

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

DECLARATORY RULING ON THE
PETITION FILED BY THE STATE EMPLOYEES' CAMPAIGN COMMITTEE

I. INTRODUCTION

On November 19, 1999, the Commission on Human Rights and Opportunities (Commission or CHRO) received a Petition from the State Employees' Campaign Committee (Committee) requesting a Declaratory Ruling. Under the authority of CONN. GEN. STAT. § 4-176 and CONN. AGENCIES REGS. § 46a-54-122 (1993), the Committee seeks a ruling from the CHRO on the policy of the Boy Scouts of America (BSA) of excluding homosexuals from participation. The Committee has requested that the Commission rule on CONN. GEN. STAT. §§ 46a-81d, 46a-81l, and 46a-81n, and any other state anti-discrimination statute or regulation over which the Commission has any oversight or jurisdiction.

At its regular meeting held on December 9, 1999, the Commission voted to issue a declaratory ruling on the Committee's petition. On January 28, 2000, the Commission received a petition for Intervenor Status on behalf of: Connecticut Coalition for Lesbian, Gay, Bisexual and Transgender Civil Rights; Connecticut Civil Liberties Union; Connecticut Women's Education and Legal Fund; and Gay & Lesbian Advocates &

Defenders, in the matter of the Committee's request for Declaratory Ruling. At its regular meeting on February 10, 2000, the Commission granted the Petition to Intervene, pursuant to CONN. GEN. STAT. § 4-176(e).

In accordance with CONN. GEN. STAT. § 4-176(e)(1), the CHRO issues this Declaratory ruling on the Petition of the Committee.

II. FACTS PRESENTED

In its petition, the Committee provides the following factual background for CHRO to examine:

The Committee, established under CONN. GEN. STAT. § 5-226 (sic), is an annual campaign designed to raise funds from state employees for charitable and public health, welfare, environmental, conservation and service purposes. The funds are administered through a Principal Combined Fund Raising Organization ("PCFO") and charitable federations. These federations are composed of member agencies, some of which are local councils of the Boy Scouts of America ("BSA"). Under the regulations of the Committee, specifically § 5-262(a)(4)(a)(vii) (sic), each federation must maintain on file for each member agency 'a policy of nondiscrimination.' Each federation and its member agencies are also required to state in writing that each does not discriminate. Although each federation and member agency has complied with the foregoing requirement, the Committee received a written statement from the Connecticut Rivers Council of the BSA whose Scout Executive has explained with reference to sexual orientation issues that 'the National BSA position is that homosexuals do not provide a role model for Scouts that is consistent with the traditional family values emphasized by our program.' See Petition.

In addition, on April 27, 2000, the Commission conducted a fact-finding public hearing at which it took testimony (both

written and oral) and documentary evidence, in the form of exhibits¹. Further, the Intervenors and the BSA each filed position statements; and the United Way, the Committee and the BSA produced numerous documents in response to the Commission's request for documents.

III. PARTIES

The parties to this declaratory proceeding are:

Connecticut State Employees' Campaign Committee
1344 Silas Deane Highway
Rocky Hill, Connecticut 06067

Intervenors:

Connecticut Coalition for Lesbian, Gay, Bisexual and Transgender Civil Rights;
Connecticut Civil Liberties Union (CCLU);
Connecticut Women's Education and Legal Fund; and
Gay & Lesbian Advocates & Defenders

By: Attorney Maureen M. Murphy
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New Haven, Connecticut 06510

and

Attorney Mary L. Bonauto

Attorney Jennifer L. Levi

Gay & Lesbian Advocates & Defenders

294 Washington Street, Suite 740

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and

Attorney Philip Tegeler

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32 Grand Street

Hartford, Connecticut 06106

¹ Hereinafter Ex.#__ (p.__ , where appropriate).

In addition, due to the subject matter, the following have an interest in this Ruling, although neither requested to be made a party or Intervenor:

Cary DuPont, (Representative to the Committee)
Chief Professional Officer
United Way of Central Connecticut
10 Main Street
Bristol, Connecticut 06010

and

The Boy Scouts of America
By: Attorney Daniel L. Schwartz
Day, Berry & Howard, LLP
One Canterbury Green
Stamford, Connecticut 06901

**IV. ANALYSIS OF THE ISSUES PRESENTED BY THE COMMITTEE'S
PETITION FOR DECLARATORY RULING**

A. Introduction

In its petition for declaratory ruling, the Committee has asked the CHRO to issue a declaratory ruling on two questions:

1. Does the BSA's and/or its local councils' policy or policies on sexual orientation violate any state anti-discrimination statute or regulation over which your agency has any oversight or jurisdiction?

2. Is the Committee's inclusion of BSA member agencies in the State Employee Campaign in violation of any state law over which your agency has oversight or jurisdiction, including but not limited to CONN. GEN. STAT. §§ 46a-81d, 46a-81l, and 46a-81n?

