary, the language of the Police Rules is not so limited.

II. SUMMARY JUDGMENT SHOULD ISSUE FOR PLAINTIFF, NOT DEFENDANTS, BECAUSE PLAINTIFF'S FIRST AMENDMENT RIGHTS WERE CLEARLY VIOLATED

Plaintiff's First Amendment rights were violated by the Department's application of all five policies. The undisputed facts show that Plaintiff's statements are protected by the First Amendment under *Garcetti*. "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." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). First, it is undisputed that Plaintiff's statements to the media were made as a citizen, not in his official capacity as a police officer. SUF ¶ 68. Second, the statements clearly involved a matter of public concern, i.e. corruption in the police department. SUF ¶ 70. Third, Defendants have offered no justification that the speech restrictions are necessary to protect the "actual operation" of the Department. *Moonin v. Tice*, 868 F.3d 853, 861 (9th Cir. 2017) (*quoting Pickering v. Board of Education*, 391 U.S. 563, 571 (1968)).

A. The Undisputed Facts Show That Plaintiff's Speech Was Made as a Citizen, Not Pursuant to Official Duties

An employee speaks as a private citizen when his speech is not "ordinarily within the scope of an employee's duties," even if his speech relates to those duties. *Lane*, 134 S.Ct. at 2397. It is undisputed that the statements were not made pursuant to official duties. SUF ¶ 68. Plaintiff's official duties do not include speaking to the media. *See Public Information Policy*; SUF ¶ 36. Plaintiff's position was Detective at the time of his interview with Ms. Tempera. SUF ¶ 22. Only the Deputy Chief is designated as the Department's Public Information Officer (PIO). Subject to approval from the PIO or Police Chief, information may be disseminated by the: Uniform Division Commander; Investigative Division Commander; Operations and Training Commander; Traffic/Special Services Commander; and Watch Commander. A Detective is not authorized to speak to the media. Further, it is undisputed that Plaintiff's statements were made off-duty. SUF ¶ 67, 69. Plaintiff was getting out of the shower at his personal residence when he spoke with Ms. Tempera on the phone. SUF ¶ 22. At no point did Plaintiff assert that he was speaking on behalf of the Department. Defendants erroneously argue that Plaintiff's speech is

unprotected because it was made pursuant to his official duties by way of relaying information he obtained from work. Def. MSJ at 15, 18, 52.

Defendants' argument misses the point – that Plaintiff's speech concerns information relating to his official duties is not dispositive on whether the speech was made pursuant to his official duties.[8] "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech." *Lane*, 137 S.Ct. at 2379. At the request of Catamero's legal counsel, Plaintiff called Ms. Tempera from his personal residence to discuss Catamero's lawsuit. SUF ¶¶ 22, 23.

Defendants mistakenly claim that Plaintiff's speech was unprotected because it concerned a matter of personal interest. Def. MSJ at 40. However, Defendants do not provide any evidence to support the argument. Plaintiff's speech was clearly concerned with the corrupt practice of issuing tickets by way of favoritism and Catamero's public lawsuit. Additionally, Defendants' argument that Plaintiff's speech concerns a personal grievance is without merit for the same reasons. Def. MSJ at 16.

The publication of Plaintiff's statements in ProJo clearly evidence a matter of public concern. Courts have recognized the public value in permitting government employees to voice "informed opinions as to the operations of the public employers," and the resulting harm to public discourse when such informed opinions are suppressed. *Firenze*, 993 F.Supp.2d at 52 (*quoting City of San Diego, Cal. v. Roe*, 543 U.S. 77, 82 (2004)).

[8] Defendants, at various points throughout their Motion for Summary Judgment, argue that Plaintiff did not make comments to ProJo pursuant to his duties as President of the International Brotherhood of Police Officers, Local 307. Even if true, the argument is irrelevant. Rather, the relevant question is whether he made statements to Ms. Tempera as a police officer pursuant to his official duties. The record is clear that he did not.

Defendants offer no evidence that Plaintiff's speech was made pursuant to his official duties. Further, the Summary Punishment Letter shows that Defendants did not care that Plaintiff spoke as a private citizen:

> [Y]ou maintain that you spoke with Ms. Tempera in your capacity as President of the [Union] and not in your capacity as Detective James Brady. However, *I have determined that your alleged distinction is not applicable in this instance. And it does not exempt you from the departmental rules and regulations*.

SUF ¶ 81; emphasis added.

Defendants cannot prove, as a matter of law, that Plaintiff was speaking pursuant to his official duties. On the contrary, the undisputed facts show that he was speaking as a private citizen.

