

CALIFORNIA SUPREME COURT

Averell Smith v. Regents of the University of California,

4 Cal. 4th 843, No. S006588,
93 D.A.R. 1712 (Feb. 3, 1993).

University Must Provide Activities Fee Deduction for Students Who Disagree With Fee-Supported Causes

In this proceeding, students at the Berkeley campus of the University of California opposed the manner in which the mandatory activities fee is used; part of the income from the fee is used to support student groups that pursue political and ideological causes. In considering the constitutionality of the various uses of the fee, the California Supreme Court noted that two important principles were in conflict: the principle that the government may not compel a person to contribute money to support political or ideological causes, and the principle that the Regents, to be effective, must have considerable discretion to determine how best to carry out the University's educational mission. The court noted that "if the Regents decide to implement educational programs that entail burdens on constitutional rights they must ensure that the burdens are justified, and it is clear that they have made no serious effort to do so."

Accordingly, the court concluded that the only practical way to protect the rights of dissenting students is to implement the procedures outlined in *Keller v. State Bar*, 496 U.S. 1 (1990), and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). These procedures require the Regents to identify any groups that are ineligible for mandatory funding under certain constitutional standards and offer students the option of deducting a corresponding amount from the mandatory fee. Students who disagree with the Regents' calculation of the deduction will be entitled to the procedural safeguards articulated in *Keller*: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."

The court also addressed the students' challenge of the use of the mandatory fee by the Associated Students of the University of California (ASUC) to lobby state and municipal governments; issues on

which the ASUC has lobbied in the past include a nuclear freeze initiative, public transportation fares, city investment policy, zoning, rent control, rent discrimination, the use of registration fees to fund abortions, budget cuts for the University, and mandatory student fees. The court agreed that even if the Regents had appointed the ASUC to negotiate with governmental bodies on students' behalf, and even if the state had a compelling reason to do so, recent caselaw provides that the state still could not force unwilling students to subsidize lobbying beyond the narrow subject matter that justified the requirement of support. Thus, the court concluded that the Regents may not collect, from any student who objects, that portion of the mandatory fee that represents the cost of lobbying governmental bodies.

CALIFORNIA COURTS OF APPEAL

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

14 Cal. App. 4th 715, 93 D.A.R. 3990, No. C011460
(Mar. 25, 1993).

Appellate Court Interprets Provisions of State Open Meeting Act

In this proceeding, Funeral Security Plans, Inc. (FSP) challenged the trial court's rejection of its allegations that the Board repeatedly violated the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.* On March 25, the Third District Court of Appeal issued an opinion which affirms in part and reverses in part the trial court's decision.

The court first considered the interpretation of the Act's "pending litigation" exception, which allows state bodies to meet in closed session "to confer, and receive advice, from legal counsel" regarding pending litigation. FSP insisted that the exception should be construed strictly, objecting to the Board's routine discussion of facts presented for the first time in closed sessions by either staff or legal counsel. The Board argued that the traditional scope of the attorney-client privilege applies to all closed sessions involving pending or threatened litigation. The court rejected both arguments, finding that "FSP's position offends common sense and the Board's position violates the

language, as well as the spirit, of the statutory scheme." The court found that deliberation and decisionmaking are necessary components of "conferring with" and "receiving advice from" legal counsel. However, the court rejected the Board's proposition that the attorney-client privilege is as broad in closed sessions as in all other arenas in which the privilege is invoked, choosing to leave that issue "to be resolved in a proper case in which the strong public policy ensuring open discussion and deliberation is weighed against the asserted need for the attorney-client privilege."

The court then discussed the Act's requirement that "legal counsel of the state body shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session" whenever the Board meets in private under the pending litigation exception. FSP complained that on various occasions the Board failed to prepare the memorandum, prepared it late, and/or did not include in the memorandum the statutory authority or the facts and circumstances justifying the closed session; the Board responded by asserting a defense of substantial compliance. The court, however, rejected this defense, finding that a state body has "the burden of proving a compelling necessity for a closed session." Accordingly, the court held that the statute compels legal counsel to describe the existing facts and circumstances which would prejudice the position of the state body in the litigation if the discussion occurred in open session, and found that the Board did not comply with this requirement in the past.

