CALIFORNIA SUPREME COURT

Dibb v. County of San Diego,

8 Cal. 4th 1200, 94 D.A.R. 17455, No. S035914 (Dec. 12, 1994).

Charter County Has Constitutional Authority to Create Citizens' Review Board With Power to Issue Subpoenas

In November 1990, the voters of San Diego County amended their County Charter by enacting section 606, which required the County Board of Supervisors to establish by ordinance a Citizens Law Enforcement Review Board (CLERB) to review and investigate citizen complaints and any deaths of individuals arising out of or in connection with the actions of peace officers; section 606 empowers CLERB to subpoena and require attendance of witnesses and the production of books and papers pertinent to its investigations. Plaintiff Randy Dibb filed a taxpayer's suit pursuant to Code of Civil Procedure section 526a to enjoin the County from spending funds in order to implement CLERB; Dibb contended that there is no legal authority for the creation of CLERB, and that in any event it is not legally authorized to issue subpoenas. The trial court denied Dibb's application for a permanent injunction; the Fourth District Court of Appeal affirmed, holding that the Board of Supervisors is authorized to create CLERB, and that because the California Constitution provides that county charters shall specify the powers and duties of county officers, County voters are also permitted to grant to CLERB, by Charter amendment, the power to issue subpoenas. *[13:4 CRLR 224]*

In affirming the Fourth District's opinion, the California Supreme Court explained that Article XI, section 4, subdivision (h) of the California Constitution provides that charter counties shall have all the powers that are provided by the Constitution or by statute for general law counties. The court noted that Government Code section 31001.1 permits the board of supervisors to establish a commission of citizens to study and report on matters within the board's general or special interest; accordingly, the court held that the creation and existence of the CLERB is authorized by statute, and is thus a proper exercise of charter county authority under the state constitution.

Although the court found that no such statutory authority exists for the grant to CLERB of the power to issues subpoenas, it held that to the extent that the power to issue subpoenas is properly grounded on the County's authority to provide for the powers and duties of its local officers and the operation of its local government, it is within the competence of the Charter. Further, the court noted that the power to issue subpoenas is one that is often conferred throughout the nation on boards such as CLERB.

Griset v. Fair Political Practices Commission,

8 Cal. 4th 851, 94 D.A.R. 16731, No. S029701 (Nov. 28, 1994).

Statute Requiring Candidates for Public Office To Identify Themselves on Mass Mailings Does Not Violate First Amendment

Government Code section 84305 requires candidates for public office, and individuals or groups supporting or opposing a candidate or ballot measure, to identify themselves on any mass mailings they send to prospective voters. In this case, a candidate for city council and two committees he controlled sent prospective voters five mass mailings that did not contain the identifying information required by the statute. When the Fair Political Practices Commission brought administrative charges against candidate Daniel Griset and the two committees he controlled, Griset brought this lawsuit challenging the constitutionality of the statute; he argued that persons who send prospective voters mass mailings designed to influence the outcome of an election are entitled, under the first amendment to the United States Constitution, to remain anonymous, and that section 84305's requirement that such persons identify themselves is therefore unconstitutional.

The California Supreme Court noted that although the U.S. Supreme Court has never addressed the precise question at issue—whether a statute that prohibits anonymous mass mailings by candidates or candidate-controlled committees in political campaigns violates the first amendment, the high court in several opinions has discussed the degree to which government entities may compel the identification of persons engaged in activities protected by the first amendment. Specifically, in three cases decided between 1958 and 1960, the U.S. Supreme Court rejected as unconstitutional attempts by state and local governments to require disclosure of names of persons exercising their first amendment rights; according to the California Supreme Court, in those three cases, the U.S. Supreme Court established that governmental entities may not, absent substantial justification, compel those engaged in first amendment activities to identify themselves when identification would impair their ability to engage in those activities. The Supreme Court also established that any statute requiring disclosure must bear a reasonable relationship to the asserted governmental purpose and must be narrowly tailored to achieve that purpose. However, in two more recent cases, the U.S. Supreme Court has held that the government's need to ensure the integrity and reliability of the electoral process will, at least in some instances, provide an adequate justification to compel those exercising their first amendment rights to identify themselves.