B. ***Plaintiff's Speech Involved A Matter of Public Concern***

It is undisputed that Plaintiff's statement to the media involved the Department's unwritten (and illegal) rule that certain people are not subject to the laws. Although Plaintiff never directly states his belief for Officer Catemaro's discharge, Plaintiff's statements were interpreted by ProJo to imply that Officer Catemaro was terminated because he did not comply with an unwritten (and illegal) policy. In fact, it is evident from the Summary Punishment Letter that Chief Tamburini was angry at the substance of Plaintiff's speech accusing the department of misconduct. The Chief writes that:

> It is evident that your comments to Ms. Tempera were made in order to bring this department in to disrepute.
>
> ***
>
> You made this statement despite your first-hand knowledge of the statements that Mr. Catamero made to you and Lt. Guilmette, which ultimately lead [sic] to him being deemed unfit for duty. You chose however, to feign ignorance as to those statements and opine that Mr. Catamero was separated from service because others in the department did not like him.

SUF ¶ 83.

Whether the restricted speech touches upon a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48. Matters that affect the "public health and safety are clearly matters of public concern." *Providence Firefighters Local 799 v. City of Providence*, 26 F.Supp.2d 350, 356 (D.R.I. 1998). Speech regarding the competency of the police force is "surely a matter of great public concern." *Tice*, 868 F.3d at 864 (*quoting Robinson v. York*, 566 F.3d 817, 822 (9th Cir. 2009)). This Court has recognized that "an employee's First Amendment interest is entitled to greater weight where he is acting as a whistleblower in exposing government corruption." *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 53 (1st Cir. 2003) (*citing Conaway v. Smith*, 853 F.2d 789, 797 (10th Cir. 1988)); *see O'Connor v. Steeves*, 994 F.2d 905, 915 ("O'Connor's disclosures concerned alleged abuse of public office on the part of an elected official, a matter traditionally occupying the highest rung of the hierarchy of First Amendment values.").

Plaintiff's communications with Ms. Tempera concerned the termination of Officer Catamero and an unwritten favoritism policy. The ProJo article on September 15, 2016 provides:

> Detective James Brady, *the union president*, says high-ranking officers 'didn't like the way [Catamero] did things,' while working the detail. Namely, he would write traffic tickets for 'anybody, no matter who they were.' And despite an 'unwritten rule' where officers were encouraged to write more tickets that could be processed through Johnston Municipal Court than through the Rhode Island Traffic Tribunal he refused – continuing to work by the book, Brady said. 'He is a straightforward, all-business kind of guy,' said Brady in an interview.

SUF ¶ 26. Emphasis added. Plaintiff's speech clearly concerns information relating to an officer's termination for failing to abide by a corrupt Department policy. Plaintiff's comment to

Ms. Tempera is fundamentally concerned with the competency of the Department, which is a matter of great public concern. *Tice*, 868 F.3d at 864. "The diligence and lawfulness of a police department's activities are matters of great interest to the public." *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 52 (1st Cir. 2003). *See Branton v. City of Dallas,* 272 F.3d 730, 740 (5th Cir.2001) ("Exposure of official misconduct, especially within the police department, is generally of great consequence to the public."). The fact that ProJo was interested in publishing the story is further evidence of the public's interest.

Defendants erroneously assert that Plaintiff's comments to Ms. Tempera were not a matter of public concern because they involved a "confidential internal Departmental personnel matter involving the separation of service of Mr. Catamero by Chief Tamburini." Def. MSJ at 14. This is a misrepresentation of the Plaintiff's statements and is unsupported by the record. Simply put, Plaintiff did not comment on any confidential personnel matter relating to Mr. Catamero on September 15, 2016. At the time of Plaintiff's statements to Ms. Tempera, Mr. Catamero had already been separated from service and had filed a lawsuit for wrongful termination. SUF ¶ 41. At all relevant times, Mr. Catamero's termination and lawsuit were public knowledge. SUF ¶ 20. Finally, Plaintiff's statements concerning an "unwritten policy" did not relate to confidential personnel info.

No reasonable juror could conclude that Plaintiff spoke on a matter of personal interest rather than public concern. Accordingly, Plaintiff's claim must be analyzed under the *NTEU* balancing test.

C. ***Under the* NTEU *Balancing Test, Plaintiff's First Amendment Speech Outweighs Government Interest***

When the Government imposes a prior restraint of speech prohibiting the employee from ever uttering the speech, the Court applies the test set out in *NTEU*. *Firenze*, 993 F.Supp.2d at 54. The *NTEU* test balances "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression [against the] expression's 'necessary impact on the actual operation' of the Government[.]" *NTEU*, 513 U.S. at 455. Additionally, the *NTEU* test requires a showing by the Government that the restricted speech would have had a necessary impact on the actual operation of government, meaning 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." *Firenze*, 993 F.Supp.2d at 54 (*quoting Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734, 739 (E.D. Mich. 2003)).

