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Free Speech, Supreme Court, Appellate Division, Third Department: MacFarlane v. Village of Scotia

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

MacFarlane v. Village of Scotia[94]
(decided July 3, 1997)

Petitioner, Timothy MacFarlane, a police officer in the Village of Scotia, brought an Article 78 proceeding[95] in order to "review the suspension imposed against him for misconduct in connection with a letter he wrote as vice-president of a police officers association, which criticized the police chief's position regarding the implementation of a 911 emergency call system."[96] In the Article 78 proceeding the petitioner, MacFarlane, argued that his right of free expression under the Federal Constitution,[97] had been violated.[98] The Third Department held that the petitioner's letter would have been entitled to First Amendment protection since the letter referred to a matter of public concern.[99]

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[94] 659 N.Y.S.2d 351 (3d Dep't), *appeal dismissed*, 90 N.Y.2d 1008, 688 N.E.2d 1384, 666 N.Y.S.2d 102 (1997).

[95] N.Y. C.P.L.R. 7801 (McKinney 1982). This section states in pertinent part:

> Relief previously obtained by writs of certiorari to review, mandamus, or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. . . .

Id.

[96] *MacFarlane*, 659 N.Y.S.2d at 351-52.

[97] U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*; N.Y. CONST. art. I, § 8. Article I, Section eight of the New York Constitution provides in pertinent part: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

[98] *MacFarlane*, 659 N.Y.S.2d at 353.

[99] *Id.*

However, because the interests of the village in operating its police force efficiently and effectively outweighed petitioner's free speech rights,[100] petitioner, MacFarlane, was not entitled to the protection granted by the First Amendment.[101]

The use of a 911 emergency call system in Schenectady County had been the topic of intense public debate and of ongoing coverage by the press.[102] This included the publication of several letters written by various union leaders, including the petitioner, who were opposed to the positions taken by the Village of Scotia's Mayor and Chief of Police.[103] In order to effectuate the emergency call system, the village's Board of Trustees considered several different dispatch plans.[104] One of the dispatch plans which was favored by the Scotia Police Benevolent Association called for the Village of Scotia's Police Department to handle the 911 calls.[105] In contrast, the plan favored by the Board of Trustees provided that the citizens of the Town of Glenville act as the dispatchers for the 911 calls.[106] On the night of the Board of Trustees' meeting to select the dispatch plan to be used by the village, a letter, written by petitioner, the vice-president of the Scotia Police Benevolent Association, was delivered to each of the four trustees.[107] This letter highlighted what the "petitioner perceived to be the deficiencies in the plan favored by the Board

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[100] *Id.*

[101] *Id.* at 354. The Appellate Division, Third Department also held that:

> [T]he regulations which Officer MacFarlane was charged with violating were not unconstitutionally vague; 2) substantial evidence did not support the finding that MacFarlane intentionally disregarded a lawful order; 3) substantial evidence did support charges based on MacFarlane's use of intemperate language; 4) but a reprimand, rather than a suspension, would have been an appropriate punishment under the circumstances.

Id. at 353.

[102] *Id.* at 353.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

of Trustees."[108] While petitioner's letter criticized the Chief of Police and the Mayor, there was no public discredit with respect to the Chief or the Mayor, or to their offices.[109] However, it was the Mayor, one of the recipients of the letter, who had it publicized.[110] Shortly after the publication of the letter, the Village of Scotia, pursuant to Civil Service Law section 75(1),[111] served petitioner with a notice and a statement of the charges against him.[112] These charges alleged twelve incidents of misconduct which were based upon the contents of his letter.[113] Following these events, the Board of Trustees appointed a hearing officer, who, dismissed the portions of the charges pertaining to the Mayor following an evidentiary hearing.[114] Ultimately, the hearing officer found the petitioner guilty of the remaining charges.[115] Pursuant to the hearing officer's findings,

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[108] *Id.* The letter written by the petitioner included the following:

> It is the Chief's letter to the editor I find more interesting. As president of the Police Benevolent Association when Paul Boyarin came to Scotia and current vice-president, I have made it very clear to our members that Chief Boyarin is a provisional Chief and as such is subject to the whim and pleasure of the Mayor. Until he becomes permanent and can speak freely he is a tool of the Mayor. With this in mind we have not said anything to, for, or against the Chief, and have kept him out of our comments about plan three etc. I was very surprised (as were many people I talked to) that the Chief of Police would jump into this political pot to publicly shaft his men and the Police Benevolent Association and suck up to the Mayor in the same article. This was uncalled for and did harm to the Department and the Chief's image.

Id.

[109] *Id.*

[110] *Id.*

[111] N.Y. CIV. SERV. LAW § 75(1) (McKinney 1982). Section 75(1) states: "Removal and other disciplinary action. A person . . .shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." *Id.*

[112] *MacFarlane*, 659 N.Y.S.2d at 353.

