

SENATE COMMITTEE ON SOCIAL CONCERNS
MINUTES OF MEETING
NOVEMBER 1, 2004

[In these minutes: Maranatha Christian Student Fellowship Lawsuit – Mark Rotenberg followed by Committee discussion/action plan]

[These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate or Twin Cities Assembly; none of the comments, conclusions or actions reported in these minutes represent the views of, nor are they binding on, the Senate or Assembly, the Administration or the Board of Regents.]

PRESENT: Ken Heller, chair, Jennifer Oliphant, Ruth Taylor, Peter Hiniker, Sandy Ulsaker Wiese, Lauren Gilchrist, Elizabeth Richardson, Susan Von Bank, Greg Schooler, Julie Sweitzer, Susan Craddock, Katherine Fennelly, David Fox, Mani Subramani, Nick Bengtson, Kara Ferguson, Leonard Roy

REGRETS: Barbara Boysen, Gerald Rinehart, Julie Pelletier, Elaine Tarone, Abby Bar-Lev, Elizabeth Fuerst

ABSENT: Ravi Norman, Shaun Laden, Lonnie Bradford

OTHERS: B. David Galt, Hawona Sullivan Janzen, Claire Walter-Marchetti, Naomi Scheman

GUEST: Mark Rotenberg, General Counsel

D). Professor Heller called the meeting to order and asked those present to introduce themselves.

II). Mark Rotenberg shared with members the legal basis for the University's decision to settle with Maranatha Christian Fellowship. He began by providing members with background information on the suit. He noted that Maranatha Christian Fellowship sued the Board of Regents in a Federal civil rights case. The case asserted that the University violated the Fellowship's first amendment rights by requiring the organization to sign a non-discrimination statement as a condition of being a registered student organization. The University has routinely required all student organizations that want to be an official registered student organization to sign a non-discrimination statement. Failure to sign this statement meant that a student organization would be unable to take advantage of various University benefits e.g. the right to meet in University buildings, the right to lease space at a reduced rate, the right to apply for mandatory student fee funding, etc.

Mr. Rotenberg discussed a case in which the Office of the General Counsel defended against various students and student organizations opposing the University's mandatory student fee. In that suit, certain groups and individuals opposed paying the mandatory student fee because it was distributed to groups that had political, social and cultural views differing from their own. The court ruled that universities could, within certain limits, force students to pay fees to promote a marketplace of ideas as long as they did so in a viewpoint neutral fashion. Mr. Rotenberg used this case to illustrate the

importance of the University maintaining its neutrality with respect to speech by students and private student organizations.

Mr. Rotenberg shared information concerning another relevant case, *Boy Scouts of America v. Dale*. In this case, a New Jersey Boy Scout leader claimed that the Boy Scout's refusal to allow him to be a Boy Scout leader violated New Jersey's anti-discrimination law and sued the Boy Scouts of America. The New Jersey anti-discrimination law, like many anti-discrimination laws, bars discrimination on the basis of sexual orientation. A divided Supreme Court ruled that the State of New Jersey could not impose its anti-discrimination principle upon the Boy Scouts of America because by doing so it would violate the Boy Scout's associational rights under the first amendment. Mr. Rotenberg also briefly referred to another case, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In this case Massachusetts required parade organizers to permit gays to march in a privately sponsored St. Patrick's Day Parade, thereby forcing the parade organizers to appear to support ideas that they actually opposed.

Mr. Rotenberg concluded that the Supreme Court recognized a right of association under the first amendment. The Supreme Court's decisions prevent states from imposing their anti-discrimination norms on private groups in a manner that determines their membership. Based on these Supreme Court decisions the Office of the General Counsel (OGC) recommended to the President that the case be settled. Under the settlement agreement, the University continues to require that the Maranatha Christian Fellowship sign its anti-discrimination policy; however, the University has agreed to allow the organization to "require its voting members and officers to adhere to the organization's statement of faith and rules of conduct". Mr. Rotenberg pointed out that this is a narrower construction than the fair interpretation of *Boy Scouts v. Dale*.

