



Student Judiciary

511 Memorial Union, 800 Langdon Street, Madison, WI 53706

phone: 608.265.4ASM ♦ fax: 608.265.5637

www.asm.wisc.edu/student_judiciary/index.html

UW Roman Catholic Foundation, Petitioner

v.

Student Services Finance Committee, Respondent

2005 ASM SJ 16

JUDGMENT

Cite As: 2005 ASM SJ 16

♦
Nicholas J. Fox
Chief Justice

♦
Nathaniel Romano
Vice-Chief Justice

♦
Timothy Leonard
Chair, Student
Elections
Commission

♦
Shannon Brusda
Associate Justice

♦
Amber Hodgson
Associate Justice

♦
Joshua Tyack
Associate Justice

Before Fox, CJ, Brusda and Tyack, S.JJ.

Mr. Kruse for Petitioner.

Chair Stone for Respondent.

CHIEF JUSTICE FOX delivers the Unanimous Opinion of the Court.

NICHOLAS J. FOX, Chief Justice. 1. On 17 November 2005, the Student Services Finance Committee (SSFC) made several cuts from the UW Roman Catholic Foundation's (UWRFCF) budget request for the 2006-2007 fiscal year. Petitioner filed suit in the Student Judiciary claiming that several cuts were made in violation of both viewpoint neutrality standards and current Supreme Court caselaw. Among those charges are as follows: 1) challenge to a cut of \$4,961 for Lenten booklets; 2) challenge to a cut of \$84.00 for printing bulletins; 3) challenge to a cut of \$35,462 for building rental; 4) challenge to a cut of \$3,000 for janitorial supplies and services; 5) challenge to a cut of \$15,262.50 for student event coordinators; and 6) challenge to a cut of \$227 for advertising for small group events. *Complaint.* Petitioner also filed for Preliminary Relief to enjoin the SSFC from presenting Petitioner's budget to the ASM Student Council for final approval. THE CHIEF JUSTICE granted the Relief, arguing that if the Student Council ratified the budget before all complaints were pending, a gross due process violation would have occurred. *Petition for Preliminary Relief* (granted), 2005 SJ Ord. 23.

I

2. The Court begins its analysis by collectively examining the cut of \$4,961 to the Lenten booklets line item and the cut of \$84 from the bulletins line item. Petitioner argues that the cuts were made improperly, and cites some SSFC members referring to the religious aspect of the Lenten Booklets and bulletins. These items were generally characterized as something that a church would normally do, or something that is so religious in nature that it should not be funded through the segregated fee system.

3. Members of the SSFC overlook a crucial tenet to the segregated fee system: the system is viewpoint neutral. This necessarily means that the state is not speaking, and so excessive entanglement or endorsement of religion by the state is not possible. As CHIEF JUSTICE FOX noted in his concurrence to *UWRFCF v. SSFC (I)*, 2005 ASM SJ 11 at ¶25, when the state speaks, it is free to tailor its message. *Rust v. Sullivan*, 500 U.S. 173. However, when the state creates a viewpoint neutral limited public forum through the funding system, as it has here, the requirement of viewpoint neutrality would necessarily avoid "any mistaken impression that the [student groups receiving funds] speak for the University." *Board of Regents v. Southworth*, 529 U.S. 217, citing *Rosenberger*, 515 U.S. 819.

4. In *Widmar*, 454 U.S. 263, the Court also held that "[T]he University's discrimination against religious activity and discussion violated [the religious groups' rights] to free exercise of religion,

equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States.” While *Widmar* primarily dealt with equal access to university facilities which were otherwise open to other student groups, the same principle applies in the instant case: when the University opens up a public forum—whether through the use of physical space or in the metaphysical sense of a funding forum—the University cannot discriminate on viewpoint. In addition, the University cannot reasonably argue that, in this viewpoint neutral forum, the funding of any speech, including religious speech, could be construed to be the speech of the University itself.

5. This trend is emphasized elsewhere in the caselaw of the Supreme Court. In *Rosenberger*, the Court made this principle clear:

The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," nor may it discriminate against speech on the basis of its viewpoint.