B. The Committee's Inclusion of BSA Member Agencies in the Campaign Violates CONN. GEN. STAT. §§ 46a-81i, l, & n, and Constitutes State Action.

CONN. GEN. STAT. § 46a-81i reads as follows:

(a) All services of every state agency shall be performed without discrimination based upon sexual orientation.

(b) No state facility may be used in the furtherance of any discrimination, nor may any state agency become a party to any agreement, arrangement or plan which has the effect of sanctioning discrimination.

(c) Each state agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of sections 46a-81h to 46a-81n, inclusive, and shall initiate comprehensive programs to remedy any defect found to exist.

(d) Every state contract or subcontract for construction on public buildings or for other public work or for goods and services shall conform to the intent of section 4a-60a.

CONN. GEN. STAT. § 46a-81l reads as follows: "No state department, board or agency may permit any discriminatory practice in violation of section 46a-81b, 46a-81d or 46a-81e."

CONN. GEN. STAT. § 46a-81n reads as follows:

(a) Sexual orientation shall not be considered as a limiting factor in state-administered programs involving the distribution of funds to qualify applicants for benefits authorized by law.

(b) No state agency may provide grants, loans or other financial assistance to public agencies, private institutions or organizations which discriminate, unless exempted as provided in section 46a-81p.

Based on the evidence in the record, the BSA's policy of excluding homosexuals from participation violates Connecticut's anti-discrimination statutes. As such, the Committee's

inclusion of BSA member agencies in the campaign for charitable giving constitutes State action and violates CONN. GEN. STAT. §§46a-81i, l and n.

All state agencies are implicated by virtue of their participation in the annual Campaign.² The Office of the State Comptroller is further implicated by virtue both of committee membership and by processing all the paperwork necessary to effectuate the payroll deductions. All state agencies and facilities used in any way to effectuate the Campaign further discriminate by making funding possible to the BSA.

The Committee is comprised of thirteen state employees, including the Comptroller, the Commissioner of Administrative Services, and the Executive Director of the Joint Committee on Legislative Management (or their designees). CONN. GEN. STAT. § 5-262(b). The solicitation occurs during the workday, on state time. CONN. AGENCIES REGS. § 5-262-2(b) (1996).

The Committee is charged with a number of tasks: selecting a federation through a competitive process; conducting a comprehensive review of the state employee Campaign; submitting to the Governor and the General Assembly a report on the results of the Campaign and recommendations for improvement; reviewing each federation application; notifying each federation of the

² The BSA argues that since the Committee is not a state agency, it is not covered by the statute. (See. Ex. 12) The inquiry, however, does not end there. The statute's coverage is much broader, as hereinabove set forth.

Committee's decision regarding participation; approving of the PCFO's itemized budget of administrative expenses; submitting to the auditors of public accounts a financial report each year; establishing a competitive process; deducting salaries or wages of every participating state employee; transmitting all deductions collected to the PCFO; and transmitting a list of all contributors to each federation or member agencies. CONN. GEN. STAT. §§ 5-262(c) - (h).

Further, the Committee meets monthly for approximately one hour. See Ex. 19-E (pp. 14, 20-22), 20-0 (p. 1). State agencies are allowed --- even expected --- to "loan" employees to the Committee to work on the Campaign. See CONN. AGENCIES REGS. § 5-262(d) (1996); see also Ex. 19-D. Further, numerous other provisions enumerate the State's work on this Campaign. See CONN. AGENCIES REGS. §§ 5-262-6, 7(c), 8, & 9(a). A campaign which is coordinated and conducted by the State results in pecuniary gain to the BSA. See Ex. 20. Further, according to the United Way, it received 49% of the proceeds from the 1998 Campaign. Ex. 20-0(p. 8) Given the large number of Boy Scout member agencies of the United Way, the financial benefit to the BSA from the Campaign is indisputable. Ex. 9. See generally Ex. 20. The United Way distributes an average of 16.8% of the donations received from the Campaign to participating local Boy Scout councils. Ex. 9 (pp. 25-54).

Clearly the above factors far exceed the amount of time and resources expended by the State in Gay & Lesbian Law Students Association v. Board of Trustees, 236 Conn. 453 (1996). There our state supreme court easily found the State's action to violate the Gay Rights Law's proscription on discrimination by the State.

In that case, the court found State action in the school's Office of Career Services allocation of resources to military employers and arranging for and following up on on-campus interviews. Id. at 467. The Intervenors are correct in their argument that

the Court did not limit its analysis of 'use of state facilities' solely to the use of campus buildings, but also included the use and allocation of state resources such as time spent by the Office of Career Services in arranging for and following up on on-campus interviews. The Court noted that merely 'by allowing the military to use the services of the placement office and to conduct on-campus interviews, the defendants sanctioned impermissible discrimination that caused shock, anger, humiliation, frustration and helplessness.' Id. 467.

