

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DEPUTY SHERIFF'S
ASSOCIATION, ET AL.,

Plaintiffs,

v.

CASE NO: 06-C-0602

DAVID A. CLARKE, JR., ET AL.,

Defendants.

**BRIEF IN OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION**

STATEMENT OF FACTS

In early May of 2006, Milwaukee County Sheriff David Clarke was approached by George Papachristou, a former Milwaukee police officer. Papachristou indicated that he was organizing a support group for police officers. He further indicated that while the organization was faith-based, it was intended to be open to all officers regardless of their religious beliefs and to officers without any religious belief. The initial organizing event was scheduled to be held on May 20, 2006 at the Elmbrook Church Fellowship Hall in Brookfield. Milwaukee Police Chief Nan Haggerty was a scheduled speaker together with John Anderson, a former Green Bay Packer football player.

Sheriff Clarke thought that the effort to organize a peer support group was a worthwhile venture, and he invited the organizers to make a presentation at his quarterly Leadership Conference. Clarke conducts quarterly Leadership Conferences with his

leadership personnel. The group includes deputies holding the rank of sergeant or higher. With the exception of sergeants (who are members of the collective bargaining unit) the balance of the attendees are part of management and are not union employees. The Leadership Conference, which is held over a full day, is designed for purposes of training, communication, and discussion of pending issues. Beginning with the first conference of the year, which was held in February of 2006, Sheriff Clarke made the decision that he would set aside approximately one-half hour for a particular community group or groups to be invited and make a presentation. At the February, 2006 session, he included a representative of the Lakefront Kite Festival, who made a presentation to the assembled group. At the May conference, he invited the organizers of the Fellowship of Christian Centurions to speak. The individuals made a presentation explaining the purpose and goals of their organization. There was no prayer or other religious activity in connection with the presentation. The did have handouts, which were in the form of a small book; available to attendees, if they chose to take one.

During that same Leadership Conference in May of 2006, one of the items on the agenda for discussion was a presentation by Sheriff Clarke of his plans for filling an immediate vacancy in a captain's position, as well as a vacancy that was scheduled to occur in November of 2006. Clarke indicated that the Milwaukee County Department of Human Resources would screen resumes and that Clarke would interview the top-ranked individuals for the vacancies and make the final decision. The sheriff did hand out a single page document, which included some inspirational information about the importance of surrounding oneself with certain kinds of people. It is common for Sheriff Clarke to provide inspirational quotations from a variety of sources. Seldom does he use

any biblical or religious references or sources. There was no connection express or implied between the comments on the promotional process and the appearance by the Fellowship. Sheriff Clarke has never indicated that adherence to any particular religious faith or religious faith in general is a prerequisite for promotion or other benefits of employment. With the exception of two persons, Sheriff Clarke has no knowledge of the religious beliefs or lack thereof of any of the 600 plus sworn personnel in the department. He is aware of the religious affiliation of Inspector Kevin Carr because they attend the same church and of Captain Bailey, as Bailey has invited him to speak at his church.

Following the presentation at the Leadership Conference, the individuals involved asked if they could make a brief presentation at roll calls held at the various sites, where the Sheriff's Department assigns deputies. Sheriff Clarke granted that request and asked defendant, Captain Bailey, to implement the request. The Fellowship did send speakers to most of the roll calls that were held, and they made a 3-5 minute presentation relative to the upcoming organizing event at Elmbrook Church Fellowship Hall, together with a brief explanation of what the organization was intended for. Again, handouts were available to those who chose to take them. It is common practice to distribute information during roll calls, either in the form of written documents and/or oral presentations about community events and/or organizations concerned with connection to the law enforcement activities. Some of that information is related to religious organizations. Attached to the brief as Exhibit 101 are copies of postings which are placed on the roll call bulletin board. Attached as Exhibit 102 are examples of some communications from the Sheriff's Department, which are read and posted at the roll calls. As reflected in Exhibits 101 and 102, those items may concern charitable events,

social events, religious events and/or religion-related charities.

