THE TAYLOR LAW AT 40: PREPARING FOR THE BATTLE OVER REFORM

MAY 2008

Introduction

With the upcoming celebration of the Taylor Law's 40th anniversary, the attention of the labor movement will again turn to reforms. Some years ago, the New York State AFL-CIO Taylor Law Task Force issued a report detailing eight recommendations for reform. Some of those recommendations, like the statutory grant of Weingarten rights – the right to have a union representative present at any interview that may result in discipline – have been achieved.[1] The battle for other reforms continues amid opposition from some governmental representatives and conservative groups. Many of the reforms most important to organized labor will be discussed at the Public Employee Relations Board's ("PERB") statewide conference in Albany this May.

Labor leaders are not the only anticipated participants in May's conference with an agenda for Taylor Law reform. As New York elected officials and commentators increase their focus on containing taxes, the "cost effectiveness" of the Taylor Law is being questioned, based on a recent study published by the Empire Center for New York State Policy, a conservative think tank. The study, entitled: "Taylor Made: the Cost and Consequences of New York's Public-Sector Labor Laws" (the "Study"), suggests that although in its 40 years of service the Taylor Law has been reasonably successful in achieving labor peace, that success has come at too high a price for taxpayers.[2] The Study is being cited by conservatives and some local government leaders who favor changing New York State's labor laws to achieve cost savings (and thus help reduce the tax burden) by rebalancing the collective bargaining dynamic to more strongly favor public employers at the expense of civil servants' terms and conditions of employment.[3]

Critics contend that the Study's statistical model is flawed and its analysis is overly simplistic, at best. The Study's often curious methodology seems calculated to "prove" that public sector employees

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have it "too good," whereas an equally or more compelling case could be made that after 40 years of the Taylor Law, many public employees have battled their way to something approaching economic parity with many private sector employees of comparable education and skill. Similarly, although the Study decries the burden faced by New York's taxpayers, it ignores the fact that among those taxpayers are some 1.3 million public sector employees.[4]

Because the Study is likely to be used by public officials and commentators as a tool to block positive Taylor Law reform sought by public sector unions, it is important to understand the true meaning of what is included in the Study and most importantly, what has been suspiciously left out. With the possible uses of the Study in mind, this article takes an in-depth look at the Study, provides context and counterpoint to some of its conclusions, and discusses some of the issues it fails to address.

The Context

The Study uses the occasion of the Taylor Law's 40th anniversary to take stock of the Law's effects and argue for pro-employer changes. To evaluate both the Law and the assertions made in the Study, it is important to understand them both in historical context.

Adoption of the Taylor Law followed a 25-year period of public sector labor strife, from the end of World War II to its passage in 1967. The 1966 Transit Workers' Union ("TWU") strike served as the final impetus for the creation of the Taylor Committee and its eventual recommendations, which formed the backbone of the Taylor Law.[5]

In the 40-some years since the adoption of the Taylor Law, the TWU has gone out on strike twice, with the last strike being some three days.[6] Although the Study argues that the Taylor Law has tipped the balance of power in favor of organized labor, and calls for a reaffirmation of strong strike penalties, the Taylor Law was originally, and continues to be, criticized by organized labor as pro-employer because it continued the policy of depriving labor of its most powerful economic weapon – the strike.[7] A precursor to the Taylor Law, the Condon-Wadlin Act, codified the previously existing common law doctrine that public employees did not possess the right to strike, a policy continued in the Taylor Law. The Condon-Wadlin Act, unlike the Taylor Law, did not address the conditions that precipitated labor strife and strikes throughout New York State; rather, it sought to discourage strikes solely through draconian penalties imposed on both unions and individual employees.[8] Strong penalties themselves did not and have not prevented strikes. The opening lines of the Taylor Committee's report summarize the realities of strike prevention succinctly: "The avoidance of the strike is substantially the perfection of procedures and policies to provide an effective alternative to conflict."[9]

Although the Study acknowledges that New York State has enjoyed almost unbroken labor peace since the 1980s (it could hardly do otherwise, as that is historical fact), it gives considerable weight to the strikes and other work actions that were prevalent in the 1970's, immediately after the passage of the Taylor Law. In what is a recurring failing of the Study, it cites the strikes during this early period as evidence that the Taylor Law has failed to maintain labor peace, without providing the historical context in which these strikes occurred.

The Taylor Law, whose provisions are based upon the recommendations of the Taylor Committee, a committee created by then Governor Rockefeller to study the issue of public sector labor relations,

went into effect on September 1, 1967. When it was adopted, the law was nothing short of a revolution in public sector labor relations in New York. The creation of an entirely new structure for the relationship between government and organized labor does not happen overnight, particularly where neither side is quite sure it is a good framework. As commonly occurs, many labor leaders saw the strike prohibition as tying their hands and management saw the statute as tipping the balance of power in favor of labor. Moreover, based on both sides' experience with Condon-Wadlin, it was not initially clear if the Taylor Law would fare any better.[10]

When the Taylor Law went into effect, its provisions covered some 900,000 employees state-wide. Of these, some 340,000, were in New York City and already were represented by unions operating under the rubric of New York City's pre-existing labor policies. Thus, when the Taylor Law went into effect on September 1, 1967, it had little impact on New York City employees.[11]

As if to underscore the point, New York City teachers, under the leadership of then-UFT President Albert Shanker, struck for 17 days soon thereafter. Although PERB considered getting involved in the matter, it ultimately took no part.[12] The 1967 New York City teachers' strike, counted by the Study as among those that the Taylor Law failed to prevent, in reality had little to do with the Taylor Law and more to do with the particular patterns of New York City labor relations. This was followed by the 1968 City Sanitation strike, which lasted 10 days.[13] But, PERB issued a statement "pointing the finger at [New York City's Office of Collective Bargaining ("OCB")]" and pointing out differences between the provisions of the Taylor Law and the City's collective bargaining law.[14]

The Study points to the nine public sector employee strikes that took place within the first 12 months of implementation of the Taylor Law as evidence that the Law had initially failed to maintain labor peace. This ignores that the incidence of strikes *prior* to adoption of the Taylor Law was substantially higher and that during the same period, PERB successfully intervened in some 300 other impasses, more than half of which were resolved through mediation. Furthermore, because the Taylor Law has undergone significant amendments – in 1969, 1971, 1973, 1982 and 2007 – the Taylor Law of 1967-1968 is not the Taylor Law of today.

The 1969 amendments were based in part on a January 1969 report issued by the Taylor Commission, which had been reconvened in 1968 to address concern that the Taylor Law was not working.[15] The report concluded that much of the continued strife was due to lack of experience in the process and that "'time and experience will, no doubt, render [labor-management difficulties] less abrasive.'"[16] Nonetheless, additional strike penalties were added in a round of amendments passed in 1969.

The Taylor Law's initial growing pains ended after it was amended in 1971 to carve out confidential and managerial employees and to reduce the period within which review of a PERB determination could be sought. Three other notable amendments came later – the exclusion of pension issues from the scope of bargaining in 1973, the Triborough Amendment in 1982 and the codification of <u>Weingarten</u> rights in 2007 — one loss and two wins for organized labor.[17]

Shortly on the heals of the adoption of the Taylor Law came the economic difficulties of the 1970's, with inflation rates at historically high levels,[18] which were felt particularly sharply in New York City. The outlook was so dismal it became the stuff of song, as depicted in Billy Joel's 1976 "Miami 2017 (Seen The Lights Go Out On

Broadway)" and others.[19] After President Gerald Ford refused to support a federal bailout for New York (memorialized by the infamous *New York Daily News* headline "FORD TO CITY: DROP DEAD"), Mayor Abraham Beame prepared a statement declaring the City unable to pay its debts due for release on October 17, 1975. Not surprisingly, the Study ignores the seminal role played by public sector employees in rescuing New York City from imminent bankruptcy at that time. To the surprise of some, given the fractious relations between organized labor and public employers at the time, it was the decision of UFT President Shanker and the Teachers' Retirement System to invest $150 million from the union's pension fund in Municipal Assistance Corporation bonds that gave the City a much-needed reprieve and obviated the need to declare public default.[20]

The role played by the UFT in that crisis is easily forgotten today, following large yearly New York City budget surpluses in all but the years immediately following 9/11.[21] It bears pointing out that when times were hard indeed, public sector employees put aside their differences with public employers and acted like the conscientious citizen-taxpayers they are, to help ensure the common good. In focusing solely on what labor has "gained," the Study obscures what labor has "given."

