

Viewpoint Neutrality Training for UW System SUFAC Advisors

UWM Office of Legal Affairs

Current as of August 2011

Introduction

- Although the *Southworth* (*Southworth v. Board of Regents of the Univ. of Wis. System*, 529 U.S. 217 (2000)) case name is used frequently in the context of the distribution of student segregated fees, it is important to understand what the Southworth line of cases really means so that the students involved in this process can ensure that actual funding decisions comply with constitutional mandates.

History of *Southworth*

- A group of concerned students challenged UW-Madison's allocation of segregated fees, claiming that it was unconstitutional to compel them to financially support groups that espoused political and ideological views with which they did not agree.
- A court ruled that the fee system in place at that time was unconstitutional on the grounds that the process was not operated in a viewpoint-neutral manner.
- "Viewpoint neutrality" means that the viewpoint espoused by the group is not taken into consideration when making funding decisions, which violates the First Amendment right to the freedom of speech and association.
- Absent a refund or opt-out mechanism, Madison's then-current funding system constituted compelled speech because it required students to financially support political and ideological groups with which they disagreed.

Southworth History – Continued

- The University appealed to the U.S. Supreme Court, which issued a decision in March 2000. The Court found that the fee system was constitutional as long as the distribution was viewpoint neutral.
- The Court also noted that referenda (which had been used to determine, by popular vote, particularly controversial funding questions, i.e., should a portion of fees be used to fund a group's particular project?) probably wouldn't pass the viewpoint neutrality test and remanded the issue to the district court to address.
- Then-UW System President Lyall subsequently issued a policy directive prohibiting the use of referenda to distribute fees.

Southworth History – Continued

- In February 2001: The UW Board of Regents amended Financial and Administrative Policy Paper F20 (now F50). The changes included the following requirements:
 - describing criteria for the allocation of Segregated University Fees
 - creating a detailed record of deliberations
 - providing Registered Student Organizations (“RSOs”) written reasons for funding denial
 - providing mechanisms for avoiding conflicts of interest by students involved in the allocation process
 - establishing an appeal process within student government for alleged VPN violations
 - providing for an appeal to the chancellor
 - disallowing student referenda, directly or indirectly

Southworth History – Continued

- In a subsequent related case, a court ruled that Madison's segregated fee funding system is constitutional as long as students do not have "unbridled discretion" in the allocation of student fees.
- Madison's system avoided unbridled discretion because of objective/viewpoint neutral criteria for evaluating fee requests and a comprehensive appeals process. The court also found it helpful that the student government participated in viewpoint neutrality training.
- However, the Seventh circuit found problematic:
 - absence of criteria for funding travel grants
 - considering the length of time an organization received funding
 - funding criteria that considers amount of organizations past funding to determine eligibility for funding

Practical Application of Decisions

- What does it mean to operate in a viewpoint neutral manner?
 - May NOT consider the viewpoint espoused by the group
 - Decision makers cannot have unbridled discretion – there must be objective rules in place
 - Checks and balances must be in place: appeal process, including appeal to Chancellor
 - Compare grant amounts to determine whether similar RSOs were treated equally (be careful about what “similar” means). Similarity should be judged by requests, not the organization’s purpose

Practical Applications- Continued

- Establish eligibility criteria that are neutral on their face: must be unrelated to viewpoint/content of group's speech and do not have effect of excluding unpopular minority viewpoints (e.g., must have X number of members to qualify for funding (different than requirements to organize))
- Most importantly, consider use of the funding application and attached budget(s), and apply common sense to those documents to determine whether to grant funding

Practical Applications – Continued

- Potential VPN violations:
 - Ignoring eligibility/funding criteria
 - Considering longevity or past funding (using past funding as the minimum the group can receive for next year)
 - Considering the purpose of group, its members' opinions or political activities, success of group's mission

Practical Applications - Continued

- Student Affairs staff's role:
 - If you sense there are viewpoint neutrality issues, talk to the students and ask questions. Make sure they can be fair.
 - Students should recuse themselves from part or all of the process if they cannot be fair.
 - Training is not intended to teach students how to be savvy about avoiding viewpoint neutrality rules. If they can't provide their actual reasoning on the record, they should not be relying on the reasoning.

Test

1. A new RSO applies for funding. During deliberations, a student involved in the funding process says that he does not want to fund the organization because he does not know what the organization will really do with the money; it has no track record. Is this permissible under viewpoint neutrality?

A: No. This comment implicitly penalizes the group for being new. Under viewpoint neutrality, it is impermissible to consider a group's longevity. When in doubt about a request, the students should ask the group questions about it. What will it do with the money? How did it come up with the budget?

