

Criticism of Staff and the Board: What's Fair Game?

Nick Govea, Esq.

Geno Zamora, Esq.



ORTIZ & ZAMORA

Attorneys at Law, LLC

Overview

- **Legal Overview of Staffs' First Amendment Rights**
- **Legal Overview of Defamation**
- **Board Policies and Procedures governing Board Communication with Staff**
 - **Board Authority and Limitations**
 - **Sample board policies**
- **Hypotheticals**

First Amendment Rights of Staff and Employees

“Teachers may not constitutionally be compelled to relinquish First Amendment rights, they would otherwise enjoy as citizens, to comment on matters of public interest in connection with the operation of public schools in which they work.”

Pickering v. Board of Ed. Tp. High School High School Dist. 205, Will County, Illinois
391 U.S. 563 (1968)

Where Federal Case Law Begins

1) *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County Illinois* 391 U.S. 563 (1968)

- A teacher wrote an Op-ed in the local newspaper that was critical of the School Board and handling of the financial resources of the District. The teacher advocated more funding was needed for academic activities instead of for athletics, which the Board was increasing funding too.
- The School Board terminated the teacher for the letter, and stated that several accusations made in the letter were false.
- The Supreme Court held that the dismissal was improper, because there was no proof of false accusations in the letter, and **(more importantly)** the matter of the financial well being of the District was a legitimate public concern.
- The teacher in expressing his opinion for legitimate public concern should be allowed to express himself publicly without fear of retaliatory termination.

Where Federal Case Law Begins (Cont.)

2) *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

- A Deputy district attorney filed suit after he was denied promotion and was reassigned to another courthouse following his authoring of an interoffice memo in which he recommended dismissal of a case on the basis of purported governmental misconduct.
- The Supreme Court held that when public employees make statements pursuant to their official duties, they are not citizens for purposes of the First Amendment.
- Therefore, the Constitution does not insulate them from employer discipline for their statements made pursuant to those official duties.
- The Court asked a basic question:
 - 1) **Did the employee speak as a citizen on a matter of public concern?**
- Since his opinion was given in the context of him doing his job, this was not free speech and not protected by the First Amendment.

Garcetti/Pickering Factors

1. Did the public employee speak pursuant to their official duties?
 - Are they saying it as a teacher to students? To other faculty members?
2. If the employee spoke as a citizen, is the subject of the speech a matter of public concern?
 - What exactly are they saying? What is the context of their remarks/expression?
3. If the first two factors are met, does the employee's interest in commenting on the issue outweigh the interest of the employer?
4. Was the protected speech a substantial/motivating factor in any detrimental employment decision?
5. Can the employer demonstrate that they would have taken the same action against the employee even in the absence of the protected speech?

What does this all mean?

- Due to the ruling in *Garcetti*, public employees' rights to free speech are limited to the confines of their employment.
- For teachers that means their rights to free speech, on school campus, are limited to the set curriculum, and to the **policies of the School District.**
- The good news is for the most part this is where the legal analysis for school employees stops, if the speech occurs in the classroom.
- However, if like in *Pickering*, the speech takes place outside the classroom, then all five factors previously listed must be discussed before any action is taken.

This is a long way of saying, talk through the issue with your Board Counsel

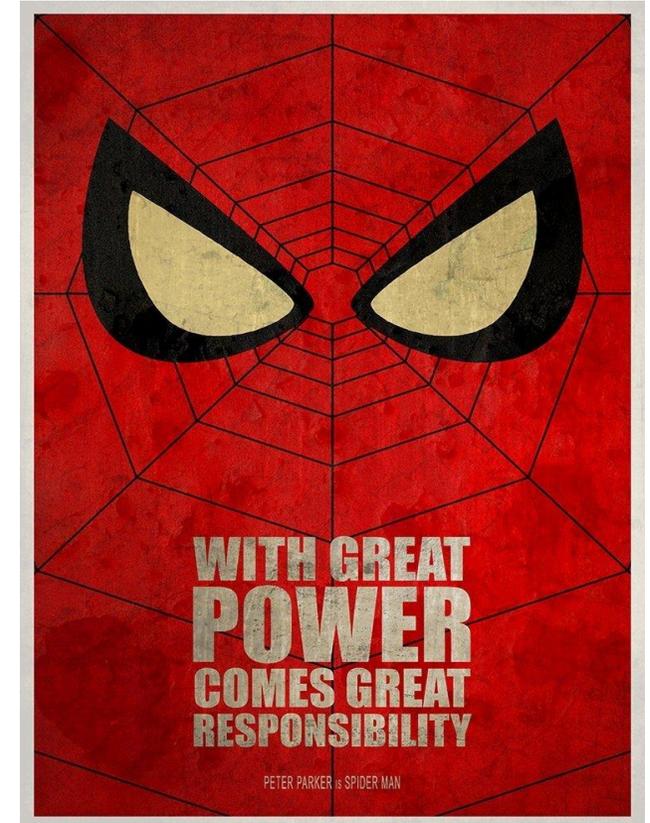
Defamation: Public Officials

- “The elements of defamation include a defamatory communication published by the defendant, to a third person, of an asserted fact, of and concerning the plaintiff, and proximately causing actual injury to the plaintiff.” *Clough v. Adventist Health Sys., Inc.*, 1989-NMSC-056, ¶ 13, 108 N.M. 801, 806.
- Defamation only applies to false statements of fact, and not for statements of Opinion.
 - Small Inaccuracies don't amount to slander or libel
- A Public Official must prove that the defendant acted with **actual malice**, which is a higher standard than a private plaintiff who must only prove negligence.
- The Courts reasoning is that “there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on. government and public officials...” *Young v. Wilham*, 2017-NMCA-087 quoting *New York Times v. Cox* 376 U.S. 254.