The Study

Although the Study concedes that the Taylor Law ultimately achieved general labor stability – with public employee strikes now being rare (maybe one a year statewide) and the majority of contract negotiations being settled without resort to third-party intervention – it maintains that the rocky start and fiscal price of this peace has been too high, blaming aspects of the Taylor Law it alleges prevent public employers from reducing personnel costs, thereby increasing the state and local tax burden. It identifies three provisions of the Law as the primary culprits: (1) compulsory "interest arbitration" for police and firefighters; (2) the Triborough Amendment's applicability to automatic pay increases; and (3) PERB rulings making the subcontracting of services a mandatory subject of bargaining, and uses statistical comparisons between the public and private sector to support its theory.

Interest Arbitration

Citing *no* independent authority, the Study asserts that compulsory interest arbitration unnecessarily drives up wages by:

- creating an incentive for employers and unions to simply disagree and let the arbitrator decide;
- allowing elected officials to steer what are perceived to be "imposed" settlements towards higher wages in order to make unions happy while at the same time avoiding public responsibility for the increases;
- causing employers to agree to more generous terms than they would otherwise, out of fear that an arbitration award will be even worse; and
- inflating the wages of public employees not subject to interest arbitration because many employers engage in pattern bargaining and feel compelled to give comparable increases to all employees.

The Study bases these conclusions on statistics showing that police and fire fighters, who are subject to interest arbitration, receive higher salaries than local government employees (except teachers) who are not subject to interest arbitration and on statistics showing that pension contributions are higher for police and fire. In making this argument, the Study's authors reveal one of the systemic flaws of their work; the selective exclusion of statistics that do not fit their

ultimate message. First, according to the Study's own statewide data, police and fire wages are in line with teachers' wages, despite the fact that teachers are not subject to interest arbitration. Second, with regard to pension contributions, police and fire are not the only City employees to achieve favorable retirement ages, with or without interest arbitration.

The Study's conclusions on this point are both premature and fail to take account of historical information. One of the centerpieces of PERB's statewide conference this May will be a new presentation by Professor Thomas A. Kochman examining the effect of compulsory interest arbitration and other impasse procedures on the bargaining process. Prior examinations of this questions showed that there is little significant difference between the results of arbitration and negotiated settlements. [22]

A central contention of the Study's authors appears to be that compulsory interest arbitration encourages arbitrators to render awards with little or no regard for a community's ability to pay. Although they cite no examples or statistics to support this contention, they suggest that repealing compulsory interest arbitration altogether might be a good thing. However, in recognition of the destabilizing effect that would have on long-standing bargaining relationships, they propose, as an alternative, that arbitrators be required to make a community's ability to pay the *primary* consideration in any compulsory interest arbitration, rather than the current practice of viewing ability to pay as one among several factors. They further propose, without any additional explanation, that "ability to pay" be defined "in a way that reflects the true affordability of a proposed contract."[23]

This treatment of the ability to pay factor in arbitration is an oversimplification to the point of uselessness. The Study appears to assume that there is some litmus test for ability to pay and all we need do is declare it to be a controlling instead of contributing factor. Nothing in government and budgeting is that simple. Disputes over ability to pay in the public sector are invariably about priorities. Setting the budget for any government entity is about choosing between priorities. Once the desired allocations are made, it is all too easy for the municipality to claim it lacks an "ability" to allocate more resources to the employees it is negotiating with. This choice is more often an *unwillingness* to pay rather than an inability. Arbitrators are already giving the "ability to pay" factor undue weight, often ignoring public employers' capacity to pay in favor of the employer's self-determined budget.[24] To further strengthen that ability of such budgetary decision-making to be outcome-determinative in arbitration is to nullify the entire collective bargaining process.

The Study also contends that large wage increases granted by arbitrators to police and fire drive up increases for other public sector employees through pattern bargaining. Curiously, the statistics used to demonstrate this contention actually show that public employees other than teachers have received raises at a significantly slower rate than police and fire.

The Study also advocates that last-best-offer arbitration replace the current issue-by-issue arbitration – seemingly in the belief that this would motivate employers to put their most reasonable proposal forward in advance of impasse. Setting aside for the moment that this change is aimed at making employers do what they could and should already be doing at the bargaining table, the authors admit that there is no proof that a last-best-offer approach would be an improvement, noting that it has not been successful in other states.

It also bears mention that the parade of horribles that the Study alleges stem from interest arbitration mostly fall on the shoulders of public employers who, according to the Study, alternatively are (i) unwilling to bargain fully in the first instance; (ii) too willing to cede their responsibilities to arbitrators; (iii) too afraid of excessive arbitration awards; or (iv) surreptitiously directing the entire process towards higher wages so that they can both avoid

responsibility for those increases and gain union support because of them. Given these characteristics, one might ask whether the public might be better served by reforming the behavior of public employers, rather than seeking to overhaul portions of the Taylor Law.

Finally, this portion of the Study is diametrically opposed to one of organized labor's specific reform goals. The first recommendation of the New York State AFL-CIO's Taylor Law Task force is to make permanent the Taylor Law's "experimental" sections, providing for (i) binding interest arbitration for police, fire and other essential personnel; (ii) agency shop fees; and (iii) injunctive relief in improper practice proceedings. The first two of these experiments have been ongoing since 1974 and 1977 respectively. That time period certainly seems long enough to determine if the experiment has been successful. The last provision has been in place since 1995. State court judges, who act as the gatekeepers of this remedial provision, have applied it conservatively. Nonetheless, it is an important avenue of recourse in the most egregious cases where an employer pays even less than lip service to its obligations under the Taylor Law. Each of these provisions is due to sunset in 2009.

Triborough Amendment

The Triborough Amendment, named for the case in which PERB first enunciated the doctrine, prohibits employers from unilaterally changing any terms and conditions of employment contained in an expired contract while negotiating a successor agreement.[25] The rationale for this doctrine was that it would be unfair to give a public employer the ability to influence negotiations by unilaterally implementing whatever terms and conditions it wanted, while simultaneously depriving unions of their strongest economic weapon against such action – the strike. Thus, the prohibition of unilateral change during negotiations is a *quid pro quo* for the strike prohibition.[26]

Recognizing the handicap under which organized labor would operate without the Triborough doctrine, the Study focuses its objections on one feature of the doctrine – "step" wage increases.[27] The Study correctly notes that most government employees are paid according to salary schedules with multiple salary "steps" that provide automatic seniority-based wage increases. Teachers also are eligible for additional "steps" based on accumulated in-service graduate credits. When PERB initially enunciated the Triborough doctrine, it was not clear whether it would affect such automatic "step" increases.

The New York Court of Appeals resolved the ambiguity in 1977, holding in *BOCES v. PERB* that the "status quo" did not include automatic increases and that an employer did not violate its duty to bargain by continuing to pay the same wages as were due when the agreement expired.[28] The New York State legislature responded in 1982 by adopting an expanded version of the doctrine – the so-called Triborough Amendment – as an amendment to the Taylor Law.[29] The Triborough Amendment applied to all terms in an expired agreement, including automatic "step" increases.[30]

The authors of the Study criticize the Triborough Amendment because it allows public sector employees to receive increases without agreeing to a new contract. This, they argue, gives unions an unfair advantage in collective bargaining, enabling unions to hold out longer in negotiations and putting added pressure on employers to settle, because even an impasse can result in increased wage costs.

This argument ignores that the Triborough Amendment is the result of a trade-off in rights and obligations between the parties, and that allowing public employees the right to strike during an impasse would place considerably greater pressure on public employers, both practical and financial, than the continuation of the "step" increase schedule. Viewed through this lens, it could be argued that public employers purchased the strike prohibition relatively cheaply. Nor is it fair to say that automatic

step increases based on experience level or other agreed-upon criteria are unique to public employees.

Moreover, although the notion that continued "step" increases put pressure on a public employer makes sense academically, practice shows that this pressure does not amount to much. Many public employers, particularly in New York City, have made it a habit of dragging out contract negotiations such that many wage increases end up being applied retroactively.