After reviewing the U.S. Supreme Court's rulings on this matter, the California Supreme Court determined that courts must carefully examine governmental limitations on the right of those who wish to remain anonymous while exercising their first amendment rights. In some circumstances, however, the court found that the government's interests in conducting fair and honest elections and in providing prospective voters with the information necessary to make an informed choice may justify a requirement that persons identify themselves when they engage in speech designed to influence the outcome of elections.

The California Supreme Court agreed with Griset that section 84305 implicates first amendment rights because it prohibits anonymous political speech; however, the court found that the second proposition of Griset's argument—that a statute prohibiting anonymous mass mailings in political campaigns may be upheld only if it is narrowly tailored to serve a compelling governmental interest—has not been conclusively resolved. Further, the court concluded that whether it uses a "compelling interest" test or tests articulated by other courts, it would conclude that section 84305 as applied to candidates and candidate-controlled committees survives first amendment scrutiny, and that the state's interests that justify section 84305 are compelling. According to the court, the primary interest asserted by the FPPC in support of the statute at issue—to provide the voters with information to aid them in making their choices at the ballot box—is of sufficient magnitude to permit restriction of the first amendment rights of candidates (and committees controlled by them) who wish to send political mass mailings anonymously.

The court also noted that section 84305 does not in any way prohibit the communication of ideas; it does not attempt to regulate the content of expression; and it does not restrict the quantity of speech. It

merely requires sender identification for a narrow range of public speech—speech designed to influence the outcome of an election. Thus, the court concluded that the restraint on first amendment freedoms is carefully limited.

G. Dennis Adams, A Judge of the Superior Court v. Commission on Judicial Performance,

8 Cal. 4th 630, 94 D.A.R. 15387, No. S037475 (Oct. 31, 1994).

Judges Do Not Have Constitutional Right to Confidential Disciplinary Hearings Involving Charges of Moral Turpitude

Under the authority of the state constitution, the Commission on Judicial Performance initiates and oversees proceedings for the censure, removal, retirement, or private admonishment of a judge; the state constitution also provides that if, after conducting a preliminary investigation, the Commission by vote determines that formal proceedings should be instituted against a judge, the Commission may—in the pursuit of public confidence and the interests of justice—issue press statements or releases or, in the event charges involve moral turpitude, dishonesty, or corruption, open hearings to the public. In this proceeding, San Diego County Superior Court Judge G. Dennis Adams, who was charged by the Commission with numerous counts involving moral turpitude, contended that the open hearing provisions of the state constitution, as implemented, violate the California Constitution's provisions for separation of powers, and that the open hearing procedure is void as an unconstitutional exercise of judicial power.

The California Supreme Court rejected Adams' arguments, noting that the state constitution provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this constitution." The court explained that the Commission was created by constitutional amendment; the Commission's authority to order that a hearing be open is similarly part of the constitution. For these and other reasons, the court held that the Commission's authority to order an open hearing where the constitutional criteria are met does not constitute an unconstitutional usurpation of judicial power.

Adams also argued that, in determining whether the charges involve moral turpitude, the Commission must consider not only the charges specified in the notice of formal proceedings, but also the defenses and explanations asserted by the judge in his/her answer to the charges. The court rejected this contention, noting that prior to making the determination whether charges involve moral turpitude, the Commission already will have—among other things—reviewed and assessed a significant body of information pertinent to the complaint of misconduct, including all material provided by the judge that he/she believes to be relevant and material to the evaluation of the accusations, and that may explain, justify, or place in context the conduct in question. Thus, the court found that a determination that charges involve moral turpitude is based not upon the particular language chosen by the Commission in framing the formal written charges, but rather upon the Commission's independent preliminary assessment of the judge's conduct and the reliability and truth of the allegations, including evidence relating to the motivation of the judge as well as his/her explanation for the alleged misconduct uncovered by the Commission in its preliminary investigation. The court also held that "even if the facts alleged in the notice of formal proceedings did not necessarily or unavoidably involve moral turpitude, the Commission nevertheless had the discretion to determine that the particular facts established in the course of its investigation, and the decision to file formal charges, justified the conclusion that the judge's actions did involve moral turpitude, dishonesty, or corruption" within the meaning of the state constitution.

