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STATE OF NEBRASKA
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AUG 31 1990
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DATE: August 31, 1990

SUBJECT: Whether existing Nebraska statutes address the discretion of a political subdivision in allowing non-profit health and welfare groups to solicit contributions from employees during work hours.

REQUESTED BY: Senator Don Wesely

WRITTEN BY: Robert M. Spire, Attorney General
Denise E. Frost, Assistant Attorney General

We write in response to your request whether existing case law and Nebraska statutes address the question of a political subdivision's decision to allow one non-profit health and welfare group to solicit donations from employees in the workplace during working hours, but to deny like access to other similar non-profit health and welfare organizations.

According to Neb.Rev.Stat. §28-1440 et seq. (Reissue 1989) entitled "Illegal Solicitation of Funds", every person or organization soliciting funds in this state in any county other than the county in which its home office is located shall register with and be subject to the jurisdiction of the Secretary of State. Further, each such person or organization must file an annual financial report with the Secretary of State. However, the section is silent as to the fora in which solicitations may be made. In view of that significant silence, a review of case law is mandated.

There appears to be no Nebraska case law directly on point with this issue. Federally, however, this issue has arisen several times, with analysis of the issue primarily couched within the auspices of First Amendment or free speech considerations (U.S. Const. amend. I; See also Neb.Const.art.I, §5), as well as equal protection claims (U.S.Const. amend.XIV, §1).

I. Charitable Solicitations As Protected Speech

Perhaps the best analysis of this question to date as a free speech issue is provided in Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). There, relying on its holding in Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), the Court began its analysis of facts much

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like the question posed by this legislative opinion with the cornerstone proposition that charitable solicitations involve interests protected by the First Amendment's guarantee of freedom of speech. Further, they do not lose that constitutional protection merely because the solicitation occurs in the contest of a payroll appeal rather than a personal, face-to-face exchange. Pilsen Neighbors Community Council v. Burns, 672 F.Supp. 295 (N. Dist. Ill. 1987).

In Cornelius, the plaintiff NAACP, along with six other legal defense funds, sought to be included in a combined charity fund drive aimed at federal employees in the workplace. However, NAACP was denied permission to participate, arguably because it was not dedicated to health and welfare. However, other non-profit groups not dedicated to health and welfare were allowed to participate in the charity drive. The plaintiffs sued, alleging that their First Amendment rights were unconstitutionally abridged by their exclusion from the fund drive.

In evaluating the plaintiff's First Amendment claims, the Court applied a tripartite analysis: 1) whether the speech is protected by the First Amendment, 2) the nature of the forum in which the speech occurs, and 3) the standard of the Court's review of the government's restriction of the speech.

The Cornelius Court identified charitable solicitations as speech that is constitutionally protected by the First Amendment. The next element in the analytic formula is a determination whether the forum in which the charity wishes to speak/solicit--here, a government office--is public or nonpublic. Cornelius at 796, 105 S.Ct. at 3446. According to the Cornelius Court, the fact that the government owns or controls the workplace does not make it a per se public forum accessible for all First Amendment purposes. Rather, the Cornelius Court found that the workplace is a nonpublic forum despite its government nature because it is there for a dedicated purpose -- attending to the affairs of the government -- and "the government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs." Id. at 805, 105 S.Ct. at 3451. That analysis of the federal government workplace is likely applicable to Nebraska state and municipal offices as well, since they too are created by the government for a similar dedicated purpose.

Following the Cornelius model, the third and final determination in the First Amendment analysis is whether the restrictions that the government has imposed on access to that forum conform to the level of protection the First Amendment mandates for that particular speech in that particular forum. Here, since the workplace is a nonpublic forum, the government's

reason for restricting access to it need not be compelling, as is the case with a traditional public forum, or even the most reasonable alternative, but simply reasonable.

> Implicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 49, 103 S.Ct. 948, 74 L.Ed.2d 794, 807 (1983). In other words, a government office may assert a "legitimate interest in preserving the property for the use to which it is lawfully dedicated." [Citations omitted.] Id. at 50, 74 L.Ed.2d at 808.

Therein lies the crux of the matter: May a political subdivision in Nebraska, upon its own discretion, deny access to participation by a voluntary health and welfare organization in a charity drive aimed at government employees? Following Cornelius and Perry, nothing in Nebraska state law bars a political subdivision from denying access to any organization from participation in a charity drive aimed at employees in the government workplace as long as the political subdivision can articulate a reasonable basis for that denial.

