UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| SALVATORE DAVI,<br><br>Plaintiff,<br><br>-against-<br><br>SAMUEL D. ROBERTS, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, in his individual and official capacity, *et al.*<br><br>Defendants. | Index No. 16-cv-5060 (RRM) (PK) |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Plaintiff Salvatore Davi submits this memorandum of law in support of his motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting partial summary judgment against the official capacity defendants in this action.

## Factual Background

### A. OTDA, OAH, And Fair Hearings

Formerly known as the Department of Social Services, *Mills v. State of New York*, 2000 WL 863451, at *2 n.3 (S.D.N.Y. June 28, 2000), the Office of Temporary and Disability Assistance ("OTDA") is a state agency of the State of New York. It administers social welfare programs in the State of New York, including the Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance. Plaintiff's Statement of Undisputed Facts ("SOUF") ¶¶ 1-2.

During the year 2015, OTDA's mission was (1) to enhance the economic security of low-income working families, (2) to assist work-capable public assistance recipients in achieving entry into the workforce, (3) to assist individuals with priority needs other than work-readiness in accessing appropriate benefits and services, and (4) to enhance child well-being and reduce child poverty. Its stated purpose stressed that it would "oversee . . . the State's most important programs for its low-income residents, with a focus on employment wherever possible." Its success was to be measured, *inter alia*, by the extent to which it assisted welfare recipients and potential welfare recipients in entering employment, and promoted access to economic supports for low-income working New Yorkers. SOUF ¶¶ 3-5.

Social service districts are agencies that make initial decisions on the eligibility of individuals for benefits under the programs that OTDA administers. The New York City Human Resources Administration ("NYC HRA") is an example of a social services district and one that frequently appeared before Plaintiff. Social service districts may contract with private contractors to perform some of their duties. N.Y. Soc. Serv. Law § 20-c(1)(b). SOUF ¶¶ 6-7.

The Office of Administrative Hearings ("OAH") is an office in OTDA. It is responsible for holding hearings ("Fair Hearings") when an individual (the "Appellant") appeals the decision of a social services district with respect to that individual's benefits or eligibility under a social services program administered by OTDA. SOUF ¶¶ 8-9; N.Y. Soc. Serv. Law § 22.

Fair Hearings are usually conducted by Hearing Officers or Supervising Hearing Officers. SOUF ¶ 10.

B. Defendants

Each of the official capacity Defendants is or was an employee of OTDA. Each of them acted under color of state law for purposes of 42 U.S.C. § 1983 when undertaking the employment actions challenged in the Amended Complaint, and those actions constituted state action for purposes of the Fourteenth Amendment. Each of the positions holds responsibility for the ongoing personnel action against Plaintiff. SOUF ¶¶ 11-15.

Defendant Roberts was the Commissioner of OTDA. (The current Acting Commissioner is Michael P. Hein.) The Commissioner is responsible for the overall management and operation of the agency, and ultimately responsible for all of its actions. He has ultimate authority for the employment of individuals and can make personnel changes. SOUF ¶ 12.

Defendant Spitzberg was the Director of Administrative Hearings and in charge of OAH in 2015 and 2016. Roy Esnard currently is in charge of OAH. SOUF ¶ 13.

Defendant Rock is the General Counsel at OTDA. She is the top lawyer for OTDA and establishes legal policy for the agency. SOUF ¶ 14.

Defendant Faresta was the Director of Human Resources ("HR Director") at OTDA in 2015 and 2016. The Bureau of Human Resources is responsible for all personnel matters, including hiring and firing. Ms. Faresta retired in July 2017, and was replaced by Jill Shaddick. SOUF ¶ 15.

C. Plaintiff's Work As A Hearing Officer

Plaintiff was hired in 2010 to work as a Hearing Officer at OAH. As a Hearing Officer, Plaintiff conducted Fair Hearings and accordingly heard appeals from initial denials of eligibility and reductions of benefits for various public assistance programs. Appearing before him at these hearings were the Appellants (the applicants for the benefits) and the New York City social service districts (or private contractors) that had made the initial determination with respect to the benefits being appealed. SOUF ¶¶ 16-18.

Plaintiff worked as a Hearing Officer, and conducted Fair Hearings, through early November 2015. Throughout that time, Plaintiff did not make any final decisions, but rather recommendations. His recommendations were reviewed by, and a determination made by, a Commissioner's Designee, usually a Supervising Hearing Officer. SOUF ¶¶ 19-20.

