

SUPREME COURT, NEW YORK COUNTY
NEW YORK LAW JOURNAL
July 7, 2000

Justice Davis

WALLACE v. THE CITY UNIVERSITY OF NEW YORK QDS:22445804 — Motions in sequence 001 and 002 are consolidated for disposition.

In this CPLR Article 78 proceeding, petitioners, student journalists at the City University of New York ("CUNY"), seek a judgment ~~declaring that~~ respondents violated the New York State Open Meetings Law ("OML") and the Freedom of Information Law ("FOIL"), when the official student government body of CUNY, the University Student Senate ("USS"), elected officers by secret ballot.

Respondents CUNY and CUNY Chancellor Matthew Goldstein have answered the petition and denied that the USS is subject to either the OML (Public Officers Law ["POL"] §100-111) or FOIL (POL §84-90). Respondents USS and MD. Mizanoor Biswas ("Biswas"), Chair of the USS, have made a pre-answer motion to dismiss alleging that petitioners have failed to exhaust their administrative remedies because they failed to appeal the results of the student election to the USS Election Review Committee. Petitioners cross-move pursuant to CPLR 3211(c) to treat the motion to dismiss as one for summary judgment.

Facts

The basic facts are not in dispute. The USS is a CUNY-wide student government body composed of delegates from all CUNY colleges and graduate schools. The delegates of the USS elect their own chairperson, who by virtue of Education Law §6204(2)(a), serves as a voting ex-officio trustee of the CUNY Board. The election of the chairperson is subject to review and certification by a University Student Senate Election Review Committee ("USSERC"), appointed by the CUNY Chancellor.

The USS is funded through the imposition of a mandatory University Student Government Fee on all students of 85 cents a semester. Part of that fee is earmarked for the CUNY athletic conference and spent with the approval and under the supervision of the USS and the Vice Chancellor for student affairs. Another part is earmarked for academic scholarships. The remainder of the money funds the USS's own operations and programs. However, pursuant to a resolution adopted by the CUNY Board on February 23, 1992, all USS "allocations, expenditures and personnel appointments shall be subject to the prior approval of the Chancellor, or his/her designee."

On October 10, 1999, the USS met at the Borough of Manhattan Community College for the annual election of USS officers. At this meeting, respondent Biswas was re-elected USS chair and six other officers were elected. The vote was conducted by secret ballot.

In this proceeding, petitioners are not contesting the results of this election nor do they seek to invalidate the election. Instead, they seek a declaration that the USS is subject to both OML and FOIL, and that OML and FOIL were violated when the USS elected officers by secret ballot without any record of how each delegate voted. Petitioners claim that the election of USS officers, including the student trustee, is a matter of great interest to CUNY students in general, who have a right to know the vote of their elected representatives, and student journalists in particular, who have a special interest in being able to report to their fellows students how the USS delegates voted.

Exhaustion of Administrative Remedies

Respondents USS and Biswas claim that this proceeding must be dismissed because petitioners have failed to exhaust their administrative remedies. These respondents claim that respondents have failed to appeal the results of the election to the University Student Senate Election Review Committee, a body made up of CUNY faculty, administrators and students, whose function is to hear appeals concerning the conduct of USS elections. It is argued that since petitioners failed to utilize this appeal procedure, the petition must be dismissed as premature.

The motion to dismiss is denied.

The general rule requiring exhaustion of administrative remedies does not apply where the issue raised involves pure questions of law requiring statutory interpretation (see *Cady v. Clark*, 176 AD2d 1055; *Vrooman v. Prevost*, 80 AD2d 933; *Herberg v. Perales*, 180 AD2d 166). Here, the issue of whether the USS is subject to OML and FOIL "turns solely on a statutory interpretation question" (*Smith v. City University of New York*, 92 NY 2d 707).

Further, the purpose of the exhaustion doctrine (see, *Watergate II Apts., v. Buffalo Sewer Authority*, 46 NY2d 52) would not be furthered by any dismissal of this proceeding. Issues regarding the applicability of the OML and FOIL are not entrusted to nor within the expertise of CUNY or its election review committee, these entities are not required to develop a coordinated, consistent and legally enforceable scheme of regulation on these legal issues, and there is no need to develop a factual record reflective of any specialized expertise or judgment. As stated, the facts of this case are not in dispute and the issue to be resolved is purely a question of law, which is for the Court to determine.

The Court also notes that the Election Review Committee was set up under the authority of CUNY and its Chancellor. However, neither of these parties raises the exhaustion issue. The argument is only raised by the USS and Biswas.

Further, the USS and Biswas request, in the alternative, leave to serve an answer in the event their motion to dismiss is denied. However, in this case, an answer of the USS and Biswas is not required.

