IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KAREN GRIGSBY, AND JEFFREY T. BROWN,	)	
Plaintiffs,	)	1:CV-99-2083
v.	)	Judge Gregory M. Sleet
YVETTE KANE, ROBERT DESOUSA, GERARD MACKAREVICH, ROGER CAFFIER, AND RUTH DUNNEWOLD,	)	
Defendants.	)	

MEMORANDUM

I. INTRODUCTION

Presently before the court is a motion for summary judgment filed on October 30, 2003 by defendants Robert DeSousa, Gerard Mackarevich, Roger Caffier and Ruth Dunnewold (collectively, "the Commonwealth Defendants"). (D.I. 110.) Their motion seeks summary judgment only as to plaintiff Jeffrey Brown's claims.[1] Brown originally filed his complaint in the Middle District of Pennsylvania, but the case was subsequently assigned to this court. At issue in this case is Brown's claim under 42 U.S.C. § 1983 (2003) that he was unlawfully terminated for exercising his First Amendment right to speak freely. (D.I. 5.) For the following reasons, the court will grant the Commonwealth Defendants' motion and dismiss Brown's complaint in its entirety.[2]

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[1]The Commonwealth Defendants filed a separate motion for summary judgment on plaintiff Karen Grigsby's claims on January 5, 2004.

[2]Judge Yvette Kane was dismissed by order of the court on July 25, 2003. (D.I. 106.) Therefore, only DeSousa, Mackarevich, Caffier, and Dunnewold remain as defendants. Although Brown admitted in his deposition that he has no claim against Caffier (Brown Dep. at 59:11-13), Caffier has not been formally dismissed. Thus, he is technically still a defendant.

II. JURISDICTION

The court has jurisdiction over this matter under 28 U.S.C. § 1331 (1993).

III. STANDARD OF REVIEW

Summary judgment is appropriate when there are no genuine issues of material fact. *See* Fed. R. Civ. P 56©. A fact is material if it might affect the outcome of the case, and an issue is genuine if the evidence is such that a reasonable factfinder could return a verdict in favor of the nonmovant. *See In re Headquarters Dodge, Inc.*, 13 F.3d 674, 679 (3d Cir. 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When deciding a motion for summary judgment, the court must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). The nonmoving party, however, must demonstrate the existence of a material fact supplying sufficient evidence – not mere allegations – for a reasonable jury to find for the nonmovant. *See Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996) (citation omitted). To raise a genuine issue of material fact, the nonmovant "need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the 'mere scintilla' [of evidence] standard." *Petruzzi's IGA Supermarkets, Inc. v Darling-Delaware Co.,* 998 F.2d 1224, 1230 (3d Cir. 1993) (citations omitted). The nonmovant's evidence, however, must be sufficient for a reasonable jury to find in favor of the party, given the applicable burden of proof. *See Anderson*, 477 U.S. at 249-50.

IV. BACKGROUND

Pursuant to the Commonwealth Attorneys Act, Pennsylvania has established an Office of the General Counsel, headed by a gubernatorially-appointed General Counsel who serves as the

Governor's legal advisor. Pa. Stat. Ann. tit. 71, § 732-301 (1990). The General Counsel appoints a Chief Counsel (and necessary assistant counsel) for each executive agency, including the Department of State. § 732-301(1). Directly under the Chief Counsel in the Department of State are four Deputy Chief Counsels, one of whom is primarily responsible for the legal affairs of the Bureau of Professional and Occupational Affairs ("the BPOA"). (Mackarevich Dep. at 16:1-6.) The BPOA is charged with the responsibility of monitoring the professional licenses issued in the Commonwealth of Pennsylvania. *See* 71 Pa. Code § 279.1(6). Within the BPOA is a hierarchy of attorneys headed by the Deputy Chief Counsel. (D.I. 111 Ex. 9.) In the prosecution division of the BPOA, there are four Senior Prosecutors in Charge directly under the Deputy Chief Counsel. (Id.) Each Senior Prosecutor in Charge supervises a group of non-supervisory attorneys categorized as level I, II, or III. (Id.) In June of 1993, Brown was hired as an Attorney I in the prosecution division of the BPOA (Brown Dep. at 14:11), a position he held until he was terminated on December 11, 1997 (D.I. 111 Ex. 11). At the time Brown was terminated, he was under the direct supervision of Senior Prosecutor in Charge Ruth Dunnewold. Gerard Mackarevich was Deputy Chief Counsel. (D.I. 111 at 2 n.1.)