Plaintiff received six-month and annual performance reviews as a Hearing Officer. In each of the annual reviews for the years ending in March 2011, 2012, 2013, 2014, and 2015,

Plaintiff's reviewers assessed Plaintiff's performance as satisfactory. Each of his six-month recertification assessments were also satisfactory. SOUF ¶ 21.

In the annual performance review, a reviewer would set forth more detailed written comments about Plaintiff's job performance. In each of the annual reviews for the years ending in March 2011, 2012, 2013, 2014, and 2015, the comments of Plaintiff's reviewers were positive. SOUF ¶ 22.

The Fair Hearings that Plaintiff conducted generally had one of three disputed areas: documents, appointments, or income. The first involved whether the Appellant provided some document requested by the agency. The second involved whether the Appellant appeared at an appointment for a discussion of his/her eligibility for benefits. The third involved calculating Appellant's income and determining eligibility. SOUF ¶ 23.

During the time that Plaintiff conducted Fair Hearings as a Hearing Officer with OAH, most of the programs for which OAH conducted Fair Hearings had some kind of work or training requirement. SOUF ¶ 24.

D. Objections To Hearing Officers

There are various ways that a party to a Fair Hearing can object to a particular Hearing Officer presiding (or having presided) over that Fair Hearing. Parties have sought recusal of a Hearing Officer based on the bias of the Hearing Officer prior to the Fair Hearing. Parties may seek recusal of a Hearing Officer on the ground that the Hearing Officer is biased by specifically requesting it at the Fair Hearing itself. SOUF ¶¶ 25-27.

Parties may also seek reconsideration of a decision issued by the Commissioner's Designee based upon the alleged bias of the Hearing Officer conducting the Fair Hearing, and OTDA has considered requests for reconsideration made long after the hearing. SOUF ¶¶ 28-29.

An Appellant may also file a petition under Article 78 of New York's Civil Practice Law and Rules asking that the decision be overturned on grounds of arbitrator bias. Finally, an Appellant may also file suit in federal court alleging that a Hearing Officer's bias deprived them of due process. SOUF ¶¶ 30-31.

E. The Anonymous Complaint

On November 4, 2015, OTDA received an anonymous complaint (the "Anonymous Complaint") regarding Plaintiff. The Anonymous Complaint attached an excerpt (the "Facebook Excerpt") from a Facebook exchange regarding an article from the *Daily Kos*, posted by a Facebook user, that advocated the expansion of social welfare programs like food stamps. SOUF ¶¶ 32-33.

The Anonymous Complaint had a "cc" on it indicating that the author was sending a copy of the letter to Project Fair, a Legal Aid organization that represents Appellants. SOUF ¶ 34.

The Facebook Excerpt had an exchange between Salvatore P. Davi and Erin Lloyd. In the exchange, Erin Lloyd stated: "Salvator P. Davi I remember your bullshit from law school so I've got no patience for you." In contrast, the author of the Anonymous Complaint stated: "I do not personally know Mr. Davi. . . I merely observed his comments on a mutual friend's Facebook wall." SOUF ¶¶ 35-38.

OTDA later learned that Erin Lloyd was the author of the Anonymous Complaint. Representatives of OTDA communicated with Ms. Lloyd. No one at OTDA questioned Erin Lloyd about the contradictory statements she made concerning her knowledge (or lack of knowledge) of Salvatore Davi and whether she "merely observed" his comments. SOUF ¶¶ 39-41.

OTDA employees tried to access the exchange reflected in the Facebook Excerpt but could not do so because it was a private conversation on Facebook. SOUF ¶ 42.

F. The Facebook Excerpt And OTDA's Investigation Of The Anonymous Complaint

The exchange reflected by the Facebook Excerpt could not be viewed on Facebook by members of the public generally or any Facebook users other than those participating in the private conversation. OTDA had no information to the contrary. SOUF ¶ 43.

OTDA did not communicate at all with Project Fair or any other Legal Aid organization about the Anonymous Complaint or Plaintiff, even to determine whether the author of the Anonymous Complaint had, in fact, sent a copy of it to Project Fair or Legal Aid. SOUF ¶ 44.

No Appellant (1) asked for reconsideration of a decision in which Plaintiff had served as the Hearing Officer at the Fair Hearing or (2) had filed an Article 78 proceeding or any action claiming a due process violation on the ground that Plaintiff's Facebook comments showed that he was biased. SOUF ¶¶ 45-46.

OTDA did not receive any communication from any member of the public, aside from the author of the Anonymous Complaint, concerning the Anonymous Complaint, the Facebook Excerpt, or any of Plaintiff's statements on Facebook concerning social welfare programs.

SOUF ¶ 47.

