



Student Judiciary

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Collegians for a Constructive Tomorrow (CFACT), Petitioner

v.

Barb KIERNOZIAK, Kevin OTTEN, Drew DORSHORST, Emily MCWILLIAMS, in their official capacity as members and officers of: the SSFC and Student Council, Respondents

2004 ASM SJ 16

Judgment

Cite as: 2004 SJ 16; *Affirmed* at 2005 ASM SJ 1

♦
Nathaniel Romano
Chief Justice

♦
Timothy Leonard
Chair, Student Elections
Commission

♦
Grant Collins
Vice-Chief Justice

♦
Nicholas Fox
Associate Justice

♦
Yin-Chin Wang
Associate Justice

Before Romano, CJ, Collins, VJC and Wang, S.J.

Peter McCabe for the Petitioner.

Kevin Otten for the Respondents.

THE VICE CHIEF JUSTICE announced the Judgment and delivered the Opinion of the Panel which

THE CHIEF JUSTICE joins in full, and which JUSTICE WANG joins as to all but Part IV.

THE CHIEF JUSTICE delivered a concurring opinion, which THE VICE-CHIEF JUSTICE joins.

JUSTICE WANG delivers an opinion dissenting in part.

Grant Collins, Vice-Chief Justice. Petitioner Collegians For A Constructive Tomorrow (CFACT) brings suit against several members of the Student Council (Council) and Student Services Finance Committee (SSFC), alleging violations of viewpoint neutrality when the Council considered CFACT's budget at its meeting on December 1, 2004. Petitioner alleges this conduct to have been part of a pattern of behavior occurring all during the fall semester. Four counts have been alleged: Respondent McWilliams is Chair of the Council; Respondent Kiernoziak is Chair of the Finance Committee and a member of both Council and SSFC; Respondent Otten in Vice-Chair of the SSFC; Respondent Dorshorst is a Representative on both the Council and SSFC.

I. Facts

SSFC conducts both eligibility and budget hearings for all GSSF-funded Registered Student Organizations (RSOs) during the fall semester each year. CFACT was granted eligibility after first being denied eligibility during a hearing on September 13, 2004. Later that semester, CFACT's budget request was approved, though with several cuts from the original request.

The Student Council is to hold a hearing on the GSSF budgets at the end of the fall semester. *ASM By-Laws* §2.03(A) (2004). On December 1st 2004, the Student Council cut \$10,000 from the honoraria budget of CFACT. This motion was made by Representative Barb Kiernoziak, seconded by Representative Dorshorst. Both Chair Kiernoziak and Rep. Dorshorst spoke to the motion, as did Vice-Chair Otten; no other members spoke for or against the motion.

Pursuant By-laws 2.01(B)(II) and *ASM Const. Art. IV, §2* (2004), CFACT brought suit against these individuals for comments made during the hearing which they believed to violate VPN.

II. Background

Viewpoint Neutrality is protected by the Constitution of the Associated Students of Madison (ASM). Our By-laws specifically delineate what viewpoint neutrality is: "A decision is made in a

viewpoint neutral fashion where the decision is made: (1) in accordance with any procedural requirements for making the decision; and (2) without considering the viewpoint being expressed by the recipient of the funds.” *ASM By-laws 2.01(C)(II)*. *Greenbaum v MCSC* 2004 SJ 9. Furthermore, VPN is enforced in the first instance by “safe harbor” provisions of the By-laws encouraging both the Chairs and members of committees to police their committees, *By-laws 2.01(D)*, and after that point by appeal to the Student Judiciary, *By-laws 2.01(C)(IV)*.

III. Analysis

1. Respondent Dorshorst

With regard to the statements made by Representative Drew Dorshorst during the December 1st 2004, Council meeting, this Court finds that the statements did not violate VPN. The statement was merely an argument for equalization and standardization of budgets for the same program.