The narrow construction of the University's settlement with Maranatha only applies to religious groups. Therefore, this settlement continues to prohibit non-religious student organizations from excluding classes of people from their membership. Mr. Rotenberg noted that in the opinion of the OGC, the settlement prevented a decision by the Federal court that the University was violating Maranatha's first amendment rights. Such a decision could have been more expansive in regard to the University's ability to insist on its own internal anti-discrimination rules.

Comments/questions from members included:

- Is the University violating its neutral position by singling out religious organizations for special treatment? Mr. Rotenberg noted that the legal traditions of the United States have historically given a privileged place to religious expression beyond other associational groups within the context of the first amendment. On the other hand, if one takes the position that having special rules for religious organizations is constitutionally suspect, a more generalized repudiation of the University's anti-discrimination principles could follow.
- Are municipalities, school systems, etc. that have anti-discrimination polices required to make their spaces available to organizations that violate their anti-discrimination policies? Mr. Rotenberg is not sure whether such a government entity can deny space in a public facility; although he believes that a government agency may not condition the use of its facilities on an organization's repudiation of its constitutional associational rights. He volunteered to research this further. Mr. Rotenberg's office was primarily concerned with the Federal court interpretation of *Boy Scouts v. Dale*, not whether a municipality acts unconstitutionally.

- A member asked whether as a religious organization a group could, for example, restrict its membership to only white people and still be able to use University facilities, etc. Mr. Rotenberg stated that the University chose to settle the Maranatha case utilizing a double constitutional protection of associational and religious rights. This hypothetical situation would not qualify because this associational preference does not have a religious basis. The University's goal is to always defend the Board of Regents' views of non-discrimination.
- How does one determine whether discrimination has a religious basis? Mr. Rotenberg replied that if it were questionable, the University would likely force them into court for a determination.
- A member asked Mr. Rotenberg to explain the distinction between limiting a state institution's ability to interfere in private groups beliefs with allowing private groups access to state/community resources. Mr. Rotenberg stated that in the early 20th century the government could afford certain groups opportunities that were not made available to other groups unless those groups relinquished a first amendment right. Because of Supreme Court rulings of 1970's, the government can no longer require groups to repudiate a belief in order to be allowed opportunities and resources. The forced relinquishment of an associational or other first amendment right as a condition for receiving a benefit is unconstitutional.
- How are universities different from K12 institutions in light of the fact that K12 institutions do limit first amendment rights? Mr. Rotenberg explained that in K12 settings the state mandates attendance. As a result, associational, free speech and other rights are much more circumscribed. Because universal attendance is not required, public universities are viewed quite differently from K12 institutions.
- Did the University consider taking this case to Federal court even though it might receive an adverse decision? Mr. Rotenberg noted that this is really a question for the administration. However, speaking as an individual administrator and not as a lawyer, Mr. Rotenberg is very troubled by any implication that the University lost this case. The settlement around this case is in no way a vindication for discriminatory beliefs or practices at the University. The University will continue to allow the widest marketplace for ideas on its campuses.
- Have there been discussions within the administration concerning the symbolic importance of this decision and what the University could do to demonstrate its commitment to anti-discrimination issues? Again, Mr. Rotenberg deferred this question to the administration. He did note, however, that the University has created and supports a GLBT program, and the University has no intention of retreating from this commitment. Not every group on campus has this kind of support from the administration, the Board of Regents and has been allocated University resources. The University stands behind maximal opportunities for the GLBT community and for other previously excluded minority groups in Minnesota.
- A member stated that in her opinion that acquiescing is worse than losing this case. Mr. Rotenberg admitted being bothered by this statement. Mr. Rotenberg stated that as the University's general counsel he presented legal options to the administration, and, in his best judgment predicted the likely outcome. It was then up to the University administration to weigh the risks and decide how to proceed.
- Would the University react differently if a Muslim group wanted to practice the adherence to a strict interpretation of Islamic law on campus? Mr. Rotenberg used as an example a group that wanted to establish a prayer venue in a University building. This matter raised two questions for the University:
 - Would providing this venue violate the separation of church and state?
 - Would establishing this prayer group violate the University's anti-discrimination policy?