[113] *Id.*

[114] *Id.*

[115] *Id.*

it was recommended that petitioner be suspended from work for two weeks without pay.[116] The Board of Trustees adopted the hearing officer's findings and recommendations, and suspended the petitioner without pay for ten working days.[117] Petitioner then brought an Article 78 proceeding.[118]

The Appellate Division began its analysis by addressing the petitioner's initial argument of protection under the First Amendment of the United States Constitution.[119] The court agreed with the petitioner's contention that the letter addressed a matter of public concern.[120] However, the court stated that the Village of Scotia could "justify its restriction of the petitioner's speech if it can show that its interest in promoting the efficiency of the public services it performs through its employees outweighed the petitioner's interest in commenting on a matter of public concern."[121] Accordingly, the court further noted that "[b]ecause the government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs, its interest in achieving its goals as efficiently and effectively as possible is a significant one."[122]

In *United States v. National Treasury Employees Union*,[123] government employees filed a suit claiming that their First Amendment rights to freedom of speech were being abridged by a statute which prohibited them from receiving honorariums for speeches made or articles written.[124] After granting certiorari to

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[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 353-54.

[120] *Id.* at 353.

[121] *Id.* (citing United States v. National Treasury Employees Union, 513 U.S. 454 (1995); Pickering v. Board of Educ. of Township High School Dist. 205, 391 U.S. 563 (1968); Matter of Zaretsky v. New York City Health and Hosps. Corp., 84 N.Y.2d 140, 638 N.E.2d 986, 615 N.Y.S.2d 341 (1994)).

[122] *Id.* at 353-54 (citing Waters v. Churchill, 511 U.S. 661, 675 (1994); Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

[123] 513 U.S. 454 (1995).

[124] *Id.* at 461. The speeches and articles for which respondents had received honoraria in the past concerned matters such as religion, history, dance, and the environment. *Id* at 461-62.

hear the matter, the United States Supreme Court held the statute violated the First Amendment.[125] The Supreme Court further held that this was a situation where government employees sought, as ordinary citizens, to comment on matters of public concern, as opposed to speaking on matters of a more personal nature.[126] There was a need for the government to satisfy a balancing test similar to the one set forth in *Pickering v. Board of Education*,[127] in order to "maintain a statutory restriction on the employees' speech."[128] The government must specifically show that "[t]he interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression were outweighed by that expression's necessary impact on the actual operation of the government."[129]

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[125] *Id.* at 470.

[126] *Id* at 466.

[127] 391 U.S. 563 (1968). In *Pickering*, the Board of Education dismissed a teacher for publishing and writing a letter in a newspaper which criticized the Board's allocation of the school's funds between athletic programs and educational programs, as well as "the Board's and superintendent's methods of informing, or in preventing the informing of the district's taxpayers of the real reasons why there were additional tax revenues being sought for the schools." *Id.* at 564. The Board charged that many of the statements in the letter were false and that the publication of the letter "unjustifiably impugned the Board and school administration." *Id.* at 566-67. In its opinion, the Supreme Court stated: "The problem in any case is to arrive at a balance between interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services through its employees. *Id.* at 568.

[128] United States v. National Treasury Employees Union, 513 U.S. 454 (1995). The Supreme Court stated:

> Because the honoraria ban constitutes a wholesale deterrent to a broad category of expression by a massive number of potential speakers, the Government's burden here is even greater than it was in *Pickering* and its progeny, which usually involved individual disciplinary actions taken in response to particular Government employees' actual speech.

Id. at 466-67.

[129] *Id.* at 468. The Supreme Court held the honoraria ban imposed a burden on the Government employees by "[i]nducing them to curtail their expression if they wished to continue their employment." *Id.* at 469. Furthermore, the Court held that the ban imposed a far greater burden on them than on the far

The facts in the Court of Appeals of New York decision of *Zaretsky v. Hospitals Corporation*[130] were similar to those in the instant case.[131] In *Zaretsky*, a former employee of a hospital owned and operated by a public employer sought reinstatement, through an Article 78 proceeding, to his positions at the hospital.[132] Zaretsky claimed his discharge "violated his rights of free speech, free association, and access to courts."[133] Zaretsky's discharge came after he authorized a lawsuit against the hospital.[134] As the president of a non-profit organization, Zaretsky was expected to support the organization of the hospital, however, the hospital thought he was misusing funds and they demanded an inquiry.[135] Believing the hospital had no right to such an inquiry, Zaretsky filed suit against them.[136] The Court of Appeals ultimately dismissed Zaretsky's petition because he was unable to meet the requisite burden of proof necessary in showing how his removal violated his constitutional rights.[137]

The overarching factor in *MacFarlane*[138] was that "[a] police force is a quasi-military organization demanding strict discipline."[139] Since the Village of Scotia's police force was so

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smaller group of lawmakers, whose past actions motivated the enactment of the ban, and the ban imposed a burden on the public's right to be able to read and hear what Government employees have to write and say. *Id* at 469-70.

[130] 84 N.Y.2d 140, 638 N.E.2d 986, 615 N.Y.S.2d 341 (1994).