Under the By-laws, as stated above, viewpoint neutrality is assured when the normal processes for funding decisions are followed and when decisions do not take into account the viewpoint or political ideology of the group to be funded. *By-laws 2.01(C)(II)*; *ASM Const. Art. IV, §2 (2004)*. During the Dec. 1st 2004, Student Council meeting Rep. Dorshorst stated that “I’m just saying like, that we did discuss that and we have come to not the consensus but like the majority opinion that five thousand dollars is like a standard amount to give for honoraria,” *Transcript of the Council Meeting of Dec. 1, 2004*. Dorshorst further affirming that “if we don’t go through and cut this we’ll have to go through other groups and also reconsider why they are not getting ten thousand like CFACT is getting ten thousand.” *Id.*

The argument levied by Representative Dorshorst is by no stretch of the imagination a violation of VPN. Arguing to fund line items to show some degree of continuity is simply a neutral argument made for the same reasons as a standard wage policy or cost-effectiveness. See, *By-laws 4.04(C)*; *MCSC v. Greenbaum, supra*; *MCSC v. Werner*, 2003 ASM SJ 20.

2. Respondent Otten

Similarly, the Court finds that the statements made by Representative Otten during the December 1st Student Council meeting did not violate VPN.

During the December 1st 2004 Student Council meeting Mr. Otten gave a statement regarding his support for the amendment to cut a total of \$10,000 dollars from CFACT’s budget. According to the records, he stated that “we shouldn’t treat this organization any different than any other organization. No other organization has received more than five thousand dollars for nay honoraria previously heard. It would be unfair to all of those other organizations who asked for more than five thousand dollars who were cut to five thousand dollars or less. It would be unfair to give one group more.” *Transcript of Council Meeting of Dec. 1, 2004*. Again, an argument for the funding of all line items to show some degree of continuity is in no sense a violation of viewpoint neutrality.

3. Respondent Kiernoziak

After a careful examination of the factual record, we find that the statements made during the December 1st 2004 Student Council meeting, were in violation of VPN. *By-laws 2.01(B)(II)*; *Const. Art. IV, §2*. Fault with Chair Kiernoziak’s statements come from the fact that she mislead the Council and impermissibly compared the substantive activities of different groups.

Chair Kiernoziak made misleading statements during her remarks at the Student Council Meeting on December 1st 2004. By asserting that “five thousand seems like a fair amount to give to an organization who may not have the name of the speaker yet or like not everything planned” Chair

Kiernoziak mislead the Student Council into believing that a vote against her amendment would be a vote for giving CFACT somewhat of a blank check. No rational RSO would contract a speaker before it had secured funds with which to do so. Therefore, her argument was misleading to the Council.

A misleading statement is a clear violation of viewpoint neutrality, for there is no rational basis for such a statement, as opposed to an innocently incorrect statement. Chair Kiernoziak was not simply mistaken, because CFACT had clearly explained their plans for their speaking series. By telling Council that CFACT essentially just wanted money without having a clear plan, Chair Kiernoziak acted in an impermissible manner.

Further, Chair Kiernoziak acted impermissibly in comparing CFACT's possible speakers to other possible speakers. During the Council meeting, she stated that there were many speakers who other groups had brought before but who were inexpensive. Simply stating the existence of inexpensive speakers is clearly not viewpoint neutrality, but by mentioning who those speakers were, and what views they held, blurs the line. At the Council meeting, Chair Kiernoziak specifically focused on Ted Kennedy being a conservationist. At another point, she compared possible speakers by CFACT to previous budget requests up for debate that night, specifically requests by the Tenant Resource Center. Clearly, by referencing a "conservationist" and a tenants rights group, Chair Kiernoziak impermissibly took into account CFACT's ideology.

With regard to punishment of VPN infractions, the bylaws set forth two different paths of punishment which are differentiated by the intent of the transgressor. Subsection 2.01(C) differentiates between "negligently" violating VPN and "knowingly, willfully, or intentionally" violating VPN. We have interpreted this to be a distinction between "malicious" and "non-malicious" violations. Malicious violations warrant a full trial on the question of immediate removal, while non-malicious violations are simply forwarded to Council for it to take such action as it sees fit. Considering all of the relevant facts, it is reasonable to conclude that Representative Kiernosiak did not knowingly or maliciously violate VPN. Accordingly, we simply forward to Council our findings in this matter, to take such action as that body deems fit.