In 1995, the Ridge Administration came into power. Naturally, this lead to several changes in Pennsylvania's government. Former-defendant (now-Judge) Yvette Kane was appointed by then-Governor Ridge as Secretary of the Commonwealth, and Paul Tufano was appointed as General Counsel. (D.I. 111 at 2 n.1.) Tufano appointed Robert DeSousa as Chief Counsel of the Department of State, a position he assumed on March 17, 1995. (DeSousa Dep. at 4-5.) One change implemented by DeSousa at BPOA was a quota system[3] in order to more

[3]The Commonwealth Defendants disagree with this characterization, instead referring to it as a (continued...)

objectively gauge the performance of prosecuting attorneys. (Id. at 86-89.) It is Brown's belief that the quota system was illegal, and he allegedly expressed his opposition directly to the Commonwealth Defendants. (D.I. 5 ¶ 27.) Brown also brought the quota system to the attention of the Pennsylvania Association of Realtors ("PAR"),[4] and filed what he calls a "whistle blower report" with the Auditor General of the Commonwealth of Pennsylvania. (Id. ¶ 28.) Shortly thereafter, Brown was terminated. As a result, Brown brought the present action.

V. DISCUSSION[5]

It is Brown's belief that he was terminated in retaliation for his speaking out against the quota system. Because First Amendment rights (applicable to the states through the Fourteenth Amendment) are within the protective penumbra of § 1983,[6] Brown argues that his termination was unlawful.

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[3](...continued)
"goal system." For the purposes of the court's decision, the label is inconsequential.

[4]At the time of his termination, Brown was assigned to the Real Estate Board. (Brown Dep. at 61:6-62:3.)

[5]Due to the substantial factual overlap between this case and that of Brown's co-plaintiff, portions of this section are replicated from the court's recently-issued opinion granting summary judgment against Grigsby.

[6]Section 1983, Title 42 of the United States Code provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2003).

The Commonwealth Defendants urge the court to analyze this set of facts under the *Elrod*/*Branti* line of First Amendment cases, in which the Supreme Court carved out an exception to the general rule forbidding the politically-motivated discharge of a public employee in cases where the employee is a "policymaker." *See generally Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).[7] However, these cases and their progeny have generally been thought to apply only when the employee's freedom of association, i.e., "political affiliation," rights are implicated. *Curinga v. City of Clairton*, 357 F.3d 305, 311 (3d Cir. 2004). On the other hand, when the employee's freedom of speech rights are implicated, the *Pickering*/*Connick* line of cases control. *See generally Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). Under that line of cases, the Supreme Court has directed the lower courts to employ a three-step balancing test in deciding whether the employee was unlawfully dismissed. *Curinga*, 357 F.3d at 310. Ostensibly these two lines of cases present dichotomous analytical methods. The unfortunate reality is that the two lines are intertwined – sometimes inextricably so. The Supreme Court has not yet found the opportunity to directly address this relationship, but the Third Circuit recently found itself presented such an opportunity in *Curinga*. In *Curinga*, an employee was dismissed for both his political affiliation and his campaign speech against his government-employer. This gave rise to the question of whether *Elrod*/*Branti* or *Pickering*/*Connick* provides the proper mode of analysis in mixed cases. The court held that even though the outcome happened to be the same under either line of cases

[7]More precisely, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. In spite of this refinement, the court will continue to use the term "policymaker" as shorthand throughout this opinion.

given the facts presented, the outcome under *Pickering*/*Connick* should be dispositive. *Curinga*, 357 F.3d at 313.

Under *Pickering*/*Connick*, the plaintiff must first "demonstrate that the speech involves a matter of public concern and the employee's interest in the speech outweighs the government employer's countervailing interest in providing efficient and effective services to the public." *Curinga*, 357 F.3d at 310. Second, the plaintiff must show that the speech was "a substantial or motivating factor in the alleged retaliatory action."[8] *Id.* Finally, "the employer can show that it would have taken the adverse action even if the employee had not engaged in protected conduct." *Id.* "The second and third factors are questions of fact, while the first factor is a question of law." *Id.* However, in spite of the fact that *Pickering*/*Connick* controls in mixed cases, a court's determination of the government-employer's countervailing interest at step one often requires the court to consider whether the employee is a policymaker under the *Elrod*/*Branti* line of cases. This is because the "government's interest in appointing politically loyal employees to policymaking positions converges with its interest in running an efficient workplace." *Curinga*, 357 F.3d at 312. "In this sense, *Elrod* considerations of fidelity may easily converge with the government's interest in managing an efficient workplace under the *Pickering* spectrum." *Id.*

