Policy Advisor

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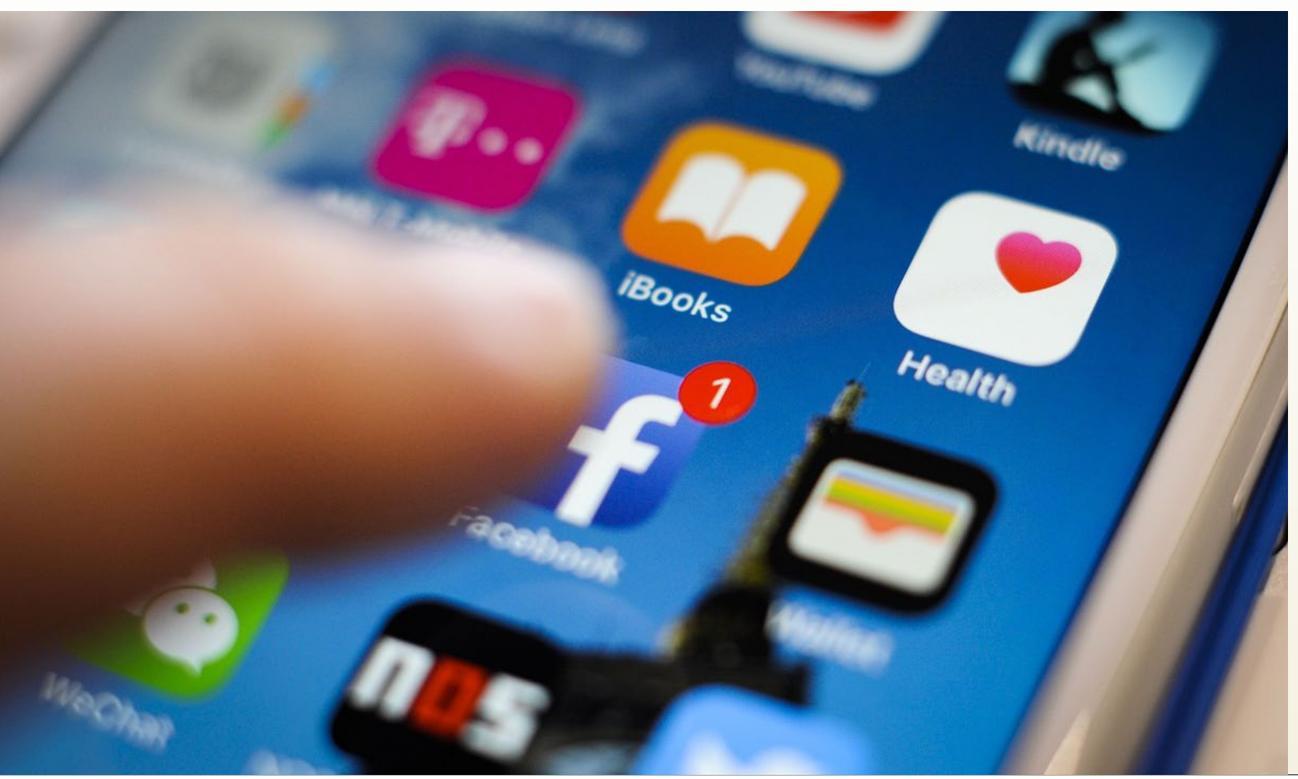
BOARD MEMBER SOCIAL MEDIA PAGE:

A Public Forum or Not?



As is the case with most of society, individual school board members have their own social media pages whether on Facebook, Instagram, or other social media platforms. In many instances, the individual school board member created the social media page long before thinking about running for the local school board. Thus, the social media page created was the individual's own personal page. Once the school board member was running and elected to the school board, the individual school board member may have used the page to provide campaign information and/or to provide information about the school board or related matters. Does use of the social media page by the individual school board member make it a public forum wherein the individual school board member cannot control whose comments are allowed or deleted or who they block from posting on the social media page? This question was answered recently by the United States Supreme Court in a unanimous decision. The case was Lindke v. Freed, 144 S.Ct. 756(2024).

The case was combined with a case with similar facts but the same legal issue was presented: is the personal social media of a government official wherein information about the governmental entity is provided by the government official a public forum subject to the requirements of the First Amendment? Freed was a City Manager but the defendants in the companion case were school board members. The Court made its decision based upon the facts of the Lindke case. Its findings would be applied to the companion case on remand to the circuit court as both lower courts used different tests in their review of the cases then the test established by the United States Supreme Court.

FACTS OF THE CASE

The facts of the case as summarized by the Court are as follows: James Freed, like countless other Americans, created a private Facebook profile sometime before 2008. He eventually converted his profile to a public "page," meaning that anyone could see and comment on his posts. In 2014, Freed updated his Facebook page to reflect that he was appointed city manager of Port Huron, Michigan, describing himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." Freed continued to operate his Facebook page himself and continued to post prolifically (and primarily) about his personal life.

Freed also posted information related to his job, such as highlighting communications from other city officials and soliciting feedback from the public on issues of concern. Freed often responded to comments on his posts, including those left by city residents with inquiries about community matters. He occasionally deleted comments that he considered "derogatory" or "stupid."

After the COVID–19 pandemic began, Freed posted about it. Some posts were personal, and some contained information related to his job. Facebook user Kevin Lindke commented on some of Freed's posts, unequivocally expressing his displeasure with the city's approach to the pandemic. Initially, Freed deleted Lindke's comments; ultimately, he blocked him from commenting at all.