Here, Defendants fail to meet their burden of proving that the Department's interests in its broad censorship policies outweigh the "combined interest of *all* employees whose speech is restricted by the rule *plus* all members of the public who would have an interest in hearing the restricted speech." *Firefighters*, 246 F.Supp.2d at 740 (emphasis in original).

Defendants allege Plaintiff's protected speech adversely affected: (1) discipline by Chief of Police and the higher-ranking officers; (2) harmony among co-workers; (3) working relationships in the department; (4) operations and efficiency of the Department; and (5) Plaintiff's own duties as a Detective with the subsequent internal investigation. Def. MSJ at 42-43. However, Defendants offer no evidence to support its claim any of the foregoing interests were remotely affected. On the contrary, the expansive Police Rules as applied to the Plaintiff do not support whatever legitimate interests the Department may have. While Defendants have

alleged that Plaintiff's comments "impeded the operations of the JPD," the lack of any evidentiary support belies the claim. Def. MSJ at 23. Further, Defendants have failed to produce a single affidavit to support any of their alleged interests.

The facts here are nearly identical to *Kessler* and *Local 799*. In *Kessler*, this court found that a police department policy that prohibited employees from divulging "any information concerning the business of the department" violative of the First Amendment, absent a showing by Defendants of a substantial interest. *Kessler*, 167 F.Supp.2d at 487. Similarly, in *Local 799*, this court found a fire department policy that prohibited members from "discuss[ing] for publication matters concerning the Department without [prior approval]" was outweighed by First Amendment interests. *Local 799*, 26 F.Supp.2d at 357. Further, the fire department's interest in "speak[ing] with one voice; that the department is a paramilitary organization; and that said speech would compromise the 'efficiency, integrity and discipline' of the department'" would not "amount to an ounce on the NTEU scale." *Id*. at 356. Here, the Department's interests are similarly generalized and lack the weight to permit the Police Rule's sweeping censorship.

It is undisputed that Plaintiff was disciplined pursuant to Police Rules that prohibited protected speech. Because Defendants have provided no evidence that would outweigh Plaintiff and the public's interest in free expression, the Police Rules must fail the *NTEU* balancing test.. Simply put, the absence of any concrete evidence of actual disruption of the department caused by Plaintiff's speech cannot support a judgment as a matter of law for Defendants. *Wagner*, 241 F.Supp.2d at 93-94.

D. *Defendants' Application of the Internal Investigation Policy To Punish Plaintiff For His Speech Violates the First Amendment*

Plaintiff was disciplined, in part, for a violating the Internal Investigation Policy. That Policy prohibits members of the Johnston Police Department from discussing any on-going internal investigation with the press/media. Plaintiff informed the ProJo that he was under investigation for exercising his First Amendment rights. There can be no doubt that this speech (informing the media of a constitutional violation) constitutes a matter of public concern. Defendants used the Internal Investigation Policy to punish Plaintiff for exercising his First Amendment rights. Defendants have offered no evidence that it was necessary for them to punish Plaintiff for exercising his First Amendment rights. Because Plaintiff's statements to the media regarding the internal investigation were made in his capacity as a private citizen and involved matter of public concern, Defendants have violated his constitutional rights by disciplining him for his speech.

III. CHIEF TAMBURINI DOES NOT HAVE QUALIFIED IMMUNITY BECAUSE HE VIOLATED A CLEARLY ESTABLISHED FIRST AMENDMENT RIGHT[9]

This Circuit takes the view that qualified immunity is available to protect government officials who engage in unconstitutional conduct so long as that "conduct does not violate clearly established … constitutional rights of which a reasonable person would have known." *Wagner v. City of Holyoke*, 404 F.3d 504, 508-09 (1st Cir. 2005) (*quoting Malley v Briggs*, 475 U.S. 335,

[9] Defendants have not asserted that either the Town or the Police Department is entitled to qualified immunity. In fact, Defendants assert that Tamburini's actions were "authorized by the Town Charter and as retained under the management rights provisions of the CBA." Def. MSJ at 23. Thus, neither the Town nor the Police Department is entitled to immunity. See *Owen v. City of Indep., Mo.*, 445 U.S. 622, 657 (1980) and *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 701 (1978).

341 (1986)). An "[i]mmunity exists even where the abstract 'right' invoked by the plaintiff is well-established, so long as the official could reasonably have believed 'on the facts' that no violation existed. *Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 70 (1st Cir. 2002). The threshold questions are (1) whether Plaintiff's right was "clearly established" at the time of the violation and (2) whether Chief Tamburini could reasonably have believed no violation existed.

