

NHMA
NEW HAMPSHIRE MUNICIPAL ASSOCIATION
EST. 1941


Freedom of Speech and Electioneering

Jonathan E. Cowal, Esq.

1

Speech & Other “Expressive” Conduct

- ▶ Right-to-Know Law applies to deliberative session
- ▶ Who has the right to speak?
- ▶ Reasonable restrictions



2

1st Amendment Cases



- ▶ ***Dayton v. Estari (Ohio)***- Regulation of “expressive conduct” not permissible unless it is accompanied by other impermissible conduct.
- ▶ ***Norse v. City of Santa Cruz***- Government officials in America must occasionally tolerate offensive and irritating speech.
- ▶ ***Cohen v. California***- Citizens have the right to express their opinions and criticisms, even if the speech is foolish and without moderation.

3

Artus v. Town of Atkinson



- ▶ To state a viable claim of First Amendment retaliation, a plaintiff must show that the defendant intended to “chill his expression”.
- ▶ The defendant’s actions must be such that it would curb the expression of a “reasonably hardy individual”.
- ▶ Moderators are protected by “Legislative Immunity” when they are enforcing rules to keep the proceedings in order.
 - ▶ No person shall speak in any meeting without leave of the moderator
 - ▶ All persons shall be silent at the desire of the moderator
 - ▶ Is any person persists in disorderly behavior after a warning from the moderator, the moderator may command that person to be removed.

4

652:16-h Electioneering - Definition

Electioneering means visibly displaying or audibly disseminating information that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure being voted.



5

Electioneering At Polling Places - RSA 659:43

- ▶ Electioneering shall be prohibited within the polling place building.
- ▶ Establish one or more no-electioneering corridors, no less than 10 feet wide, that extend from all entrances of the polling place
- ▶ Voter must be allowed to enter polling place building without interference from individuals outside the corridor.
- ▶ Moderator shall designate a preferred area for electioneering
- ▶ The distribution or posting of electioneering communications, including but not limited to posters, cards, handbills, placards, pictures, pins, stickers, circulars, or articles of clothing, is prohibited within any no-electioneering corridor established outside the polling place by the moderator.

6

nhmainfo@nhmunicipal.org / 603.224.7447 / www.nhmunicipal.org



6

Attorney General Recommendations on handling electioneering speech*



- ▶ Upon observing a voter enter the polling place to vote wearing electioneering campaign material, it is reasonable to ask the voter to remove or cover up campaign material being worn.
- ▶ It is recommended, that local election officials keep spare shirts or inexpensive rain ponchos on hand to offer voters to cover unlawful attire.
- ▶ However, should the voter refuse, he or she must be allowed to vote.
- ▶ The proper response if the person is unwilling to cease the improper conduct is to refer the voter to the Attorney General's office for investigation.

* *New Hampshire Election Procedure Manual 2020-2021, page 248*

7

VIEW POINT DISCRIMINATION AND TABLES FOR NON-PROFITS AT TOWN MEETING



8