The Study's blanket pronouncements with regard to step increases are also based upon a faulty assumption that public sector employees all have long and substantial wage schedules. Many public sector unions have very short pay schedules allowing for a few modest step increases in the beginning before employee wages plateau. This often has the effect of freezing wages for more experienced employees until a new contract is negotiated, making the "pressure" that the Triborough Amendment places on public employers more academic than real. Even those employees qualifying for an "automatic" step increase, generally those with fewer years experience who are less well paid, receive only a fraction of what they are likely to receive with a new contract.

These realities contribute to the persistent practice of governmental employers dragging out negotiations for years sometimes. Until the Bloomberg administration, in New York City a large portion of City collective bargaining agreements were substantially retroactive by the time they were signed, sometimes years after expiration. The Study ignores the cost savings to a municipal employer in delaying such an agreement, and thus delaying the payment of wages. One proposed solution to the unequal effect of time and delay on labor and management has been to require employers to pay interest on retroactively paid wages.

Subcontracting

Although the Study generally finds PERB's determinations as to the scope of bargaining to be evenhanded, it takes issue with PERB's determination that the subcontracting of unit work is a mandatory subject of collective bargaining. The Study states in conclusory fashion that because an employer would have to bargain with regard to potential cost-saving subcontracting options, no cost-savings could ever be achieved. This conclusion ignores the risks if subcontracting were not a mandatory subject of bargaining.

Looking at subcontracting within the larger Taylor Law scheme, it becomes clear why certain types of subcontracting must be mandatory subjects of bargaining. In contemplating the alternative to PERB's determination, it is important to see subcontracting both for what it is and for what it could be in a public employer's arsenal against organized labor. Subcontracting is giving unit work (only that work that was exclusively performed by the unit) to someone else. That someone else could be a private company that is outside the reach of the Taylor Law entirely.

Taking work away from unit members through a subcontract with non-union employees is fundamentally different than reducing staffing levels because the decision has been made to reduce the level of service. A public employer has the right to determine the level of services to be provided, but subcontracting is not a reduction in services, it is a reassignment of those services to others. If subcontracting were not a mandatory subject of collective bargaining, the message to public employers would be "You must negotiate over wages, but not over whether you can replace union workers with non-union, private sector employees." In the context of collective bargaining, this would allow an employer to threaten a unit with its very existence during negotiations, while maintaining the same level of services provided. This type of imbalance in the rights of workers and their employers is a recipe for work action.

The Study's authors propose that although employers should be required to bargain regarding subcontracting, the final decision on whether to subcon-

tract should rest with the employer. This would stand the collective bargaining process on its head. What incentive would an employer have to negotiate in good faith if it retained the discretion to exercise the "nuclear option" of subcontracting to replace the entire workforce with non-union, private sector employees? Moreover, how much negotiation would be enough to justify such unilateral action by the employer?

Lies, Damn Lies, and Statistics

The Study relies heavily on the selective use of statistics, often taken out of context, to try to make its case that the Taylor Law has led to unjustifiably high wages and benefits for public sector employees in New York State, and that this in turn has unfairly increased the tax burden on New Yorkers. It is these statistical snippets that critics have latched onto. However, when viewed in context, the numbers reflect a situation that is more complex than the Study would have us believe, and which requires a response more finely calibrated than simply calling for evisceration of portions of the Taylor Law. For example, the Study paints a bleak picture of New York's tax burden, claiming that the gap between New York's tax burden and the national average began to expand after two pivotal events – passage of the Taylor Law and adoption of New York's Medicaid program. In focusing on the Taylor Law, the Study fails to note the added tax burden caused by the Medicaid program, which has been characterized as the "nation's most generous."[31] The authors also ignore that these events occurred at the start of a period of ballooning inflation and fiscal crisis that left New York City moments away from bankruptcy.[32] As with the number of public employee positions, discussed below, the gap between New York's tax burden and the national average began to narrow in the 1990's, beginning to widen again only after 9/11.

The assertion most often cited from the Study is that public sector employees are better paid than their private sector counterparts. The numbers presented in the Study simply do not bear this out. Even after excluding large, highly compensated private industries such as finance and insurance, the statistics in the Study show that public sector salaries are essentially the same as private sector salaries.[33] When the finance and insurance industries are included, the statistics show that average public sector salaries are lower than average private sector salaries.[34] The regional breakdown is consistent with the averages. Of the 10 regions provided, six showed public sector wages that were either lower, on average, or comparable to private sector wages.

The implicit rationale for excluding high paying industries like finance and insurance is that they require sophistication and skills that public sector employees do not possess. This is simply wrong, and betrays a bias that underlies much of the Study. The reality is that public sector employees possess a spectrum of skills and education levels that would enable many of them to obtain highly compensated employment in the finance and insurance industries if they so desired. Even if that were not true, the statistics from the Study demonstrate wage parity. The reality is that public sector raises have been in line with inflation.[35] Public employees are not getting rich at the expense of taxpayers.

The Study also seeks to depict the Taylor Law as having led to increases in the number of state and local government jobs but fails to provide any substantiation for this theory. As in other sections of the Study, its authors refuse to hold elected and appointed officials responsible for their own management of public services. Not only do none of the Taylor Law provisions faulted elsewhere in the Study relate to no-layoff clauses, but under both PERB and BCB law, the determination of staffing levels is often viewed as a managerial prerogative.[36]

In yet another attempt to brand the public sector workforce as the cause of New York State's growing tax burden, the Study points to the fact that public sector wages account for 12.8 percent of the total

public and private wages in the state, compared to the national average of 12.4 percent. The Study concedes that since the mid-1990s, New York state public sector wages have been converging with the national average in this measure.

Not satisfied that these results fit into the intended message of the Study, the authors again selectively remove from the statistics high paying industries such as finance, insurance and real estate ("FIRE"). Having substantially reduced the ratio's denominator, it then points to the adjusted higher percentage accounted for by public sector wages – approximately 16.3 percent – and compares this percentage to other populous states, excluding their FIRE sectors as well. This methodology is flawed for several reasons. As discussed above, there is no legitimate reason to assume that public sector employees would be unable to obtain highly compensated employment in the finance and insurance industries if they so desired. Second, the Study does not indicate what portion of any particular state's wages are made up by the excluded industries. It may be that New York's FIRE industries make up a larger portion of total wages than they do in other states. Third, because the ratio depends on both public and private sector numbers, movement in either would cause the ratio to rise or fall. This means that even if the number of public sector jobs remained constant, an economic downturn resulting in a shrinking private sector market would cause the ratio to rise. Finally, at the very end of their discussion of this issue, the authors gloss over the most important point in comparing job growth, noting only that "state and local government employment has been [and is] less volatile" than private employment.[37]

The authors imply that the growth rate in public employment should be in line with the growth rate of private employment, but the reality is that the economics of the two are sometimes divergent, even though taxes on the private sector fund public sector jobs. In times of economic downturn, when private industry may be shrinking, the demand for public services may well stay the same or even increase for the very same reason. The comparative lack of volatility in the demand for public services is evident from the Study's Figure 3. It reflects that during good economic times, when private sector employment is at its highest, the gap between private sector employment and public sector employment is small. During economic downturns, however, the gap between public and private industry increases. Indeed, the gap disappears entirely during the economic boom leading up to the events of 9/11, reappearing dramatically during the economic decline that followed. It is not surprising that after 9/11, state and local government employees in New York had more work, not less work.[38]

The study selectively removes high paying industries from the statistics

Conclusion

The Study starts with the premise that New York State's tax burden is too high, identifies the Taylor Law, public employee unions, and public employees generally, as the culprits responsible for this crime, and then, through the selective and often misleading use of statistics, purports to "prove" the culprits' guilt. An objective analysis of the Study makes clear that the Study fails to make its case. Nonetheless, the Study's dramatic assertions were good copy for news media.

