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Opinion No. 00-057

Teachers' organizations - limitations on access to school communication media

QUESTIONS

Tenn. Code Ann. §49-5-609 (a)(4) provides that, when a professional employees' organization has been selected or designated as exclusive bargaining representative pursuant to law, the local board of education may deny any other professional employees' organization access and/or usage of school bulletin boards, mail boxes or other communication media or the use of institutional facilities for the purpose of holding meetings, until a lawful challenge to the majority status of the representative is sustained.

1. Is Tenn. Code Ann. § 49-5-609 (a)(4) constitutional?

2. If this statute is constitutional, does a local board of education have the sole authority and discretion to deny such access and/or usage to any such professional employees' organization or can each individual school make its own determination to permit or deny access and/or usage?

3. Can a local board of education constitutionally prohibit an individual employee of the school system from discussing and promoting an employees' organization of which that individual is a member?

4. What lawful matter can a professional employees' organization employ to challenge to the majority status of the representative pursuant to TCA 49-5-609 (a)(4)?

5. Can a board of education lawfully deny a professional employees' organization that has not been selected or designated from using institutional facilities after school hours for meetings?

OPINIONS

1. Tenn. Code Ann. §49-5-609(a)(4) is not unconstitutional *per se*, but depending on the specific facts and circumstances it could be unconstitutional as applied by an individual school district.

2. Under the statute the local board of education has the sole authority to deny such

access to professional employees organizations other than the selected representative.

3. No.

4. Tenn. Code Ann. § 49-5-605 describes the specific manner in which a lawful challenge to the majority status of a representative organization may be made by another professional employees' status.

5. The answer to this question would depend on the individual circumstances; in particular, whether other organizations and groups are allowed to use institutional facilities after school hours for meeting.

ANALYSIS

1. In 1978 the Tennessee General Assembly passed the "Education Professional Negotiations Act," which grants teachers and other professional employees of local school districts the right to form and join organizations and to negotiate through representatives of their own choosing.[1] The Act establishes the procedure for conducting an election to recognize a professional employees' organization that shall be the exclusive representative of all professional employees employed by a local school system for the purpose of negotiating.[2] The provision of that Act that is the subject of this Opinion is Tenn. Code Ann. § 49-5-609(a)(4), which provides as follows:

> **49-5-609. Unlawful acts. -** (a) It is unlawful for a board of education or its designated representative to:
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> . . . .
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> (4) Refuse to permit a professional employees' organization to have access at reasonable times to areas in which professional employees work, use institutional bulletin boards, mail boxes, or other communication media, or use institutional facilities at reasonable times for the purpose of holding a meeting concerned with the exercise of the rights guaranteed by this part; provided that if a representative has been selected or designated pursuant to the provisions of this part, a board of education may deny access and/or usage to any professional employees' organization other than the representative until such time as a lawful challenge to the majority status of the representative is sustained pursuant to this part.

The constitutionality of a similar provision in a collective bargaining agreement between a school district and the exclusive bargaining representative was addressed by the United States

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[1]1978 Tenn. Pub. Acts, ch. 570, codified at Tenn. Code Ann. §§ 49-5-601 *et seq*.

[2]Tenn. Code Ann. §§ 49-5-605-606.

Supreme Court in *Perry Education Association v. Perry Local Educators' Association*.[3] In that case the collective bargaining agreement granted access to teacher mail boxes to the union that had been elected by the public school teachers as their exclusive bargaining representative, while denying such access to a rival union. The Court stated:

> The First Amendment's guarantee of free speech applies to teacher mailboxes as surely as it does elsewhere within the school . . . . [b]ut this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs . . . . The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.[4]

The Court found that the school mail facilities are public property that is not by tradition or designation a forum for public communication. The First Amendment does not guarantee access to all public property simply because it is owned by the government, and a state or local government body "may reserve the forum for its intended purposes, communicative or otherwise as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[5]

The internal school mail in the Perry School District was used to transmit official messages among teachers, between the teachers and the school administration, and between teachers and the district school board. Various principals granted selective access to groups such as Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students. Access to the teacher mail boxes was given to the union that had been elected as the teachers' exclusive bargaining representative. However, it was not open to organizations such as the rival union that was the Plaintiff in the case, which is concerned with the term and conditions of teacher employment.