Lindke sued Freed under 42 USC Section 1983, alleging that Freed had violated his First Amendment rights. As Lindke saw it, he had the right to comment on Freed's Facebook page because it was a public forum. The District Court determined that because Freed managed his Facebook page in his private capacity, and because only state action can give rise to liability under Section 1983, Lindke's claim failed. The Sixth Circuit affirmed.

The Court began its analysis reviewing the text of 42 USC Section 1983 and focused on the words "under color of" state statute, regulation, custom, or usage. The Court in prior cases has ruled an individual acting "under color of" state law is a state actor. Thus, the Court would need to determine first if Freed was a state actor when he posted information related to his job as City Manager on his personal Facebook page. If he was a state actor, the Court would then determine if he created a public forum by doing so. The Court stated it is usually clear when a person is acting under color of law or as a state actor as opposed to a private citizen. This is true in cases of actions taken by a police officer or school employees when performing their job duties. It was clear in this case that Freed was a government official as he was a City Manager, but was his conduct in posting about his job or related information "state action" or was it a function of a private citizen? This is the question the Court had to answer in this case.

The Court stated Freed's status as a state employee was not determinative but rather it had to look at the substance of the conduct. It pointed out state officials are also private citizens with

the First Amendment right to speak about their jobs and have editorial control over posts and comments made on their personal social media platforms. So, if Freed acted as a private citizen when he deleted comments by and eventually blocked Lindke, he did not violate Lindke's First Amendment rights but instead Freed exercised his own rights as a private citizen. The Court stated the Free Speech Clause protects against "governmental abridgment of speech and not private abridgment of speech." But also pointed out when a citizen becomes a government employee or official, the citizen does not "relinquish … First Amendment rights" as a private citizen. Thus, conduct requires a closer look and is a fact intensive inquiry.

The Court reviewed its precedent on this issue and concluded in this context of a state actor posting on social media about government matters the state actor had to have authority of the state in order for it to be attributable to the state as required by Section 1983. This is the first prong of the analysis to be applied in this context. The mere fact of a government employee posting about his job or related matters did not prove he had authority to do so. The Court found Lindke skipped this step at the lower court. He did not provide evidence that Freed had the authority of the city to speak on its behalf on Freed's social media page. The Court ruled this is a critical step as it is what makes the conduct state action. This is the gravamen of a case under Section 1983. "To misuse power, one must possess it in the first place" and it is required to show the state actor had such "power" or the conduct cannot be considered attributable to the government. The issue with respect to possession of state authority is whether the state actor has *actual* authority to engage in the conduct that deprived a constitutional right and not perceived authority by citizens.

Once state authority has been established, in the context of social media posts, the Court set out a second prong: the state actor must also purport to use the state authority. The Court points out this is also a fact-specific inquiry as the content and function of the posts are important considerations. Are the posts merely repeating or sharing information that can be found elsewhere such as on the government's official website? If so, the Court states this is most likely the state actor's private voice and not the voice of the government. If the state actor states on social media he is speaking in his official capacity and the information cannot be found anywhere else, then he is most likely engaging in state action. Another example is whether the page is designated as an official page of the state actor or he states he is speaking as a private citizen. These are the factors that must be considered in determining if the second prong of the test has been met. The Court remanded the case as the lower court used a different test to decide the case. The lower court was instructed to decide the case using the two-prong test set out by the Court in this case.

THE COMPANION CASE

In the companion case involving the school board members, O'Connor-Ratcliff and Zane created public Facebook pages to promote their campaigns for election to the local school board. While O'Connor-Ratcliff and Zane both had personal Facebook pages that they shared with friends and family, they used their public pages for campaigning and issues related to the school district. After they won the election, they both continued to use their public pages to post school district-related content, including board-meeting recaps, application solicitations for board positions, local budget plans and surveys, and public safety updates. They also used their pages to solicit feedback and communicate with constituents. Their Facebook pages described them as "Government Official[s]" and noted their official positions. Christopher and Kimberly Garnier, who had children attending the school district, often criticized the board of trustees. They began posting lengthy and repetitive comments on the social-media posts. O'Conner-Ratcliff and Zane initially deleted the Garniers' comments before blocking them from commenting altogether.

The Garniers sued seeking damages and declaratory and injunctive relief for the alleged violation of their First Amendment rights. At summary judgment, the District Court granted the school board members qualified immunity as to the damages claims but allowed the case to proceed on the merits on the ground that the school board members acted "under color of" state law when they blocked the Garniers. The Ninth Circuit affirmed. It held the state-action requirement was satisfied because there was a "close nexus between the Trustees' use of their social media pages and their official positions." The court cited its own state-action precedent, holding the state action was based largely on the official "appearance and content" of the school board members' pages. The Court remanded the case to the circuit court for further proceedings because the circuit court applied a different standard from the one set out in the Lindke case. O'Conner v. Garnier, 144 S.Ct. 717 (2024)

THOUGHTS ON USE OF SOCIAL MEDIA BY BOARD MEMBERS

Based upon the facts of both cases and the Court's inability to determine if the social media pages in Lindke were private pages, it would be a best practice for a board member who uses any social media platform to state the information provided in the post is that of the board member's own personal opinion and is not an official page or communication of the school board or the school corporation nor is the board member acting on the authority of the school board or school corporation.

If a school board has a policy on the use of social media by individual board members, then it should state social media pages created by individual board members are not official social media platforms for the school board or school corporation nor does the school board member have the authority to speak on behalf of the school board on such platforms. The policy should also require the individual board member to include a disclaimer on their own created social media that the content is that of the individual board member and is not an official communication of the school board or school corporation.

If you have any questions about information in this article, please contact Julie M. Slavens, Senior Counsel/Director of Policy Services, by phone: 317/639-4362 or by e-mail: jslavens@isba-ind.org.