

**TAYLOR LAW SPEECH ISSUES**

New York State Bar Association  
Labor & Employment Law Section  
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## **TAYLOR LAW SPEECH ISSUES**

- I. Statute: Public Employees' Fair Employment Act, N.Y. Civ. Serv. Law §§200-214
- II. Focus: CSL §209-a Improper Practice Provisions

### **EMPLOYEE SPEECH**

I. Controlling Proposition: If speech in any form (verbal, printed, demonstrative, symbolic) is concerted and protected, it cannot be the basis for any adverse employment action and cannot be subjected to unilaterally imposed employer prohibitions or restrictions. Facts of case can be important as to whether speech is protected. Issues arise in a variety of contexts, most often disciplinary.

II. Case Illustrations:

A. Ellenville CSD, 9 PERB ¶3067 (1976)

Union president's comment to elementary school principal regarding principal's reputed refusal to recommend a teacher for tenure ("that is a remark I'd expect from a whore") not basis for disciplinary action. PERB appears to treat case as pretext case by concluding the union president's comment was not "the real reason for bringing the disciplinary charge." Real reason may have been retaliation for increased grievance filing.

B. Deer Park UFSD, 11 PERB ¶3043 (1978)

Employer's directives to employees to stop student "success" report cards, not improper. Program to enhance teachers' and union's public image is not protected activity. Not protected because comments in the success cards were based on information acquired by the teachers in the course of duties for school district. Possible different result if the student recognition was based on information generally available to the public. Board invokes private-sector "duty of loyalty" concepts [E.g., NLRB v. IBEW, Local 1229, 346 U.S. 464 (1953)].

C. State of New York (Aaman), 11 PERB ¶3084 (1978)

Union representative's "impulsive" and "overzealous" conduct during representation of employees at grievance hearings is proper grounds for disciplinary charges. Right to represent is "not unlimited". Bringing of disciplinary proceeding was not a *per se* violation and improper motive not found.

D. Town of Lake Luzerne, 11 PERB ¶3094 (1978)

Discharge of an employee for political reasons (employee supported rival candidate to incumbent Highway Superintendent) is not an improper practice because political activities are not protected by Taylor Law. Political action "is not in and of itself an inherent aspect of the right of public employees to organize or to be represented by employee organizations". Employee's belief that political action would improve his and other employee's terms and conditions of employment does not make the action protected. Accord Lawrence and VanPelt, 1 PERB ¶399.91 (1968) (change in employees' duty assignments motivated by political considerations)

E. City of Long Beach, 13 PERB ¶3008 (1980)

PBA President's written, publicized harsh criticism of Police Chief's actions regarding police officers protected. Reassignment of PBA President to foot patrol improper and ordered rescinded. Criticism dealt with capricious discipline and inadequate training.

F. Plainedge Public Schools, 13 PERB ¶3037 (1980)

Union representative who publicly criticized school principal's pupil promotion and retention policy protected even though comments were inaccurate and an exaggeration. Employees do not lose Act's protection merely because statements are inaccurate or disturbing to an employer. Protected unless statements are intentionally false or malicious. Reference to

disloyalty concepts. Summoning employee to principal's office to explain comments was improper interference with employee's protected rights.

G. Town of Oyster Bay, 14 PERB ¶3002 (1980)

Employer's withdrawal of benefits from union president because he campaigned against re-election of Town Supervisor is not a violation of Act §209-a.1(a), (b), or (c) because political activities are not protected by Taylor Law.

H. City of Mount Vernon, 14 PERB ¶3037 (1981)

PBA President improperly reassigned to permanent tour from rotating tours in retaliation for publicizing in press complaints about employees' working conditions and criticisms of City Mayor.

I. Western Regional OTB Corporation, 15 PERB ¶3078 (1982)

Employer memorandum requiring employees to refer to employer all media contacts regarding "corporate operations" not improper *per se* and not improperly motivated. Board reads memo narrowly as not prohibiting employees from speaking to media regarding their terms and conditions of employment. Memo intended to address matters of operational security in betting parlors.

J. City of Buffalo, 15 PERB ¶3123 (1982)

Lawful picketing is protected activity. (union officers and members picketed party honoring City Mayor) Union officer's letter to editor of local newspaper critical of City's conduct of negotiations protected.

K. City of Saratoga Springs, 18 PERB ¶3009 (1985)

Political opposition to elected official and filing of charge alleging violation of Human Rights Law are not Taylor Law protected activities.

