

Informal Opinion #2000-1

March 17, 2000

Kermit R. Spaulding
Sergeant At Arms
Vermont State House

Re: Cartoons in Out In The Mountains

Dear Mr. Spaulding:

You have asked to what extent display and distribution of the above-mentioned publication may be regulated in the State House.

It is my understanding that the publication in question is often displayed in the State House Cafeteria as is one other publication. The concern is that the publication contains cartoons that are sexually explicit. The January edition of the publication contains cartoons that depict sexual activity including depictions of intimate sexual contact.

As you know the First Amendment limits the extent to which speech can be regulated. The United States Supreme Court has held that the government need not permit all forms of speech on property that it owns and controls. The Court has adopted a "forum based" approach for evaluation of restrictions that the government seeks to place on the use of the property. The Court has recognized three distinct categories of public property: traditional public forum, designated public forum, and nonpublic forum. International Society for Krishna Consciousness, Inc. v. Lee 505 U.S. 672 (1992)

A traditional public forum is property that has as a principal purpose the free exchange of ideas. In a traditional public forum, which includes places such as streets and parks, the government may not prohibit all activity that communicates information and opinions. Content-based exclusions are possible but the exclusion must be necessary to serve a compelling state interest and must be narrowly drawn to serve that purpose.

A designated public forum differs from a traditional public forum in that it is not a public space that is historically associated with free expression. It is a place that the state has opened for use by the public and in which expressive activity has been

allowed. In the case of a designated public forum the state need not indefinitely retain the open character of the facility, but as long as the facility is open to the public, the state is bound by the same standards that apply in a traditional public forum.

Public property that is not by tradition or designation a forum for public communication is considered a nonpublic forum. Places such as the interior of government owned office space would be considered nonpublic forum. In places that are not a public forum regulations concerning expression need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. Stated differently, even in nonpublic forums a regulation will not be upheld if it discriminates on the basis of the speaker's viewpoint.

Obviously, before determining the degree to which expression may be regulated in the State House cafeteria it is necessary to determine the cafeteria's nature as a forum. It is my understanding that the cafeteria is open to the public when the State House is open, that public meetings are sometimes held there and that lobbying occurs there. I also understand that the publication in question and "Seven Days" are the only two publications that have recently been displayed for distribution in the cafeteria. Other publications are displayed in the State House mailroom.

Given that the State House cafeteria is a place that the state has opened for use by the public and in which expressive activity has been allowed, I conclude that it falls within the definition of designated public forum. As such, there are strict limits on the extent to which communicative activity can be regulated. Any limitation or exclusion based on content must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. Additionally, the regulation may not be designed to suppress a particular viewpoint. R.A.V. v. St. Paul 112 S. Ct. 2538 (1992)

It is my understanding that the principal concern is that children not be exposed to sexually explicit material. I also understand that the cafeteria is frequented by groups of school children. Many of those children are under the age of twelve. Additionally, the cafeteria is frequented by legislative pages. The usual age of pages is thirteen or fourteen.

The United States Supreme Court has recognized that there is a compelling interest in protecting the physical and psychological well-being of minors which extends to shielding them from indecent materials that are not obscene by adult standards. FCC v. Pacifica Foundation 438 U.S. 726 (1978)

In Ginsberg v. State of New York 88 S.Ct. 1274 (1968) the Supreme Court found a New York statute that prevented the distribution of materials to children to be valid even when the materials in question were constitutionally protected concerning adults. The materials involved in Ginsberg were magazines that were described in the Court's decision as "girlie" picture magazines. The magazines contained photographs containing some degree of nudity. There is no indication in the Court's decision that the

magazines at issue contained photos or drawings involving sexual activity or sexual intercourse.

Given the above-mentioned United States Supreme Court decisions it is reasonable to conclude that the First Amendment does permit some regulation of materials that depict sexual intercourse, particularly in the context of access by minors. Regulation may occur even in a designated public forum such as the State House cafeteria. However, in order to be consistent with the First Amendment the regulation must be limited in a number of ways.

Any regulation that restricts access of adults to the publication in question is likely to be constitutionally objectionable as over-broad. Reno v. American Civil Liberties Union 117 S. Ct. 2329 (1997) Therefore, the regulation would have to be limited to making displays of the publication within the State House unavailable to minors.

Any regulation that is designed or appears to be designed to suppress a particular viewpoint would not be consistent with the First Amendment. For that reason, a regulation that restricts minors' access to material depicting homosexual activity while not restricting minors access to material depicting similar heterosexual activity is unlikely to survive judicial review. In this regard it would be helpful to prepare written guidelines and to take steps to ensure that the guidelines are applied evenhandedly.

To summarize, it is my opinion within the context of your inquiry, that it is constitutionally permissible to prohibit access by minors to displays within the State House of material that depicts intimate sexual activity. Such regulation is likely to be impermissibly overbroad if it also restricts the access of adults to such materials. Any regulation that prohibits or restricts access to material that depicts homosexual activity without prohibiting or restricting access to material depicting similar heterosexual activity is likely to fail because of its tendency to suppress a particular viewpoint.

I hope that this is responsive to your concerns.

Very truly yours,

Michael McShane
Assistant Attorney General