The purpose of the forum is broadly defined: “In the University’s view, the activity fees ‘enhance the educational experience’ of its students by ‘promot[ing] extracurricular activities,’ ‘stimulating advocacy and debate on diverse points of view,’ enabling ‘participa[tion] in political activity,’ ‘promt[ing] student participat[ion] in campus administrative activity,’ and providing ‘opportunities to develop social skills,’ all consistent with the University’s mission.” *Southworth*. With such a broadly defined forum, most speech and activity is necessarily relevant to the purpose of the forum, including religious speech and religious activity.

6. The University or SSFC cannot argue that funding religious activity would in some way endorse or indoctrinate a certain religion. As the Supreme Court noted in *Mitchell v. Helms*, 530 U.S. 793:

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality. [If] the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. [If] the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.

The purpose of the funding forum is clearly secular, because it is designed to enhance the educational experience of students on campus by promoting a diversity of activities and viewpoints. The criteria for this forum are presumptively facially viewpoint neutral. As long as the criteria are themselves neutral and applied in a neutral manner, any benefit or burden that religion receives from the forum is merely incidental. See also, *Widmar*, supra; *Rosenberger*, supra; *Committee for Public Education v. Nyquist*, 413 U.S. 756, 771; *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736; *Hunt v. McNair*, 413 U.S. 734; *McGowan v. Maryland*, 366 U.S. 420, 422; *Employment Division v. Smith*, 494 U.S. 872.

7. It is important to note that in a viewpoint neutral forum, the University or the SSFC is not advancing or inhibiting a certain viewpoint, which includes the advancement or inhibition of religion as compared to non-religion. The forum has been created for all viewpoints, and those groups which meet the criteria for funding must necessarily receive that funding. This does not

mean, however, that a group will receive all of the funds it requests. As this Court has noted in *MCSC v. Otten*, 2004 ASM SJ 8 at pg. 2, “[I]t is [the] job of the SSFC to effectively distribute segregated fees.” This means that the SSFC will not rubberstamp budgets but will determine if the funds requested are being utilized efficiently by the organization. *Id.*

8. Under Supreme Court caselaw, religion is in fact a viewpoint (as opposed to being merely an activity). *Widmar* held that religious worship and discussion “are forms of speech and association protected by the First Amendment,” and *Rosenberger* affirmed that “[r]eligion may be a vast area of inquiry, but it also provides [...] a standpoint from which a variety of subjects may be discussed and considered.” Indeed, religious speech and activity is not only protected under the First Amendment, but it is also considered to be a viewpoint.

9. In terms of the SSFC’s cuts to Petitioner’s budget, it is clear that the SSFC’s cuts were based on the religious nature of the booklets and bulletins. The SSFC cannot cut a line item merely because the line item is religious in nature; this would be clear content and viewpoint discrimination. From the record it appears that the only motivation behind the cuts was that they were likened to religious activities. But, as already stated, just because an activity is religious does not exclude it from potential funding, especially in a viewpoint neutral forum. Petitioner does not speak for the University or the SSFC, and it cannot be argued that the University or SSFC is in any way endorsing one religion over another, or religion over irreligion. There was no legal and acceptable alternative presented in the record to reducing these line items.

10. It is also important to note that, even if this Court accepts the University’s memo regarding segregated fees, the memo itself specifically states, “University/state funds cannot be used to directly support the operating costs of a church or strictly church-related activity (e.g. worship service) if the funds being transferred could be characterized as a donation to the church or as being in lieu of other contributions to the church normally used to cover similar costs.” *Exhibit B*, pg. 7. Here, Petitioner’s organization is not a church, even though Petitioner’s organization may engage in religious viewpoint expression and activities. The cut in regards to the Lenten Booklets and Bulletins were also both premised on the fact that this type of activity is something a church would do, and therefore cannot be funded under the memo’s guidelines. However, since Petitioner’s organization is not a church (as they self-profess), it appears that the memo is not applicable in this case. Accordingly, Judgment is entered for Petitioner on these counts.