If, under *Elrod*/*Branti*, the employee is found to be a policymaker, then the *Pickering*/*Connick* balance is tipped decidedly in the employer's favor. For example, in *Rose v.*

[8]The Commonwealth Defendants deny that Brown's termination had anything to do with his speaking out against the quota system. (D.I. 111 at 36-42.) Nevertheless, they argue that "[e]ven if Mr. Brown could raise questions with respect to the Commonwealth's motives, his claim would still fail because he is a policymaker who can be discharged for speaking out against the legitimate policies of the Commonwealth." (Id. at 42.) Because the court determines that Brown's claim fails under *Pickering*/*Connick*, the court need not address this issue.

Stephens, the Sixth Circuit adopted what can only be described as a *per se* rule: "where a confidential or policymaking public employee is discharged on the basis of speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." 291 F.3d 917, 921 (6th Cir. 2002). The *Rose* court went on to say, "the rule we adopt today simply recognizes the fact that it is insubordination for an employee whose position requires loyalty to speak on job-related issues in a manner contrary to the position of his employer, and, as the Supreme Court has recognized, 'employees may always be discharged for good cause, such as insubordination . . . .'" *Id.* at 923 (quoting *Elrod*, 427 U.S. at 366). "In this situation," the court said, "an individualized balancing of interests is unnecessary." *Id.* The Third Circuit did not go quite so far in *Curinga*, but it came close. Of the Sixth Circuit's decision in *Rose*, the Third Circuit said, "[w]hether or not this can be decided as a matter of law, the government's interest in these kinds of cases is *likely dispositive*." *Curinga*, 357 F.3d at 312 n.5 (emphasis added).

In the present case, Brown does not allege that his freedom of association rights were ever impinged. Rather, Brown's claim is based entirely on his contention that he was terminated for speaking out against the quota system. Therefore, contrary to the Commonwealth Defendants' assertion, *Pickering*/*Connick* provides the proper analytical framework in this case. As such, the first step requires Brown to show that his speech involved a matter of public concern and that his interest in the speech outweighs his supervisors' countervailing interest in providing efficient and effective services to the public. Although the Commonwealth Defendants concede that Brown's speech addressed a matter of public concern (D.I. 111 at 51-53), they argue that his interest in the speech does not outweigh their countervailing interest in providing efficient and effective services to the public (Id. at 53-56).

As indicated above, virtually every time an employee is found to be a policymaker under *Elrod*/*Branti*, the government-employer's countervailing interest outweighs the employee's interest. *Tomalis v. Office of Attorney Gen. of the Commonwealth of Pa.*, 45 Fed. Appx. 139 (3d Cir. 2002), an unpublished Third Circuit opinion, is informative on this point. In *Tomalis*, the plaintiff was employed as a Deputy Attorney General handling tax cases in the Office of Attorney General ("OAG") for the Commonwealth of Pennsylvania. Although the plaintiff was initially hired by a Republican, he was actually an Independent. The plaintiff served under several Attorneys General, but after one Attorney General resigned in the midst of a criminal investigation against him, the newly-elected replacement Attorney General requested the resignation of every at-will employee in the OAG. Not only did the plaintiff refuse to resign, but he also sent a severely critical letter to both his new boss and the news media. *Tomalis*, 45 Fed. Appx. at 141. The plaintiff subsequently discovered that several of the cases he was handling involved parties who had contributed to the new Attorney General's inaugural committee. Concerned that this presented a conflict of interest, the plaintiff raised the issue with his superiors on more than one occasion. He was terminated shortly thereafter. *Id.* The plaintiff brought a § 1983 claim in which he alleged that he was terminated both because of his political affiliation and in retaliation for speaking out on a matter of public concern. *Id.*

The Third Circuit first determined that under *Elrod*/*Branti* the plaintiff was a policymaker, and therefore, could be terminated for his political affiliation. The plaintiff's official job description was crucial to the court's decision. It described the plaintiff's position as "highly responsible," and stated that the position required the rendering of "legal services and advice on matters of significant scope, importance, and complexity." In addition, the job

description outlined the potential need for the person holding that position to assume a supervisory role. *Tomalis*, 45 Fed. Appx. at 141. In spite of the plaintiff's attempt to downplay his role to that of a "line attorney," the Third Circuit viewed him as "an attorney deeply enmeshed in the ebb and flow of important tax litigation for the Commonwealth, handling cases that have significant ramifications on policy and affect taxpayers beyond the particular litigants." *Id.* at 143. The court considered it irrelevant that the plaintiff was supervised to some degree and subject to formal performance reviews. *Id.* at 144. Thus, the court held that the plaintiff's *Elrod*/*Branti* claim was not viable.