- To what extent does a state agency have to defer to a religion and favor religious preferences over its own interests?
- The Maranatha lawsuit was a nationwide, well-organized political effort to weaken antidiscrimination. At what point will the University or other institutions reach a threshold where they will not allow own their principles to be further degraded? Mr. Rotenberg stated that by settling the case and not having a Federal judge issue a decision, the University minimized rather than accentuated the problem. Based on its interpretation of the Supreme Court's decisions around associational rights under the first amendment, the University's goal was to narrow the scope of what Maranatha could demand. Mr. Rotenberg noted that the settlement does not permit Maranatha to exclude any member of a protected classification from any of its activities, with the exception of voting for its leadership.
 - Does the University have a process in place for consultation when important legal issues like this arise? Mr. Rotenberg believes strongly that the administration needs to discuss important matters with the University community before there is a media disclosure around an issue. Based on comments Mr. Rotenberg heard today, the University needs to more clearly articulate that it is in no way retreating from its policies that mandate inclusion.
 - A member requested that when legal decisions are being made that there be consultation with governance committees, and affected programs. Mr. Rotenberg assured members that he would share these comments with the President.
 - Are there any legal implications with respect to consulting more broadly when a legal case arises? Mr. Rotenberg noted that there is an issue of attorney/client privilege. Privilege can be broken if attorney/client information is disclosed with people not in the controlling group. While this is a definite consideration, measures can be taken to have the controlling group be more consultative.
 - There is often a tendency to define legal issues in narrow, technical terms rather than recognizing their broader impact. To guard against this tendency, the University should consider including as many perspectives as possible in their legal decision making process.
 - GLBT director B. David Galt stated that he was in complete agreement with the University's decision to settle the case but wanted the University to follow a different process in communicating to the University community about the suit. While it was outside forces targeting GLBT people that brought this suit, it has resulted in the University's GLBT community currently questioning whether the University has its best interests in mind.

Professor Heller thanked Mr. Rotenberg for attending today's meeting. Next, he asked members their thoughts on what actions the Committee should take based on do the information they received today. Members discussed what they heard today and generated the following ideas:

- Craft a memorandum to the President thanking him for today's presentation by Mr. Rotenberg and requesting that a more consultative process be put in place around legal issues that impact the University community. A member suggested being specific with regard to who should be consulted with. Being both specific and practical are very important. Broad consultation around legal matters can oftentimes be extremely difficult and perhaps impractical.
- Draft a resolution or statement to the Senate Consultative Committee stating that the Social Concerns Committee believes there is a lack of operational procedure around some very important legal issues at the University. This statement would solicit the SCC's support for putting a consultative process in place. As part of this resolution, a suggestion was made to

- include a general statement about the importance of inclusiveness and use Maranatha as an example.
- Draft a letter to GLBT director B. David Galt on behalf of the Social Concerns and EAD Committees voicing support for the program.
 - Draft a collective letter to the Minnesota Daily to educate the University community around the rationale used to settle the Maranatha lawsuit. A member questioned whether doing this would just promote further free advertising for Maranatha, and, therefore might not be the best way to proceed.

Professor Heller asked whether other Senate committees or other University programs/organizations should be consulted around this issue. The following were mentioned:

- Office of Equal Opportunity
- Student Legal Services
- Senate Committee on Disability Issues

In the end, members agreed that a joint Social Concerns and EAD letter be drafted and forwarded on to the President requesting that a more consultative process be put in place at the University around legal issues that impact the University community. The document should point out the value of consultation.

Members agreed that a more consultative process would:

- Promote a better understanding of the issues facing the University.
- Provide for a wide variety of useful perspectives.
- Provide a venue for the legal experts in the University to educate the University community about the legal environment in which decisions need to be made.

III). Hearing no further business, Professor Heller adjourned the meeting.

Renee Dempsey
University Senate