The Court held that it was reasonable to grant access to the mail boxes to the elected exclusive representative while denying such access to rival unions, because "[u]se of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers."

> We have previously noted that the "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining

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[3]460 U.S. 37, 103 S.Ct. 948, 74 L. Ed. 2d 794 (1983).

[4]*Id*. 460 U.S. at 44, 103 S.Ct. at 954.

[5]*Id.*, 460 U.S. at 46, 103 S.Ct. at 955.

> agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 221, 97 S.Ct. 1782, 1792, 52 L. Ed. 2d 261 (1977). Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."[6]

The United States Supreme Court in *Perry* accordingly concluded that the First Amendment of the United States Constitution was not violated when a union elected as the exclusive bargaining representative was granted access to certain means of communication, while the same access was denied to a rival union. The Court also held that the differential access provided the two unions did not violate the Equal Protection Clause of the Fourteenth Amendment. As explained above, the union did not have a First Amendment right of access to the interschool mail system, so no fundamental right was implicated. Consequently, the differential treatment of the two unions "need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the constitution. . . . The school district's policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative."[7]

Tenn. Code Ann. § 49-5-609(a)(4) does not require that local school systems deny access to school communication facilities to professional employees' organizations other than the organization that has been selected as the exclusive bargaining representative. It merely permits the school district to have such a policy or practice and/or, presumably, to negotiate for such a policy in its collective bargaining agreement. Similarly, the statute does not require a local school system that has such a policy to limit the non-representative union's access to all communication media or institutional facilities at the same time. Again, this is left to the discretion of the local school board. It is the opinion of this Office, based upon the Supreme Court's decision in the *Perry* case, that Tenn. Code Ann. § 49-5-609(a)(4) is not *per se* unconstitutional.

Whether this statute is unconstitutional *as applied* in a given school district depends upon the facts in each case, namely the specific policies and practices adopted by such district regarding the access to its communications facilities. The Supreme Court in *Perry* held that a school district could differentiate between the exclusive representative union and a rival union in the access to its communication facilities, so long as the policy "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views."[8]

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[6] *Id.* 460 U.S. at 51-52, 103 S.Ct. at 958-59 (citation omitted).

[7] *Id.*, 460 U.S. at 54, 103 S.Ct. at 959-60, *citing San Antonio School District v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L. Ed. 2d 16 (1973).

[8] *Id.*, 460 U.S. at 46, 103 S.Ct. at 955 (emphasis added).

One of the factors that persuaded the Supreme Court that the differential access policy of the Perry School District was reasonable was that the limitation of access to school mail facilities to the exclusive representative union was consistent with the district policy and practices that dedicated the internal mail service to the transmission of official messages. If a school district had a policy that opened up its internal mail, institutional bulletin boards, and other communication facilities not only to the union selected as exclusive representative but also to any person or group that wanted to communicate with the schools' professional employees, then denying access to rival unions would not be consistent with the public use of these facilities, and might be found to constitute the discrimination based on the content of the speech or identity of the speaker that violates the First Amendment.

Another factor cited by the Supreme Court as supporting its conclusion that the limitations on one union's access to the school mail system were reasonable was the fact that several alternative channels remained open for union-teacher communications, including bulletin boards, meeting facilities, personal distribution of written materials, and U.S. mail. A school district policy or collective bargaining agreement that denied access to all communication media to professional employees' organizations other than the recognized representative would be legal under Tenn. Code Ann. § 49-5-609(a)(4) but it would be constitutionally suspect under *Perry*, depending upon the school board's policies concerning access to such media to other groups engaging in activities or advocacy of relevance to teachers' personal interests. If the rival unions were denied access to absolutely all means of communication, a court might find the policy to be unreasonable. If other teacher-oriented groups were granted access denied to the rival union, a court might find the policy to be an effort to suppress expression because public officials oppose the rival union's views. In either circumstance a court might conclude that the policy was unconstitutional.