The court then proceeded to analyze the plaintiff's *Pickering*/*Connick* claim. Although the court eschewed completely collapsing *Elrod*/*Branti* into *Pickering*/*Connick*, the plaintiff's status as a policymaker was directly relevant to the court's decision to dismiss the retaliation claim:

> [The Attorney General] has a reasonably greater cause for concern when direct public criticism of him comes from one in a confidential position. [He] cannot implement his goals and policies alone. Rather, he does so only through the individual attorneys that represent him in matters on a day-to-day basis. For example, as explained above, [the plaintiff's] position thrusts him into an appellate court to speak on [the Attorney General's] behalf in major pieces of tax litigation that can have long-lasting, state-wide effects on policy and other tax payers. As such, [the Attorney General] has a vested interest in [the plaintiff's] loyalty, confidence and judgment. . . . The employer does not have "to allow events to unfold to the extent that the disruption of the office and the destruction of the working relationships is manifest before taking action."

Tomalis, 45 Fed. Appx. at 145 (quoting *Connick*, 461 U.S. at 152). While it acknowledged the significance of the plaintiff's "right to speak out on the issues he chose to address," the court concluded that the Attorney General's interest in promoting the "efficiency of the public service"

he and his office performed outweighed the plaintiff's interest. *Id.* Therefore, the plaintiff's *Pickering*/*Connick* claim was dismissed as well.

The Third Circuit has held on at least three other occasions that government lawyers are policymakers under *Elrod*/*Branti*. *See Wetzel v. Tucker*, 139 F.3d 380 (3d Cir. 1998) (solicitor for a county agency); *Mammau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (assistant district attorney); *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981) (city solicitor and two assistant city solicitors). For example, in *Wetzel* the court rejected the First Amendment claim of a solicitor for the Northeastern Pennsylvania Hospital and Education Authority ("the Authority"), an entity created to provide tax exempt status to bonds issued in order to raise money for health care providers and educational institutions. The court first questioned whether the Authority was a policy-making body. For an answer, it looked to the Authority's statutory grant of power, which conferred "upon the Authority the power 'to do all acts and things necessary or convenient for the promotion of its business and the general welfare of the Authority, to carry out the powers granted to it by this act or any other acts.'" 139 F.3d at 384 (citing 53 Pa. Cons. Stat. § 306B(n)). The court concluded this was an expansive grant of power because it charged the Authority "with ensuring its continued operation, [and also] the discretionary power to decide how to conduct its operations." *Id.* at 385. Thus, the court disagreed with the plaintiff's characterization of the Authority as a mere "conduit through which tax exempt financing is obtained by health care providers and educational institutions," *id.*, and instead held that the Authority was in fact a policy-making body,

The Third Circuit next addressed the plaintiff's status as a policymaker by "assess[ing] the level of input that the office of Solicitor has on matters of public policy." *Id.* The court saw

no reason to stray from its previous decisions regarding government attorneys (i.e., *Ness* and *Mammau*), particularly "in light of the broad discretionary power conferred by § 306B(n) and the role that the advice of counsel would have in shaping policy decisions." *Id.* Most notably, the court said of this role:

> Tough legal questions are not answered mechanically, but rather by the exercise of seasoned judgment. Judgment is informed by experience and perspective, and any evaluation of the risks involved in such a decision (including the determination as to whether it is advisable to pursue litigation) is informed, in turn, by values. Moreover, as the foregoing discussion suggests, these issues are not purely legal; clients employ counsel to assess whether the goals are indeed worth the risks. As such, to be confident in its Solicitor's advice on matters "intimately related" to Authority policy, the [Authority's] Board [of Directors] must have the right to demand that his loyalties lie with it and its agenda. *Ness*, 660 F.2d at 522. Given the political ramifications of any attendant legal advice, confidence sometimes may come only with the assurance that the Solicitor shares the same political ideology as the Board. These situations are exactly the types for which the Supreme Court created the *Elrod*/*Branti* exception.