Though the Study can be criticized for analytical obfuscation and a results-driven methodology that too often pays only lip service to objectivity, one of its most offensive omissions is to all but dismiss public sector employees as members of the taxpaying public. "'You would almost think public employees aren't taxpayers,'" one critic of the Study was quoted as saying. "'Nobody likes to pay taxes but the public expects the services.'"[39] Public employees like any other citizens, work, pay taxes and participate in politics, employing "the customary methods of pressure politics – lobbying, endorsements, and contributions of money and campaign workers."[40] Indeed, without the right to strike, and often facing obstructionist tactics at the bargaining table, organized labor's only avenue for change may at times be in the political arena. This, however, does not mean they are disproportionately responsible for New York State's taxes. Aggregate calculations of New York's tax burden will necessarily appear high on the surface, as they would include progressive taxes paid by corporations, nonresidents, and some of the richest individuals in the country. New York's public sector unions have demonstrated their willingness to sacrifice for the greater community, and that when they lobby for what they believe is best for them, they do so with the knowledge that they will share in the consequences of their success.

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1. Then Governor Spitzer signed Chapter 244 of the Laws of 2007 on July 18, 2007, statutorily overruling the Court of Appeals decision in *New York City Transit Authority v. PERB*, 8 N.Y.3d 226, (2007), holding that the Taylor Law, unlike the National Labor Relations Act, did not provide for Weingarten rights.

2. Terry O'Neil and E.J. McMahon, *Taylor Made: The Cost and Consequences of New York's Public-Sector Labor Laws*, EMPIRE CENTER FOR NEW YORK STATE POLICY, SPECIAL REPORT, SR4-07 (October 17, 2007) *available at* www.empirecenter.org/Publications.

3. *See e.g.,* Jay Gallagher, *Taylor law faulted and defended at Albany conference*, www.Pressconnects.com (October 16, 2007) (describing Suffolk County Executive Steve Levy's comments about the need for Taylor Law reform as a stepping stone to reducing the cost of public services at an Albany conference on the subject sponsored by the Empire Center for New York State Policy, the study's publisher); Lawrence C. Levy, *New York State's real issues go ignored,* NEW YORK NEWSDAY, October 17, 2007, at Opinion (calling for state and local government officials to lend their attention to the "real" issue of soaring public employee costs, as described in the study, and not to political gossip having no effect on taxpayers' bottom line).

4. *See* Michael Gronley, *Landmark Taylor Law gets rare public review with eye to reform*, ASSOCIATED PRESS, October 8, 2007.

5. RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW (1990), at 23.

6. Jennifer Steinhauer, *M.T.A. and Union Remain Locked in Acrimonious Standoff*, THE NEW YORK TIMES, Dec. 20, 2005.

7. DONOVAN, *supra* note 5, at 53-54 (in an editorial, the editor of THE CHIEF LEADER, a civil service newspaper, wrote of the passage of the Taylor Law that "[d]emocrats at Albany gave their friends in labor a slap in the face when they agreed to a new anti-strike bill."). Some labor leaders even referred to the Law as the "Rockefeller-Travia Slave Labor Act," after then governor Rockefeller and Anthony Travia, then Democratic speaker of the assembly. JEROME LEFKOWTIZ, MELVIN H. OSTERMAN AND ROSEMARY A. TOWNLEY, PUBLIC SECTOR LABOR AND EMPLOYMENT LAW (2d Ed. 1998), at 23-24. (Hereinafter "LEFKOWITZ").

8. DONOVAN *supra* note 5, at 10.

9. *Id.* at 33.

10. *See* generally, DONOVAN *supra* note 5, at 23-54 (The New York Times called the Taylor Committee's report "trail-blazing" and described the subsequent adoption of the Taylor Law as a "significant and overdue accomplishment.").

11. *Id.* at 67. New York City's labor policy was governed by Mayoral executive order beginning in the 1950's until the adoption of its own collective bargaining law pursuant to the Taylor Law's mini-PERB provision (§ 212). DONOVAN *supra* note 5, at 104-106 and 154-55; LEFKOWITZ *supra* note 7, at 28-34 (describing in detail the evolution of City labor relations from the adoption of Executive Order No. 49, dubbed "The Little Wagner Act," to the adoption of the New York City Collective Bargaining Law ("NYCCBL"). The NYCCBL went into effect on the same day as the Taylor Law, September 1, 1967. *Id.* at 104. The NYCCBL was recommended by a tripartite labor relations panel created by Mayor Wagner and continued by Mayor Lindsay. The panel had been the focal point of City labor relations until it was replaced by the similarly tripartite Office of Collective Bargaining, pursuant to the NYCCBL. *Id.*

12. DONOVAN *supra* note 5, at 67-69.
13. *Id*. at 106-110.
14. *Id*.
15. *Id*. at 60, 110-17.
16. *Id*. at 120 (alteration in original).
17. DONOVAN *supra* note 5, at 185-190; LEFKOWITZ *supra* note 7, at 971-72. One of the proposed changes that was not adopted in 1971 was the addition of a management rights clause similar to that found in the NYCCBL. Unions, particularly the Teachers' unions, opposed the addition of the clause because it would further circumscribe the scope of bargaining. DONOVAN *supra* note 5, at 148-49. The NYCCBL continues to have a management rights provision that has no analogue in the Taylor Law, (NYCCBL § 12-307), the authority of which remains subject to question.
18. *Inflation By Decade: Average Annual Inflation by Decade*, www.InflationData.Com.
19. NANCY GROCE, NEW YORK: SONGS OF THE CITY (January 1, 2003), at 115.
20. *Id*.
21. The City has enjoyed budget surpluses in the billions of dollars every year from 1998 through 2007, with the exception of the three years beginning with 9/11. Glenn Pasanen, *Mixed news in a 'Good News' Budget*, GOTHAM GAZETTE, July 12, 2007.
22. Reuven Blau, *Talking Taylor Law Changes*, THE NEW YORK TIMES, Feb. 22, 2008.
23. Study at 20.
24. Arnold Zack, *Ability to Pay in Public Sector Bargaining*, Proceedings of New York University Twenty-Third Annual Conference on Labor 403, 419 (1970).
25. The doctrine, in its initial more limited form, was first enunciated in *Triborough Bridge and Tunnel Authority*, 5 PERB ¶ 3037 (1972). It represents a departure from the private sector model of labor relations, in which an employer may make unilateral changes once negotiations reach impasse. *United Paperworkers Intern. Union v. N.L.R.B.*, 981 F.2d 861, 866 (6th Cir. 1992) ("An employer may not alter the existing terms and conditions of employment in a collective bargaining agreement without first bargaining to impasse with the union over the terms."); *Clarke Mfg., Inc. v. United Steel, Paper and Forestry Rubber, Manufacturing, Energy, Allied, Inds. And Srvcs. Workers Int'l Union*, 2007 WL 1101503 (N.L.R.B. Div. Of Judges) (April 10, 2007) (holding that because parties had lawfully reached impasse, employer was entitled to make unilateral change).
26. Study at 13.
27. The Study also notes the Triborough Amendment's effect on potential interest arbitration. Unless a union agreed to submit an impasse to binding arbitration, any arbitration initiated by the employer or default award obtained is unenforceable because it does not constitute a new agreement such that the employer's Triborough obligations end. LEFKOWITZ *supra* note 7, at 290. If the Union agreed to arbitration, however, then the award is binding and does constitute a new agreement. This issue is a red herring. First, the Study admits that the majority of contract negotiations are now settled without resort to third-party intervention, making the interaction of Triborough and interest arbitration of little effect. Second, PERB has recognized a contractual exception to Triborough. Parties to a contract can avoid the consequences of Triborough by incorporating "sunset clauses." *Id*. at 292. A sunset clause terminates a term of the agreement at a specific time or upon a specific event. Where such term sunsets at or before the expiration of the agreement, an employer can refuse to continue that term during negotiations. *Id*.
28. 41 N.Y.2d 753 (1977).
29. 14 Civil Service Law § 209-a(1)(e).
30. LEFKOWITZ *supra* note 7, at 288.
31. Gallagher, *supra* note 44.
32. See discussion *infra* section "In Context."
33. *Id*. (excluding finance and insurance, public sector salaries have a ratio of 1.01 to private sector salaries).
34. Study at 5 (stating that statewide, public sector salaries average only 83% of private sector salaries).
35. Jay Gallagher, *Taylor Law a formula for inaction*, ALBANY TIMES UNION, October 22, 2007.
36. *New York State Correctional Officers and Police Benevolent Assoc., Inc. v. State of New York*, 38 PERB ¶ 4526 (May 19, 2005); *EMS Superior Officers Assoc. v. City of New York.*, No. B-07-2007. Some decisions take this point too far, failing to give proper credit to related issues of safety and the like.
37. Study at 7.
38. The Study again touches on this concept in Figure 5, which misleadingly lists New York as having the largest public workforce as a percentage of its population compared to other most populous states. Reading the fine print you discovery that New York actually ranked 11th overall in this measure, trailing ten less populous states.
39. *Workers' Perspective Added to Taylor Law Reform*, NEW YORK TEACHER, October 26, 2007, *available at* www.nysut.org.
40. DONOVAN *supra* note at 231.