OTDA had no other statements made by Plaintiff in the exchange on Facebook in which he participated other than those that appeared in the Facebook Excerpt sent with the Anonymous Complaint. In the Facebook Excerpt, Plaintiff did not identify himself as an employee of OTDA, did not make any specific reference to any law, regulation, or program with respect to which he made recommendations, did not mention any specific applicant for aid, and did not mention any person who had appeared before him as a Hearing Officer. SOUF ¶¶ 48-52.

Shortly after receiving the Anonymous Complaint, OTDA had several of its representatives (Defendant Spitzberg and Nigel Marks) review a set of Plaintiff's hearings and recommendations to determine if they reflected any bias. They concluded that Plaintiff's conduct and recommendations did not reflect any bias. SOUF ¶ 53.

G. OTDA Removes Plaintiff From Conducting Fair Hearings

Based on the Facebook Excerpt, OTDA decided to remove Plaintiff from the duty of hearing cases on November 5, 2016. Plaintiff's Supervising Hearing Officer, Kenneth Luciano, was told to tell Plaintiff that he was being taken off calendar, but was instructed not to tell Plaintiff why. SOUF ¶¶ 54-55.

During the time between November 5, 2015 and November 12, 2015, Plaintiff continued to draft recommendations for Mr. Luciano for appeals on which he had earlier conducted the Fair Hearings. At that time, Mr. Luciano was the Commissioner's Designee who reviewed Plaintiff's recommendations and issued the actual opinions resolving the appeals for which Plaintiff had conducted Fair Hearings. OTDA supervisors knew that Plaintiff was continuing to work on draft

opinions during this time period between November 5, 2015 and November 12, 2015. SOUF ¶¶ 56-57.

H. OTDA's Interrogation And Suspension Of Plaintiff

On November 9, 2015, Wendy Phillips, on behalf of OTDA, sent Plaintiff a Notice of Interrogation stating that his attendance would be required at an interrogattion on November 13, 2015 at 10:30 a.m. pursuant to the Collective Bargaining Agreement ("CBA") between the union representing him (Public Employees Federation , AFL-CIO) and the State of New York. SOUF ¶ 58.

Plaintiff was interrogated by Ms. Phillips on the morning of November 13, 2015. During the course of the interrogation, Ms. Phillips did not show Plaintiff either the Anonymous Complaint or the Facebook Excerpt. At the end of the interrogation, Ms. Phillips handed Plaintiff a letter from defendant Donna Faresta apprising Plaintiff that he was suspended without pay effective immediately. OTDA's decision to suspend Plaintiff without pay was based on the Facebook Excerpt. SOUF ¶¶ 64-67.

OTDA sends out Hearing Notices to the parties to an appeal. OTDA continued to send out Hearing Notices for hearings scheduled in November and early December with Plaintiff's ALJ number (291) on them, indicating that he was going to be the Hearing Officer for the hearing. Advocacy organizations that represent Appellants are familiar with Hearing Notices and can look up the ALJ associated with an ALJ number on a public website. SOUF ¶¶ 74-76.

From November 1, 2015 to December 31, 2015, OTDA had no evidence that any Appellant or Appellant's representative complained about Plaintiff being the assigned Hearing

Officer on any hearing scheduled for November or early December or sought his recusal from a Fair Hearing ahead of the date of the hearing. SOUF ¶ 77.

I. The Notice Of Discipline

On December 29, 2015, defendant Samuel Spitzberg, on behalf of OTDA, sent Plaintiff a Notice of Discipline informing him that OTDA intended to terminate his employment at OTDA. OTDA's decision to terminate Plaintiff was based on the Facebook Excerpt. SOUF ¶¶ 78-79.

Plaintiff grieved the proposed discipline pursuant to the CBA. Had Plaintiff not grieved the proposed discipline pursuant to the CBA within fourteen (14) days of service of the notice, his employment at OTDA would have been terminated on January 13, 2016. SOUF ¶¶ 80-81.

The Notice of Discipline identified five statements, all of which were taken from the Facebook Excerpt, which OTDA relied upon to support its decision to terminate Plaintiff. They were:

1. This article and the underlying study use the wrong metric. These programs should be judge[d] by how many people or families they get back on their feet and off government assistance, not how well these programs enable their recipients to be poor and collect government assistance for the rest of their li[v]es.

2. It is not the government's job to subsidize laziness and failure.

3. But I have zero sympathy for anyone who refuses to work and/or get the education or training to earn a livable wage.

4. This country has turned welfare into a generational career path!

5. If you are going to be that nasty then fuck you, too. Your 'morals' suck because they create an underclass dependent on government handouts that translates into generational poverty, while at the same time taxing productive members of our society to the breaking point.