Test, cont.

2. A member of the SUFAC knows members of an RSO that is requesting funding and tells them not to worry about funding because he is sympathetic to their cause. Is this a potential viewpoint neutrality violation?

A: Yes. The lesson from this is not that the statement should be avoided (although it should). Rather, the more important lesson is that the person making the statement should consider whether he can vote in a neutral manner because of his views. If he can, he should set his personal views aside and vote based upon the request being made and whether the request is supported by adequate need, documentation, and funding and whether it complies with funding criteria. If not, he should remove himself from deliberations concerning this group's request.

Test, cont.

3. Of 50 RSOs applying for funding, six submit late applications. The SUFAC wants to extend the deadline for 2 because SUFAC members are friends with members of those two organizations and not with the others. Is this a potential viewpoint neutrality problem?

A: Yes. The bylaws, and deadlines set forth within them, should be strictly applied. Exceptions made to the bylaws should be made only in the rarest of cases, and then only after consultation with Students Affairs staff (who, presumably will consult with legal counsel). Exceptions made for one group, if ever made, should generally be made for all similarly situated groups.

Test, cont.

4. Is it OK to deny funding to a group if there is not enough money to go around?

A: Yes. However, take care when denying money to a group or not fully funding a group's request. It is OK for students to prioritize spending (transportation is more important to students than health issues or vice versa, so groups offering such services may receive more funding if there isn't enough funding to give all groups all the money they request). However, groups should not be PENALIZED because of viewpoints they represent ("I don't agree with Democrats/Republicans") or because a majority of students does not support such a viewpoint ("No one believes that!")

Test, cont.

5. Is it OK to deny funding to a group if the request seems excessive for the proposed event/operation?
 - A: Yes. Is a group requesting \$500 for paperclips? Then yes, it makes sense to ask more questions, and if a group cannot support its request for a certain dollar amount, it is OK not to fully fund the request. But, again, take care, and make sure that the request is being denied for viewpoint neutral reasons.

Test, cont.

6. May the SUFAC deny a request because fewer students will benefit from it?
- A: No. In general, the SUFAC should not consider the size of a group. However, it may be OK to consider what the group will accomplish with the money from a budgetary standpoint. For example, will one group spend \$10,000 on 2 students but another group \$12,000 on 150 students? You could deny funding to the first group based on this comparison (but are not required to, especially if there is a reason that one activity is so expensive). If you do deny funding on this basis, do not take direct account of the number of group members or the purpose of the group, but rather, base your decision on the relative benefits that can be achieved with the proposed budget.

Test, cont.

7. May a student participate in SUFAC deliberations if the student used to be a member of an organization that is requesting funding?

A: Yes, unless the bylaws provide otherwise. If the student participates, s/he should take extra care to ensure that s/he is deliberating in a viewpoint neutral manner. If the student is currently a member of a group (except student government) that is requesting funding, s/he should recuse her/himself from the eligibility and funding deliberations for that group in order to avoid any actual or apparent impropriety.

Test, cont.

8. A student knows that another SUFAC member has violated viewpoint neutrality. Should s/he report this?
- A: Yes. First, s/he should raise the VPN violation while it can potentially be cured. Either the member can remove himself or be removed from further deliberations as to the allocation at issue (and/or be impeached, if applicable) and/or the issue may be cured by the fact of discussing the offending statement or statements. If this is not sufficient to cure the violation, it should be raised at the time the Senate votes on the SUFAC's allocations so it can be cured at that time. Finally, if the Senate is unable to cure the violation, it should be cured on appeal. However, the best way to address the violation is to raise it as soon as possible.

Test, cont.

9. The students are not sure what a specific SUFAC Bylaw provision means. May they ignore it?

A: No. They should seek guidance from the SUFAC Chair and/or Student Affairs staff.

Test, cont.

10. A student is frustrated with the SUFAC process and would like to quit. Should s/he?

A: No. In general, the students should attempt to work through the SUFAC process as best as possible, even if there are disagreements about funding decisions. In some cases, abandoning the process may cause viewpoint neutrality problems, and it is important for the students involved in the SUFAC process to remain vigilant about VPN to ensure that the process complies with constitutional mandates.

Test, cont.

11. If students fund one group, must they fund all similar groups?

A: No. For example, students can fund the Campus Republicans but not the Campus Democrats as long as viewpoint has not been considered. Different groups may propose different activities, and there may be legitimate reasons for denying funding to these activities completely unrelated to viewpoint. For example, students can fund the Campus Republicans but not the Campus Democrats if the Democrats' budget does not provide adequate justification for the request.