GARCETTI V. CEBALLOS TWO YEARS LATER: HOW ARE PUBLIC EMPLOYEES FARING?

Background

In 2006, the United States Supreme Court handed down its controversial decision in *Garcetti v. Ceballos*,[1] holding that the First Amendment to the United States Constitution does not protect a public employee's speech when the speech is made in the course of the employee's official duties. *Garcetti* drastically altered the landscape for plaintiffs claiming they were punished for speaking out, replacing the so-called "*Pickering* Balance" – in which the damage, if any, to the efficiency of the workplace caused by an employee's speech was weighed against the value of the speech to the employee and the public – with a test under which courts need only determine whether or not an employee was speaking pursuant to his job duties.

The *Garcetti* decision raises significant concerns for public employees as to the loss of First Amendment protection for speech that is held to be in the course of their official duties – but it's not the end of the story. Since *Garcetti*, federal judges have decided numerous cases involving public employee speech – most recently, the March 20, 2008 decision of the United States Court of Appeals for the Second Circuit in *Almontaser v. New York City Department of Education*[2], a case in which Dhaba (Debbie) Almontaser alleged she was retaliated against after giving an interview, as acting interim principal of the Khalil Gibran International Academy ("KGIA"), to respond to allegations that she supported radical Islamists and students wearing t-shirts bearing the words 'Intifada NYC.' This decision came on the heels of the Second Circuit's February 6, 2008 decision in *Ruotolo v. City of New York*[3], its first applying the *Garcetti* standard.

Although some of these decisions have uncritically applied *Garcetti*, in others, judges appear to be troubled by the potential chilling effect of *Garcetti* on legitimate speech by public employees. These post-*Garcetti* decisions are important to public employee unions and their leaders as

they consider ways in which public employees can address, and begin work to regain, their lost free speech rights. With this in mind, we look at the *Almontaser* and *Ruotolo* decisions, as well as the Eastern District's 2007 decision in *Weintraub v. Board of Education of the City of New York*[4] (a case heard prior to the *Garcetti* decision, but ultimately decided applying the *Garcetti* standard), and *Williams v. Riley*,[5] a Mississippi District Court decision critical of *Garcetti*.

Background: *Garcetti v. Ceballos*

In *Garcetti*, Richard Ceballos, an attorney employed in a supervisory role by the Los Angeles County District Attorney's Office, discovered what he believed to be material misrepresentations in a police officer's affidavit. Ceballos relayed his concerns to his supervisors (both orally and in two written memoranda), who seemingly disregarded Ceballos' reports of potential wrongdoing.

Ceballos filed suit after he was demoted and transferred to a different office, claiming his demotion and transfer had occurred because of his speech. The United States District Court held that Ceballos' memo was not protected speech under the First Amendment because it was written as part of his employment duties. The Court of Appeals for the Ninth Circuit reversed, reasoning that Ceballos' allegation of wrongdoing was protected because it was on a matter of public concern and did not cause any workplace disruption.

Under the Supreme Court's principal decisions regarding public employees (*Connick v. Myers* and *Pickering v. Board of Education*), the government could not discipline (or terminate) an employee based on the employee's speech if both of the following were true: (1) the speech was on a matter of public concern; and, applying the "*Pickering* Balance," the damage, if any, to the efficiency of the workplace caused by the employee's speech was outweighed by the value of the speech to the employee and the public.

The Court had not focused on whether speech made in an employee's "official capacity" is entitled to First Amendment protection. In *Garcetti*, the Court filled this doctrinal gap, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the [First Amendment] does not insulate their communications from employer discipline." The Court reasoned that the government's interest in providing efficient public services outweighs the First Amendment rights of public employees speaking in their official capacities.

Garcetti marked a substantial doctrinal shift in First Amendment jurisprudence. Instead of applying the *Pickering* Balance to situations where speech is made in the course of a public employee's official duties, *Garcetti* drew a line between protected and unprotected speech. Any speech made pursuant to a public employee's job duties is not protected, while speech that a public employee makes outside of his employment may be protected.

Almontaser v. New York City Department of Education

In August 2007, the New York City Department of Education ("DOE") press officer told Almontaser to give an interview to the *New York Post*. Among other things, she was to address allegations that she was connected to an organization known as Arab Women Active in the Arts and Media ("AWAAM"), which was allegedly selling t-shirts marked with the words "Intifada NYC." During the course of the interview, Almontaser

responded to a question about the meaning of the word "intifada." After press reports apparently inaccurately characterized her comments as condoning violence against Israel, she was, she claims, pressured to issue an apology (drafted by the DOE) and to resign as acting interim principal of KGIA.

When Almontaser's application for the position of permanent principal of KGIA was rejected, she filed suit seeking a preliminary injunction requiring the DOE to give her candidacy "full and fair" consideration and stopping the DOE from filling the position until then. The District Court denied Almontaser's application for a preliminary injunction and she appealed.

Citing *Garcetti*, the Second Circuit held that the District Court did not abuse its discretion by denying Almontaser's application:

> While 'the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern,' the Supreme Court has clarified that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'"[6]

Based on the record below, the Second Circuit concluded that Almontaser's interview was not constitutionally protected because she was speaking within the scope of her employment. The Court, however, specifically left open the question of whether a public employer may sanction an employee whom it has ordered to speak with the press for having spoken accurately when, as the employer knows, her statement is inaccurately reported and misconstrued by the press, leaving that to be addressed at trial.

Ruotolo v. City of New York

The District Court Decision

In 1999, Angelo Ruotolo, then a New York City Police Department Training and Safety Officer in the Bronx, wrote a report chronicling numerous health problems, including miscarriages and birth defects, affecting those working in his precinct (the "October 1999 Report"). Based on his report, an environmental evaluation was undertaken, which revealed that fuel storage tanks had leaked into the air and soil. Following completion of an environmental evaluation, the New York City Patrolmen's Benevolent Association ("PBA") filed a personal injury lawsuit against the City of New York. In April 2000, with the knowledge of his commanding officer, Ruotolo was deposed by a lawyer for the PBA, but did not become a plaintiff himself.

In July 2003, Ruotolo filed suit against the City of New York ("City") and various persons employed by the NYPD, alleging that his superiors began retaliating against him soon after he submitted the October 1999 Report. The alleged retaliation included transfer to a less desirable precinct, verbal harassment by superior officers, and the first negative review of his twenty-year career. In his original complaint, Ruotolo alleged that this retaliation was for speaking out about the health problems in the precinct.

Two weeks before the trial was to begin, the Supreme Court handed down *Garcetti*. The City responded by filing a renewed motion to dismiss. In opposing that motion, Ruotolo argued for the first time (according to the Court of Appeals) that when he gave his deposition testimony to the PBA's lawyers, he was speaking as a private citizen on a matter of public concern, not as a Safety Officer and author of the October 1999 Report.

The District Court granted the motion to dismiss, ruling that because Ruotolo had not previously alleged the April 2000 PBA conversation, it "was outside the pleadings and not properly considered on a motion to dismiss."[7] The Court held that under *Garcetti*, Ruotolo's First Amendment claim failed, because he admittedly had written the October 1999 Report in his capacity as Safety Officer, and the lawsuit was therefore based on non-actionable speech.

After final judgment was entered on July 21, 2006, Ruotolo moved for leave to file a Third Amended and Supplemental Complaint in order to add the PBA conversation. The District Court denied that motion on the grounds of undue delay and undue burden and prejudice to defendants.

