STATE OF MINNESOTA COUNTY OF STEARNS

ADMINISTRATIVE HEARING SEVENTH JUDICIAL DISTRICT

City of St. Cloud,

Plaintiff,

vs. HEARING OFFICER'S DECISION

S[redacted] A[redacted] E[redacted],

Defendant.

This matter was heard on June 24, 2010, with R[redacted] C[redacted], Assistant St. Cloud City Attorney, appearing for the City of St. Cloud; and Ryan Garry, Attorney at Law, appearing with and on behalf of Mr. S[redacted] E[redacted]. The undersigned Hearing Officer received testimony and exhibits regarding this matter at the hearing held at the Lake George facility in St. Cloud, MN. Mr. Garry was allowed until July 16, 2010, to submit additional information and Ms. C[redacted] was allowed until August 6, 2010, to submit her responsive brief. Counsel for both parties were timely in their submissions, and their submissions, the exhibits, the testimony, and the law have been considered in this decision. Based on the testimony and all the evidence and arguments presented, this Hearing Officer determines the following:

FINDINGS OF FACT

1. The parties stipulated that S[redacted] A. E[redacted] (hereinafter "Mr. E[redacted]") is not a resident of the City of St. Cloud. However, on or about December 8, 2009, Mr. E[redacted] put together a packet of approximately ten offensive cartoons he printed from the internet that depicted his views of the Muslim faith. Mr. E[redacted] then drove to various locations within the City of St. Cloud and posted approximately ten of these packets. The parties have stipulated that Mr. E[redacted] did this. Mr. E[redacted] was interviewed in his home in December 2009 when he spoke to Officer T[redacted] H[redacted] of the St. Cloud Police Department and was fully cooperative. See Exhibits 4 and 6.

2. The parties agreed at the hearing that this Hearing Officer had jurisdiction over this matter and that the materials posted by Mr. E[redacted] may be considered "posters" for the purposes of St. Cloud City Ordinance 600.05 at two specified locations, namely, a

light pole in the 10 Block of 2nd Avenue NE, St. Cloud, MN and a utility pole in the 300 Block of 5th Avenue South, St. Cloud, MN. See Exhibits 1 and 6. There is no dispute, Mr. E[redacted] posted the packets at these locations.

3. As part of his cooperation with law enforcement, Mr. E[redacted] agreed during his interview that he would travel to the locations he had posted the packets and take any down he found were still posted. Mr. E[redacted] informed Officer H[redacted] that he did not know posting these items were illegal. Mr. E[redacted] also told Officer H[redacted] that he did not have a problem with Somalis, he had a problem with the Muslim religion overall.

4. On January 22, 2010, Officer T[redacted] H[redacted] issued a citation for two of the violations Mr. E[redacted] admitted. See Exhibit 1. Some unknown third party checked the box on Exhibit 1 increasing the violations to "major violations", due to the content of the posters. The St. Cloud City Attorney's office agreed to dismiss the "major violation" at the hearing. Based on Exhibit 1, there is no question that the "major violation" was based upon the content contained in the posters. Due to the dismissal of the "major violation", what led to the "major violation" is not considered by this Hearing Officer in this decision.

5. The parties stipulated and agreed at the hearing that St. Cloud City Ordinance 600.05,subd. 3, is a "content neutral" ordinance on its face, as required by the United States Constitution. However, the analysis of Ordinance §600.05, subd. 3, must go deeper, because Mr. E[redacted] has challenged the ordinance based on constitutional grounds as illegally restricting his right to free speech.

6. The overall question in this analysis is whether the ordinance, while content neutral, is narrowly tailored to serve an important governmental interest or whether it is an outright ban on written materials in a traditionally important public forum.

7. At the hearing, Mr. E[redacted] demonstrated that the Ordinance at issue had never been utilized in the past to prosecute or ticket anyone for posting prohibited items on telephone poles or other places barred by the statute, including lost kitten signs, garage sale signs, realtor signs, and other postings and displays without a prior "cease and desist" warning letter. In addition, Mr. E[redacted] demonstrated that on the rare occasions where the City did pursue a fine against someone for violating the Ordinance, the violator had always received a written warning ahead of time. Any violation was only cited after the cease and desist letter. There have been only a few examples of this in the last decade. Mr. E[redacted] argued that the City of St. Cloud was

selectively prosecuting him in an inappropriate and illegal way. There was no dispute that the City has been littered by at least a thousand prohibited postings over the last decade that were not cited without a prior cease and desist letter. Mr. E[redacted] argues these facts demonstrate discriminatory enforcement of the Ordinance overall.