The court then considered the proper interpretation of Government Code section 11126(d), which allows a state body to hold a 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 (APA)]." FSP argued that the exception only applies when a public hearing has been conducted pursuant to the APA. The court disagreed, holding that the Board may seek legal advice and confer with counsel in a closed session about the propriety of proposed stipulated settlements, reinstatements, and disciplinary proceedings, as long as there is "a demonstrated prejudice to the public by open discussion." The court indicated that proving the purported prejudice to the Board's litigation posture would be more difficult when the Board is discussing a settlement of a disciplinary charge, as compared to when there is an ongoing investigation before litigation is initiated,



or when the Board is involved in civil litigation.

The final issue considered by the court is whether the Board's two-member advisory committees constitute "state bodies" subject to the Act's open meeting requirements. The Board—which was represented in this litigation by the Attorney General's Office—argued that its two-member advisory committees may meet in private, relying in part on the language of Government Code section 11121.8, which states that the term state body "also means any advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons." FSP, counting the attendance of Executive Officer James Allen at the committee meetings, argued that the committees had three members and were thus subject to the Act under section 11121.8. The court rejected this argument, finding that Allen's attendance to answer questions and assist in the handling of matters before the committee did not make him a member of the committee.

However, despite the specific application of section 11121.8 to advisory committees—the type of committee here at issue, the court concluded that the Board's advisory committees are also subject to the Act under the much broader Government Code section 11121.7; that section states that the term state body "also means any board, commission, committee, or similar multimember body on which a member of a body which is a state body pursuant to section 11121, 11121.2, or 11121.5 serves in his or her official capacity as a representative of such state body and which is supported, in whole or in part, by funds provided by the state body, whether such body is organized and operated by the state body or by a private corporation." The court found support for this position in a 1982 Attorney General's Opinion which found that meetings of the State Board of the California Community College Student Government Association (CCCSGA) are subject to the Act because some of CCCSGA's governing board members are members of the local student association, which does constitute a state body; according to the Attorney General, "when a second body is financed by a 'state body,' and a member thereof *qua* member serves on that second body, the open meeting requirements attach to and follow that member to the second body." [13:1 CRLR 1]

Following the court's decision, the Board filed a petition for rehearing; on April 26, the court granted the Board's

motion. At this writing, the rehearing has yet to be scheduled.

Warfield v. Peninsula Golf and Country Club,

12 Cal. App. 4th 178, 93 D.A.R. 437, No. A051828 (Jan. 8, 1993).

Unruh Civil Rights Act Does Not Apply To Discriminatory Practices of a Private Country Club

Peninsula Golf and Country Club is a nonprofit recreational club located in San Mateo, which provides for the use of its members and invited guests a golf course, driving range, putting greens, golf and tennis courts, locker rooms, clubhouse, restaurant, bars, conference rooms, and other facilities. Although several different classes of membership are available, the only proprietary membership is the "regular family membership," which is limited to 350 members. In March 1970, the bylaws of the club were amended to provide that regular family memberships "shall be issued only in the name of adult male person. Proposals for regular family memberships shall not be approved for females or minors." The bylaws further state that upon termination of the marriage of a regular family member by divorce or annulment, "the Husband shall continue to be the Regular Family Member, and all rights, privileges and obligations shall be his. In the event of an award of the Certificate of Regular Family Membership in final judicial action to the female spouse, and the male spouse does not forthwith thereafter purchase the female spouse's interest in the Regular Family Membership, such membership may, by action of the Board [of Directors], be terminated."

Appellant became interested in the club through her participation in golf tournaments, and suggested to her husband in 1970 that a membership would be "great for the family." Subsequently, a regular family membership was approved by the Board and issued in the name of appellant's husband; appellant was not then aware that women were precluded by the bylaws from becoming proprietary members of the club.