4. *Respondent McWilliams*

According to Section 2.01(D)(II), the committee chair is culpable for censure if she is "aware that any member is making his or her decision on a Grant Allocation Decision in a non-viewpoint neutral fashion." No evidence was brought before us to show that Chair McWilliams was aware of any viewpoint neutrality violations. In fact, both sides seemed willing to ignore Chair McWilliams' role in the matter.

IV. Remedy*

The proper remedy in viewpoint neutrality cases is to ask the type of violation committed by individuals and to then look at the effect on the overall financial decision. *By-laws* 2.01(C). A committee decision is only reversed when it was procedurally flawed or absolutely tainted an individual's viewpoint violation. See, *By-laws* 2.01(C)(II); *MEChA v. Patzner, et. al.*, 2002 ASM SJ 6. Individual violations, while constituting malfeasance in office, are left to the discretion of the Council to punish, unless they are repeat violations, or egregious and malicious. *Id*; *By-laws*, 2.01(C)(III), (IV), (V).

Chair Kiernoziak's violation was her first violation. As we have already stated it was clearly unintentional and non-malicious. As such, we do not believe that our equitable powers should be

* JUSTICE WANG does not join this section. See dissenting opinion, *post* at 6.

implemented at this time to take any further action. Accordingly, we simply refer the instance to the Council to take such action as it deems appropriate. Further, for the reasons stated in Chief Justice Romano's concurring opinion below, which we incorporate by reference as a full part of the majority holding, we do not believe that this *de minimis* violation tainted the Council's work. Alternative rationales were presented at the same time as the impermissible one and could reasonably have been relied on by the Council. See, *post*, at 5. For that reason, we will not disturb the judgment of the Council.

V. Orders of the Court

Accordingly, for the reasons set forth above and in the concurring opinion, it is the holding of the Court that:

1. IT IS ORDERED that with regard to Petitioner's claim against Respondent Student Council Chair Emily McWilliams, Judgment be entered for Respondent and the claim DISMISSED.
2. IT IS FURTHER ORDERED that, with regard to Petitioner's claim against Student Council Representative Drew Dorshorst, Judgment be entered for Respondent and the claim DISMISSED.
3. IT IS FURTHER ORDERED that, with regard to Petitioner's claim against Student Services Finance Committee Vice-Chair Kevin Otten, Judgment be entered for Respondent and the claim DISMISSED.
4. IT IS FURTHER ORDERED that, with regard to Petitioner's claim against Finance Committee Chair Barbara Kiernoziak, Judgment be entered for Petitioner and Chair Kiernoziak be deemed to have committed a non-malicious violation of viewpoint neutrality and that notification to that extent shall be made to the Student Council, to take such action as that body deems necessary.

By the court, it is **SO ORDERED**.

Nathaniel Romano, Chief Justice, with whom Vice-Chief Justice Collins joins, concurring. By today's decision, the Court finds that Chair Kiernoziak improperly took into account the viewpoint of petitioner when consideration of their budget was before the Student Council. However, the Court does not invalidate the overall decision of the Council. This is entirely appropriate and consistent with the common law of the Associated Students of Madison. ASM law presumes that collective bodies and their members act in a lawful manner, unless contrary evidence is presented. Here, the contrary evidence applies solely to Chair Kiernoziak; all justices, including the dissent, agree that no other member of the Council violated viewpoint neutrality. See, *Ante* at 2; *post* at 6.

I – History and Background Illustrate the Dual Nature of Violations

^{*} JUSTICE WANG dissents from this Order. See dissenting opinion, *post* at 6.