8. There is no question that after Mr. E[redacted] met with Officer H[redacted] and admitted to posting the packets, that both the Benton County Attorney's office and Stearns County Attorney's office declined to prosecute Mr. E[redacted] criminally on the grounds that he had exercised his freedom of speech and that a criminal prosecution would likely be unsuccessful.

9. At issue is whether Mr. E[redacted] exercised a protected right to free speech in a protected manner AND whether he has been selectively singled out for prosecution.

10. In pertinent part, St. Cloud City Ordinance §600.05 states in subd. 3:

> Bill Posting. To place or cause to be placed any bills, advertisements, posters, signs, notices or advertising matter of any kind on any tree, telephone, or light pole, post or fixture in the streets or public ways of the City, or to place or post any such bills, advertisements, or posters on any building, fence or property adjacent to such streets or public places, without the consent of the owner or person in control of such buildings or property; provided that such bills or advertisements may be removed by any officer of the City or the owner of such property without notice to the person posting or placing such bills or advertisements.

11. After Mr. E[redacted] posted the packets, there was a tremendous outcry from the public. The City of St. Cloud subsequently held a "town hall meeting" to discuss the matter, whereby the St. Cloud Mayor, Police Chief of St. Cloud, and the City Attorney's office expressed viewpoints on the "prosecution" and voiced their opinions about the postings by Mr. E[redacted].

12. It is undisputed that the St. Cloud City Ordinance would not prevent Mr. E[redacted] from walking through the City of St. Cloud and handing out a packet to people that willingly accept them. Mr. E[redacted] would not have been cited with this violation if he had talked to property owners and received permission prior to posting packets on private property. Mr. E[redacted] would not have been cited had he chosen to e-mail the

packets to friends or to anyone else he knows.

13. Mr. E[redacted] claims because the City chose this case to "prosecute" him, it is the public outcry over the content of the posting that led to this prosecution (which is actually an ordinance violation citation). This is not a criminal prosecution. It is undisputed that the City has a legitimate interest in protecting the aesthetic beauty of the City itself by preventing littering, traffic safety and the ambiance of the city. See Exhibits 10 and 11. There is no question that the government has a legitimate interest in protecting public health and safety. See e.g., Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 249 (1919). Furthermore, it is a long established principle that the First Amendment does not guarantee an absolute right by anyone to express their views at any time at any place and in any way that they want. See, e.g., Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640, 647, 101 S. Ct. 2559, 2563 (1981).

14. In the case at hand, it is disturbing to this Hearing Officer that the ordinance has never been used to cite anyone unless those individuals or businesses were given prior notice and that no one has been cited until a violation occurred after receipt of a cease and desist letter. This is also called a "correction order." See Exhibit 10. It is undisputed Mr. E[redacted] was not provided such a notice and order. However, "prosecutorial discretion" allows some selectivity in deciding whom to cite by the St. Cloud City Attorney's office.

15. St. Cloud City Ordinance §600:05, subd. 3, is narrowly tailored to serve a substantial government interest in promoting traffic safety and the aesthetic enhancement of the City. When signs are posted in the streets or public ways of the City, drivers can be distracted, which can create a risk for motor vehicle accidents. See, e.g., State v. Dahl, 676 N.W.2d 305, 309 (Minn. App. 2004). The City unquestionably has a substantial government interest in keeping its streets and public ways clear from being littered with postings, whether the postings contain offensive material, non-offensive material, or are simply a nuisance.

16. From a constitutional standpoint, St. Cloud City Ordinance §600:05, subd. 3, leaves open ample alternative channels of constitutionally protected free speech communication by allowing individuals to hand out pamphlets or poster items anywhere that is not expressly prohibited by the ordinance itself. There is no question that ample alternative channels of communication exist that are not barred by the ordinance. So long as the ordinance does not foreclose a particular means of communication, the constitutional requirement of narrow tailoring is satisfied. In

addition, the St. Cloud City Ordinance at issue promotes a substantial government interest that would not be achieved less effectively absent the regulation. See Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S. Ct. 2746, 2758 (1989).

17. Mr. E[redacted] has made the contention that the St. Cloud City Ordinance 600:05 is impermissibly void for vagueness. Vagueness in the eyes of constitutionality is judged in light of the conduct that is charged under the ordinance. See e.g., City of Mankato v. Fetchenhier, 363 N.W.2d 76, 78 (Minn. App. 1985). A person challenging an ordinance must show that the ordinance lacks specificity as it relates to his or her own behavior rather than some hypothetical situation. See Ruzic v. Comm. of Public Safety, 455 N.W.2d 89, 92 (Minn. App. 1990). There appears to be a contention by Mr. E[redacted] that he did not know that the City had an ordinance that prevented individuals from posting materials in the manner in which he did. However, not knowing and not understanding are very different concepts from vagueness. If Mr. E[redacted] had researched St. Cloud City Ordinances ahead of time, he would have realized that his conduct was prohibited. It was his obligation to do so. The ordinance is not vague. Posting materials in the manner Mr. E[redacted] did is explicitly prohibited.