II

11. The Court will next address the collective cuts of \$35,462 for building rent and \$3,000 for janitorial supplies and services. SSFC contends that, per a memo released by the University administration, segregated fees are not to be used for rent and general overhead or maintenance. *Exhibit B*, pg. 7. The memo, originally written on 11 October 2004, states in part:

University/state funds cannot be used to directly support the operating costs of a church or strictly church-related activity (e.g. worship service) if the funds being transferred could be characterized as a donation to the church or as being in lieu of other contributions to the church normally used to cover similar costs.

and later:

The allocable portion of segregated fees is not available for such expenses such as improvements, maintenance and overhead expenses in non-university facilities, and should not be used to support improvements, maintenance or overhead expenses in facilities that are not owned, leased, or otherwise controlled by the university.

In its denial of the rent and janitorial supplies line items, SSFC members invoked this email as a justified reason for denying these line items.

12. The panel believes that if the University administration wants to set limits for expenditures in a neutral manner, it is free to do so. Should any organization feel that such requirements are invalid, those organizations can take up the issue with the University in the appropriate arenas.

13. However, the panel also feels that there is a gross due process violation involved in the denial of Petitioner's rent request. The most obvious issue present before the Court is that other organizations were funded for rent and maintenance costs, such as MCSC, JCC, LIC, CFACT, TRC, WISPIRG, WSUM, CWC, LGBTCC, PAVE, and SOL. *Exhibit B*, pg. 25. These organizations were fully-funded for their rent costs, and all received some level of maintenance costs. *Id.*

14. The other pressing issue in regards to these line items is the timing of the memo from the University administration. SSFC concedes that while the memo was written in 2004, the SSFC members this year did not actually receive the memo until about one week prior to Petitioner's budget consideration. This timing is problematic because it seriously undermines the intent of the memo: if the memo was intended to inform SSFC members about segregated fee policy, then it should have been sent out at the beginning of the funding cycle. The memo's release so close to the end of the budget cycle and so close to Petitioner's budget is immediately suspect.

15. Moreover, the memo has forced a shift in the standard used. While SSFC is correct in arguing that it needs to follow University policy and Legal Services' interpretation of that policy (see *DES v. Patzner et al.*, 2002 ASM SJ 7), it appears from the record—since other organizations were funded for similar requests—that the memo held Petitioner to a higher standard. SSFC should follow the advice of the Administration; however, that advice should be applied equally to all groups, not just to one or a select few. The entire concept of viewpoint neutrality and due process is that valid, neutral criteria will be applied consistently and equally to all groups seeking funding under those criteria. The effect of this memo is that the standard shifted, and Petitioner was held to a higher standard than any other groups seeking a similar funding request. To ensure that the criteria were applied equally to all organizations, the SSFC should have either reconsidered all budgets with rent and maintenance funds, or should have applied the same standard to Petitioner as they did to everyone else, despite the memo from the University.

16. SSFC raised the point that because Petitioner's building is not University property, Petitioner should not be funded per the requirements in the memo; since Petitioner's property is not University property, the shifting standard issue is not pertinent. Petitioner argued at trial that, through outside research that was submitted as evidence to the Court, it appeared several organizations which received rent and maintenance costs were not leased in conjunction with the University. In the examples of TRC, WISPIRG, CFACT, JCC, and LIC, the executive director of the organization was the only person to sign the lease. In the cases of MCSC and WSUM, the University did sign the lease.

17. The panel believes that, since several organizations were funded for rent and janitorial supplies without a University-signed lease, the same standard must be applied to Petitioner in order for the neutral criteria to be applied equally to all similarly-situated groups in accordance with the tenets of viewpoint neutrality and due process. Since the memo has created a shifting standard, a standard which was heightened and only applied to Petitioner, Judgment is entered for Petitioner to these counts.

18. The Court next approaches Petitioner's challenge to the cuts made to the Student Event Coordinators line item. Petitioner alleges that the SSFC and its members inappropriately took the religious activities of the coordinators—which from the record appear to be rather minimal—into consideration when determining the level of funding for this line item. In addition, Petitioner alleges that the SSFC improperly used Petitioner's previous levels of funding to determine the level of funding for this year.