The Notice of Discipline stated that these five statements

1. Expressed opinions relative to a matter before the agency in violation of directives for Neutral Decisionmaking in the Manual for Administrative Law Judges and Hearing Officers (the "Manual").

2. Showed a bias, prejudice and prejudgment against recipients of Public Assistance and SNAP benefits in violation of a different part of the Manual that required ALJs to approach a hearing impartially and with an open mind.

3. Indicated that Plaintiff was not impartial and objective in violation of Executive Order No. 131.

4. Violated (a) OTDA's Mission to enhance the security of low-income working families, assist work-capable public assistance recipients in achieving entry in the the workforce, and to assist individuals with priority needs other than work-readiness and (b) OTDA's Purpose, measured by the extent to which it assists welfare recipients and potential welfare recipients in entering employment and promotes access to economic supports for low-income working New Yorkers.

5. Were likely to raise suspicions among the public that Plaintiff was likely engaged in acts in violation of his trust in violation of § 74(3)(h) of New York's Public Officers Law.

6. Gave an unreasonable basis for NYC HRA representatives to have the impression that they may unduly enjoy Plaintiff's favor in violation of § 74(3)(f) of New York's Public Officers Law.

7. Showed that he was not an impartial Hearing Officer and that he was involved with the action in violation of 18 NYCRR § 358-5.6(a), which states that the hearing shall be conducted by an impartial hearing officer assigned by OAH.

SOUF ¶¶ 82-84.

OTDA believed that the opinions reflected by Plaintiff's statements in the Facebook Excerpt rendered him unfit to be a Hearing Officer. If Plaintiff had not made the statements in the Facebook Excerpt, but OTDA had learned in some other way that his beliefs were consistent with those statements, it would have concluded that he was unfit to be a Hearing Officer. SOUF ¶¶ 85-86.

There was no basis for OTDA seeking Plaintiff's termination other than those stated in the Notice of Discipline. SOUF ¶ 87.

J. The Arbitration

Pursuant to Plaintiff's grievance of the proposed discipline, an arbitration was held. In its closing brief in the arbitration, OTDA argued that Plaintiff could not be a Hearing Officer because "aware that the magnifying glass will always be on him, and his decisions will be scrutinized," he would "be pre-disposed to rule in favor of Appellants and a pre-disposition to make any ruling (whether against or in favor of an Appellant) is bias." SOUF ¶¶ 88-90.

The arbitrator ruled that Plaintiff's First Amendment rights and any alleged violation thereof were outside the scope of the CBA and the arbitration. SOUF ¶ 91.

The arbitrator's decision upheld charges 1, 2, 4, and 5, and rejected charges 3, 6, and 7. The arbitrator's ruling held that OTDA could suspend Plaintiff for six months without pay. The arbitrator's decision stated that, upon Plaintiff's return from his suspension, OTDA had to offer him a job in the New York City area at the same pay grade as his job as a Hearing Officer. The offered job did not have to involve hearing cases, but the ruling did not prohibit OTDA from offering Plaintiff his previous position as a Hearing Officer upon the completion of his suspension. SOUF ¶¶ 92-95.

The Notice of Discipline remains in Plaintiff's personnel file. If asked by a potential employer of Plaintiff, people in OTDA could disclose the existence of the Notice of Discipline. The fact that OTDA suspended Plaintiff is reflected in various databases that can be accessed by other New York State agencies. SOUF ¶¶ 96-98.

Plaintiff petitioned to vacate the arbitration award in an Article 75 proceeding in New York State court, naming OTDA and Roberts as respondents. OTDA and Roberts cross-moved to dismiss the petition. The petition to vacate was denied, and the cross-motion granted, on the ground that Davi was not a party to the arbitration and thus had no standing to move to vacate. SOUF ¶¶ 101-02.

K. The Transfer Of Plaintiff's Civil Service Title And His Duties As A Senior Attorney

In a letter dated June 1, 2016, Donna Faresta apprised Plaintiff that OTDA would transfer his civil service title to the position of Senior Attorney. OTDA transferred Plaintiff's civil service title to Senior Attorney because of the statements in the Facebook Excerpt. The transfer of Plaintiff's civil service title has had adverse consequences to Plaintiff, including a loss of relative seniority. SOUF ¶¶ 103-11.

Hearing Officers' potential duties include (1) reviewing new legislation, regulations, and other developments that have an impact on the conduct of hearings or on hearing decisions, (2) studying court cases having an impact on the hearing process, and (3) assisting in defending lawsuits regarding hearing decisions by conducting research, drafting briefs and other supporting documents. SOUF ¶ 112.