See Intervenors' Position Statement at pp. 14-15.

The Gay Rights Law was enacted to protect people from pervasive and invidious discrimination on the basis of sexual orientation. . . The Gay Rights Law provide[s] that it is the public policy of this state that individuals are not to be discriminated against because of their sexual orientation. . .

Gay & Lesbian Law Students Association, supra, at 481-82, n. 24.

Further, the court referenced the legislative history of the Gay

Rights Law, which supports the court's conclusion that the Gay Rights Law was enacted in response to the invidious discrimination against gays. During the floor debate, Representative Tulisano engaged himself in rhetorical repartée and asked, "As a body, have we determined there is invidious discrimination against people who are homosexual?" He then replied, "I believe that we have." Ex. 16 (p. 175)

The U.S. Supreme Court has had occasion to discuss the impact of State action in the midst of allegations of private discrimination. "The question then is whether there is significant state involvement in the private discrimination alleged." Gilmore v. City of Montgomery, 417 U.S. 556, 573 (1974) (internal citations omitted). Here, the record amply demonstrates that the State is significantly involved in furthering the "private" discrimination of the BSA. "Invidious discrimination takes its toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action. Norwood v. Harrison, 413 U.S., at 470, 93 S.Ct. at 2183." Id. at 575.

Even the BSA in its Reply Brief in the BSA v. Dale Supreme Court case acknowledged the right of the government to withdraw any support or benefits. Specifically, the BSA wrote, "To the extent that New Jersey sponsors Scouting units or provides special benefits, it is entitled to withdraw support if it now

disapproves of Scouting." See BSA Reply Brief at 13. To be consistent, then, the BSA cannot expect the State to continue its support in the face of this finding of discrimination.

To the extent that the CHRO does not have before it an applicant to be a leader, a volunteer, or a scout, this fact is irrelevant. This issue was squarely addressed in Gay & Lesbian Student Association, supra, at 469-70. "The relevant question is not whether one of the Plaintiff's members wants to join the military; rather the relevant question is whether the members are receiving the same placement opportunities as heterosexual students." Id.

Further, in Gay & Lesbian Law Students Association, the court had occasion to address government sanctioned discrimination. In the matter presently pending before this Commission, the BSA has questioned whether the Commission should await the U.S. Supreme Court's decision in BSA v. Dale, supra, before rendering its Declaratory Ruling. It argues that if the Court rules in its favor, then the issues before the Commission are moot. This is not so, because the Court is only considering specific facts related to the service of an openly gay male as an adult volunteer. The Court does not have before it whether the BSA's failure to employ a homosexual would violate a state's anti-discrimination law, neither is the issue of State action related to providing financial assistance to the BSA before the

Court. Thus, even if the U.S. Supreme Court were to overrule Dale and allow the BSA to discriminate, the Commission still has jurisdiction to consider the second question presented in the Request for Declaratory Ruling. By comparison, the military enjoys the legal right to discriminate against individuals based on their sexual orientation, nonetheless, our state supreme court found no law which required the State to allow the military to recruit on campuses or in other state facilities. Gay & Lesbian Law Students Association, supra, at 470, n. 13. Likewise, the CHRO finds no law which requires the State or any of its actors to allow the BSA to participate in the Campaign.

As noted by one of Connecticut's most well respected jurists,

Gay men and lesbians have a right to be free from the discrimination and degrading homophobia that is prevalent in our society. The legislature has adopted this public policy, not only with respect to employment, but also in areas such as the use of state facilities. . . today, . . . the public policy of this state is unequivocal: discrimination based upon sexual orientation is prohibited and those who persist in discriminating against gay men and lesbians will, among other sanctions, be barred from utilizing state facilities unless specifically exempted.

Gay & Lesbian Law Students Association, supra, at 491 (Berdon, J. concurring).

V. CONCLUSION

In response to the Committee's first question, the Commission declines to rule. However, the Commission on its own

motion initiates a proceeding for declaratory ruling on the first issue raised by the Committee.

In response to the Committee's second question, the Commission finds that Committee's inclusion of BSA member agencies in the State Employee Campaign violates Connecticut's anti-discrimination statutes, specifically CONN. GEN. STAT. §§ 46a-81i, 46a-81l, and 46a-81n.

The BSA's policy of excluding homosexuals from participation violates Connecticut's Gay Rights Law. As a result of this finding, the Committee's inclusion of Boy Scouts member agencies in the Campaign also violates Connecticut's Gay Rights Law.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

Attested by a unanimous vote of the Commissioners of the Commission on Human Rights and Opportunities present and voting at the regular monthly meeting of the Commission held on May 11, 2000, at Hartford, Connecticut.

Attest:



Amalia Vazquez Bzydra, Chairperson

5/12/00
Date