The relevant and ultimate "body or officer" in this case, entitled by law to submit an answer pursuant to CPLR 7804 (e), (f), after the denial of a motion to dismiss, is CUNY. The Court has before it an answer submitted by the attorney general on behalf of CUNY. Nothing further is required. An answer of the USS and Biswas is not necessary since the USS was created by and operates subject to resolutions of the CUNY Board; they have informed the Court of their relevant arguments in the papers submitted in support of their motion to dismiss (*Davila v. New York City Housing Auth.*, 190 AD2d 511); the issue before the Court is solely a question of law; the basic fact that the October 10, 1999 election of officers was conducted by secret ballot is not in dispute; and any additional answer could be expected to contain the same arguments raised by the attorney general. Therefore, it is not necessary to further delay this proceeding to allow the USS and Biswas to submit an answer after the denial of their motion to dismiss (*Kane v. New York State Dept. of Corrections*, 21 Ad2d 919; *Alexander Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR §7804 (7804: 7, p.658-659)*). Petitioner's cross-motion to deem the motion to dismiss as one for summary judgment is denied as moot. In any event, petitioner's cross-motion was not timely served.

OML and FOIL

Entities covered by the OML or FOIL may not take final action by secret ballot (*Smithson v. Ilion Housing Authority*, 130 AD2d 963,967).

In order to be subject to the OML, the USS must be deemed to be a public body. Public Officers Law §102(2) provides that a "public body" is "any entity, for which a quorum is required to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof."

For purposes of FOIL, the question is whether the USS is an agency. Section 86(3) of the POL defines the term agency to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Petitioners claim that the USS is a "public body" under the OML and an "agency" under FOIL because they elect a voting member of the CUNY Board of Trustees and because they allocate public funds. Respondents claim that the USS is neither a public body nor agency because it is purely an advisory body that has no decision-making authority, cannot implement its initiatives and subject to ongoing review and, sometimes, disapproval of its recommendations.

An examination of the constitution and bylaws of the USS as well as the relevant resolutions of the CUNY Board of Trustees reveals that at least with regard to the allocation of student activity fees, the USS performs a "governmental" function within the meaning of the OML and FOIL.

The USS is funded through the imposition of an 85 cents per semester mandatory university student government fee on all students. A CUNY student cannot register and hence matriculate and graduate without payment of such fee. As such, these fees, garnered by the State, are considered public funds and the allocation of such public funds is a governmental function (see, *Smith v. City University of New York*, supra). Although the USS must obtain approval of the Chancellor prior to any allocation or expenditure of the funds, its role is not merely advisory.

While the Chancellor or his designee may veto expenditures proposed by the USS, only the USS has the authority to initiate expenditures of USS funds for such activities as lobbying or specific programs, and the USS chooses the recipients of its scholarships. The decision of the USS not to allocate funds for a given purpose, such as legislative lobbying, is tantamount to a final determination of that issue since it may not be overruled by the Chancellor. The Chancellor's authority to initiate expenditures not first recommended by the USS is very limited, applying only when the USS fails to approve a budget and in that situation is further limited to "rent, utilities, essential staff and other fixed overhead, and continuing contractual commitments." (March 26, 1990 resolution of Board of Trustees, A.4).

Consequently, the requirement that the USS obtain prior approval before any allocation or expenditure of funds does not obviate the USS's role as the allocator of the student activity fees it controls since the Chancellor lacks the authority to initiate allocations of student activity fees or to overrule a decision by the USS to deny a request for funding. In *Smith v. City University of New York*, supra, the Court of Appeals rejected a similar argument that an organization's role (a Community College Association) was merely advisory because the College president had the right to disapprove its allocations. The Court held:

"... the College by-laws do not allow the president the self-initiating power to appropriate monies that the [Association] has not first recommended. Thus, the [Association's] decision not to appropriate monies is tantamount to the final determination of at least that kind of matter."

Similarly, in this case, the USS's decision not to allocate funds for a particular purpose is tantamount to a final determination of at least that kind of matter because the Chancellor cannot allocate funds that the USS has not first recommended. Accordingly, the USS performs a governmental function for purposes of the OML and FOIL. Consequently, the secret ballot election of USS officers held on October 10, 1999 violated the OML and FOIL (*Smithson v. Ilion Housing Auth.*, supra). It is therefore declared that the USS is a "public body" under the OML and an "agency" under FOIL and that the secret ballot election of USS officers violated both the OML and FOIL.

Attorney Fees

As the successful party in this proceeding, petitioners are entitled to costs and reasonable attorney fees (see, *Smith v. City of New York*, supra, POL §107[2]; 89[4][c]). The claim for costs and legal fees is severed and is referred to the Legal Support Office for assignment to a Special Referee to hear and report as to the reasonable value thereof. Pending receipt of the report and a CPLR §1403 motion, final determination of this claim is held in abeyance. A copy of this judgment shall be served upon the Legal Support Office.

This constitutes the decision and judgment of the Court.

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This constitutes the decision and judgment of the Court.