19. In terms of the religious activities in which the event coordinators may engage, the Court, per the reasoning set forth in Part I, *supra*, believes that if SSFC members take the religious nature of the activities into account, they have violated the tenets of viewpoint neutrality. However, it is not clear from the record that the members of the SSFC necessarily took that factor into consideration when debating this line item. While several members may have asked Petitioner what types of religious activities the coordinators did, this is not dispositive to determine whether those questions were motivated by hostility towards religion or specifically towards Petitioner. Indeed, the questions may have been informational in nature so that SSFC members could better understand the role of the event coordinator in Petitioner's organization.

20. In addition, it appears that if SSFC members took a previous year's funding into account as the sole reason for setting the next year's funding, this would also violate viewpoint neutrality. In *Southworth* on remand, the Seventh Circuit Court of Appeals ruled that the consideration of a previous year's funding is not viewpoint neutral because such consideration would favor those groups which have been in existence longer and, consequently, assumingly have a more favored viewpoint.

21. This Court has also noted, however, that a previous year's funding cannot be used as a floor or ceiling for a budget. Recently in *CFACT v. Stone, et al.*, 2005 ASM SJ 14 at ¶8, this Court affirmed that Representatives can question increases from a previous year's budget because fiscal responsibility is the duty of the SSFC. In *CFACT v. Stone, et al.*, this Court noted that fiscal responsibility is a neutral criterion (see also *MCSC v. Otten*, 2004 ASM SJ 8; *MCSC v. Greenbaum*, 2004 ASM SJ 9). If Representatives question a year-to-year increase because of fiscal responsibility concerns, then their concerns are legitimately grounded and viewpoint neutral.

22. In the record before the Court, it appears that Petitioner's argument about a previous year's funding has no weight. Representatives on the SSFC were concerned about whether a jump from two coordinators to nine coordinators in one year was a fiscally responsible increase. It would of course be up to Petitioner to justify the increase. Looking at fiscal responsibility in funding increases from year-to-year is in line with the requirements of viewpoint neutrality; solely using a previous year's funding as a floor or ceiling is not viewpoint neutral, however.

23. The Court is concerned, though, with the cut made by the SSFC for "fiscally responsible" reasons. From the record, it does appear the Petitioner would have been able to justify the increase in funding for coordinator positions; however, this does not mean that the SSFC must necessarily fully fund those positions. What is of concern for this Court is the comparative funding of other groups in relation to Petitioner.

24. Upon the Court's own motion, parties were asked to submit a brief post-hearing to specifically address the event coordinator line item. Petitioner notes that, compared to other groups that provide a comparable amount of services and programming (regardless of viewpoint), salaries for Petitioner were significantly cut. In its Brief to the Court, Petitioner observes that many organizations—including CWC, CCTAP, GUTS, JCC, LGBTCC, MEChA, PAVE, SOL, SLP,

TRC, and Student Radio—were all fully funded or nearly fully funded for their salary line items, and yet Petitioner's line item was cut in half.

25. The Court believes that, from the record, the SSFC did not adequately justify its cuts to Petitioner's budget. While fiscal responsibility from year-to-year is vital to the segregated fee system, that responsibility must be applied equally to all groups. Petitioner's organization offers a comparable degree of services and programming to that of other organizations, regardless of viewpoint. Merely invoking fiscal responsibility is not enough to justify a cut or increase; instead, the invocation must be justified through further analysis of why the cut or increase does not correlate with the requested amount. Increasing Petitioner's coordinator positions may not be fiscally responsible because it does not correlate with an increase in programming or services, but cutting the positions without adequate justification beyond the invocation of "fiscal responsibility" is insufficient. Judgment is entered for Petitioner on this count.