The Second Circuit Decision

In his appeal to the Second Circuit, Ruotolo conceded that *Garcetti* required dismissal of his retaliation claim based on the October 1999 Report, but argued that the trial court had abused its discretion when it dismissed his claim for retaliation that was based on his having filed a federal lawsuit. He also argued that the District Court should have permitted him to file the Third Amended and Supplemental Complaint, which would have enabled him "to plead another instance of speech that would not be vulnerable to the specific *Garcetti* analysis that had defeated the claim premised on the October 1999 Report."[8]

The Second Circuit upheld the District Court's dismissal of Ruotolo's claim of retaliation based on the filing of his lawsuit. The Court stated that the issue of whether a public employee's speech is protected under the First Amendment turns on two questions:

> (1) 'whether the employee spoke as a citizen on a matter of public concern' and, if so, (2) 'whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.'[9]

The Court stated that it was unnecessary to decide whether Ruotolo's lawsuit constituted speech by a "citizen" rather than by a "public employee" because his speech was not on a matter of public concern. It explained that "the heart of the matter is whether the employee's speech was 'calculated to redress personal grievances or whether it had a broader public purpose.'"[10]

In Ruotolo's case, the Court noted, the retaliation he allegedly suffered was personal to him, as was the relief he sought, including an injunction relating to his employment records. Although Ruotolo's complaint sought punitive damages to deter such allegedly illegal and retaliatory conduct in the future, the Court stated that "retaliation against the airing of generally personal grievances is not brought within the protection of the First Amendment by 'the mere fact that one or two of [a public employee's] comments could be construed broadly to implicate matters of public concern.'"[11] The Court affirmed the District Court's dismissal, concluding that Ruotolo's lawsuit did not seek to advance a public purpose.

The Second Circuit next turned to whether the District Court abused its discretion when it denied the motion to file a Third Amended and Supplemental Complaint, in which Ruotolo sought to avoid dismissal under *Garcetti* by claiming that when he spoke to PBA representatives in 2000 he did so as a private citizen. The Court noted that:

> Leave to amend, though liberally granted, may properly be denied for: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'[12]

The Court observed that when Ruotolo filed his original complaint in 2003, he knew about the April 2000 conversation and rejected the argument that "he did not realize [the conversation's] significance until the Supreme Court spoke in *Garcetti*," explain-

ing that even though Ruotolo "was not required to plead every conversation he had as a private citizen . . . he may be expected to have pled every such conversation as to which he was asserting unconstitutional retaliation."[13] Given Ruotolo's failure to do this, the Second Circuit held that the District Court was within its discretion to deny him leave to amend his complaint.

Weintraub and *Williams*

Weintraub involved David Weintraub, a public school teacher in Brooklyn who sent a student to the principal's office to be disciplined after that student twice threw a book at him. On each occasion, the principal sent the student back to Weintraub's classroom. In his complaint, Weintraub alleged that after he filed a grievance against the principal, the principal and other officials retaliated against him by, among other things, falsely accusing him of sexual abuse and giving him unwarranted negative performance reviews.

Because the case was heard prior to the Supreme Court's decision in *Garcetti*, the trial court applied the *Pickering* Balancing test. The court denied a motion to dismiss Weintraub's case for failure to state a claim because, it concluded, even though his "concerns about the lack of discipline and safety in New York City public schools [were] clearly relevant to his personal interests [they] also pertained to a matter of public concern."[14] In other words, although Weintraub had a personal motive for his speech, it was protected because it concerned safety and discipline in public schools, legitimate matters of public concern.

After *Garcetti*, the Board of Education again moved to dismiss Weintraub's claim. This time, Judge I. Leo Glasser held that "[t]he *Garcetti* decision profoundly alters how courts review *First Amendment* retaliation claims and compels the Court to reconsider its earlier ruling that the speech underlying Weintraub's *First Amendment* retaliation claim is constitutionally protected."[15] Judge Glasser ruled that after *Garcetti*, neither Weintraub's private conversations with the principal nor his formal grievance were entitled to *First Amendment* protection. "In both instances, Weintraub was speaking as an employee," and the fact that his "speech also touched upon a matter of public concern is not sufficient to entitle that speech to First Amendment protection."[16] Judge Glasser observed that under *Garcetti*, "the dispositive distinction" is "whether the speech was made pursuant to the employee's official duties or was not required for those duties."[17]

Nonetheless, Judge Glasser expressed grave concern about the effect of *Garcetti* on situations

> in which a public employee is deprived of a federal constitutional remedy for his employer's alleged bad-faith retaliation for statements that were neither incompetent nor insubordinate, but rather identified legitimate issues regarding the safe and effective operation of the public school system.[18]

Judge Glasser's statement echoes Judge W. Allen Pepper, Jr., U.S. District Court Judge, Northern District of Mississippi, in *Williams v. Riley*, a case in which the court dismissed the suit of a prison officer who claimed he was retaliated against after having reported that other law enforcement officers were beating inmates. For both Judge Glasser and Judge Pepper, when *Garcetti* is applied to cases in which the employer has retaliated against an employee for having blown the whistle on internal misconduct, the problem is not the line *Garcetti* draws, but that it makes no allowance for actions made in good faith. As Judge Pepper stated in *Williams v. Riley*, *Garcetti* deprives public employees seeking to expose govern-

ment wrongdoing "of a federal constitutional remedy for [their] employer's bad-faith retaliation for statements that were neither incompetent, nor insubordinate, but rather identified legitimate issues."[19]

Rosenblatt v. The City of New York

Perhaps also troubled by *Garcetti*, Judge Gerard E. Lynch of the Southern District of New York may have forged a path for courts that believe its rationale is too constricted. In *Rosenblatt v. The City of New York*,[20] Judge Lynch was presented with a report sent to the Inspector General ("IG") of New York City's Public Assistance and Grants Unit by Cheryl Rosenblatt, a caseworker, alleging fraud and corruption by Rosenblatt's supervisors. Rosenblatt claimed that after she sent the report, her supervisors responded by retaliating against her.

The defendants argued that Rosenblatt's report was not constitutionally protected speech because, they alleged, in sending the report to the IG, Rosenblatt was acting pursuant to her official duties. Judge Lynch disagreed. He emphasized that the defendants had themselves described Rosenblatt's job as making determinations as to whether day care applications were eligible for publicly funded programs, and that

> Nothing in defendants' proferred description of her job or in the record suggests that plaintiff was also expected to scrutinize her *supervisors* for fraud – essentially acting as a supervisor of her supervisors – let alone report them to external investigators. . . . [D]efendants provide no other reason to exclude plaintiff's 2001 complaint to the IG . . . from the realm of First Amendment protection.[21]

Relying on the limited scope of Rosenblatt's job, Judge Lynch found that the First Amendment protected Rosenblatt's report to the IG, because "reporting of fraud and corruption allegedly committed by her supervisors plainly was not encompassed within her official duties."[22]

The *Garcetti* Anomaly

One of the most puzzling aspects of *Garcetti* and its progeny is that a public employee's speech appears to receive more First Amendment protection if he or she voices concerns outside official channels. *Brenes v. City of New York* illustrates this anomaly. In *Brenes*, the then-dean of a public high school complained to the chancellor, special investigator, and superintendent about attendance problems at the school. Judge Sandra J. Feuerstein held that the First Amendment did not protect that speech.[23] However, Judge Feuerstein held that when the same official spoke to the *New York Post* and was quoted in an article charging that several public schools, including the one the plaintiff worked at, "were falsifying attendance records . . . in a scheme to siphon off crucial education dollars," his speech was protected.[24] Because "plaintiff's communications to the *New York Post* bore no official significance and cannot be said to have been taken pursuant to his official duties as a dean," they may remain protected by the First Amendment even after *Garcetti*.

Likewise, in *Sassi v. Lou-Gould*, Judge Charles Brieant of the Southern District of New York found that the speech of Sassi, a police chief who wrote letters to the City Council criticizing police department funding, was protected because he specifically said he was writing "in his capacity as a resident taxpayer."[25] Sassi prevailed because he had no official duty to write the letters and therefore, Judge Brieant reasoned, was speaking as a citizen and not an employee.