"A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (*quoting Reichle v. Howards*, 566 U.S. 658, 664 (2012). The First Circuit held that when considering whether a right was clearly established, the court must analyze the specific context of the case, rather than broad formulations, e.g., a public employer may not penalize an employee for speech about a matter of public concern. *Jordan v. Carter*, 428 F.3d 67, 74 (1st Cir. 2005) (*citing Suboh v. Dist. Attorney's Office of Suffolk Dist.*, 289 F.3d 81, 93 (1st Cir. 2002)). The court in *Jordan v. Carter* held:

> [I]f plaintiffs' criticism consisted of serious expressions of concern, voiced in an appropriate manner, about the effect of their supervisors' poor performance on public safety or other public matters, and [Defendants'] retaliation was primarily aimed at silencing their criticism for his own advantage, precedent would have clearly established that the balance of interests tipped decisively in plaintiff's favor.

Id. at 75. The record shows that Officer Tamburini disciplined Plaintiff for speaking with the press in his capacity as a private citizen on a matter of public concern, a corrupt police practice. As outlined above, Plaintiff's speech was protected and Defendants offer no interest in censoring Plaintiff's speech to ProJo. Thus, the balancing of interests shows a clearly established right at the time of Plaintiff's discipline.

In *Moonin v Tice*, 868 F.3d 853, 868 (9th Cir. 2017), it was held that a police department was on notice via Supreme Court precedent "that a policy precluding all sorts of speech by

officers, to whomever communicated, about [a] K9 program was subject to limits imposed by the First Amendment."[10] In *Tice*, a department policy was emailed to all K9 officers that prohibited any communications with non-departmental entities on matters related to the Nevada Highway Patrol K9 program. *Id*. at 858-859. The court held that the policy violated a clearly established First Amendment right based on legal precedent in *Pickering* and *NTEU*. *Id*. at 868. Similarly, Plaintiff was disciplined under Police Rules that prohibited speaking on "police related matters without expressed approval of the Chief of Police or the PIO." SUF ¶ 37. The law is clear "that a policy prohibiting public discussion of matters of public concern by employees of a particular government program, without a countervailing showing of substantial workplace disruption, [is] much too broad to be constitutional." *Id*. at 872. Defendants provide no evidence of a workplace disruption. The record shows a violation of a clearly established First Amendment right.

The First Circuit held in *Wagner* that a superior officer could assert qualified immunity when he had a reasonable belief to enforce discipline regardless of the content of speech at issue. *Wagner*, 404 F.3d at 508. Here, Officer Tamburini did not have a reasonable basis for disciplining Plaintiff and cannot assert qualified immunity. Plaintiff's speech did not concern confidential Department information nor present any harm to an ongoing Department investigation. Rather, Officer Tamburini's discipline clearly violated protected speech – Plaintiff was speaking to the press on a matter of public concern in his capacity as a private citizen. In contrast, Officer Wagner was disciplined for disclosing police misconduct to newspapers using confidential material. *Wagner*, 404 F.3d at 508. Further, Officer Wagner's broad range of complaints included unprotected and antagonistic speech. *Id*. at 509. The court found that

[10] *See also Brammer-Hoelter v. Twin Peaks Charter Acad*., 602 F.3d 1175, 1175, 1187 (10th Cir. 2010) (school administrator denied qualified immunity who imposed on teachers a broad ban on the discussion of all 'school matters' with anyone)

Wagner's conduct would lead a reasonable superior officer to believe that he was entitled to discipline. Here, however, Chief Tamburini's discipline was an exercise of unconstitutionally broad censorship that any reasonable officer would understand as a violation of the First Amendment.

Based on the clear legal precedent, Chief Tamburini had to have been aware that his Police Rules violated the First Amendment. In fact, the ACLU specifically brought the unconstitutionality of the Police Rules to the forefront. SUF ¶ 75. Steven Brown, executive director of the Rhode Island Affiliate of the American Civil Liberties Union, was quoted in ProJo stating that prohibiting an employee from speaking to the media "raises very basic and serious First Amendment concerns," and that "[p]olice officers do not completely waive their First Amendment rights, especially if they are speaking in a capacity other than as an employee[.]" SUF ¶ 75.

Plaintiff submits that a jury could easily (and likely) conclude that a reasonable person should have known that discipline for speech made on a matter of public concern by an employee in his capacity as a private citizen violates the First Amendment. Accordingly, Defendants' request for Summary Judgment on Qualified Immunity must be denied.

Conclusion

Based on the foregoing, the Defendants have failed to prove that they are entitled to judgment as a matter of law on the constitutionality of the Police Rules and the violation of Plaintiff's First Amendment rights. Most significantly, Defendants have failed to demonstrate any legitimate interests in maintaining broad censorship over employees' speech. Thus, this Court should deny the Motion for Summary Judgment and issue summary judgment for Plaintiff.

Respectfully submitted,

JAMES BRADY,

By his attorney,

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CERTIFICATION

I hereby certify that I electronically filed the within document on February 7, 2020. The documents are available for viewing and downloading from the Court's Electronic Case Filing system.

/s/ Elizabeth Wiens