When a financial decision has itself been made in a way that violates viewpoint neutrality, it is, of course, absolutely null, void, and of no effect whatsoever. *ASM By-laws* § 2.01(C)(II). However, when a violation is personal violation, not one participated in by an entire body, the results are personal; the violation leads, in most cases, to information to the Council, or, in egregious cases, to a trial and dismissal from office by this Court. *By-laws* § 2.01(C)(III) *et seq.*

When challenging financial actions, any petitioner may challenge both individuals who may have violated viewpoint neutrality, or the corporate decision of either the Council or the Student Services Finance Committee (SSFC). *By-law* § 5.06(C)(IV)(2). This Court has repeatedly recognized the concept that budgetary decisions of a deliberative body acting as a whole and the independent actions taken by members of those bodies are separate entities. See, *MCSC v. Otten – Order Denying Dismissal*, 2004 SJ. Ord. 8 at 2 (“[Respondent] is confusing two distinct types of complaints, one that accuses the committee as a whole...and one that is against a specific member...”). Here, we must carefully distinguish the actions of the Council from the actions of its members; members may act in a way that is not viewpoint neutral without the Council itself acting as such.

Reviewing the common law of ASM on viewpoint neutrality, it is clear that committee decisions have only been vacated when either (1) there was a fundamental defect of process; or (2) when viewpoint neutral violations made by members were egregious and malicious. In *Legal Information Center v. Werner Appeal*, 2003 ASM SJ 18 (en banc), the Court reversed an eligibility hearing when the SSFC Chair was negligent in the performance of his duties. Likewise, in *State-Langdon Neighborhood Ass’n v. Smith*, 2002 ASM SJ 14 (en banc), the full Court found a violation at the eligibility stage where improper forms were used. Improper forms likewise provided the basis for viewpoint neutrality appeals in *Tenant Resource Center v. SSFC I*, 2004 ASM SJ 7, *appeal denied*, 2004 SJ Ord. 9; *ALPS v. Patzner*, 2002 ASM SJ 13; *DES v. Patzner*, 2002 ASM SJ 7; and *MEChA v. Patzner*, 2002 ASM SJ 6. In each of these instances, the overall decision of the SSFC or Council was reversed and new hearings were held.

However, these cases applied only when the overall action taken by the body in question was tainted. Individual violations do not automatically taint the outcome. Our recent caselaw has absolutely recognized that there is a sharp distinction between committee decisions, and individual actions. *MCSC v. Otten – Order Denying Dismissal, supra*. A very similar situation occurred in the case of *Nichols v. Reyes*, 2002 ASM SJ 8. In that case, the Court found that Rep. Reyes violated viewpoint neutrality by neglecting to properly fill out eligibility paperwork. *Id.* at 2. However, while finding her guilty of a non-malicious violation, the Court did not reverse the overall funding decision. *Id.*

The overall principle to be gleaned from the cases is the same principle found in the By-laws. That is, a funding decision itself is void only if the actions taken by the decision-making body themselves are procedurally flawed or if it is clear that the majority has taken viewpoint into account. See, *By-laws* § 2.01(C)(I). Where there is simply improper activities by an individual, the overall decision should not be disturbed. *Nichols v. Reyes, supra*.

II – Application to the Current Case Requires that the Council Decision Be Upheld

In the case at bar, there has been no evidence that the Council’s consideration of Petitioner’s budget was procedurally flawed. The evidence further shows only that Respondent Kiernoziak took an improper motive into account. Indeed, Rep. Dorshort and Vice-Chair Otten, both also respondents in this matter, both offered an alternative rationale for cutting CFACT’s budget; they both suggested that the budget should be cut to equalize honoraria across all groups. This equalization argument is perfectly acceptable. It is neutral, in that it does not take viewpoints into account.

So, we find the Council has a motion to cut \$10,000 from CFACT's budget. The movant, Respondent Kiernoziak, offered the impermissible motive of the comparison of speakers and misleading information about the speakers. Respondents Dorshort and Otten offer the permissible motive of equalization of funding. Given the at Council had two motives to choose from, and given that we are not in a position to judge the minds of each representative other than the record before us, I am not willing to say that the Council as a whole was motivated either solely or primarily by the improper recommendations of Respondent Kiernoziak.

