Citizenship at Work: How the Courts Privatized Public Sector Workplace Law

By Ruben J. Garcia*

Collective bargaining by public sector employees has been the subject of recent heated debates recently in state legislatures in Wisconsin, Michigan and Ohio among others. The right of public sector employees to bargain collectively is only one of what I call the citizenship rights of public employees. Other citizenship rights of public employees include the right to privacy, freedom of speech, freedom of association and political participation. I argue that these citizenship rights are under threat both in state legislatures and in the courts. Paradoxically, the ability of public sector employees to change legislation has been hampered over years by Supreme Court decisions make it more difficult to organize politically. At the same time, public employees increasingly are politically marginalized and the importance of the courts as a backstop for public employee constitutional rights is even more important.

First, this article describes the recent disputes over collective bargaining in several states in 2010 and 2011. Legislative efforts to roll back collective bargaining take place in an environment of increasing vitriol against public sector employees and efforts to contract out and privatize government services. At the same time that public employees need legislative muscle to reverse or halt the efforts to limit their freedom of association rights, the Supreme Court has incrementally privatized public sector labor law by making the working conditions of public sector employees more symmetrical with those of employees in the private sector. In Garcetti v. Ceballos, the Supreme Court made obtaining whistleblower protection for public employees under the Constitution more difficult and relegated them to the patchwork of state and federal regulations that is badly flawed. Then, I look at Quon v. City of Ontario, where it became even more clear that several justices believe that any searches considered reasonable as against private sector should be considered constitutional under the Fourth Amendment when public sector employees are being searched. Finally, I examine Borough of Duryea v. Guaraneri, a 2011 Supreme Court decision where the Court imported the “public concern” requirement of free speech rights into the freedom of assembly clause in the First Amendment. This decision, I argue, makes it more difficult than ever to overturn earlier decisions holding that the right to collective bargaining is not protected by the First Amendment, and thus to ever change the legislative rollbacks of public employee collective bargaining rights through the courts. In the end, all of these developments further exacerbate the divide between work and citizenship for public sector employees.

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