Wetzel, 139 F.3d at 386. Therefore, the court held that the plaintiff could be dismissed (in spite of his First Amendment rights) because he was a policymaker. *Id.*

Similarly, the Third Circuit held in *Ness* that a city solicitor and two assistant city solicitors were policymakers. The court reasoned that, "as a matter of law, the duties imposed on city solicitors [by the city's administrative code] and the undisputed functions entailed by these duties e.g., rendering legal opinions, drafting ordinances, negotiating contracts define a position for which party affiliation is an appropriate requirement." *Ness*, 660 F.2d at 522. The court also found it persuasive that "that the city solicitor (and any assistants deemed necessary by the mayor and city solicitor) [are] appointed by the mayor . . . [and] serve at the pleasure of the mayor." *Id.* at 521. The Third Circuit came to the same conclusion in *Mammau* with regard

to an assistant district attorney. Recently, this court relied on these cases in holding that Brown's co-plaintiff, an Attorney III at the BPOA, was also a policymaker.

These cases stand in contrast to *Burns v. County of Cambria*, where the Third Circuit determined that deputy sheriffs were not policymakers under *Elrod*/*Branti*. 971 F.2d 1015 (3d Cir. 1992). The court looked to the three main duties of deputy sheriffs (serving process, transporting prisoners, and guarding courtrooms), and concluded that since the defendants failed to show that "deputy sheriffs enjoy significant autonomy or discretion in their jobs or that their political activities are relevant to their duties," they are not subject to reduced First Amendment protection. *Id.* at 1023.

Based on the teachings of these cases, the court concludes that Brown was a policymaker as an Attorney I. For starters, BPOA is a policy-making body. Pursuant to Pa. Stat. Ann. tit. 71, § 279.1 (1990), the BPOA is entrusted with expansive powers. Among other things, it is responsible for establishing license reciprocity with other states, § 279.1(a)(1), aiding in the determination and establishment of standards of professional regulation, § 279.1(a)(5), investigating the qualifications of applicants for professional and occupational licenses, § 279.1(a)(6), fixing the fees charged by professional and occupational examining boards, § 279.1(a)(7), etc.[9] All of the foregoing responsibilities are clearly policy-oriented. Consequently, the court must take the next step and assess the level of input an Attorney I has on matters of public policy.

After reviewing the record, the court concludes that an Attorney I at the BPOA has a high level of input on matters of public policy. Indeed, it is evident that the BPOA considered this to

[9]The statute enumerates several other responsibilities. By omitting them from this list, the court does not hold that the omitted items are not policy related.

be the case. Management Directive 530.22, Amended, specifies that all attorneys employed by the Commonwealth of Pennsylvania are classified as "major nontenured *policymaking* or advisory" employees. (D.I. 111 Ex. 8 (emphasis added).)[10] Furthermore, the Attorney III job description has many similarities with the job descriptions relied upon in *Tomalis* and *Ness*:

> Attorneys are responsible for researching, interpreting and applying laws, court decisions, and other legal authorities in the preparation of briefs, pleadings, adjudications and other legal papers in connection with professional licensing disciplinary matters, other administrative proceedings and civil litigation. It is the duty of the attorney to uphold and enforce the laws governing the licensed practice of the professions within the jurisdiction of the BPOA. Employees in this class make appearances before trial and appellate courts, hearing examiners and licensing boards. Employees assist attorneys of higher classification on more complex and varied matters. Much of the work is performed independently, subject to periodic review.
> . . .
> The attorney performing duties for the Prosecution Division prosecutes cases before one or several licensing boards. He or she is responsible for a revolving caseload that exceeds 100 files. The attorney reviews case files processed through the Bureau's Complaints Unit and Bureau of Enforcement and Investigations. . . . Such complaints, which allege misconduct by a licensed practitioner or unlicensed activity by others, are reviewed by the attorney to determine whether they allege facts which would be grounds for disciplinary action by the appropriate licensing board under the relevant licensing and related laws. These cases vary in complexity from simple ones, in which the Commonwealth's case is proven solely with certified documents from another jurisdiction, to the more complex, requiring witness interviews, preparation for a hearing, including attendance at pre-hearing conferences. . . . The attorney as prosecutor decides whether any particular case is to proceed to the formal prosecution stage, a decision that is reviewable by a Senior Prosecutor in Charge. . . . In appropriate cases, the attorney negotiates a Consent Agreement prior to the hearing. If a hearing is required, the attorney presents the case before the applicable board or a hearing examiner . . . .
>
> The attorney in either division may handle appellate matters, which includes the certification of the record to the court, legal research of the issues raised by the licensee, preparation of briefs which outline the legal arguments in response to

[10]The court does *not* hold that an employee is a policymaker under *Elrod*/*Branti* merely because her employer labels her as such. Nevertheless, it is a relevant consideration.