Andrew Purrott is a Hearing Officer in OAH. From March 13, 2013 through at least the time of the deposition of defendant Spitzberg, Andrew Purrott did not conduct Fair Hearings. During that time, his duties as a Hearing Officer were similar to Plaintiff's duties as a Senior Attorney. SOUF ¶¶ 113-15.

In or around July 8, 2016, Krista Rock designated Plaintiff as a General Counsel's designee. In that role, Plaintiff reviews, and determines the correctness of, Hearing Officers' initial denials of requests by parties at the Fair Hearings to recuse those Hearing Officers. Plaintiff reviews all requests for recusal made at a Fair Hearing. SOUF ¶¶ 116-18.

A determination by Plaintiff, after a review of a Hearing Officer's denial of a request to recuse, can have an effect on an Appellants' social welfare benefits. Anyone who is aware of an allegation of bias by a Hearing Officer is supposed to send the allegation to Plaintiff. Plaintiff's reviews include reviews of Hearing Officers' denials of requests to recuse themselves where the request is based upon a party's allegation that the Hearing Officer is biased. Plaintiff's name and signature appears on these decisions. SOUF ¶¶ 119-22.

Plaintiff's decisions reviewing denials of requests to recuse become part of the file for that appeal. Appellants in such cases can ask to review the file, including Plaintiff's decision. SOUF ¶¶ 123.

## L. Complaints About Plaintiff's Performance As A Hearing Officer And OTDA's Responses

On or around August 18, 2015, an Appellant wrote to OTDA complaining about Plaintiff's rudeness at a Fair Hearing he conducted on August 17, 2015, as well as the conduct of the Commissioner's Designee for the case, Kenneth Luciano. SOUF ¶ 124.

Darla Oto, then a Principal Hearing Officer at OTDA, wrote a responsive letter to the Appellant dated January 28, 2016. Ms. Oto did not reopen the hearing or assign it to another Hearing Officer, did not modify the decision that had been issued by the Commissioner's Designee, and did not mention the Facebook Excerpt in her letter. SOUF ¶¶ 125-27.

On June 25, 2016, an Appellant wrote to OTDA to complain about a Fair Hearing that Plaintiff had conducted on May 11, 2015. The letter stated that Plaintiff "seemed not to be impartial," based on Plaintiff's behavior at the Fair Hearing and the decision of the Commissioner's Designee, which had stated that the Appellant's claims were not credible. The letter did not mention the Facebook Excerpt or any of Plaintiff's views on social welfare programs in general. SOUF ¶¶ 128-30.

The underlying decision of the NYC HRA related to the Public Assistance program and was based on the Appellant's alleged failure to report for a work assignment. OTDA's response to the letter, dated July 7, 2016, was drafted by Principal Hearing Officer Darla Oto. It stated that it "found no impropriety on the part of Mr. Davi, nor any evidence of bias." The response found no basis to reopen the hearing or change the outcome of the hearing, and did not mention the Facebook Excerpt. SOUF ¶¶ 131-34.

## Argument

On a motion for summary judgment, the moving party's burden on any elements on which it will bear the burden at trial is to demonstrate that there is no genuine issue of material fact. Fed. R. Civ. P. 56. For any elements on which the non-moving party bears the burden at trial, the moving party may produce evidence negating an element of the nonmoving party's case or show that the non-moving party will be unable to meet its burden. *B.C. v. Mt. Vernon School Dist.*, 837 F.3d 152, 157 (2d Cir. 2016). If movant meets its initial burden, the party opposing the motion must produce evidence sufficient to create a genuine issue of material fact. Evidence should be construed in the light most favorable to the non-moving party. *Id.* at 158.

## I. UNDISPUTED EVIDENCE DEMONSTRATES THAT PLAINTIFF'S SPEECH WAS ON A MATTER OF PUBLIC CONCERN AND DEFENDANTS CANNOT MEET THEIR BURDEN OF SHOWING JUSTIFICATION FOR THE ADVERSE CONSEQUENCES IMPOSED UPON PLAINTIFF

A plaintiff asserting a First Amendment violation must show that his speech was protected by the First Amendment, that the defendant took an adverse action against him, and that there was a causal connection between the adverse action and the protected speech. *Matthews v. City of New York*, 779 F.3d 167, 172 (2d Cir. 2015). The second and third elements cannot reasonably be disputed here; Plaintiff was plainly the subject of adverse action, and it was because of the expression of views in the Facebook Excerpt.

