EMPLOYER INTEREST MAY OUTWEIGH PROTECTED UNION SPEECH

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Americans enjoy free speech as it is the hallmark of our democracy. However, every American knows or should know that one's speech is limited in certain circumstances such as when it creates an immediate danger to others. Thus, yelling "fire" in a crowded theater is prohibited because a person's right to free speech gives way to the safety of others in the theater.

Likewise, the speech of Pennsylvania unionized employees is also subject to similar restrictions. Recently, in the case of Abington Heights School District v. Abington Heights Education Association (Proposed Decision and Order, 2016[1]), a hearing officer ruled that where protected union speech creates a danger to a particular student, even if such speech is given in an arbitration hearing, that speech can be affirmatively addressed by an employer as improper.

In the above case, a school nurse testified at an arbitration that non-medical staff should not administer an EpiPen unless the student stopped breathing. She also testified at the hearing that she would not train non-medical staff to administer a Benadryl strip to the student's tongue if a hive developed since it would constitute an unlawful administration of medicine.

Her testimony was contrary to the explicit orders of the student's doctor who indicated that if a hive developed, it should be considered a life-threatening matter. In response, the district superintendent issued a stern memorandum to the school nurse stating that her testimony potentially jeopardized the safety and health of the student. He directed her to comply with the medical plan as instructed, informed her that failure to do so would result in discipline up to and including termination, and copied the memorandum to the nurse's personnel file.

The union filed unfair labor practice charges alleging the memorandum had an anti-union animus and a chilling effect on union activity. The hearing officer dismissed both claims. He held that the memorandum was not issued as a direct result of the employee's testimony, but rather as a legitimate safety and health concern for the student. As such, he found no improper intent, a requirement for an anti-union animus charge. Also, the hearing officer found that although the memorandum could have a chilling effect on employees engaging in protected activity, no violation was present because the district's concerns outweighed concerns over the interference with employee protected rights to engage in union activity such as testifying at an arbitration hearing.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

1. This matter is on appeal before the PLRB.