[131] MacFarlane v. Village of Scotia, 659 N.Y.S.2d 351 (3d Dep't 1997).

[132] *Zaretsky*, 84 N.Y.2d at 142, 638 N.E.2d at 987, 615 N.Y.S.2d at 342.

[133] *Id.*

[134] *Id.* at 142-43, 638 N.E.2d at 987, 615 N.Y.S.2d at 342.

[135] *Id.* at 143, 638 N.E.2d at 987, 615 N.Y.S.2d at 342.

[136] *Id.*

[137] *Id.* at 145, 638 N.E.2d at 989, 615 N.Y.S.2d at 344. The New York Court of Appeals held that "[a]s a public employer, HHC is under no constitutional or legal obligation to retain an employee whose conduct the public employer deems disruptive of its operation . . . [t]hus, when petitioner's constitutional rights are balanced against HHC's interests in effectively and efficiently discharging its mandate, HHC's interests must prevail." *Id.*

[138] MacFarlane v. Village of Scotia, 659 N.Y.S.2d 351 (3d Dep't 1997).

[139] *Id.* at 354 (citing Laspisa v. Mahoney, 198 A.D.2d 279, 603 N.Y.S.2d 536 (2d Dep't 1993)). In *Laspisa*, a Suffolk County Sheriff was found guilty of misconduct after fraternizing with an inmate and continuing that relationship after the inmate was released. *Id.* at 279, 603 N.Y.S.2d at 536-37. The court

small, it "[m]andated a close relationship between its Chief of Police and officers if it was to operate efficiently and effectively."[140] It became evident, according to the *MacFarlane* court that this relationship was placed in jeopardy by the petitioner's letter, and therefore, the village's interests were determined to have outweighed the petitioner's.[141]

The New York State Constitution also provides for freedom of speech.[142] While this provision may be more specific than the Federal Constitution both can trace their foundations to the same underlying purposes. Both clauses seek to protect an individual from being persecuted due to the expressions of that individual's personal opinions.[143] However, it appears that this right is not absolute.[144] Although the *MacFarlane* court initially found that the letter written by MacFarlane would normally fall under the protection of the First Amendment, it held that MacFarlane's free expression of rights must be balanced against the Village's interest in operating its police force efficiently and effectively.[145] Here, the court found that MacFarlane's rights must give way to the greater interest of the Village.[146]

The purpose behind both the New York State and Federal Constitutions is the same, an inherent desire to protect an individual's freedom to express themselves through the spoken or written word. Both provisions re-enforce the notions of freedoms

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held that due to the police force being a quasi-military organization which demanded strict discipline, the "[p]etitioner's conduct cannot be condoned since such behavior poses a serious threat to the discipline and efficiency of the agency's operation." *Id.* at 279, 603 N.Y.S.2d at 537.

[140] *Id.*

[141] *Id.*

[142] N.Y. CONST. art. I, § 8. Article I, section eight provides in pertinent part: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

[143] *See supra* notes 98.

[144] *See* Zaretsky v. Health and Hospitals Corp., 84 N.Y.2d 140, 638 N.E.2d 986, 615 N.Y.S.2d 341 (1994); MacFarlane v. Village of Scotia, 659 N.Y.S.2d 351 (3d Dep't 1997).

[145] *MacFarlane*, 659 N.Y.S.2d at 353-54.

[146] *Id.* at 354.

which this country was originally built upon. Although it is important for people to be able to express themselves freely, it is also important to place limits or boundaries upon these rights to ensure protection from abuse. While the freedom of speech was formed to help build a more perfect society, the legal limitations on these rights were created to perform the exact same function.

Urbach v. Farrell[147]
(decided April 17, 1997)

Petitioner, the Commissioner of Taxation, was given legislative approval in 1995 to enter into a contract to privatize the processing of New York State's income tax returns.[148] In 1996, respondent, the Ways and Means Committee of the State Assembly [hereinafter committee] . . . served the petitioner with a legislative subpoena requesting that he appear at a hearing and produce a copy of the contract, designated PIT 2000, for its review.[149] Petitioner provided an incomplete version of the contract to the committee and further requested that the committee withdraw the legislative subpoena.[150] Since the committee refused to withdraw the subpoena, petitioner instituted a proceeding to have the subpoena modified or quashed.[151] The Supreme Court granted the request to have the subpoena quashed to the extent that the petitioner was not required to appear personally for the hearing.[152] However, the Supreme Court required the petitioner to produce the entire PIT 2000 contract.[153]

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[147] 229 A.D.2d 275, 656 N.Y.S.2d 448 (3d Dep't), *appeal dismissed*, 90 N.Y.2d 888, 684 N.E.2d 282, 661 N.Y.S.2d 832 (1997).

[148] *Id.* at 276, 656 N.Y.S.2d at 449.

[149] *Id.* at 276, 656 N.Y.S.2d at 449-50.

[150] *Id.* at 277, 656 N.Y.S.2d at 450.

[151] *Id.*

[152] *Id.*

[153] *Id.*