L. New York City Transit Authority, 19 PERB ¶3021 (1986)

Union representative's report to fire department of suspected safety violations and taking pictures of unsafe conditions both protected activities. Discipline improper and ordered rescinded.

M. New York City Transit Authority (Alston), 20 PERB ¶3065 (1987)

Unionized employee's distribution of written materials to other unit employees complaining about disciplinary action employer had taken against him was concerted and protected. Literature complained about alleged unsafe working conditions, the unfairness of the employer's discipline and was a solicitation of fellow employees for help with his defense of the disciplinary charges.

N. Binghamton City School District, 22 PERB ¶3034 (1989)

Discipline of union president (written reprimand) for stating to other employees that a school district official had committed perjury during testimony at an arbitration hearing on a grievance the union had filed against the District was protected. District did not establish the statement was intentionally false or malicious. Union president's stated intent to file improper practice charge if the reprimand were not removed from his personnel file was also protected. Intent to file a charge is not an unprotected threat. Reprimand and union president's written response ordered removed from employee's personnel file.

O. State of New York (Div. of Human Rights), 22 PERB ¶3036 (1989)

Union officer's "heated vocal opposition" at a labor-management meeting to employer's staffing decisions that union officer believed were detrimental to employees protected. Employer's reassignment of union officer because of those comments ordered rescinded.

P. City of White Plains, 22 PERB ¶3053 (1989)

Union officer's complaint about manner in which a supervisor handled an employee's workplace injury protected, but not protected was a "confrontation" involving an alleged exchange of "hostile words" between the union officer and the supervisor growing out of the employee's injury.

Q. Kings Park Central School District, 24 PERB ¶3026 (1991)

Reprimand of teacher for comments in a letter written to the president of board of education that board president's son's education might suffer because of an impasse in contract negotiations not protected. Protection must assess the content of the speech and the then prevailing circumstances "uninfluenced by either the writer's articulated intent or the reader's reaction on receipt." Not all statements made during engagement in a protected activity are themselves protected. Letter was the type of impulsive, overzealous enmeshing of students in a labor dispute that is not protected. Words must be read objectively and reasonably. Statutory analysis "hinges on the close facts of the particular case when labels are of no use." Board stresses the "narrowness" of its decision. Does not hold that teachers are unprotected in articulating concerns about the effects of bargaining upon "the quality of classroom education or the teacher's ability to teach."

R. Village of Depew, 25 PERB ¶3009 (1992)

Employer's prohibition of police officer fundraiser conducted off-duty on private property and employer's statement employees would be disciplined if fundraiser was held unlawful. Any departmental rules arguably allowing employer to ban the activity or the employees' participation invalid and no source of defense.

S. Hudson Valley Community College, 25 PERB ¶3039 (1992)

Union officer's report of safety violation to state labor department protected. Disciplinary charges ordered rescinded. Accord Village of New Paltz, 25

PERB ¶3032 (1992) (safety complaint filed with employer). Compare Incorporated Village of Westhampton Beach, 35 PERB ¶3026 (2002) (safety complaint not protected as not concerted because was individual action taken in employee's capacity as a supervisor).

- T. State of New York (Employee Health Services), 26 PERB ¶3056 (1993)  
Employee's comments and behavior at a grievance meeting can be considered by an employer if it has an objective bearing on the employee's ability to perform job. Order to employee to submit to CSL §72 psychiatric examination not improper.
- U. Kings Park Central School District, 27 PERB ¶3022 (1994)  
Union officer's comments in union newspaper disparaging the District's honor student car bumper sticker program were not protected by Act because the comments did not have any relationship to employee interests or working conditions or any other aspect of employment relationship. Whether comments were privileged under any other law or constitution were not issues before PERB.
- V. Wappingers Central School District, 27 PERB ¶3033 (1994)  
Union's depiction in union newspaper of school board members and district administrators as clowns and circus animals is not a refusal to bargain. The Act "does not exact any particular level of civility from the parties involved in a bargaining relationship."
- W. Staten Island Rapid Transit Operating Auth., 28 PERB ¶3080 (1995)  
Employees have a protected right to discuss employment issues while at work so long as communication does not disrupt work. No policy, rule or practice of an employer can interfere with that protected right of communication.