IV

26. Finally, the Court looks at the final challenge against the SSFC's cut of \$227 for the Advertising Small Group Events line item. Minimal evidence was presented to the Court to support Petitioner's claim. In fact, the only citation Petitioner gives the Court is the Safe Harbor Statement made by SSFC Representative Edwards. While Rep. Edwards' Safe Harbor request may be illuminatory on Petitioner's challenge, it is by no means dispositive. Rep. Edwards is one representative of many on the SSFC, and just because he feels that Petitioner was scrutinized more sharply than others—aside from any other evidence—such an opinion is not enough to support Petitioner's challenge. Petitioner must prove to this Court that it was treated differently on this count than other groups were; Rep. Edwards' statement alone is not enough to convince the Court that the corporate body acted improperly. Judgment is entered for Respondent on this count.

V

27. In this Court's caselaw, any improper or illegal action taken by a corporate body of ASM is by default null and void. *UWRCF v. SSFC (I)*, 2005 ASM SJ 10; *LIC v. Werner Appeal*, 2003 ASM SJ 18. It is clear to the panel that several cuts made by the SSFC as a corporate body were improper, and therefore must be nullified. *ASM Bylaws* Section 2.01(C)(II). These cuts include the following: Rent, Janitorial Supplies, Lenten Booklets, and Bulletins.

28. From the record presented to the Court, there is not clear and convincing evidence that the corporate body of SSFC acted improperly when cutting the Student Event Coordinators line item and the Advertising for Small Group Events line item. Consistent with this Court's precedent, those cuts are to stand as valid. *CFACT v. Stone et al.*, 2005 ASM SJ 14; *CFACT v. Kiernoziak Appeal*, 2005 ASM SJ 1; *MCSC v. Otten*, 2005 ASM SJ 8, *Order Denying Dismissal*, 2004 SJ Ord.8; *Nichols v. Reyes*, 2002 ASM SJ 8.

29. As a final remedy, Petitioner asks this Court to impose an injunction on the SSFC from ever considering the organization's viewpoint or religious purpose. This seems logical under the mandates of viewpoint neutrality. However, it is important to note that the established process for eligibility, funding, appeals, and review is what makes the segregated fee distribution system viewpoint neutral. If members of the SSFC or the Committee as a whole violate the tenets of viewpoint neutrality, there is an appeals process in place. Petitioner, or any other group which believes it was harmed, can ask for redress through this system. While the Court is disinclined to acknowledge any historical or possible future discrimination at this juncture, it does understand Petitioner's concern. However, the funding distribution process—including appeals to this

Court—is a process that has been deemed viewpoint neutral. *Southworth v. Board of Regents*, 7th Circuit Court of Appeals (No. 03-2314). The Court is disinclined to impose an injunction upon the SSFC when the tenets of viewpoint neutrality and this Court's own caselaw serve as guides as to what the SSFC can and cannot do. Petitioner must use the system if it feels it has been discriminated against.

Wherefore, for the reasons stated herein:

IT IS ORDERED that Judgment be ENTERED for Petitioner in regards to the SSFC's cuts to the Lenten Booklet, Bulletins, Rent, Janitorial Supplies and Services;

IT IS FURTHER ORDERED that the Funding Decision of the SSFC in regards to the Lenten Booklets, Bulletins, Rent, and Janitorial Supplies and Services is REVERSED;

IT IS FURTHERED ORDERED that the SSFC reinstate the following amounts to Petitioner's budget:

1. \$4,961.00 for Lenten Booklets.
2. \$84.00 for Bulletins.
3. \$35,462.00 for Rent.
4. \$3,000.00 for Janitorial Supplies;

IT IS FURTHER ORDERED that Judgment be ENTERED for Respondent in regards to the SSFC's cuts to the Advertising for Small Group Events;

IT IS FURTHER ORDERED that the SSFC forward Petitioner's budget as amended per the Court's opinion on to the ASM Student Council;

IT IS FURTHER ORDERED that the ASM Student Council will consider Petitioner's budget at its next regular business meeting in accordance with all procedures for such consideration.

By the Student Judiciary,

IT IS SO ORDERED.

Nicholas J. Fox, Chief Justice
Shannon Brusda, Associate Justice
Joshua Tyack, Associate Justice

Published: 16 December 2005, 6.00PM

Attest: /s/ NJF