2. Tenn. Code Ann. § 49-5-609 makes it unlawful for "a board of education or its designated representative" to deny access to communication media or use of institutional facilities, except that a "board of education" may deny access and/or usage to a professional employees' organization other than the recognized representative organization. While designated representatives of the local board of education can commit the unlawful act of denying access and/or usage, the statute by its terms only gives authority to the local board of education to create the exception to the general rule and deny access and/or usage to professional employees' organizations other than the recognized representative. This is consistent with the Act's overall structure. The "negotiating unit" is defined as the non-management professional employees in a school district, and collective bargaining agreements are entered into on a district-wide basis, not school by school.[9]

3. Teacher communications may be suppressed only when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school."[10]

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[9] Tenn. Code Ann. § 49-5-602.

[10] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969).

The power to regulate speech in the schools by outside organizations does not extend to teacher communications within the school. A policy that prevents teachers from discussing professional employees' organizations during non-class time violates the First Amendment.[11]

4. Tenn. Code Ann. § 49-5-605 describes the manner in which a lawful challenge to the majority status of a representative may be made by another professional employees' organization or by the board of education.

There is an election procedure set out in this code section for recognizing a union as the exclusive representative.[12] The organization receiving the majority vote of eligible professional employees shall be designated as exclusive bargaining representative for a period of 24 months, effective January 1 next, and the initial recognition will be automatically extended for an additional 24 month period,[13] unless there is a challenge to such representative between October 1 and October 15 of the second twelve months of any recognition period.

This challenge may be made by another employees' organization, which files an application for recognition with the local board of education, together with signed petition cards which constitute a majority of the professional employees.[14] In such an event an election committee is formed to set the date and convenient times and places for a secret ballot election. The statute describes how the members of the committee are selected, and other details concerning the election process.[15]

When a lawful challenge has been made to the majority status of a representative, Tenn. Code Ann. § 49-5-609(4) provides that a board of education may no longer deny institutional communication media to the organization bringing the challenge.

5. Tenn. Code Ann. § 49-5-609(a)(4) permits a board of education to deny access to institutional facilities for holding meetings to professional employees' organizations other than the organization selected as the exclusive representative until such time as a lawful challenge is made to the majority status of the representative organization. As discussed in section 1 above, this statute is not unconstitutional *per se*. Whether the statute is unconstitutional as applied will depend upon the other uses of school meeting facilities that are permitted in a particular school district. The Supreme Court in *Perry* held that the internal school mail boxes were not a public forum because

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[11] *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046 (5th Cir. 1985), affirmed without opinion, 479 U.S. 801, 107 S.Ct. 41, 93 L. Ed. 2d 4 (1986).

[12] Tenn. Code Ann. § 49-5-605(a), (b).

[13] Tenn. Code Ann. § 49-5-605(b)(8).

[14] Tenn. Code Ann. § 49-5-605(c). The local board of education may also make a challenge during this time frame by showing that the representative does not in fact possess a majority of employees as dues-paying members.

[15] Tenn. Code Ann. § 49-5-605(b).

their use was limited to the facilitation of internal communication of school related matters to teachers. If the use of school meeting facilities were similarly limited to school related activities, the school board could make distinctions between the representative union and its rival union in the access allowed to this and other non-public forums of communication so long as the distinctions are reasonable in light of the purpose the non-public forum serves, and discriminate between organizations based upon the status of the respective unions and not their views.

We can visualize, however, that a local board of education might generally open its schools' meeting facilities for general use by the public as a place for expressive activity, even if it was not required to do so. Although the board is not required to indefinitely retain the open character of such facilities, so long as it does so it is bound by the stricter standards that apply to traditional public forums:

> In these . . .public forums, the government may not prohibit all communicative activity. For the state to enforce its content-based exclusion it must show that its regulation is necessary to serve a compelling state interest that is narrowly drawn to achieve that end. . . . The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[16]

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[16] *Perry Education Assn. v. Perry Local Educators' Assn., supra*, 460 U.S. at 45, 103 S.Ct. at 955 (citations omitted).

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