C S E A

COMBATING ANTI-UNION DISCRIMINATION

A CSEA PRIMER

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INTRODUCTION

This primer is aimed at arming our CSEA activists with information to successfully combat anti-union conduct by an employer against officers and members. Of course, it is always important to remember that the strongest weapon against union-bashing is an active and organized Local or Unit.

I. APPLICABLE STATUTES

1. Taylor Law

A. Statutory Provisions

Pursuant to the Taylor Law, it is an improper practice for a public employer to deliberately:

a) interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; or

b) to discriminate against any employee for the purpose of encouraging or discouraging membership in or participation in the activities of any employee organization.

B. Protected Activities

Some basic examples of improper employer conduct in this regard are threatening or disciplining an employee for filing grievances or attending PERB hearings.

Unlike the private sector, an employee's activity can not just be concerted activity; it must be connected with union activity. Participating in a union-related safety issue would be protected; an individual raising a safety issue on his or her own, without connection with the union, may not be (although it might violate some other statute).

Also, unlike the private sector, the Taylor Law requires a deliberate intent to engage in improper activities.

C. PERB Procedures

When an employee has been the victim of anti-union discrimination under the Taylor Law, either CSEA or the individual can file an improper practice charge with the New York State Public Employment Relations Board (PERB).

The improper practice charge must be filed with PERB **within four months** of the action which is being challenged by the improper practice charge. It is therefore critically important to contact your Labor Relations Specialist immediately if you suspect anti-union discrimination so that a timely improper practice charge can be filed.

After the charge has been filed, PERB will hold a pre-hearing conference which is aimed at sorting out the relevant issues and determining whether the case can be settled. If the matter cannot be resolved at the conference, a hearing will be scheduled. At the hearing, CSEA will be obligated to present evidence demonstrating that anti-union actions have taken place. Any decision by the

administrative law judge is appealable to the full PERB Board.

2. National Labor Relations Act

A. Statutory Provisions

For CSEA members who work for private sector employers, the National Labor Relations Act ("NLRA"), as amended, is the law which protects employees against anti-union animus.

Sections 8(a)(1) and 8(a)(3) prohibit employers from interfering, restraining or coercing employees with respect to their rights to engage in union related activity or discriminating against employees for engaging in such activity. Section 7 protects employees who engage in *concerted activities* for the purpose of collective bargaining or other mutual aid and protection.

B. NLRB Procedures

The private sector procedure under the NLRA for challenging anti-union activity is very different from what is required in the public sector. Under the NLRA, as amended, an unfair labor practice charge must be filed with the National Labor Relations Board (NLRB). The charge must be filed **within six months** of the alleged conduct.

After the charge is filed, the NLRB's regional office will conduct an investigation. After an investigation, the NLRB will either find that the charge has or does not have merit. If the NLRB finds merit to the charge after conducting its own investigation, it

will issue a complaint. The complaint is heard by an administrative law judge and an NLRB attorney will present the case against the employer. An administrative law judge decision is appealable to the full Board.

3. Lawful Activities Law

A. Statutory Provisions

The Lawful Activities Law (Labor Law §201-d) permits, among other things, an employee to sue in court when he or she has been discriminated against for engaging in conduct which is protected by the Taylor Law or the NLRA.

B. Procedures

Under the Lawful Activities Law, a person can commence a lawsuit in New York State Supreme Court for damages and injunctive relief. The statute of limitations is three years.

Before CSEA can commence an action under the Lawful Activities Law, a request for legal assistance must be filed by the Labor Relations Specialist and be approved by the CSEA Standing Legal Committee.

C. No "Dual" Filings

Case law exists which states that both a PERB improper practice charge and court action cannot be filed simultaneously; the court action will be dismissed.

II. THE STANDARDS OF PROOF

1. Generally

In order to win a case of anti-union discrimination, **CSEA** must present evidence which satisfies the burden of proof. There are three essential elements, all of which must be proven:

1. The employee or employees have engaged in activity which is protected under the Taylor Law or the NLRA;

2. The protected activity was known to the person(s) making the adverse employment decision; AND

3. The adverse employment decision would not have been made but for the protected activity, or was inherently destructive of important employee rights.

2. "Protected Activity"

A. Public sector

In order for conduct to be considered protected union activity under the Taylor Law, it must be done in the context of some organizational connection to the union. The mere fact that an employee has complained to his or her supervisor about working conditions may not be sufficient to show protected activity unless the employee was acting on behalf of the union or other union members, or there are other facts which demonstrate that the activity is protected activity.

The activity also must in some way relate to the

terms and conditions of employment. The following are examples of activity which has been recognized to be protected activity:

1. Filing a grievance or an improper practice charge or participating in those proceedings.

2. Unit officer filing a health and safety complaint with the appropriate authority.

3. Announcing an intention to run for union office.

4. Unit officer's vocal opposition to an employer's staffing decision.

5. Written communication to the unit membership regarding terms and conditions of employment.

6. Working to organize a union.

B. Private Sector

Protected activity in the private sector must:

1. Be in the mutual aid and protection of workers.

2. Be done in a concerted fashion.

3. Not be so disruptive as to go beyond the protections of the Act.

"Concerted activity" generally requires two or more employees working together at the same time and in the same place toward a common goal. However, where an employee acts individually by asserting a right derived from the collective

bargaining agreement, the activity may be "concerted" because the right is for the mutual aid and protection of all employees.