Some examples of reasonable denial are avoiding controversy or distraction that would disrupt the workplace, as well as a determination that a dollar spent by one charity for its purposes may be more beneficial than a dollar spent by another charity for its particular purpose. Cornelius, supra; Perry, supra. See also United Black Community Fund, Inc. v. City of St. Louis, Missouri, 800 F.2d 758 (8th Cir. 1986). Examples of unreasonable government denial of access to a workplace forum for the purpose of charitable solicitation include findings by the coordinator of such fund drives that the activities of one of the petitioning organizations were "detestable", NAACP Legal Defense and Educational Fund v. Horner, 636 F.Supp. 762 (D.D.C. 1986), as well as exclusion of a charity based simply upon the fact that it was not in existence at the same time as the charity receiving preferential treatment received its exclusive grant of access to the workplace forum. Black United Fund of New Jersey, Inc. v. Kean, 593 F.Supp. 1567 (1984) rev'd on other grounds 763 F.2d 1956 (1985).

II. Equal Protection

Generally, when a law or government practice operates with the effect of conferring or denying a benefit to some but not all persons, an equal protection analysis may be merited to determine whether the law is being applied in an unconstitutionally discriminatory manner. A threshold issue in an equal protection inquiry is a determination of the type of right in question. Then, the government's reason for conferring or denying that right is examined to ascertain its constitutional relationship to the right itself.

Some rights, such as speech in a traditional public fora like a park or sidewalk, are considered fundamental. Likewise, the right to be free from discrimination based on certain immutable or "suspect" characteristics like race, national origin, alienage, gender or birth legitimacy are also considered fundamental. There, the government's reason for controlling or suppressing that right must be compelling, able to survive strict scrutiny. However, when the right is more limited in its scope and is not considered fundamental, the government's regulation of or infringement upon that right need only be rational to withstand a constitutional challenge.

The Court in Cornelius, supra, found that charitable solicitation in a government office is not a fundamental right, because a government workplace is a nonpublic forum. Where, as here, the right at issue is not fundamental, all that the government must articulate in order to abridge or deny it is a rational reason for doing so. Perry, supra, 460 U.S. at 54, 74 L.Ed.2d at 810. The "rational" test required in this equal protection analysis where no fundamental right is at stake is a less stringent standard than the "reasonable" standard applied in the context of a First Amendment analysis. Black United Fund of New Jersey, supra, 593 F.Supp. at 1575.

Turning to the inquiry at hand, if a political subdivision excludes a charitable organization from soliciting contributions in the government workplace and can articulate a basis for doing so that is sufficient to meet the higher "reasonableness" standard required by First Amendment considerations, it seems virtually certain that the basis will satisfy the lesser "rational" test as well. If the charitable organization cannot meet the First Amendment test, it probably will also fail as an equal protection agreement. Perry, 460 U.S. at 54, 74 L.Ed.2d 810. ("We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb.")

In sum, in the context of a political subdivision's decision to deny a charitable organization access to the government workplace for the purpose of soliciting contributions, an assertion of equal protection issues will fail if the political subdivision can articulate a rational basis for excluding the charitable organization.

CONCLUSION

Currently, there is no Nebraska statutory or case authority that addresses limitations upon a political subdivision's decision to allow or disallow a charitable organization access to the government workplace for the purpose of soliciting donations from government employees. Federal courts addressing this question have found that a government workplace is a nonpublic forum, and, although charitable solicitations are a form of speech deserving First Amendment protection, charitable organizations have no fundamental right to solicit contributions from employees in the government workplace. In the analytical context of the First Amendment, the government need only articulate a reasonable basis to sustain its exclusion of the charitable organization from the government workplace. (Note, however, that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint-based discretion." Cornelius at 811, 105 S.Ct. at 3453-54.) Applying an equal protection analysis, the government need only have a rational basis for denying the charitable organization access to the government workplace.

At this time, resolution of a dispute regarding access to the workplace of a Nebraska political subdivision by a charitable organization for the purpose of soliciting contributions would most likely have to be settled by the courts, relying on federal case law. Should there be a move to initiate a bill in the Nebraska legislature to statutorily address the questions discussed herein, it may be wise to look at statutes that have been passed in other states, cf. N.J.Stat. Ann. §52.14-15.9c1 (West 1985).

Respectfully submitted,

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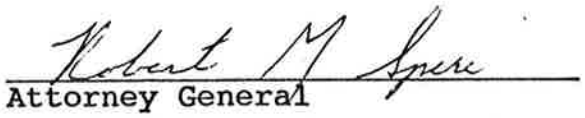
Approved:



Attorney General

cc: Patrick J. O'Donnell, Clerk of the Legislature

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