Finally, the court addressed Judicial Council Rule 907.2, which establishes a procedure enabling the Commission, in the event any of the charges involve moral turpitude, to open the hearing on all charges, if doing so would promote public confidence and the interests of justice. The court explained that the Judicial Council, as an independent agency charged with a specialized and focused task of promulgating rules implementing an open hearing procedure in judicial disciplinary proceedings, is the entity presumably equipped or informed by experience to perform such task, and whose findings warrant deferential treatment by the court. The court went on to hold that the "Judicial Council reasonably could conclude that...the goal of public confidence in the judiciary and in the disciplinary procedure might not be furthered if the public were permitted to observe only a portion of the proceedings, leaving to speculation the nature and gravity of the other alleged misconduct and its relationship to the moral turpitude charges."

CALIFORNIA COURTS OF APPEAL

Funeral Security Plans, Inc. v. State Board of Funeral Directors and Embalmers,

28 Cal. App. 4th 1470, 94 D.A.R. 14180, No. C011460 (Oct. 7, 1994).

Open Meeting Act Requires Justification for Closed Sessions of State Board of Funeral Directors

In this proceeding, the Third District Court of Appeal again decided several important issues applicable to state agencies arising under the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq. [14:4 CRLR 22]* Among other things, the court found the following:

• The court interpreted the "pending litigation" exception to the Act's open meeting requirement, Government Code section 11126(q), which permits state bodies "to confer, and receive advice from, legal counsel," to include the communication of facts (as well as legal advice) from legal counsel, and to include the state body's deliberations and decisionmaking thereon.

• With regard to the Act's procedural requirements accompanying the use of the "pending litigation" exception, the court noted that section 11126(q) requires the state body's legal counsel to prepare and submit to it, preferably prior to the closed session but no later than one week after the closed session, a memorandum stating the specific reasons and legal authority for the closed session. The court rejected the Board's assertion of a "substantial compliance" defense for failure to comply with these procedures.

• The court also interpreted section 11126(d), which—at the time relevant to this litigation—provided that state bodies may meet in closed session "to deliberate on a decision to be reached based upon evidence introduced in a proceeding required to be conducted pursuant to [the Administrative Procedure Act]." Because the language of the statute expressly contemplated (1) deliberation, (2) decision, (3) evidence, and (4) APA proceedings, the court held that state bodies are not permitted to meet in closed session under section 11126(d) to consider petitions to terminate license probation, for license reinstatement, or to reduce a penalty unless it has previously held an APA hearing to receive evidence on the licensee's reha-

bilitation. Further, the court held that state bodies may not meet under section 11126(d) to consider proposed disciplinary settlements which involve a stipulated set of facts: "Subdivision (d)...does not permit deliberations to provide cover for receiving and considering evidence in closed session. It is only deliberation, and not the introduction of evidence, which can be conducted in closed sessions pursuant to the subdivision (d) exception." To the extent that evaluation of a proposed settlement is part of the Board's litigation strategy, the court found that it may be reviewed with legal counsel under section 11126(q), but not under section 11126(d). The court noted that several of the Board's arguments for closed sessions to consider stipulated settlements are better addressed to the legislature, because "subdivision (d) simply does not go that far."

• And once again, the court held that the Board's two-member advisory committees are state bodies under section 11121.7, and fully subject to the Act's open meeting requirement. Although two-member advisory committees of a state body appear to be exempt from the open meeting requirement under section 11121.8, the court held, in effect, that when even one member of a state body serves on an advisory committee in his/her official capacity as a representative of the state body, and the state body finances the member's participation, the open meeting requirements of the Bagley-Keene Act "follow" that member and his/her official participation.