Conclusion

It is beyond dispute that *Garcetti* has had a chilling effect on public employees' speech. Judges have criticized the decision for punishing public employee whistleblowers, depriving them of their First Amendment rights for statements made in good faith that identify internal misconduct or other legitimate issues. Judge Lynch's opinion in *Rosenblatt* may serve as a model for other judges who are troubled by the absolutism of *Garcetti*.

Another avenue for judges who are concerned by the impact of *Garcetti* is to read state and local whistleblower protection laws more broadly. *Garcetti* does not eliminate statutory protections afforded by applicable whistleblower statutes. The problem has been that such statutes provide only limited protection and often have been narrowly interpreted. In New York, for example, city employees can seek protection under the New York City Administrative Code § 7-805; similar protection is available at the state level under New York Civil Service Law § 75-b. However, civil remedies generally are available under these statutes only when the action the employee exposes is illegal and such illegal action presents a "substantial and specific danger to public health or safety." This requirement has been narrowly interpreted by New York courts and criticized by commentators as limiting the effectiveness of the statutes. Labor may want to make the broadening of statutory whistleblower protection part of its legislative agenda.

Although federal courts may carve out exceptions to *Garcetti*, it will continue to pose a problem for public employees. The challenge for public employee unions and their leaders will be to educate their members as to their rights and to help them navigate the protected paths suggested by the courts. These efforts, together with judicial and legislative action, may help to ensure that speech by public employees receives the constitutional protection it deserves.

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1. 126 S. Ct. 1951 (2006).
2. No. 07-5468-cv, 2008 WL 744243 (2d Cir. March 20, 2008).
3. 514 F.3d 184 (2d Cir. 2008).
4. *Weintraub v. Board of Education of the City of New York*, 489 F. Supp. 2d 209 (E.D.N.Y. 2007).
5. *Williams v. Riley*, 481 F. Supp. 2d 582, 584 (N.D. Miss. 2007).
6. *Almontaser*, 2008 WL 744243 at *2 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 417, 421 (2006)).
7. *Ruotolo*, 514 F.3d at 188.
8. *Id.* at 190.
9. *Id.* at 188 (internal citations omitted).
10. *Id.*
11. *Id.* (internal citations omitted).
12. *Id.* at 190-91.
13. *Id.*
14. *Weintraub*, 489 F. Supp. 2d at 212.
15. Id. at 214 (internal citation and quotation omitted) (alteration in original).
16. *Id.* at 219-20.
17. *Id.* at 215.
18. *Id.* at 220 (citing *Williams*, 481 F. Supp. 2d at 584).
19. *Williams*, 481 F. Supp. 2d at 584.
20. O5-CIV-5521 (GEL), 2007 U.S. Dist. Lexis 55853 (S.D.N.Y. July 30, 2007).
21. *Id.* at *6 (internal citations omitted).
22. *Id.* at *16.
23. CV-01-3942(SJF)(LB), 2007 U.S. Dist. Lexis 84737, at *28-29 (E.D.N.Y. Nov. 9, 2007).
24. *Id.* at *9, *34.
25. No. 05-CV-10450, 2007 U.S. Dist. Lexis 13643, at *2 (S.D.N.Y. Feb. 27, 2007).

TRADING FIRST AMENDMENT RIGHTS FOR DUES CHECKOFF

Introduction

Section 207(3)(b) of the Taylor Law requires any employee organization that wishes to be the exclusive representative of public employees in New York to pledge that it does "not assert the right to strike against any government." Almost 30 years after this no-strike pledge was first tested against the First Amendment of the United States Constitution, the same issue is again making headlines.[1] The rejection of the New York City Transport Workers Union's application for reinstatement of the Union's right to dues checkoff – the process by which union members' dues are deducted automatically from their paychecks and transferred to the union – has turned what might – and should – have been a routine proceeding into a constitutional case touching upon core fundamental rights under the First Amendment.

This article looks at the Transit Workers Union's application, provides background on the constitutional issues raised by both § 207(3)(b) and the additional requirements imposed upon the TWU, and compares the First Amendment issues raised by each.

Strike and Consequences

In December 2005, New York City's Transit Workers Union ("TWU") struck for the second time since the Taylor Law was implemented in 1967.[2] The strike lasted some three days and brought the City's public transportation system to a halt. Shortly prior to the strike, the New York City Transit Authority – the agency within the Metropolitan Transit Authority ("MTA") that employs the City's transit workers – commenced an action in state court seeking both a preliminary and permanent injunction against any strike activity by the TWU. After a hearing, then State Supreme Court Justice Theodore Jones issued a preliminary injunction on December 13, 2005 forbidding the TWU from violating the Taylor Law by striking.[3] The TWU called a strike seven days later.

On the same day the strike was called, the MTA moved for an order finding the TWU guilty of criminal contempt for willful violation of the December 13 preliminary injunction and seeking a sanction of $1 million for the first day of the strike with successive doubling of the fine for each

day it continued. Following a hearing on the motion, Justice Jones found the TWU guilty of contempt and ordered it to pay $1 million in fines for each day of the strike.[4]

Several months after the strike had ended, the MTA made a motion asking the court, among other things, to set the amount of the fine based on the length of the strike and, for the first time, for an order suspending the union's right to dues checkoff pursuant to § 210(3)(a) of the Taylor Law.[5] Section 210(3)(a) permits the Public Employee Relations Board ("PERB"), the Taylor Law's administering agency, to suspend a union's statutory right to dues checkoff upon a finding that the Union has violated the strike prohibition.

By Order and Judgment dated May 12, 2006, Justice Jones set the fine at $2.5 million and ordered that the Union's right to dues checkoff be suspended indefinitely beginning on June 1, 2007, with the Union being permitted to seek reinstatement no earlier than September 1, 2007. Justice Jones further set out the following conditions for such reinstatement:

> Local 100 may seek reinstatement of such dues checkoff right no earlier than three months after implementation of the forfeiture sanction. At that time, Local 100 may appear before this court, and upon a showing of good prerequisite compliance with the mandates of the Taylor Law, and submission of an affirmation that it no longer asserts the right to strike against any government as required pursuant to Civil Service Law §§ 210(3)(g) and 207(3), apply for reinstatement of its right to have the employers automatically deduct membership dues from the paychecks of union members.[6]

Section 210(3)(g) of the Taylor Law provides that a public employee union seeking reinstatement of dues checkoff comply with the affirmation requirement of § 207(3). Section 207(3), in turn, requires a union seeking certification as the exclusive bargaining representative of public employees to submit a no strike affidavit. New York City's local counterpart to these provisions has substantially the same requirements. Such affidavits routinely echo the language of § 207(3), stating that the union "does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike."

On October 3, 2007, one month after the earliest date set in Justice Jones' Order, the TWU moved for reinstatement of dues checkoff. The motion was accompanied by an affirmation of the TWU's president describing the ways in which the Union had complied with the Taylor Law since the strike and affirming that:

> The Union fully recognizes whether there is a right to strike is a matter determined by law. The law is clear. The Taylor Law bars strikes against NYCTA/MaBSTOA and other government employers. The union does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike.[7]

While the MTA, the direct employer, took the position that dues should be conditionally reinstated, the City of New York appearing as *amicus curiae*, despite being a third party to the bargaining relationship, argued that reinstatement should be denied altogether. Because Justice Jones was appointed to the New York Court of Appeals after issuance of the

May 12, 2006 Order and Judgment and prior to the TWU's motion, the case had been reassigned to Justice Bruce M. Balter. On November 7, 2007, Justice Balter denied the TWU's motion and placed additional hurdles in the way of reinstatement. Justice Balter found the application "patently insufficient" and held "that the affidavit submitted by [the TWU's president] merely parrots the statutory language in order to comply verbatim with Justice Jones' Order." Justice Balter went on to note that the affirmation "is nothing more than a general acknowledgment that the Taylor Law prohibits [the union] from striking." Finally, Balter imposed *new* requirements that the TWU must meet in any re-application, holding that

> defendant may apply for reinstatement of the dues checkoff privilege, upon a showing of complete and unequivocal good faith compliance by submitting the affidavits of [the union president] as well as from each of the individual members of the Executive Board, which state in unequivocal terms that [the TWU] lacks the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike.[8]

As discussed below, it is these additional requirements that, we believe, puts Justice Balter's application of § 210(3)(g) beyond what is permitted by the Constitution. The TWU is currently appealing Justice Balter's decision on this and other grounds.

