
Coates' Canons Blog: Criticizing Public Employees in Public

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An incident involving the police department has riled up the citizens. The manager and the police chief are coming under heavy criticism. Several people have signed up to speak at the regular public comment period at the next council meeting and have indicated that they will speak about “the need for the firing of the police chief.” The clerk is concerned: Since it’s clear that personnel issues will be discussed, she wonders whether the board has an obligation to hear the complaints in closed session. Or perhaps the clerk should require that the speakers submit their complaints in writing, instead of airing them in public, so that they can be maintained as confidential personnel records. Could these comments run afoul of the board’s policy against “personal attacks” during public comment periods?

Here’s what the clerk needs to know: People have a right to complain about public employees publicly. The city has neither the obligation nor the right to require that such comments be made confidentially. The city may be able to prohibit personal attacks, which have less First Amendment protection than substantive comments about specific concerns or issues. Of course, it’s not always easy to tell the difference between protected speech and personal attacks, especially in the heat of the moment.

An important exception to the state’s broad public records law requires that most records about employees are confidential. The employer is prohibited from releasing them. This requirement applies to records that are “gathered” by the unit in connection with an employee’s work. Certainly, any record the unit creates or receives reflecting criticism of a public employee will be considered part of the personnel file. Nothing in the personnel privacy statutes, however, requires or authorizes a unit of government to restrict comments by the public about employees, nor is there any authority to dictate the format or venue in which those comments may be made.

Furthermore, cases suggest that citizens have a First Amendment right to express their concerns about public employees at a meeting that is otherwise open for public comment. In *Moore v. City of Creedmoor*, 345 N.C. 356 (1997), the North Carolina Supreme Court recognized a potential claim for a violation of First Amendment rights when the town board refused to allow a citizen to criticize the police chief. The court held:

“[Citizens] have a right to assert a public complaint concerning the negligence of public officials and to petition the government for redress of grievances...The United States Supreme Court has repeatedly held that the First Amendment guarantees the right to criticize police officers...It should also be noted that once the government has opened a forum—such as a public meeting—to allow direct citizen involvement, it may not discriminate between speakers based upon the content of their speech.” *Moore at 976* (citations omitted).

Does this mean that a board can’t enforce a policy barring “personal attacks” in public comment periods? No, as long as the mayor or chair is careful to distinguish between criticism and attacks – admittedly a challenging distinction, but one that can be made. In *Steinburg v. Chesterfield County Planning Comm’n*, 527 F.3d 377, 385 (4th Cir. 2008), *cert. denied*, 555 U.S.1046 (2008), the federal Fourth Circuit Court of Appeals upheld the removal of a citizen under a policy prohibiting personal attacks. The court noted:

“Because of government’s substantial interest in having such meetings conducted with relative orderliness and fairness to all, officials presiding over such meetings must have discretion, under the ‘reasonable time, place and manner’ constitutional principle, to set subject matter agendas, and to cut off speech which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner...We conclude that a content-neutral policy against personal attacks is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited forum of decorum

and order. Such a policy is deemed content-neutral when it 'serves purposes unrelated to the content of expression ... even if it has an incidental effect on some speakers or messages but not others.'" (citations omitted).

So what's the difference between an attack and a criticism? I suppose the tone and the words make a difference, but certainly, it's a fine line. As the court explained in *Steinburg*, a key concept is that a limitation on personal attacks leaves open an alternative channel for expressing the content of the message. The alternative is to say it without the personal attack. The court reasoned:

"[D]enying a speaker at the podium in a Commission hearing the right to launch personal attacks does not interfere with what that speaker could say without employing such attacks. The same message could be communicated, indeed probably more persuasively, as we have witnessed in the videotape of the presentations of other speakers at the proceedings in this case. In the language of First Amendment jurisprudence, the Commission's policy in this case has left open 'ample alternative channels for communication of the information.'" *Steinburg* at 387.

Perhaps a helpful guideline would be to focus on whether the comment identifies a specific action or issue of concern, as opposed to a broad based, nonspecific attack on the character or motivation of the public officials involved. For example:

Criticism: (spoken firmly but calmly) "The police chief is responsible for the acts of her department and should take responsibility for what happened. The officers were wrong to do what they did, and if the manager doesn't fire the police chief, we think the board should fire the manager."

Personal Attack: (spoken with a tone of disgust) This whole town is corrupt and you don't care about anyone but yourselves. You'll never do anything about the police chief or the manager because you just don't care about the citizens."

Meetings at which citizens criticize employees or board members can be highly charged and contentious events. It's often difficult for the chair or mayor to control his or her emotions as the line between criticism and attacks become blurred. The desire to cut off controversial or uncomfortable remarks may be hard to resist. Indeed, a threat to cut off unwelcome comments may escalate, turning a criticism into an argument, resulting in removal for disruptive behavior or personal attacks. Regular and consistent enforcement of time limits on individual speakers may be an effective way to avoid a conflict over a disruptive or controversial speaker.

Local governments are certainly free to encourage citizens to provide comments in writing, or to meet with supervisors or board members to provide their criticism in a nonpublic forum. But if a citizen truly wishes to make a public criticism, the mayor or chair should recognize the citizen's right to do so, keep an ear tuned for the difference between an attack and a criticism, and keep a cool head to avoid turning a criticism into a personal attack.