> the licensee's appeal, preparation and filing of motions, answering motions, court appearances, and oral argument before the court. . . .
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> The employee may be assigned to draft letters on behalf of the Secretary, Chief Counsel, or BPOA Commissioner pertaining to agency matters, and for addressing legal questions raised by licensees.
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> The employee reports through intermediary supervisors to the Chief Counsel of the Department, and ultimately to the Governor's General Counsel. . . .
>
> Duties are carried out with minimal direct supervision and considerable independence which provides latitude in setting priorities, executing assignments and fulfilling responsibilities. Guidance is provided as requested from the team leader and the Deputy Chief Counsel, and through the policies and directives established by the Chief Counsel and Office of General Counsel.

(D.I. 111 Ex. 9.) In *Tomalis*, the court stressed the "highly responsible" nature of the position as well as the significance and complexity of the cases. 45 Fed. Appx. at 141. In *Ness*, the court focused on the attorneys' responsibility to render legal opinions, draft ordinances, and negotiate contracts. 660 F.2d at 522. These are precisely the same type of characteristics inherent in the Attorney I position.[11] The court notes that *Tomalis* involved a job with the potential for a supervisory role, whereas Attorney I is a non-supervisory position. Nevertheless, the court does not believe this is dispositive because it is certainly possible to have significant policy-oriented responsibilities without supervising anyone.

Moreover, in contrast to the deputy sheriffs in *Burns*, whose responsibilities were entirely unrelated to policy issues, the Attorney I job description demonstrates that the position entrusts

[11]Although actual job duties performed by the plaintiff are informative (but not dispositive) "in some cases," the focus is "primarily on the 'function of the public office in question and not the actual past duties' of the plaintiff." *Tomalis*, 45 Fed. Appx. at 143 n.5 (quoting *Wetzel*, 139 F.3d at 383-84). As the Third Circuit emphasized in *Mammau*, merely because the plaintiff "could conceivably operate in . . . a legal/technical manner, or that [the plaintiff] *in fact* so limited himself to the role described is irrelevant." 687 F.2d at 10 (emphasis in original) (internal citations omitted).

the employee with significant autonomy and discretion. It uses such phrases as "work is performed independently," "minimal direct supervision," "considerable independence," and "latitude in setting priorities," etc. Also important is the fact that the General Counsel is "appointed by the Governor to serve *at his pleasure* [as] the legal advisor to the Governor. . . ." Pa. Stat. Ann. tit. 71, § 732-301 (emphasis added). The General Counsel, in turn, is statutorily directed to "appoint for the operation of each executive agency such chief counsel *and assistant counsel* as are necessary for the operation of each executive agency." § 732-301(1) (emphasis added). Once again, this is closely analogous to one of the crucial factors relied upon in *Ness*, where "the city solicitor (*and any assistants* deemed necessary by the mayor and city solicitor) [are] appointed by the mayor . . . [and] *serve at the pleasure* of the mayor." 660 F.2d at 521 (emphasis added).

In sum, the court sees striking similarities between Brown's position as an Attorney I and the positions of the various government-attorney plaintiffs in *Tomalis*, *Wetzel*, *Mammau*, and *Ness*. Therefore, like the Third Circuit in *Wetzel*, this court finds no reason to stray from the holdings in prior cases. Thus, the court holds that Brown was a policymaker at the BPOA.[12]

[12]The court is cognizant of the fact that in her deposition, Dunnewold referred to Brown as a "line prosecuting attorney" who "could not make a decision whether to prosecute a case." (Dunnewold Dep. at 47:16-17.) This characterization is similar to the characterization made by the plaintiff in *Tomalis* in his attempt to persuade the Third Circuit that he was not a policymaker. 45 Fed. Appx. at 143. Even if Brown had attempted to build an argument around this characterization (which he did not), the court would still have held Brown to be a policymaker. In *Tomalis*, the Third Circuit rejected the argument as "wholly unpersuasive" because the plaintiff "did not act as a document clerk or paralegal, exercising no meaningful independent legal judgment that impacts the OAG's position on tax matters." *Id.* Rather, the plaintiff "was an attorney deeply enmeshed in the ebb and flow of important tax litigation for the Commonwealth, handling cases that have significant ramifications on policy and affect taxpayers beyond the particular litigants." *Id.* Likewise here, although Brown had limited prosecutorial discretion, he exercised meaningful independent judgment and was deeply enmeshed in