"I Want to Hear You Say It."

The no-strike affirmation requirement for the reinstatement of dues checkoff after a strike is the same affirmation that is required when an organization initially petitions to be designated the exclusive bargaining representative of a group of public employees. The strike penalty provision at issue here, § 210(3)(g), simply refers back to § 207, entitled "Determination of Representation Status" Section 207 provides, in pertinent part, that PERB may, for the purposes of resolving disputes as to representation, recognize an organization as the exclusive representative if its meets certain criteria, among them that it affirms it does not assert the right to strike.[9] Soon after the Taylor Law was implemented, the constitutionality of the no-strike affirmation requirement was challenged. This is not surprising, as a large portion of organized labor viewed the law's strike prohibition itself to be a severe blow to organized labor, and that with Section 207, not only was the state forbidding them from striking, but also was forcing them to say "uncle."

Local 371, American Federation of State, County and Municipal Employees, AFL-CIO challenged the Taylor Law's no-strike affirmation requirement and its New York City counterpart as violative of the union's fundamental right to free speech in *Rogoff v. Anderson*.[10] After initially succeeding before the trial court, the union had a tougher time before the Appellate Division. Relying on the Supreme Court decision in *National Association of Letter Carriers v. Bloundt*,[11] the union argued that the affirmation amounted to compelled speech in violation of the union's First Amendment rights. In *Bloundt*, a federal postal employee union challenged the federal law requiring individuals to give a no-strike oath as a condition of employment. The Supreme Court affirmed the District Court's holding that the language of the oath was at best unconstitutionally vague and at worst an unconstitutional limitation on free speech.

Despite the similarities between *Bloundt* and the no-strike affirmation at issue in *Rogoff*, the *Rogoff* court determined otherwise. The court distinguished the Taylor Law provision from the federal statute

reviewed in *Bloundt* on the ground that the Taylor Law, unlike the federal statute, did not "similarly [bind] the individual," only the union. Thus construed, the Appellate Division determined that it was reasonable to require a union to "declare or maintain that it has no right to do that which is declared illegal or prohibited by law, *i.e.*, strike against or assist in a strike against the public employer."[12] In reaching this conclusion, the *Rogoff* court posited the Taylor Law as a comprehensive scheme, noting the a union was merely being asked to acknowledge the limits of the law under which it is being granted exclusive representative status.[13]

This issue was revisited in *New York State Inspection, Security and Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO v. New York State Public Employee Relations Board ("DC 82")*, this time in federal district court in New York, under circumstances closer to those surrounding the TWU's application.[14] In *DC 82*, PERB had found that a state employee union had engaged in an illegal strike in violation of the Taylor Law and, as a consequence, had ordered that

> [t]he dues deduction and agency shop fee privileges, if any, of DC 82 be forfeited, commencing on the first practicable date and continuing thereafter for a period of 18 months. Thereafter no dues or agency shop fees shall be deducted on its behalf until it affirms that it no longer asserts the right to strike against any government, as required by the provisions of CSL § 210.3(g).[15]

The union responded by commencing an action in federal court challenging, among other things, the constitutionality of requiring the union to provide a no-strike affirmation as a prerequisite to reinstatement of dues checkoff. Relying on the reasoning in, and by implication the saving construction in, *Rogoff*, the court found the imposition of an affirmation requirement as a condition of reinstatement of dues checkoff to be constitutional.[16]

Until Justice Balter's ruling, *Rogoff* and *DC 82* were the last word on the constitutionality of no-strike affirmation requirements in New York State. Justice Balter's imposition of additional requirements, particularly the requirement that each member of the TWU's executive committee individually affirm that he or she does not assert the right to strike, appears to distinguish the TWU's case from *Rogoff* and *DC 82*, and to be at odds with the holding in *Bloundt* and other federal compelled speech cases.

The seminal Supreme Court cases on compelled speech, like *Bloundt*, arose from situations in which individuals were obliged to assert a prescribed message, whether by displaying it on their property or by uttering it as part of an oath or pledge. In *Wooley v. Maynard*, an individual challenged a New Hampshire statute making the obscuring of that portion of non-commercial license plates displaying the state's motto: "Live Free or Die" a misdemeanor.[17] Pursuant to his religious beliefs, plaintiff had covered up the message and was subsequently arrested and found guilty of the misdemeanor. After serving 15 days in jail for failure to pay the assessed fines, plaintiff challenged the constitutionality of compelling individuals to display an ideological message. The Supreme Court viewed the issue as one of compelled speech, noting that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak and the right to refrain from speaking at all."[18] In concluding that the New Hampshire law was unconstitutional, the court analogized that case to an even older Supreme Court case on the issue, *West Virginia State Board of Education v. Barnette*.[19]

In *Barnette*, a religious organization challenged a Virginia state law requiring public school students

to salute the flag of the United States of America both by gesture (a raised hand) and words, under penalty of expulsion from public school and prosecution for delinquency. The court characterized the prescribed pledge as requiring an individual "to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks," specifically, "adherence to government as presently organized."[20] The court found such requirement offensive to the principles of the First Amendment and famously noted that

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[21]

As the *Rogoff* court properly recognized, in *Bloundt*, such precedents dealt with the fundamental rights of individuals, and not organizations to which rights are granted under the same comprehensive scheme that compels the speech at issue. The TWU makes just this argument, among others, in its briefs on appeal. Justice Balter's directive that each of the 48 individuals on TWU's executive board be compelled to speak the same message as is required of the TWU, as an organization, blurs the *Rogoff* distinction to such an extent that it violates the First Amendment. Whether the Appellate Division will agree, and what this may mean for other unions who may disagree with the current state of the law, remains to be seen. The appeal was fully briefed in March 2008, and a decision is pending.

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1. *See e.g.,* Ari Paul, *TWU Dues Bid Denied Despite MTA Support*, THE CHIEF, November 16, 2007; William Neuman, *Judge Deals Transit Union A Blow on Collecting Dues*, THE NEW YORK TIMES, November 9, 2007.
2. *See* RONALD DONOVAN, ADMINISTERING THE TAYLOR LAW (990), at 18-20 and 225-26.
3. *New York City Transit Authority v. Transport Workers Union of America, AFL-CIO*, 35 A.D.3d 73, 76-77 (2nd Dept. 2006) (setting out the factual and procedural history of the case). Hereinafter "*TWU Appeal*". Justice Jones was appointed to the New York Court of Appeals in February 2007.
4. *TWU Appeal*, 35 A.D.3d at 77, 81.
5. *New York Transit Authority, et al. v. Transport Workers Union of America, AFL-CIO, et al.*, 37 A.D.3d 679, 680-81. Hereinafter "*TWU Second Appeal.*"
6. *New York City Transit Authority, et al. v. Transport Workers Union of America, et al.*, -- N.Y.S.2d ----, 2007 WL 4165275, *1 (Kings Cty. Nov. 7, 2007).
7. *New York City Transit Authority, et al. v. Transport Workers Union of America, et al.*, -- N.Y.S.2d ----, 2007 WL 4165275, *1 (Kings Cty. Nov. 7, 2007).
8. *Id.* at *2.
9. The Rules of the New York City Office of Collective Bargaining similarly require compliance with the Taylor Law's no-strike affirmation requirement. 61 RCNY § 1-02(s)(2).
10. 34 A.D.2d 154 (1st Dept. 1970).
11. 305 F.Supp. 546 (D.C. Cir. 1969).
12. *Rogoff*, 34 A.D.2d at 157 (citations omitted).
13. Interestingly, this notion that the Taylor Law is a complete scheme could be used legislatively to counter the open door left by the Court of Appeals decision in *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314 (1983), as to the exclusivity of remedies under the Taylor Law. Closing that door, and limiting strike penalties in particular to those provided for in the Taylor Law, has been an ongoing reform effort for many labor leaders.
14. 629 F. Supp. 33 (N.D.N.Y. 1984).
15. *Id.* at 39.
16. *Id.* at 53.
17. 430 U.S. 705 (1977).
18. *Id.* at 714.
19. 319 U.S. 624 (1943).
20. *Id.* at 633.
21. *Id.* at 642.

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