Board Policies and Procedures

Board Authority and Limitations Review

- Section 22-5-4 of the New Mexico Statutes defines the scope of Board Authority:
 - **Focuses on setting policy direction**
 - Budgets
 - **Limited** role in employment matters as a reviewing body
 - Acquire, lease and dispose of property
 - Except for salaries, contract for expenditure of money
 - Acquire property by eminent domain



Issues that lead to conflicts with Staff

- Board members “investigating” issues
 - **Communication Obligations**
 - Help the superintendent anticipate problems
 - Be the “ears and eyes” of the district, not the legs, hands, and mouth.
 - Do not directly communicate with employees or community members regarding confidential problems
 - Remember that the superintendent is your CEO; all information should flow through him/her.



Issues (Cont.)

- Speaking for the Board
 - Board members only have authority when acting with the board, not as individuals.
 - In giving direction to the administration, the board must act as one body.
 - Speak to the superintendent with one voice, which is the majority on any one issue.
 - The superintendent cannot and should not have to pursue five agendas.
- Social Media
 - Board Members should not be posting about board business on social media
 - **May lead to issues with the press**
 - Do not engage with district staff on social media
 - Even if they ask for it



Issues (Cont.)

- Do not Publicly or Privately Attack Staff
 - Even in board meetings
 - Concerns should be addressed to the Superintendent (CEO)
 - Try to:
 - Minimize contact with Staff on non-board issues
 - Know what issues don't belong to the Board
 - **Take the High Road - try and avoid conflicts**



Sample Board Policy B-3050

Official communication between the Board and Employees will occur as follows:

- 1) The work of the District is best pursued when information is shared among the board members and the superintendent.
- 2) The authority of the Board lies with the Board as a whole, and not with individual members of the Board.
- 3) Individual board members should avoid direct involvement in administrative matters, but rather should refer them to the administration.
- 4) The Superintendent is the point person for all communications and distribution of information between the Board and the administration.
- 5) The Board's objectives and concerns should be communicated from the Board to the administration exclusively through the Superintendent.

Sample Board Policy (Cont.)

- 6) It is the Superintendent's job to prioritize and implement the Board's objectives and concerns.
- 7) If the administration is to pursue the Board's priorities efficiently, its attention and resources must not be diverted by individual board members without the assent of the entire Board and the knowledge of the Superintendent.
- 8) It is the Superintendent's responsibility to bring administrative problems and concerns to the attention of the Board.
- 9) Communications from administrators to the Board of Education or to individual members of the Board should go through the Superintendent or should involve the Superintendent.

The Board requires all employees to follow the proper channels of authority in reporting or attempting to resolve problems. It is considered to be insubordination whenever an employee knowingly circumvents the proper "chain of command".

Sample Board Policy G-0761

Board Policy – G-0761 – Staff Conduct

- “No employee, while on or using school property, otherwise acting as an agent, or working in an official capacity for the District shall engage in:
- Use profane or abusive language, symbols or conduct
- Any conduct violating federal, state, or applicable municipal law or regulation
- A violation of District policies or procedures
- Any other conduct that may obstruct, disrupt, or interfere with teaching, research, service, administrative, or disciplinary functions of the District, or any other activity sponsored or approved by the Board.

Hypotheticals

- 1) A teacher posts on social media that a particular board member (by name) doesn't know what they are talking about, and is doing a disservice to the District by being not resigning their position.
 - a) Can the employee be disciplined?
 - b) Does the board member have a defamation claim?

- 2) A district employee circulates a petition, that says that the school board does not fund after-school, educational programs correctly, and needs to rectify that issue.
 - a) Can the District take action against that employee?

- 3) On a visit to the District office, a board member antagonizes the finance department and calls the director of the department "lazy," and states there needs to be "new blood" in the department to several staff members.
 - a) Is this proper behavior by the board member?
 - b) How should he have handled his concerns?

Questions/Discussion

- First Amendment Rights of Staff
 - Was the Speech/expression of public concern?
 - Was the Speech/expression made pursuant to their official duties?
 - Was the Speech/Expression inline with board policy?
- Defamation
 - Has the Plaintiff suffered an actual injury?
 - Was the expression a matter of fact or opinion?
- Board Policies
 - Are your interactions with staff within board norms and policy?

**If you have any questions please don't
hesitate to contact our office**

Nick Govea and Geno Zamora

505-986-2900

ORTIZ  ZAMORA

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