C. Unprotected activities

Some conduct we engage in as unionists is unprotected under the labor laws. For instance, political activity by union officials is not protected activity under the Taylor Law. For example, the distribution of a letter from a CSEA unit president to the unit membership giving an update about negotiations and stating the officer's intent to vote for a particular candidate in the upcoming elections was found not to be protected activity under the Taylor Law.

Of course, a union officer who is engaged in protected activities but who also performs improper conduct is not protected. Thus, a unit president who shoves the mayor during contract negotiations can be disciplined although he was engaged at the time in a protected activity (i.e., collective bargaining).

Also, retaliation against a unit member for filing a claim of sex or race discrimination may not constitute protected activity.

Note: discrimination for such conduct may be protected by other statutes.

3. Knowledge

In most cases, it is not difficult to demonstrate that the person who made the retaliatory decision was

aware of the protected activity. Frequently, the protected activity is done in front of management, or management does not dispute that it was aware of the protected activity.

When an employment decision, such as termination, is tainted by an improperly motivated recommendation, the employment decision may be found to constitute a violation of the applicable labor law. For example, in a case involving a Long Island school district, CSEA established that a union activist was terminated for his union activity by showing that his supervisor was motivated by animus when he recommended that the activist's job be abolished. It did not matter that the school administrator who made the ultimate decision to abolish the position was unaware of the activist's union activity.

4. "But For"

Generally, this is the most difficult aspect of any anti-union case: demonstrating that the employer retaliated because of the protected union activity.

Nevertheless, there are a number of ways to prove this element of a case:

A. Direct Evidence - Statements by Management Representatives:

In many successful cases, we have been able to prove anti-union animus based on "in your face" type statements. Angry comments critical of the individual's union activity are the best evidence of anti-union motivation.

Therefore, it is critically important to keep records regarding such statements, especially when they involve a direct threat. In one case, CSEA won based on a six-month-old threat to fire an employee if he got involved in the union when the employer terminated the employee after he announced his intention to run for union office.

B. Circumstantial Evidence

1. The timing and content of the employer's reaction can be used to prove animus. For example, an employer resurrecting disciplinary charges which had been previously settled was found to demonstrate animus.

2. "Disparate Treatment": Animus can also be shown through differences in treatment by the employer toward another similarly situated employee. For example, anti-union animus was found in a case where one of three members charged with stealing was terminated after he filed a grievance challenging a suspension. The other two employees who were suspended were not terminated.

3. An employer's misleading explanations for their actions against an individual is probative to the question.

III. DEVELOPING PROOF FOR A DISCRIMINATION CASE

1. Keep notes or journal on ongoing basis.

In some situations, a supervisor periodically

makes anti-union remarks or displays mildly anti-union conduct. Later, an act of major anti-union discrimination occurs. The earlier behavior is useful circumstantial evidence to show the supervisor's mindset and frame of mind. It is thus important to be able to recount specific details of that prior conduct — date, time, location, specific comment or act, witnesses.

Where there is a supervisor who seems to be a problem in this regard, careful and detailed notes should be kept to provide this sort of evidentiary background at a later date.

2. Immediately investigate after the adverse action occurs.

   The ground work for proving a case of anti-union animus must begin as soon as the employer has taken the adverse action and it is suspected that it was done to retaliate for union activity. An interview of the employee and any witnesses should begin as soon as possible.

   In building a case, it is beneficial for someone from CSEA to contact management immediately to learn what justifications, if any, management offers for their action. Obviously, if management admits that the adverse action was taken against the employee for engaging in union activity it is important to keep a record of the conversation. If management has conflicting versions of why it acted, this could be useful circumstantial evidence that it is not being truthful as to its real motivation.

3. As soon as possible, contact your Labor Relations Specialist, who can aid in ensuring that all evidentiary

bases are covered.

4. Use Taylor Law demands and Freedom of Information demands to gather information. Any and all relevant documents should be gathered.

   Caveat regarding investigations: Some members believe that they can protect themselves by secretly tape-recording conversations. Although it is permissible in New York for one party to secretly record a conversation they are having with another party, engaging in such tape-recording ***is not appropriate and is usually counterproductive.*** Secretly recording conversations can harm the case more than help.

CONCLUSION

By working together, we can stop discrimination against CSEA-represented employees based on protected union activity. Cases of anti-union discrimination can be proven with the assistance of your Labor Relations Specialist and through a prompt and detailed investigation of the facts. Your role in gathering and analyzing the background and specifics of each situation with your Labor Relations Specialist is the key to the development of a timely and successful case.

NOTES

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