In addition to the types of activities reflected in Exhibits 101 and 102, the plaintiff labor organization is permitted to make presentations during roll call relative to the status of collective bargaining. Additionally, individual candidates for union office are allowed to make presentations in support of their candidacy at roll calls. The purpose of the roll call is not solely limited to communications relative to direct work-related matters. The roll call is viewed as an opportunity for the sheriff and upper level management of the department to communicate with deputies. Neither of the individual plaintiffs in this matter were present at the Leadership Conference.

INTRODUCTION TO ARGUMENT

Plaintiffs contend that the County and the Sheriff engaged in conduct which violated both the Free Exercise Clause and the Establishment Clause of the First Amendment to the United States Constitution by inviting two representatives of the “Fellowship of Christian Centurions” to speak at the Leadership Conference and subsequently to appear at various roll calls conducted at different locales.

Defendants acknowledge that the body of case law surrounding “Establishment Clause” matter is complex. This case, however, is clearly not a close call under either provision. Further, under established precedent, defendants were constitutionally obligated to allow the Fellowship to appear at roll calls and ran a substantial risk of violating the organization's First Amendment right, had they done so.

Our argument follows.

I. THE DEFENDANTS' CONDUCT DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The establishment clause provides that Congress “shall make no law respecting an establishment of religion.” U.S. Const. amend. I. The clause is violated when a governmental practice or policy “either has the purpose or effect of ‘endorsing’ religion.” *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592, 109 S.Ct. 3086, 106 L. Ed. 2d 472 (1989).

What constitutes an “endorsement” of religion can be a vexing question. The answer, however, is not the absolute sterility suggested by plaintiffs in their brief and argued with selective quotations from Supreme Court opinions from the ‘50’s. The modern interpretation of the Clause requires neutrality on the part of government but does not bar all governmental preference for or recognition of religion. *Van Orden v. Perry*, ___ U.S. ___ n. 3, 125 S.Ct. 2854, 2860 n.3, 162 L. Ed. 2d 607, 615 n.3 (2005).

While plaintiffs cite to *Zorach v. Clausen*, 343 U.S. 306, 72 S.Ct. 679, 96 L. Ed. 2d 679 (1952) in support of their absolutist position, in fact even then the Court acknowledged the role of government in its relation to religion as follows:

“[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”

343 U.S. at 313-14. The U.S. Supreme Court has recognized that “religion has been closely identified with our history and government.” *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212, 83 S.Ct. 1560, 10 L. Ed. 2d 844 (1963).

In analyzing an Establishment Clause claim, the standard to be applied is set forth

in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L. Ed. 2d 745 (1971). Under *Lemon*, a governmental act does not violate the Establishment Clause if the act has a non-religious purpose; if its principal or primary effect is one that neither advances or inhibits religion and if it does not foster “an excessive entanglement with religion.” *Id.* at 612-13.

The *Lemon* decision has been often criticized and sometimes disregarded but remains viable for purposes of this matter. *See, Books v. Elkhart County, Ind.*, 401 F.3d 557, 862, (7th Cir. 2005).

The first step is the question of whether the two appearances by the Fellowship constituted a “secular” or non-religious purpose. That standard does not require that the government’s purpose be “unrelated to religion” but rather requires a finding that there is “no question that the statute or activity was motivated wholly by religious consideration.” *Books supra* at 863. (Emphasis added). Here, the primary purpose of the Sheriff, in inviting the Fellowship, was to make officers aware of an available resource. Information on the availability of a peer support group for deputies is clearly a non-religious purpose. The fact that the organization itself has a religious or faith-based underpinning does not convert this action by the government into a religious purpose. The speakers at the program organized by the Fellowship were City Police Chief Heggerty and former Packer player John Anderson, hardly religious figures. To be sure, the program was being held at a church “fellowship hall” and references to Christianity were contained in the handout and the brief presentation. This was not, however, a prayer service or other obvious religious presentation. The evidence does not and will not establish that the purpose of the presentation was “motivated wholly by religious

considerations.”