In February 1981, appellant and her husband divorced, appellant being awarded "all right, title and interest in and to the membership of Dr. and Mrs. Warfield in the Peninsula Golf and Country Club." When appellant requested that the Board transfer to her the regular family membership formerly held by her hus-

band, the Board voted to terminate the membership. At appellant's request, the Board reconsidered its decision, and again decided to terminate the membership. Appellant subsequently filed a complaint for damages and injunctive relief against the club and its Board, alleging violations of the Unruh Civil Rights Act and denial of the right to fair procedure. Following a trial, the court granted respondent's motion for a directed verdict based upon a finding that appellant failed to prove the club's status as a "business establishment" under the Unruh Act; the court also held that appellant lacked standing to pursue a claim for denial of the right to fair procedure.

The First District Court of Appeal affirmed. Noting that the Unruh Civil Rights Act "prohibits discrimination in the provision of accommodations and services in all business establishments," the court acknowledged that the Act defines the term "business establishment" in the broadest sense reasonably possible, to include all private and public groups or organizations that may be reasonably found to constitute business establishments of every type whatsoever. However, the court found that truly selective, private organizations are exempt from scrutiny under the Unruh Act for discriminatory acts, stating that although no formula-like solution may be employed to define a business establishment, the functions and characteristics of the organization must be examined. The court found that the undisputed evidence before it established the extremely private nature of the club, and concluded that the business activities of the club are inconsequential when compared to the private and recreational focus of the small, fixed membership.

Regarding appellant's cause of action predicated upon denial of the common law right to fair procedure, the First District explained that the right of fair procedures as a component of due process recognizes that private associations may possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced; accordingly, one may not be expelled from membership in a private association without compliance with minimum due process requirements. Because appellant enjoyed the benefits and privileges of the club through her legal right of access to and use of the facilities, the court found that appellant had standing to assert her right to fair procedures associated with her expulsion from enjoyment of club facilities and exclusion from holding a proprietary membership.



However, the court stated that the common law requirement of fair procedure does not compel formal proceedings with all the embellishments of a court trial, nor adherence to a single mode of process; it may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his/her position. The court found that "appellant was not immediately and summarily expelled from the club and use of its facilities." Based on the record, the court found that appellant had not been denied the opportunity to present her response to the Board's action, and concluded that, "[u]nder the circumstances, we find no denial of the right to fair procedure."

On March 25, the California Supreme Court granted appellant's petition for review.

Hull v. Rossi,

13 Cal. App. 4th 1763, 93 D.A.R. 3129, No. B061652 (Mar. 9, 1993).

California's Private Attorney General Statute Mandates Attorney Fees Award in Ballot Proposition Dispute

In this proceeding, appellants Jeffrey Young and Joanne Miller appeal from denial of their motion for attorneys' fees under Code of Civil Procedure section 1021.5, the state's private attorney general statute; the underlying action involved an electoral battle concerning the future of the City of Santa Barbara's water supply. Appellants signed two ballot arguments which appeared in the official voters' pamphlet for the June 4, 1991 special election; their argument supported Measure "S-91," which advocated development of a water desalination plant by the City as an alternative to importation of water from northern California through the State Water Project. Appellants' argument against Measure "T-91" opposed a bond measure to fund City participation in the State Water Project.

Respondents are members of "We Want Water" (WET), which sponsored, funded, and supported Measure T-91. Respondents and WET filed a petition for writ of mandate in the superior court, pursuant to Elections Code section 5025, seeking to have eighteen separate statements stricken from appellants' ballot arguments as "false and misleading." Respondents' petition for writ of mandate contained a declaration of James Stubchaer, a former local water official, chair of the regional water quality control board (Central Coast Region), and former president of the State Water Contractors, an

organization which advises on the administration of the State Water Project; Stubchaer gave his opinion why he found appellants' ballot arguments "false and misleading."

Appellants were served with the petition and notice of ex parte hearing scheduled for three o'clock that same afternoon. Appellants obtained three local environmental attorneys to appear and request dismissal of the petition. The court refused to dismiss the petition and ordered appellants to appear for a hearing four days later to show why the court should not delete their ballot argument statements under attack. Appellants were required to prepare and submit their written response within three days. Appellants' attorneys prepared their answer to the petition, responsive memorandum of points and authorities, responsive declarations, and over 300 pages of exhibits supporting the ballot arguments. Respondents, over objection, filed lengthy additional evidentiary materials.