We are required to afford all members of ASM, including representatives on the Student Council, the protections of due process under the law. *ASM Const.* Art. IV, §2 (2004). One of the basic precepts of due process is that a person is presumed to be innocent. Because of this presumption, I assume, unless CFACT can prove otherwise, that members of the Council acted properly. No evidence has been entered, though, to show that any impropriety spread to the rest of the Council. In fact, considering the permissible alternatives offered by Otten and Dorshort, the exact opposite is true in the record; the Council clearly could act out of a permissible belief.

Justice Wang's dissent is correct, of course, that we should not "encourage wrong-doers to disguise impermissibility by demonstrating permissibility." *Post*, at 7. However, the Court is not authorizing after the fact post hoc justifications to erase impermissible violations of viewpoint neutrality. Rather, the Majority concludes that when the Council is offered two competing rationales, we should presume that the Council followed a permissible one, rather than an impermissible one. This presumption, like any presumption, may be rebutted by a complaining party. However, CFACT has failed to do here and we should not abandon the presumption of innocence that is a fundamental concept of due process. See, *Const.* Art. IV s. 2. Even as the dissent concedes, there has been no evidence of any violation of viewpoint neutrality by the collective action of the Council. *Post* at 7 ("Therefore I am reluctant to find the Council overall has done any violation.")

It should be a fundamental assumption that, when faced with both a permissible and an impermissible argument in favor of an action, that the Council will be motivated by the permissible argument and will disregard the impermissible one. Petitioner has given no evidence to rebut the presumption. For that reason, we decline to disrupt the judgment of the Council in this manner.

Yin-Chin Wang, *Student Justice*, dissenting in part. While I agree with the analysis by Chief Justice Romano and Vice Chief Justice Collins, I have to respectfully disagree with the majority conclusion with respect to the validity of budget decision made by the Student Council on December 1, 2004, which approved the amendment proposed by Chair Barbara Kiernoziak to cut Collegians for a Constructive Tomorrow (CFACT) budget totaling in \$10,000. The reasons are to be set forth.

The majority is correct in drawing a distinction between viewpoint neutrality violations acted by collective body from those by individual officers. The majority is also correct in citing *Nichols v. Reyes*, 2002 ASM SJ 8 in dealing with individual violation of viewpoint neutrality. However in *Nichols*, the failure of Rep. Reyes to properly fill out eligibility paperwork had no way tainted the overall action taken by the body in determining the feasibility of a fiscal proposal, as opposed to the alleged violation by Chair Kiernoziak. Based on inaccurate, improper and incomplete disclosure of information the Council trusted, it is absurd to conclude that the budget decision was not poisoned. Student Council is mere a passive information receiver that in goof faith entrust

individual officer's recommendation and disclosure. Therefore I am reluctant to find the Council overall has done any violation.

It is a catch-22 for us to survey each representative's motivation and rational to vote on a certain budget decision. However it is our tolerance of improper speeches if a decision is upheld simply because simultaneously there is a permissible underlying cause that seems to mitigate the bad one. The Bylaws have never set out such mitigation requirement in dealing with the simultaneous existence of permissible and impermissible speeches. Nor has the long-standing doctrine of innocence presumption meant to exclude the injury done with impermissible causes. The doctrine of innocence presumption is only applicable while there has not any wrong-doing proven to a level of credibility. But this is not the case before us while a certain wrong-doing, regardless of whether being malicious, has been found by the majority and myself. The majority opinion has a tendency to encourage wrong-doers to disguise impermissibility by demonstrating permissibility.

Accordingly I conclude that the decision by the Student Council on December 1, 2004 with regard to CFACT budget cut should be annulled and be reversed to the Council for further consideration.

Published: 2/2/05; 3:00PM
Attest: /s/ NVR