- X. Village of Scotia, 29 PERB ¶3071 (1996), conf'd, 214 AD2d 29, 31 PERB ¶7008 (3d Dep't 1998) (remedy modified)

Union officer's written comments to members of village legislative body that were harshly critical of Police Chief's support for "911" dispatch proposal to which PBA objected was concerted and protected. Discipline for letter ordered rescinded although letter referred to Chief as a "suck up" and "tool" of the Mayor being used to "shaft" employees. Protected activity must be evaluated in the totality of all relevant circumstances with a focus upon the purpose and effect of the activity. Board expresses a need to protect a wide range of speech "even if occasionally intemperate." Act's protections "are not, cannot, and should not be restricted to the best educated and most articulate among those who are elected or choose to protect and advance the employment interests of an employer's employees." Board also recognizes that there may be times when the words used to convey a message are "so extreme" as to render statements unprotected.

- Y. Greenburgh No. 11 UFSD, 30 PERB ¶3052 (1997), rev'd in part, 253 AD2d 46, 32 PERB ¶7004 (3d Dep't 1999) (lv. to appeal denied)

Picketing of dinner sponsored by district not protected as picketing was in violation of judicial restraining order. Peaceful, non-abusive mass demonstration on school grounds after end of school to protest disciplinary actions protected. Discipline imposed by employer because of employees' participation in demonstration *per se* violated Act. Physical and verbal confrontation between one employee and security guard not protected as wholly personal and divorced in time and space from employee's prior actions as a grievance representative.

- Z. Plainedge Union Free School District, 31 PERB ¶3063 (1998)

Retiring union officer's comments at school district breakfast urging employee unity, vigilance and activism protected. Memo in personnel file critical of the employee's comments improper.

AA. State of New York (DOCS), 31 PERB ¶3072 (1998)

Counseling of union officer for comments made in writing and distributed to unit employees improper as comments held protected. Comments included references to supervisor as having taken “divisive action” and reference to him as “Lt. P.P. Planner.” Employer’s directive to avoid “disparaging” or “discrediting” any individual too broad and serves to “chill in advance any oral or written statements that would enjoy the full protection of the Act.” Board did not decide whether reference to “Lt. P.P. Planner” was protected. “No work rule can serve as a lawful basis to counsel or discipline employees for speech which is statutorily protected.”

BB. Carmel Central School District, 31 PERB ¶3073 (1998)

Union president’s letter to the private employer of school board president impliedly threatening withdrawal of union’s investment funds is not a refusal to bargain. Pressure tactic not regulated or prohibited by the Act.

CC. New York City Transit Auth., 32 PERB ¶3057 (1999)

Union officer’s directive to employees to stop work could be protected if spoken in good faith belief performance of work presented risk to employees’ safety.

DD. State of New York, 33 PERB ¶3046 (2000), conf’d, 393 AD2d 927, 35 PERB ¶7008 (3d Dep’t 2002) (lv. to appeal denied)

Employer blocked all e-mail of employee/union officer from work or from home to department employees because employee did not comply with order to limit use to what employer believed had been agreement with union and practice. Refusal to comply was “tantamount to misconduct.”

- EE. Town of Poughkeepsie, 34 PERB ¶3043 (2001)  
Employee's distribution of union designation cards to other employees at end of workday protected. Termination for distribution of union literature improper as time at end of workday could be used by employees for personal reasons.
- FF. State of New York (Div. of State Police), 37 PERB ¶3020 (2004), conf'd, 24 AD3d 963, 39 PERB ¶7001 (3d Dep't 2006)  
Police officers' wearing of union pins on civilian clothing while off-duty in court to support fellow officer protected as would be on-duty wearing of union insignia unless "special circumstances" outweigh right to wear pin. Employer's prohibition to the wearing of pins held improper.
- GG. State of New York (Div. of Parole), 41 PERB ¶3033 (2008)  
Union steward's e-mail to unit employees sent using employer's e-mail account urging employees protest employer's holiday work schedule by having unscheduled employees report to work protected. Comments were not deliberately false or malicious nor impulsive, overzealous confrontational or disruptive.  
(Note: employee was not disciplined for using employer's e-mail account)
- HH. County of Tioga, 44 PERB ¶3016 (2011)  
Employees' wearing of pink ribbons at work concerted but not protected because action did not have a relationship to forming, joining or participating in a union. Statements and symbolic activities by employees are protected if part of a union activity, or relates to a union policy, involves matters pertaining to employee representation or stems from a contractual dispute. Here, however, ribbon wearing was for purpose of expressing a shared personal dislike of a supervisor, a sign of camaraderie tied to that dislike and an expression of support for each other. That two of

the employees were also union officers did not by itself convert unprotected activity into protected activity.

II. New York City Transit Authority, 45 PERB ¶4564 (2012) (ALJ)

Union officer's use of profane and sexually demeaning words to a supervisor in the presence of employees during a meeting with employees regarding potential discipline held not protected.