18. Freedom of speech is protected under the ordinance. However, a person cannot violate the law in doing so. A person cannot take a million pamphlets complaining about a governmental figure and drop them out of an airplane within the City of St. Cloud, thereby littering the city. While Mr. E[redacted] has the right to free speech, he cannot commit a crime or ordinance violation by doing so. Mr. E[redacted] unquestionably violated the ordinance in this case.

19. Next, specifically analyzing whether Mr. E[redacted] has been prosecuted in an illegally discriminatory manner due to the conduct of the posting: The equal protection clause of the 14th Amendment of the United States Constitution prohibits intentional, discriminatory enforcement of municipal ordinances such as the one at issue here. See e.g., State v. Vadnais, 295 Minn. 17, 19 (1972). Criminal prosecutions are presumed to have been undertaken in good faith and in a non-discriminatory manner. See, e.g., United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978). A defendant must show that other persons that are similarly situated have not generally been proceeded against because of the type of conduct forming the basis of the charge against him, therefore, demonstrating that he has been singled out. Further, he must show that the governmental discriminatory selection of him has been invidious or in bad faith. See also, State v. Hyland, 431 N.W.2d 868, 872-73 (Minn. App. 1988). A defendant must prove discriminatory enforcement by a clear preponderance of the

evidence. See Hyland, 431 N.W.2d 873.

20. In the case at hand, Mr. E[redacted] appears to have demonstrated that no one else that has posted something on a light pole or utility pole has been prosecuted or cited with this ordinance violation that has not first received a warning about it.

21. In State v. Russell, 343 N.W.2d 36 (Minn. 1984), the Minnesota Supreme Court stated that a defendant bears a heavy burden of establishing at least on a prima facie basis that selective discriminatory prosecution has occurred. State v. Russell defined selective prosecution as:

(1) demonstrating that while others similarly situated have not generally been proceeded against because of the conduct of the type forming the basis for the charge against the defendant, the defendant has been singled out for prosecution; and

(2) that the government's discriminatory selection of him was invidious or in bad faith based upon impermissible considerations such as the defendant's exercise of a constitutional right.

While the City of St. Cloud correctly points out that Mr. E[redacted]'s citation was because law enforcement was contacted due to his posters, this Hearing Officer must grudgingly find that it was the content of the postings that led to law enforcement being contacted by outraged citizens. The parties in this matter agreed the content of the postings is constitutionally protected free speech. This Hearing Office would uphold a fine amount in the amount of $100.00 per violation (this Hearing Officer is aware that Officer H[redacted] cited a fine amount of $250.00 for violation 1 and $250.00 for violation 2. However, under the schedule for civil fines, pursuant to §1100 of St. Cloud City Ordinances, any ordinances that are not specifically listed in §1100 (that are not major violations) carry a specified presumptive fine of $100.00). In fact, if this Hearing Officer could find even one example of a person being cited for this ordinance violation that had not first received a cease and desist "correction letter," this Hearing Officer would impose a fine.

22. This Hearing Officer specifically directs the City of St. Cloud to immediately issue a cease and desist letter upon Mr. E[redacted]. This Hearing Officer grudgingly admits that the St. Cloud City Attorney's argument is valid that a cease and desist letter will likely not impact Mr. E[redacted]'s ongoing conduct in the future, because Mr. E[redacted] is probably not stupid enough to post items in the future within the City of St. Cloud.

CONCLUSION

For the above-stated reasons, while Mr. E[redacted] has blatantly violated two counts of the St. Cloud City Ordinance §600.05, subd. 3, this Hearing Officer must dismiss the citations contained in Exhibit 1. This is because Mr. E[redacted] has been selectively prosecuted See State v. Russell, 343 N.W.2d 36, 37 (Minn. 1984) and its progeny. Mr. E[redacted] demonstrated that he has been singled out while over a thousand other violators have not been prosecuted, without first receiving a cease and desist letter. There is no question that the City of St. Cloud pursued this ordinance violation based upon the impermissible consideration of Mr. E[redacted] exercising his right to free speech due to the understandable outrage of concerned St. Cloud residents. However, should the City of St. Cloud issue a cease and desist letter as ordered above, and Mr. E[redacted] impermissibly posts items within the City of St. Cloud in the future, this Hearing Officer will consider a separate violation for every single posting.

Dated: 8-26, 2010

[redacted]
Hearing Officer