At the hearing, the trial court rejected fourteen of respondents' claims and ordered minor wording changes in the remaining four statements. Following the trial court's ruling on respondents' petition for writ of mandate, both sides claimed victory and sought attorneys' fees under section 1021.5. The trial court denied both motions, ruling that "no significant benefit was conferred by anybody. All this was is a temporary media net." Insofar as respondents' motion was concerned, the court characterized the changes made in the ballot arguments as minor, inconsequential, a "piffle," and a "SLAP" [sic] suit. Concerning both motions, the court stated that it did not think an important public policy was vindicated in this particular case; respondents did not appeal the ruling.

The Second District explained that section 1021.5 allows an award of attorneys' fees to "a successful party" in an action which has resulted in the enforcement of an important right affecting the public interest if a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, the necessity and financial burden of private enforcement make the award appropriate, and such fees should not in the interest of justice be paid out of any recovery. The fundamental objective of the private attorney general theory is to encourage suits effecting a strong public policy by awarding attorneys' fees to those whose successful efforts obtain benefits for a broad class of citizens.

Appellants asserted that they fully satisfied each of the necessary elements to entitle them to an award of fees under

section 1021.5. They contended they were the prevailing party and thus met the threshold requirement of being the "successful party" in the action. Appellants also noted that a prevailing defendant as well as a prevailing plaintiff may recover under section 1021.5, that fees may be assessed against a private party, that the action vindicated the public interest in a full, uncensored ballot argument and in citizen participation in public debate, and that the trial court erred in stating, in essence, that any reasonable judge would have ruled similarly without the extensive defense undertaken by appellants.

According to the Second District, the public's right to an accurate impartial analysis under Elections Code section 3781(b) constitutes an important right within the meaning of section 1021.5. The Second District also stated that appellants "are correct that section 1021.5 draws no distinctions between plaintiffs and defendants as a 'successful party,'" and found that appellants are equally correct that "[a] prospective private attorney general should not have to rely on the prospect that the court will do the right thing without opposition." Also, the Second District stated that the trial court need not rule in favor of petitioners on every single issue litigated for petitions to be "successful" within the meaning of section 1021.5. Accordingly, the court held that in defending the action, appellants achieved a victory that was substantial and which qualified appellants as prevailing parties under section 1021.5.

In reversing the trial court's holding, the Second District further recognized that "[d]enying appellants' request for attorney fees would have a chilling effect on citizens' willingness to participate in preparation of ballot arguments. The awarding of reasonable attorney fees to appellants will discourage the filing of 'SLAP' [sic] lawsuits and 'piffles' which chill the political process."

California Radioactive Materials Management Forum, et al., v. Department of Health Services, et al., Senate Rules Committee, Real Party In Interest,

15 Cal. App. 4th 841, 93 D.A.R. 5904, No. C013930 (May 7, 1993).

Legislative Committee May Not Require Formal Hearings in Agency's Consideration of License Application

This original writ proceeding arose out of a dispute over an application for a li-



LITIGATION

cense for the construction and operation of a low-level radioactive waste disposal facility in Ward Valley near the City of Needles in the southern California desert. The petitioners challenged an order of the Department of Health Services (DHS) for administrative proceedings in a formal adjudicatory mode in connection with the application of US Ecology, Inc., for the license in question. Petitioners are US Ecology and diverse individuals and groups with asserted interests in ensuring the timely construction and operation of the facility.

According to the court, DHS had already conducted "exhaustive administrative proceedings" on the pending license application and DHS itself believed the proposed adjudicatory proceeding was unnecessary. Nonetheless, DHS notified US Ecology that it must submit to a new adjudicatory proceeding conducted under the Administrative Procedure Act (APA), Government Code section 11340 *et seq.* Petitioners contended that the order for formal adjudicatory proceedings was the result of unlawful coercion by members of the Senate Rules Committee during the confirmation hearings of Health and Welfare Agency Secretary Russell Gould and Director of Health Services Molly Coye; the Senate Rules Committee admitted that it obtained an agreement for further administrative proceedings from Gould and Coye during the confirmation process but characterized the agreement as a legally proper compromise between two branches of government.