In determining whether a public employee's speech is protected, a court first must determine whether the employee spoke as a citizen on a matter of public concern, and, second, determine whether the relevant government entity had adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer. *Id.* The first part of the test is ordinarily treated as a matter of law decided on the whole record by taking into account the content, form, and context of a given statement. *Locurto v. Guliani*, 447 F.3d 159, 173 (2d Cir. 2006). Here, Plaintiff's speech plainly meets that part. He was engaged in a private discussion on Facebook after hours and in which he never mentioned his job, and the context of the discussion was a significant policy issue: the appropriate scope of welfare policies. Any inappropriate or controversial character of a statement is irrelevant to whether it deals with a matter of public concern. *Id.* (citing *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)). *See also Johnson v. Ganim*, 342 F.3d 105, 113 (2d Cir. 2003) (holding that plaintiff's caustic criticism of local government, "although he may have

made a poor choice as to the way in which he phrased his communication," was on a matter of public concern); *id.* (citing *Casey v. City of Cabool*, 12 F.3d 799, 802 (8th Cir. 1993) for the proposition that even obnoxious or offensive criticism of government officials and their policies clearly addresses matters of public concern).

To show that its needs as an employer justify treating a public employee who engaged in speech on a matter of public concern differently from a citizen, the government must show that (1) it reasonably believed that the speech in question would likely cause disruption in the workplace, (2) the potential disruption outweighed the First Amendment value of the speech, and (3) it acted in response to the potential disruption and not the content of the speech. It bears the burden on each of these, and if it fails on any one of them, it loses. *Locurto*, 447 F.3d at 175-76, 180. The showing of likely disruption must be substantial. *E.g.*, *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) ("the government's burden is to make a substantial showing of *likely* interference") (emphasis in original). It must be based upon a reasonable investigation. *Heil v. Santoro*, 147 F.3d 103, 109-110 (2d Cir. 1998) ("an employer that has received a report of such [potentially disruptive] speech must make a reasonable investigation before deciding to take action"). Finally, there must be a "proportion between the nature of the speech and the nature of the sanction that may ensue." *Jeffries*, 52 F.3d at 13.

In determining the value of the speech for purposes of the balancing between it and the potential disruption, "[t]he content of the employee's speech is an important consideration in determining the extent of the employer's burden to show likely disruption." *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130, 140 (2d Cir. 1999). "The more the employee's speech touches on matters of significant public concern, the greater the level of disruption to the

government that must be shown." *Jackler v. Byrne*, 658 F.3d 225, 237 (2d Cir. 2011). *See also Jeffries*, 52 F.3d at 13. The manner, time, and place is also important in weighing the First Amendment value to be accorded the speech, and the burden placed on the government, as is whether the speech was made in private, on the employee's own time. *Dangler*. 193 F.3d at 139; *Gusler v. City of Long Beach*, 823 F. Supp. 2d 98, 129 (E.D.N.Y. 2011) (quoting *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999)).

Indeed, in *Rankin*, the Supreme Court held that "a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee." *Rankin v. McPherson*, 483 U.S. 378, 388 n.13 (1987). *See also, e.g.*, *Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982) (holding that police department could not discipline a police captain for criticizing the chief of police as a "son of a bitch" and a "bastard" in conversation at a bar after several drinks; "In addition to [plaintiff's] fundamental interest in speaking as he chooses, he has an interest in being free from unnecessary work-related restrictions while off-duty. [Plaintiff] spoke the words at issue after he had left work, while he was out of uniform, while he was out of the department's jurisdiction, and to a person he considered a friend. We think it quite reasonable that he assumed he could vent a little steam over drinks, and we think that [plaintiff], like everyone, has a legitimate interest in maintaining a zone of privacy where he can speak about work without fear of censure.").

Here, defendants will be unable to produce evidence to meet their burden. Indeed, they rely entirely on the Facebook Excerpt. But Plaintiff's speech in the Facebook Excerpt was just his views over proper welfare policy, and whether there is a need for a work or training requirement (which, in the main, the law requires). It was unreasonable to believe that he had

just arrived at his policy views on the day he expressed them. Plaintiff had been performing his job more than satisfactorily for years, and defendants cannot show that it was reasonable to conclude that he could not continue to do so. Indeed, even after receiving the Anonymous Complaint, and removing him from conducting Fair Hearings, they knowingly allowed him to continue to make recommendations with respect to Fair Hearings that he already had conducted. Moreover, shortly after receiving the Anonymous Complaint, OTDA reviewed the Fair Hearings that Plaintiff conducted and his recommendations, and concluded that there was no evidence of bias. OTDA did not vacate any decision by a Commissioner's Designee based upon the fact that Plaintiff had conducted the Fair Hearing and made a recommendation to the Commissioner's Designee. As a Senior Attorney, OTDA tasks him with reviewing recusal determinations – that is, reviewing whether *other* Hearing Officers are biased. Finally, when a few complaints *were* made about Plaintiff's alleged bias and/or conduct of a Fair Hearing, neither of which were based on the Facebook Excerpt, OTDA rejected each complaint, upheld Plaintiff's conduct, and never mentioned the Facebook Excerpt (of which it was long aware) in doing so.

