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For Public Employees, Speech Is Free, But Is Anyone Listening?

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The government has no legal obligation to listen to any of us. The author of this article discusses this legal "secret," which is of particular import to the long-run conflict between the public sector labor movement and their right-wing opponents.

In the current political environment many groups feel that "government" is not listening to their needs and issues, but most would be surprised to discover that the government has no legal obligation to listen to any of us. This legal "secret" is of particular import to the long-run wrestling match between the public sector labor movement and their right-wing opponents, where the so-called "right to work," presented as a positive, often translates into the right to be ignored, a decided negative.

IS "RIGHT TO WORK" A RIGHT TO BE HEARD?

The "Right to Work" movement often touts its focus on empowering workers through the First Amendment. The name itself is designed to indicate a right to a job and implies some individual control over the terms of that employment. "Give yourself a raise," and other variations of that sentiment, are declared on mass mailings targeting public employees in the wake of the Supreme Court's decision in *Janus v. AFSCME*, overturning a four-decades old precedent that had permitted unions to collect fair share fees from nonmembers.[1] The decision is praised by some as a win for worker free speech, but what does it mean for a public employee's right to be heard? Anyone who has ever repeated the same

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request multiple times to a distracted child knows that there is a world of difference between speaking and being heard.

Indeed, the admittedly catchy invitation only thinly veils the reality of what was won and what was at risk of being lost in *Janus*. The mailing does not say call your boss and demand a raise higher than the one your union was able to negotiate for everyone in the last contract. Yet, individual negotiation of terms and conditions of employment is implicit (if not explicit) in the employee-facing rhetoric of Right to Work groups. The implication is that by turning down the volume knob on public sector unions you somehow inherently amplify the voices of individual workers. Nothing could be further from the legal — and practical — truth. The simple fact is that, absent collective bargaining laws, the government, neither as employer nor as sovereign, has any obligation to listen. In fact, government generally has no obligation to listen to any citizen, from the president on down.

WHAT WAS "WON" IN *JANUS*?

If you had been following the coverage of the *Janus* decision (including the dress rehearsal in the *Friedrichs v. CTA*[2] case), it may seem as though long silenced nonmembers of public sector unions finally have a right to speak freely. That, of course, is not true. Public employees (much like private sector employees) have always had the right to speak freely in opposition to the union representing their bargaining unit (and on myriad other topics).[3] As pointed out in the numerous briefs submitted in support of defendants in the *Janus* case, public employees have always had the ability to protest union or public employer action. In fact, public sector unions in New York and elsewhere have long been prohibited from taking any discriminatory or retaliatory action against any bargaining unit member for such activity.[4] Prior to the recent amendments to New York's Taylor Law accomplished in anticipation of *Janus,* public sector unions in New York could make only a few narrow distinctions in how they treated members and nonmembers (primarily focused on the ability to exclude nonmembers from internal union matters such as electing officers). Against this backdrop, *Janus* comes into focus as addressing a discrete area of speech: the requirement to contribute a fee representing the proportionate share of costs for core collective bargaining and contract administration activity. Fine, you do not need to pay your $50 per month to the union any longer. Does that mean your boss now has to listen to you when you ask for that raise? Does the legislature now have to take your call? The answer to both is "no."

CAN YOU HEAR ME NOW?

The Supreme Court has long recognized a distinction between the right to speak and the government's obligation to listen. "The First Amendment

right to associate and advocate does not guarantee that the speech will be persuasive or the advocacy effective."[5] The First Amendment does not impose any affirmative obligation on the government to listen, to respond or to recognize any organization.[6] Not only does the government have a right to ignore employees and citizens alike, but it also has the right to be selective in who it ignores. Think of the constant stream of organizations, boards, advisors and special appointees who have the president's ear.

In the seminal case of *Minnesota State Bd. For Cmty. College v. Knight*,[7] the Supreme Court recognized that although community college faculty had a special interest in public policies relating to their employment, their public employee status "[gave] them no special constitutional right to a voice in the making of policy by their government employer."[8] More broadly, the Supreme Court held "[a] person's right to speak is not infringed when government simply ignores that person while listening to others" and that any disputes individuals may have with the resultant policy choices are "to be registered principally at the polls."[9] There is no exception to this rule for public employees or unions. Absent state legislation requiring public employers to meet and bargain with public employee representatives, they are free to ignore them as well (though, potentially to their political peril). Thus, absent unions and state collective bargaining laws, public employees may find they are free to shout into the wind.

TURN UP THE VOLUME

The answer to the unsettling disconnect between the government "of the people, by the people, [and] for the people," [10] and the actual people has always been the same: organize. Many voices are louder than one. That is the fundamental principle underlying our political system. Whether you are part of the Democratic Party, the Republican Party or any other group of individuals who have some or many interests or values in common, the best way to be loud enough to be heard is to combine your voices and demonstrate, write, speak and communicate. In the public sector the ability of public employees to be heard is amplified by the very collective bargaining laws that continue to be under attack by so-called proponents of free speech.[11] These are the laws that require public employers to listen, whether through meet and confer requirements or, as in New York, the obligation to bargain with the exclusive representative (though not necessarily agree) in good faith. These rights are enforced through administrative proceedings and courts empowered to discipline both unions and employers when they fail to fulfill their statutory obligations.[12] It is true, they do not require public employers to individually listen to each and every public employee. That would be impossible. Just in New York City there are some 350,000 active public employees. Instead, collective bargaining laws are modeled after our own system of democracy — balancing majority rule with protections for individual rights. That means the only realistic way for

public employees to be heard and have a seat at the table is not to go it alone, but through the collective bargaining model. Absent that, public employees leave their livelihood within the unchecked control of their public employers.

NOTES

1. 138 S.Ct. 2448 (2018).

2. 136 S.Ct. 1083 (2016) (*per curiam*).

3. Ironically, while the Supreme Court has elevated a public employee's right to speak in relation to agency fees, the Court has been less supportive of the speech of individual public employees when it is, for example, critical of public employers or other government actors. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006)(holding there is no First Amendment protection for the speech of public employees on matters within the scope of their employment).

4. *See* N.Y. Civ. Serv. Law § 209-a.

5. Smith v. Arkansas State Highway Emp., Local 1315, 441 U.S. 463, 464-66 (1979).

6. *Id.*

7. 465 U.S. 271 (1984). The continuing viability of *Knight* post-*Janus* was recently confirmed by the United States District Court of the District of Maine. Reisman v. Associated Faculties of the Univ. of Maine, et al., 18-cv-00307 (Dkt#46) (relying on *Knight* and dismissing post-*Janus* challenge to constitutionality of exclusive representation under Maine public sector labor law).

8. *Id.*, at 286.

9. *Id.*, at 288 and 285.

10. Lincoln, Abraham. "The Gettysburg Address." 19 Nov. 1863. Abraham Lincoln Online, *available at http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm*.

11. *See e.g.*, *Reisman*, 18-cv-00307 (challenging exclusive representation on constitutional grounds); Pellegrino v. NYSUT, et al., 18-cv-C3439 (challenging the constitutionality of agency fees, pre- and post-Janus membership authorization cards as well as several statutory provisions).

12. *See* N.Y. Civ. Serv. Law §203, 204 and 209-a(1)(d).