On November 7, the Third District denied the Board's motions for rehearing and for depublication of its decision. On January 5, the California Supreme Court denied the Board's petition for review but depublished the Third District's decision, thus negating the precedential impact of five years of litigation.

Dixon v. Superior Court, Scientific Resource Surveys, et al., Real Parties in Interest,

30 Cal. App. 4th 733,
94 D.A.R. 16878,
No. G015646 (Nov. 30, 1994).

Statements Made During Public Comment and Review Process are Absolutely Immune From Tort Liability

In this matter, a university professor filed harsh comments during a public comment period after a consulting group issued a negative declaration of adverse environmental impact regarding a proposed development project; the comments caused the consulting group to lose the project, so it sued the professor for libel, slander, and intentional and negligent interference with contractual relations and prospective advantage. The professor moved to strike the complaint on grounds it constitutes a SLAPP (Strategic Lawsuits Against Public Participation) suit; Code of Civil Procedure section 425.16, added by SB 1264 (Lockyer) (Chapter 16, Statutes of 1992) *[12:4 CRLR 244]* provides that a cause of action against a person arising from any act of a person in furtherance of that person's right of petition or free speech under the United States or California constitution in connection with a public issue is subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

In this proceeding, the Fourth District Court of Appeal clarified that a party moving to strike under section 425.16 has the burden of making a prima facie showing that the lawsuit arises from any act in furtherance of his/her right of petition or free speech under the U.S. or California constitution in connection with a public issue. Once that showing is made, the burden shifts to the nonmoving party to establish a probability of prevailing on its claim. The Fourth District vacated the trial court's denial of the motion to strike, and ordered the lower court to grant the motion and dismiss the complaint.

PROPOSITION 187 LEGAL CHALLENGES

The day after California voters approved Proposition 187—the so-called "Save Our State" anti-illegal immigration initiative *[14:4 CRLR 28–29]*—in the November 8, 1994 election, attorneys filed eight separate legal challenges to the measure in state and federal courts; the plaintiffs in those actions include the California League of United Latin American Citizens, the Mexican American Legal Defense and Education Fund, and the Center for Human Rights and Constitutional Law. The following is a status update on the challenges to the initiative:

• ***Federal Court***. On November 16, Chief U.S. District Judge Wm. Matthew Byrne Jr. issued a temporary restraining order enjoining the implementation of the most controversial elements of the measure; among other things, Byrne found that some of the proposition's provisions "conflict with federal law." Byrne also criticized the measure for having internal conflicts, noting that "[i]t looks like this was drafted by one person in one section and another person in another section." Byrne set a status conference before U.S. District Court Judge Mariana Pfaelzer for November 21 to finalize the date for a hearing on plaintiffs' motion for a preliminary injunction. At the status conference, Pfaelzer scheduled a December 14 hearing on the preliminary injunction; Pfaelzer also issued an order prohibiting the state from promulgating any Proposition 187-implementing regulations without the further order of the court.

Following the December 14 hearing, Pfaelzer issued the preliminary injunction, thereby prohibiting enforcement of the challenged provisions of the measure until a trial determines their constitutionality; Pfaelzer found that most of the measure will probably be found unconstitutional, and its enforcement would cause many people to suffer irreparable harm because they would go without medical care, be kicked out of public school, or fail to report crimes and abuse to police.

On January 13, Pfaelzer announced that she will require state officials to distribute copies of her ruling by January 30 to all affected agencies, to ensure that state personnel know that key provisions of Proposition 187 may not be enforced at this time.

• ***State Court***. On November 9, San Francisco Superior Court Judge Stuart Pollak also blocked enforcement of certain aspects of Proposition 187; specifically, Judge Pollak issued a temporary restraining order prohibiting enforcement of the measure's requirement that undocumented immigrants be kicked out of the state's public schools, as well as public colleges and universities. Pollak noted that the provision conflicts with *Plyler v. Doe*, a 1982 U.S. Supreme Court ruling requiring states to provide a public education to all residents. Pollak's order will remain in effect until at least February 8, when he is scheduled to hold a hearing on plaintiffs' request for a preliminary injunction.