The second inquiry under *Lemon* concerns the question of whether the government’s action has the principal or primary effect of advancing or inhibiting religion. In making this inquiry, the standard applied is whether “an objective reasonable observer aware of the history and context of the community and forum . . . would fairly understand the display to be a government endorsement of religion.”

Books, 401 F.3d at 867 (internal quotations omitted).

It is also important to remember that the question is not whether one person or one group might be offended:

“The endorsement inquiry is not about the perception of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe.”

Id. citing, *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 779, 115 S.Ct. 2440, 132 L. Ed. 2d 650 (1995) (O’Connor, J. concurring).

Would a reasonable and objective observer view a five minute presentation about a faith-based peer support group as an endorsement of religion by Milwaukee County or the Office of the Sheriff? Particularly when viewed in the context of other fairly common religious references from a variety of different faiths, we think the answer is obviously, no. The notion that the Sheriff by inviting two people who were in turn inviting others to attend an organizational meeting somehow equates to an endorsement, is nonsense.

According to the court in *Books*, “[T]he Establishment Clause is not violated when government teaches about the historical role of religion.” We submit that the same rationale applies to the government alerting people about the availability of a particular

opportunity, be it religion-based or not.

Defendants have clearly met their burden under *Lemon*.

II. PLAINTIFFS HAVE NOT STATED A CLAIM UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Although closely related to the Establishment Clause, the Free Exercise Clause “guards the individual’s practice of her own religion against restraint by the government.” *Venters v. City of Delphi*, 123 F.3d 956, 970 (7th Cir. 1997). Unlike the Establishment Clause, the Free Exercise Clause is predicated upon proof of coercion. *Id.* The only hint of any coercion is the fact that the two individual plaintiffs were required to attend roll call and hear the presentation. There is not one shred of evidence that their employment or any aspect thereof was conditioned upon their “willingness to subscribe to particular religious principles or to any religious belief at all”. *Id.*

Plaintiffs have no claim under this provision of the First Amendment.

III. THE SHERIFF COULD NOT HAVE CONSTITUTIONALLY EXCLUDED A PRESENTATION BY THE FELLOWSHIP ON THE GROUNDS THAT THE ORGANIZATION WAS PROMOTING A RELIGIOUS BELIEF.

Given the fact that the Sheriff (and others before him) had permitted presentations by charitable organizations to roll calls, a bar to the Fellowship, based upon its Christian underpinning, would have constituted unlawful “viewpoint discrimination”.

In *Good News Church v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001), a New York public school adopted a community use policy which permitted “instruction in any branch of education, learning or the arts” and made the school available for “social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community provided that such uses shall

be nonexclusive and shall be opened to the general public”. The Good News Church which sought access to the school facilities, is a “private Christian organization” for children ages 6-12 which intended to present after school programs involving “Bible lessons” and “memorizing scripture”. The school barred the group pursuant to its policy which prohibited use “by any individual or organization for religious purposes”. The Supreme Court concluded that the club’s purpose of “teaching morals and character” would have been a permitted use under the school’s policy and, therefore, excluding the club because of its religious character constituted unlawful viewpoint discrimination and violated the club’s First Amendment rights.

Here, clearly the organization of a group of police officers who intended to provide support and counseling to fellow officers was properly a subject appropriate for publicity at roll calls. Obviously, the plaintiffs would have had no objection to publicity surrounding such a group but for their religious perspective. As the Court made clear in *Good News*, “speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that subject is discussed from a religious viewpoint.”

The Seventh Circuit addressed the subject in *DeBoer v. Village of Oak Park*, 267 F.3d 558 (2001). In that matter, the Village adopted a policy concerning the use of the Village Hall, which limited it to organizations involved in a “civic program or activity” which did not espouse or promote a particular viewpoint. The plaintiff sought and was denied use of the facility to organize a “National Day of Prayer”. The Court found that the Village Hall (like the school in *Good News*) was a “limited public forum” and that the government’s burden in sustaining restrictions on its use is lower than in the case of a

public forum. Nevertheless, even in a limited public forum, the government's restrictions on use must be "viewpoint neutral and reasonable in light of the purpose served by the forum." 267 F.3d at 566. In the view of the Seventh Circuit, the government must be viewpoint neutral and may exclude a speaker.