In concluding that the Senate Rules Committee's interference in the administration of the law was unconstitutional and that the purported agreement with the administrative officers was void, the Third District Court of Appeal stated that relevant provisions of the state's Radiation Control Law expressly provided for compliance with APA procedures with respect to rulemaking and in connection with adverse action against a licensee, but not in connection with granting or amending a license. Further, the court stated that it will not imply a requirement of an APA-type adjudicatory hearing for granting or issuing a license, noting that where the legislature has carefully employed a term or phrase in one place and has excluded it in another, it should not be implied where excluded. Therefore, the court concluded that the proposed hearings are not statutorily required.

The court then addressed "the real issue in this case, namely, whether respondents are required to proceed with a formal adjudicatory hearing based upon a purported agreement extracted from nomin-

ees during the confirmation process. That this agreement is the sole reason for [DHS'] intention to proceed with a formal adjudicatory hearing is beyond question." The Senate Rules Committee asserted that the validity of the agreement for further hearings presented a nonjusticiable political question; it emphasized its view that the agreement was not coerced but was simply the result of negotiation between the legislative and executive branches of government. In rejecting this contention, the Third District found that the issues in this case do not involve a political question committed to the determination of the legislature, but instead involve an unconstitutional usurpation of legislative and executive authority by the Senate Rules Committee. "By injecting itself into the process and in attempting to force [DHS] to conduct the type of hearings it desired, the Senate Rules Committee usurped to powers of not one but two branches of government." The court noted that the Senate Rules Committee is one committee of one house of the legislature; its authority is subsidiary and auxiliary to the legislative functions of the Senate, and the legislature may not constitutionally delegate legislative authority to one house and certainly may not delegate its authority to a committee. According to the court, to do so would violate the bicameral and presentment clauses of the California constitution. Here, the court found that the legislature did not purport to delegate supervisory authority over the Radiation Control Law to the Senate Rules Committee; instead, the committee assumed that power for itself. In doing so, the Third District concluded that the committee acted without legislative authorization and in a manner which would be unconstitutional and void even if the legislature had purported to delegate such authority.

Further, the Third District found that the Senate Rules Committee's action also usurped the power of the executive in violation of the separation of powers provision of the California constitution; having enacted a statutory scheme, the legislature has no power to exercise supervisory control or to retain for itself some sort of "veto" power over the manner of execution of the laws. Having granted authority to DHS to execute the provisions of the Radiation Control Law, the legislature "must abide by its delegation of authority until that delegation is legislatively altered or revoked" by statute in accordance with the bicameral and presentment requirements of the state constitution.

Accordingly, the court found that the Senate Rules Committee's assertion that the Director and Secretary's agreement to

conduct formal adjudicatory hearings was the result of a legally proper compromise during the confirmation process is mistaken. According to the court, nothing in the appointive process suggests that the Senate may exact promises or agreements from nominees as to the manner of performance of their duties; rather, the state constitution provides an oath which, among other things, requires that officers swear or affirm to well and faithfully discharge the duties of office. Although the legislature may dictate the manner of execution of the laws by enacting a statute in accordance with the bicameral and presentment requirements of the state constitution, it may not otherwise exercise supervisory control over the performance of the duties of an officer.

Finally, the court addressed the Committee's claim that although the agreement for further hearings originated with the committee, the Governor's inclusion of funds for the proposed hearings in the Budget Act validated the agreement. According to the court, the Governor's request for and approval of funding for the proposed hearings does not represent a shift in his consistent position that the agreement was unlawful and the hearings unnecessary, noting that "[i]t would be foolhardy for an executive officer to fail to plan for contingencies, and that is all the Governor has done. In any event, the Governor can no more concede executive power to a legislative committee than a committee can be permitted to usurp it. And the Governor's consent to an unlawful legislative act does not validate the act."

Accordingly, the court granted extraordinary relief requiring DHS to proceed with consideration of US Ecology's license application without regard to or consideration of the invalid agreement with the Senate Rules Committee.