As for Appellants or their representatives *believing* that Plaintiff was biased, regardless of whether he was, defendants also cannot meet their burden of showing likely disruption. First, of course, the exchange on Facebook was not made publicly; only those participating in the private Facebook conversation would be aware of them. While the Anonymous Complaint indicated that a copy of it was sent to Project Fair, OTDA never communicated with Project Fair or any other Legal Aid organization representing Appellants, even to confirm that it had received a copy. In any event, it was unreasonable to believe that an Appellant could properly call for Plaintiff's recusal based upon the Facebook Excerpt. The Fairness Hearings did not involve

policy questions like those addressed in the Facebook Excerpt, but rather administrative issues like whether Appellants had kept their appointments or provided proper documentation, or the proper calculation of their income.

In any event, OTDA did not seek to terminate Plaintiff until several months after it received the Anonymous Complaint, and it changed his civil service title long after that. In the meantime, no Appellant, represented by Project Fair or otherwise, ever sought reconsideration of *any* negative determination by a Commissioner's Designee based upon the views that Plaintiff expressed in the Facebook Excerpt. Although his ALJ number continued to appear on Notices of Hearing long after he was removed from conducting Fair Hearings, no one complained about the possibility of his conducting those hearings or sought his recusal. While the government need not show actual disruption, but only likely disruption, it must make a *substantial* showing and the absence of any actual disruption is hardly irrelevant. *Caracillo v. Village of Seneca Falls*, 582 F. Supp. 2d 390, 415 (W.D.N.Y. 2008) (citing *McFall v. Bednar*, 407 F.3d 1081, 1090 (10th Cir. 2005)).

All of this undermines defendants' case even *before* taking the value of Plaintiff's speech into account. That value is weighty and substantially increases the burden defendants must meet to show a likelihood of disruption. Plaintiff's speech involved an important issue of public policy and was made on his own time in a private Facebook conversation that he made no effort to publicize. (OTDA tried to access the conversation through the Facebook website, but could not because it was private.) Plaintiff did not identify himself as connected with OTDA. Plaintiff has both a strong First Amendment interest and a privacy interest in expressing views to a

limited group of listeners in response to a news article concerning whether social welfare programs like food stamps should be expanded. *Waters v. Chaffin*, 684 F.2d at 837.

Even judges (who, unlike Plaintiff, make actual binding decisions about the cases before them) are permitted to express views on general issues of the day. *E.g.*, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 228-229 (7th Cir. 1993) (holding that rule prohibiting judicial candidates from announcing their views on disputed legal or political issues violated the First Amendment because it went "far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality"; "Almost anything a judicial candidate might say . . . could be taken to cast doubt on his capacity to decide some case impartially . . . If . . . [a judicial candidate] announced boldly that he did not think juries should be used in most civil cases, he could be thought to be casting doubt on his capacity to preside impartially at civil jury trials, to rule on motions for directed verdict in such trials, to conduct a fair jury voir dire, to administer the rules of evidence in jury trials, and to decide on proposed jury instructions."); *In re Disciplinary Proceedings Against Richard B. Sanders*, 135 Wash. 2d 175, 192, 955 P.2d 369, 377 (1998) (reversing reprimand against Supreme Court Justice who spoke at an antiabortion rally; the "limitations [in the Canons of Judicial Conduct] must not be interpreted in the individual case to go so far as to permit sanctioning speech and conduct that does not clearly and convincingly lead to the conclusion that the words and actions call into question the integrity and impartiality of the judge"); *Papa v. New Haven Federation of Teachers*, 186 Conn. 725, 444 A.2d 196 (1982) (holding that judge's speech critical of teachers' strikes a month before case commenced was not sufficient ground to require recusal in case involving teachers' strike). The free speech rights of even actual adjudicators (much less those

like Plaintiff) cannot be circumscribed by these kinds of undifferentiated fears because they do not outweigh the First Amendment rights involved.