"[I]f he wishes to address a topic not encompassed within the purpose of a forum or if he is not a member of the class of speakers for whose especial benefit the forum was created (the government) violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject."

Id. at 568 citing *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 806 (1985).

Here the Fellowship was addressing a problem or at least a perceived need that law enforcement officers may have the need for support and counsel in the course of the difficult job they hold. If the limited forum of a roll call was open to other charitable and civic organizations, the Fellowship's religious character could not constitutionally form the basis for excluding their request to appear and publicize their service.

To be sure the limited nature of the "forum" does not require that any organization remote to law enforcement be entitled to appear or even law enforcement related commercial enterprises. The Fellowship, however, falls squarely with the category of law enforcement or community based groups who have been permitted to address roll calls. If the Village of Oak Park could not constitutionally deny access to a prayer service regarding civic issues, we think it unlikely that the Sheriff could deny access to a faith-based counseling service for law enforcement personnel.

Also instructive is the decision in *Tong v. Chicago Park District*, 316 F. Supp. 2d 645 (N.D. Ill. 2004). There, the Park District operated a "Buy-a Brick" fund raising

effort in which the public could purchase bricks on a park walkway and inscribe personalized messages. The plaintiffs sought to purchase a brick and inscribe it with the message, “Jesus is the cornerstone”. The court concluded that rejection of the message violated the plaintiff’s First Amendment right to free speech. *Id.* at 653.

In determining that Park District engaged in unconstitutional viewpoint discrimination, the court focused on the question of whether the religious message fell within “the included subject matter” which was acceptable under the brick program engravings. *Id.* at 656. While no formal policy was in place, the District accepted “commemorative messages” which “expressed something important to the donor’s family.” *Id.* Accepting messages commemorating favorite cats and wishes for “Peace on Earth” was a sufficient basis for the court to conclude that the Park District could not prevent a religious statement on a topic that other speakers are free to discuss. *Id.*

In our case, the Sheriff could not permit the representatives of Big Brothers – Big Sisters to solicit volunteers for its program while excluding the Fellowship, solely because of its religious perspective.

The Sheriff could not escape his responsibility to the Fellowship by adopting a uniform rule barring any religious references or content from any roll call speech. Such a policy would not regulate viewpoints – “it would simply eliminate one subject, religion; from the subjects that could be discussed in this nonpublic forum”. *Grossbaum v. Indianapolis – Manor Bldg. Authority*, 63 F. 3d 581, 590 (7th Cir. 1998).

The Establishment Clause does not compel the utter absence of any reference to religion in Milwaukee County facilities, rather it requires neutrality. As the Court observed in *Rosenberger v. Rector and Visitors of University of Pennsylvania*, 515 U.S.

819, 839, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), the:

“Guaranty of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies extends benefits to recipients whose ideologies and viewpoints including religious ones, are broad and diverse.”

The policies and practices of defendant Sheriff Clarke and his predecessors are absolutely consistent with that language.

CONCLUSION

This claim is replete with problems relative to a grant of preliminary injunctive relief. There are obvious questions relative to the standing of both the plaintiff union and the two individual deputies. There is an obvious mootness problem in light of the fact that the complained of event has past.

More importantly, however, the conduct complained of simply does not rise to the level necessary to state a claim for a violation of either the Establishment or Free Exercise Clauses. The case law clearly authorizes the event which took place here.

Furthermore, once the Sheriff’s Department opens the door in the form of creating a limited public forum available to charitable and community groups to make presentations, it cannot exclude religious themed events solely on the basis of their religious connection. To do so violates the rights of the Fellowship itself.

We urge the denial of the request for injunctive relief.

Dated at Milwaukee, Wisconsin this 9th day of June, 2006.

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