Accord New York City Transit Authority, 30 PERB ¶4564 (1997) (ALJ)

Screaming, cursing and violent actions by union officer at grievance meeting not protected. "Rogue behavior" directed to neutral presiding over grievance.

JJ. NYC Housing Auth. (Civil Serv. Technical Guild), BCB (July 2012)

Discipline imposed against union officer for sending e-mail to other union officers and employees regarding overtime pay issue ordered rescinded as e-mail protected. Internal employer rule prohibiting communication without employer approval no basis for defense. "Union activity does not lose its protection simply because management or labor has condemned it, or because management has established its own criteria for determining whether such activity is permitted."

III. Union Agent-Employee Communication Privilege

A. Selig v. Shepard, 24 PERB ¶7537 (Sup. Ct. N.Y. County 1991)

Recognizes a "species of privilege for labor union leaders" and union members regarding communications between and among union officers and their members concerning labor relations matters.

B. City of Newburgh v. Newman, 70 AD2d 362, 12 PERB ¶7020 (3d Dep't 1979), conf'g 11 PERB ¶3108 (1978)

Employer may not compel union president to disclose conversations with union member or his observations of the member's physical condition. Privilege needed to protect employees' rights to fully participate in activities and benefits of union. Operates only as against the public employer and agents of the employer. Privilege may not attach in criminal proceedings or civil actions despite recognition that communications raise constitutional speech and association issues.

C. State of New York (Dep't of Health), 26 PERB ¶3072 (1993)

Employer's question to employee as to whether the employee disclosed patient information to union representative was not improper on facts and did not violate member-officer privilege. Did not question employee about conversations with union representative. Limited question did not threaten employee's access to union representatives and did not jeopardize the purposes served by the privilege.

D. Santiago v. UFT, 39 AD3d 284, 40 PERB ¶7520 (1<sup>st</sup> Dep't 2007)

Action for libel dismissed on summary judgment. Union representative's comments in union newspaper criticizing principal's handling of disciplinary and safety issues and accusing him of violating Chancellor's regulation regarding per session pay fall within concept of "labor dispute." As such, showing of actual malice required. Offending statements were also "qualifiedly privileged" necessitating showing of constitutional or common-law malice.

## **EMPLOYER SPEECH**

### I. Initial Union Organizing Efforts

#### A. Threats of Reprisal/Promises of Benefits

1. Grounds for election objections, likely improper practice charges, and a possible bargaining order if comments are so egregious as to prevent fair election.
  2. Employer can express preference for no union or a given union so long as non-threatening and non-promising. (State of NY, 2 PERB ¶3063; Rochester CSD, 13 PERB ¶4048; Town of Greenburgh, 7 PERB ¶4035)
  3. Predictions
    - a. NLRB v. Gissel Packing, 395 US 575 (1969) adopted for use (privileged if comments are carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond employer's control)
  4. Threats
    - (a) Unionization will result in a loss of benefits or strikes (Catskill Reg. OTB Corp., 14 PERB ¶4011)
    - (b) Unionization may result in staff replacements (Catskill Reg. OTB Corp., 13 PERB ¶4028)
    - (c) Union contracts complicate benefits and cause costly strikes and layoffs (Catskill Reg. OTB Corp., 13 PERB ¶4028)
- B. Campaign Misrepresentations: Fact or Law
1. Hollywood Ceramics Co., 140 NLRB 221, 51 LRRM 1660 (1962) adopted for use. (material misrepresentation of fact made at a time that prevents an effective reply in circumstances that prevent employees from evaluating the truth or falsity of the statement)
  2. Need for campaign misrepresentation rule questioned
    - (a) County of Schenectady & Sheriff, 26 PERB ¶4018 (1993)

3. Opportunity for effective reply not applicable to misrepresentations of law
  - (a) Catskill Reg. OTB Corp., 13 PERB ¶4028 (1980); Lake Shore CSD, 18 PERB ¶4058 (1985)
  - (b) Catskill Reg. OTB Corp., 14 PERB ¶4011 (1981)  
(treated as prediction/threat cases)

## II. Polling of Unionized Employees Regarding Continuing Interest In Having Representation

A. Likely improper even if collective bargaining agreement arguably authorizes poll.

1. County of Monroe, 43 PERB ¶3025, conf'd, \_\_\_AD3d\_\_\_, 44 PERB ¶7006 (3d Dep't 2011). Case distinguishes survey of employees in conjunction with demand for initial recognition at issue in Town of Clay, 6 PERB ¶3072 (1973), remanded, 45 AD2d 292 (4<sup>th</sup> Dep't 1974), decision on remand 7 PERB ¶3059 (1974), modified, 51 AD2d 200 (4<sup>th</sup> Dep't 1976).