## II. PLAINTIFF IS ENTITLED TO EQUITABLE RELIEF AGAINST THE OFFICIAL CAPACITY DEFENDANTS TO CORRECT ONGOING CONSTITUTIONAL VIOLATIONS

Plaintiff continues to be punished for his speech. His job duties and civil service title were changed as a consequence of his speech, and he continues in the new position and title. His personnel file has a record of his suspension for alleged misconduct, which makes it difficult for him to find other employment. He lost seniority and leave credit when he was suspended.

While the Eleventh Amendment precludes Plaintiff from obtaining money damages against the official capacity defendants, appropriate equitable relief may be ordered to remedy these ongoing harms. *E.g.*, *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007) (holding that claims that layoffs in violation of the First Amendment constituted an "ongoing" violation even if the positions had been eliminated; "Every Circuit to have considered the issue, including our own, has held that claims for reinstatement to previous employment satisfy the *Ex Parte Young* exception to the Eleventh Amendment's sovereign immunity bar."); *Malkan v. Matua*, 2012 WL 4722688, *7 (W.D.N.Y. Oct. 3, 2012) (holding that dismissed law professor's claim for reinstatement and for a clearing of his personnel file of any wrongful disciplinary actions were permitted under the Eleventh Amendment); *Roman v. Niagara Frontier Transit Metro System, Inc.*, 1983 WL 458, *2 (W.D.N.Y. Jan. 10, 1983) (holding that, consistent with the Eleventh Amendment, plaintiffs could amend their complaint to seek an order enjoining defendant state officials from improperly depriving them of their

rightful seniority); *Glenn v. Brumby*, 2010 WL 3731107, at *1 (N.D. Ga. Sept. 15, 2010) (holding that restoration of seniority for illegal termination did not run afoul of the Eleventh Amendment).

The official capacity defendants are appropriate defendants here. In order to meet the requirements of the *Ex Parte Young* exception to the Eleventh Amendment, a sued state official need have only "some connection" with the continuing enforcement of the unconstitutional act. *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 367, 372-73 (2d Cir. 2006). Here, the HR Director and the Commissioner of OTDA (positions held by defendants Faresta and Roberts, respectively, at the time this action commenced) are fully responsible for the personnel decisions of the agency. The Director of OAH (a position held by defendant Spitzberg at the time this action was commenced) sought to terminate Plaintiff, was responsible (along with the HR Director) for the transfer of Plaintiff's civil service title, and is responsible for assignment of duties within OAH. The General Counsel (defendant Rock) is responsible for, and passes on, the legal propriety of personnel moves within the agency. Each of these officers has some connection to the ongoing wrongs (*inter alia*) of Plaintiff being precluded from the position of Hearing Officer and having records of his suspension maintained in his personnel file.

## III. DEFENDANTS' COLLATERAL ESTOPPEL AND ROOKER-FELDMAN AFFIRMATIVE DEFENSES ARE MERITLESS

The official capacity defendants asserted a number of affirmative defenses in their answer (D.E. 39), most of which are either irrelevant to this motion or refuted in the foregoing parts of this brief. Two deserve brief mention. The third affirmative defense asserts that Plaintiff's claims are barred in whole or in part by res judicata and/or collateral estoppel.

Previous filings indicate that they believe that the arbitration award is the judgment in question. But the Supreme Court has made clear that preclusion doctrines of any kind are inapplicable in a civil rights action where the prior judgment is an arbitration award made pursuant to a general arbitration provision (not specifically delegating authority to resolve the civil rights issue in question) in a collective bargaining agreement. *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) ("[A]ccording preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights."); *Alexander v.Gardner-Denver Co.*, 415 U.S. 36 (1974). Cases cited by defendants in past papers are distinguishable because they did not involve arbitrations pursuant to collective bargaining agreements. *E.g.*, *Burkybile v. Bd. of Educ. Of Hastings-On-Hudson*, 411 F.3d 306, 311-12 (2d Cir. 2005) (holding that prior disciplinary hearing had preclusive effect because it was an administrative adjudication and not an arbitration). *See also Siddiqua v. New York State Dep't of Health*, 642 Fed. Appx. 68, 70 n.1 (2d Cir. March 16, 2016) (noting that the Court "had expressed doubt regarding the validity of the so-called *Gardner-Denver* line of cases" in *Burkybile*, but that "there is no doubt the *Gardner-Denver* rule remains good law").

The official capacity defendants' twelfth affirmative complaint asserts the *Rooker-Feldman* doctrine. That doctrine would be applicable only if this action sought to overturn a state court judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Plaintiff's complaint does not seek any such relief.

## Conclusion

Plaintiff's motion for partial summary judgment should be granted.

*/s/ Michael E. Rosman*
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