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This holding is technically not the end of the road for Brown. As the Third Circuit held in *Curinga*, the court must still engage in *Pickering*/*Connick* balancing and determine whether Brown's interest in the speech outweighs his supervisors' countervailing interest in providing efficient and effective services to the public.[13] Such balancing is not always easy because "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. The balancing, however, is somewhat less difficult in this case given that Brown was a policymaker under *Elrod*/*Branti*. In *Connick*, the Court outlined three factors to be considered: (1) the degree to which the speech disrupts close working relationships; (2) the time, place, and manner of the speech; and (3) the context in which the dispute arose.[14] 461 U.S. at 151-54. As to the first factor, because "tough legal questions are not answered mechanically, but rather by the exercise of seasoned legal judgment," *Wetzel*, 139 F.3d at 386, it is clear that close working relationships among attorneys with varying degrees of experience are essential to the proper functioning of the BPOA. And, in cases where "close working relationships are essential to fulfilling public responsibilities, a wide degree of

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[12](...continued)
professional licensing matters. For example, in the amended complaint Brown summarizes his duties as "reviewing cases of potentially unlawful misconduct by state licensees and use [sic] his prosecutorial discretion subject to approval by his supervisors, to either close cases without prosecution, or to prosecute accused persons in accordance with state law." (D.I. 5 ¶ 24.)

[13]The court is careful to note that this balancing is not to be performed by a factfinder at trial. It is the duty of the courts, not juries, to make an "independent constitutional judgment on the facts of the case." *Connick*, 461 U.S. at 150 n.10 (internal citations omitted).

[14]The Court in *Connick* warned that it did not intend to "lay down a general standard against which all [employee speech] may be judged." 461 U.S. at 154. The court recognizes the possibility that a scenario could arise in which all three factors weigh against the plaintiff, and yet the balancing comes out against the defendant. However, the court does not believe the record in this case presents such a scenario. No evidence in the record suggests that some other, as-of-yet unnamed factor weighs in the plaintiff's favor. Therefore, the court believes the disposition of these three factors, in combination with Brown's status as a policymaker, is sufficient to control the outcome of this case.

deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. Here, the Commonwealth Defendants argue that it is important to for BPOA prosecutors to be "loyal, cooperative, and willing to carry out" the aims of their superiors.[15] (D.I. 111 at 55-56.) The Commonwealth Defendants claim that speaking in opposition the BPOA's broad policies serves to "completely undermine the operations of the BPOA prosecution division." (Id.) Since the Commonwealth Defendants' judgment warrants a "wide degree of deference," and since Brown does not refute their contentions, the court must conclude that this factor weighs against Brown.[16]

The time, place, and manner of Brown's speech is the second *Connick* factor. In *Tomalis*, the plaintiff – a policymaker – criticized his employer in a letter he copied to various newspapers. 45 Fed. Appx. at 145. The Third Circuit said the defendant-employer "has a reasonably greater cause for concern when direct public criticism of him comes from one in a confidential position." *Id.* This, in combination with other factors, led the court to conclude that the *Pickering*/*Connick* balancing favored the defendant. Similarly here, Brown – a policymaker – proliferated his view that the Commonwealth Defendants had implemented an illegal quota system to both the PAR and the Auditor General. Following the Third Circuit's lead in *Tomalis*, the court holds that the time, place, and manner of Brown's speech weigh against him as well.

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[15]The Commonwealth Defendants disclaim any knowledge of Brown's speech in opposition to the quota system. (D.I. 111 at 20-31.) Consistent with this position, they present no evidence of their contemporaneous reaction to Brown's speech. Instead, they present attorney argument as to why his speech was disruptive. Since the outcome of *Pickering*/*Connick* balancing is a legal conclusion, not a factual determination, it is appropriate for the court to consider attorney argument in this context.

[16]In *Connick*, the Court cautioned that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." 461 U.S. at 152. However, the record does not indicate that this is such a case.

As to the context in which the dispute arose, in *Connick* the Court said, "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." 461 U.S. at 153. In this case, Brown disagreed with his supervisors' imposition of a quota system to regulate his output. This ultimately led Brown to speak out against the system both internally and externally. Thus, it was "the very application of the policy to the speaker" that gave rise to the dispute, and the court is obliged to weigh this factor against Brown.