## III. Employer Communications To Employees

A. Permitted so long as communication is not threatening and does not constitute by-pass of union and direct dealing with employees. Accurate summary of status of negotiations is not improper.

1. Yonkers Bd. of Educ., 10 PERB ¶3057 (1977)  
Board of Education member's repeated, harsh verbal criticism of union president at board meetings not improper even though comments were factually incorrect in part.
2. City of Albany, 17 PERB ¶3068 (1984)  
Employer's statement that it might layoff employees if the terms of an interest arbitration award were higher than terms of a tentative agreement rejected by union not improper. Employers may express opinions regarding the merits of bargaining proposals and potential economic consequences so long as statements are not "coercive" and do not "subvert the authority of the [union's]"

negotiators.” If the statement had been that there might or would be layoffs if the union went to interest arbitration, the statement would likely have been improper. Board notes the distinction is “subtle” but “sound.”

3. New Paltz CSD, 17 PERB ¶3108 (1984)

School Superintendent’s comments to union representative that she should “watch her step”; that he was “coming after her” and that he would do everything he could to prevent reaching a contract held not improper. Although “close question”, on specific facts, comments were an “uncontrolled personal response” that was not actually intended to be carried out.

4. Town of Hempstead, 19 PERB ¶3022 (1986)

Town agent improperly told employee that his request for a job reassignment would have been handled differently if the employee had not brought a union representative with him.

5. Brunswick CSD, 19 PERB ¶3063 (1986)

Employer’s disciplinary interrogation of an employee who was present for purposes of having a review of a grievance the employee had filed held improper. Grievance proceeding cannot be used to conduct a disciplinary investigation unrelated to the merits of the grievance.

6. City of Yonkers, 23 PERB ¶3055 (1990)

City manager’s letter to employees accompanying retro pay due under interest arbitration award expressing his opinion about what he viewed to be union’s distortion of the facts surrounding the pay not unlawful. Letter was not threatening by terms or in context.

7. State of New York (DOCS), 26 PERB ¶3055 (1993)

Any statements by employer to employees linking grievance activity to their employment “must be framed in terms which clearly convey to the employees

that any job consequences caused by or taken in response to a grievance are not in retaliation for the grievance having been filed or prosecuted.” Intent or state of mind immaterial. A “threat” violation rests upon the words as spoken, as objectively viewed in the totality of circumstances.

8. Town of Huntington, 26 PERB ¶3073 (1993)

Supervisor’s statement to employee that he would not make friends by filing a grievance, which grievance was then torn up by the supervisor and thrown in the trash held improper. Supervisor’s comment clearly crossed the line between permissible grievance adjustment and improper interference with employee’s protected rights.

9. Town of Greenburgh, 32 PERB ¶3025 (1999)

Police Chief’s memorandum to employees harshly critical of union president and union attorney for filing what the Chief believed was a frivolous grievance not improper as letter was not threatening even if foreseeable effect was a withdrawal of the grievance. Mere expression of opinion. Board observes that to make improper non-threatening employer speech “would raise serious constitutional issues and would be inconsistent with the policies of the Act.” Having protected much employee and union officer speech, employer speech that is “devoid of threat or promise deserves similar protection lest we unbalance the parties’ bargaining and grievance relationship.”

10. County of Erie and Community College, 36 PERB ¶3035 (2003)

Employer’s threats made to an employee at the end of a PERB conference on an improper practice charge and outside ALJ’s presence were properly received in evidence at hearing. Employer stated employees’ work schedule would be changed because “we do not accommodate people who bring us to PERB.” Threats for exercise of protected rights are “inimical to policies and purposes of the Act.”

#### IV. Collective Bargaining Issues

A. Speech issues are present in many employee handbooks and social and electronic media policies. In addition to language that may arguably interfere with the employees' exercise of protected rights, there are likely in these documents matters that constitute "terms and conditions of employment" within the meaning of the Act. The unilateral promulgation of new policies or unilateral changes to existing policies may be improper refusals to bargain as to those speech issues that are "terms and conditions of employment." There would also be a duty to bargain those "terms and conditions of employment" on demand by either union or employer.

#### V. Employer Monitoring of Employee Speech

A. See Nanuet UFSD, 45 PERB ¶3007 (2012) (installation of workplace surveillance systems generally a mandatory subject of bargaining)