Brown implicitly disagrees with this analysis and likens his case to that of the plaintiff in *Baldassare v. State of N.J.*, 250 F.3d 188 (3d Cir. 2001). In *Baldassare*, the plaintiff was an investigator for the county prosecutor's office. At the direction of the county prosecutor, the plaintiff conducted an internal investigation into allegations of wrongdoing. Based on the plaintiff's findings, the county prosecutor brought charges against the alleged wrongdoers, but eventually turned the case over to the New Jersey Attorney General due to a conflict of interest. The Attorney General's Criminal Division conducted its own investigation and concluded that the charges should be dropped for lack of evidence. Nevertheless, the county prosecutor suspended the alleged wrongdoers. Subsequently, the Deputy Attorney General questioned the plaintiff about his role in the investigation, and simultaneously expressed disapproval about the entire matter. The county prosecutor then resigned, and he was replaced by the Deputy Attorney General. As acting county prosecutor, the former Deputy Attorney General terminated the plaintiff, which led the plaintiff to bring a § 1983 action for violation of his First Amendment rights. *Id.* at 192-94.

After determining that the plaintiff's role in the investigation qualified as speech involving a matter of public concern, *id.* at 195-97, the Third Circuit turned to the question of whether the plaintiff's interest in the speech was "outweighed by any injury his conduct could cause the interests of the prosecutor as a public employer," *id.* at 197. Weighing heavily in favor of the plaintiff was the fact that the "interest in exposing potential wrongdoing by public employees is especially powerful." *Id.* at 198. The defendants countered by arguing that the plaintiff's role in the investigation disrupted a close working relationship necessary to the effective functioning of the county prosecutor's office. *Id.* According to the court, the defendants analogized the plaintiff to the Assistant District Attorney in *Sprague v. Fitzpatrick*, 546 F.2d 560 (3d Cir. 1976), who was terminated after he "challenged the veracity of [the District Attorney's] public comments in an interview in The Philadelphia Inquirer." *Baldassare*, 250 F.3d at 199. The Third Circuit rejected this comparison because *Sprague* involved the voluntary and public criticism of the District Attorney by the Assistant District Attorney, an action which "completely destroyed a working relationship that was dependent on mutual trust and confidence." *Id.* In contrast, the evidence in *Baldassare* belied the existence of the close working relationship found in *Sprague*. Moreover, the plaintiff's role in the investigation was at the direction of the county prosecutor, and the plaintiff "did not impugn the integrity of his superior." *Id.* Therefore, the court held that the plaintiff's interests outweighed those of the defendants. *Id.* at 200.

In the present case, Brown's situation is not similar to that of the plaintiff in *Baldassare*. Most importantly, Brown was a policymaker within the BPOA – a finding that is absent in the

Baldassare opinion.[17] As such, Brown is disadvantaged at the outset in terms of *Pickering*/*Connick* balancing. Furthermore, unlike the plaintiff in *Baldassare*, Brown voluntarily exposed the allegedly illegal activity of his superiors to an outside organization – the PAR. Finally, in terms of close working relationships, Brown's relationship to his superiors is clearly more analogous to the Assistant District Attorney-District Attorney relationship in *Sprague* than it is to the investigator-prosecutor relationship in *Baldassare*. Because of these differences, the court is not persuaded by Brown's argument.

Therefore, after determining that Brown was a policymaker, and then weighing his interests against those of his supervisors pursuant to *Pickering*/*Connick* balancing, the court holds Brown's First Amendment claim must fail as a matter of law.

VI. CONCLUSION

After reviewing the entire record, the court holds that there is insufficient evidence for Brown to survive the Commonwealth Defendants' motion for summary judgment. Therefore, the court will grant the motion and dismiss this case in its entirety.

Dated: February 9, 2005

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

[17]The Third Circuit in *Baldassare* did not even address the *Elrod*/*Branti* line of cases.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KAREN GRIGSBY, AND JEFFREY T. BROWN,	)	
Plaintiffs,	)	1:CV-99-2083
v.	)	Judge Gregory M. Sleet
YVETTE KANE, ROBERT DESOUSA, GERARD MACKAREVICH, ROGER CAFFIER, AND RUTH DUNNEWOLD,	)	
Defendants.	)	

ORDER

IT IS HEREBY ORDERED that:

1. The defendants' motion for summary judgment (D.I. 110) be GRANTED in full; and

2. All counts of the amended complaint (D.I. 5) be DISMISSED with prejudice.

Dated: February 9, 2005

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE