



Request for Interpretation: ASUW By-Laws §§ 5.02 (1) (C), 5.02 (1) (D)

Opinion of the Judicial delivered by the Chief Justice. Justices Helvey, Compton, Swaney, and Thompson joined.

Background

On September 26, 2023, Senator Gabe Saint submitted a request for interpretation (hereinafter RFI) to the ASUW Judicial Council (JC) regarding § 5.02 (1) (C), (D)[1]. In the request, Senator Saint asks two questions. First, “does subsection C limit the free expression of members of ASUW?” Second, “Do subsections C and D contradict each other?”

Senator Saint first argues that § 5.02 (1) (C) is ambiguous and that reasonable minds may differ on the meaning of “discrimination.” Senator Saint then argues that § 5.02 (1) (C) is an unconstitutional restriction of free expression and posits that this section could lead to litigation.

Senator Saint next argues that § 5.02 (1) (C) may have a chilling effect on the expression of ASUW members. Senators may be fearful to share their opinions and views because they can be “popped”[2] by other senators who use § 5.02 (1) (C) as a cudgel[3]. Saint then asks, “How can people in ASUW freely confront each other and exchange ideas if something negative can be labeled as discriminatory?”

Finally, Senator Saint argues that § 5.02 (1) (C) is in direct conflict with § 5.02 (1) (D). He posits § 5.02 (1) (D) intends to welcome all views, but that some views may be considered discriminatory and are barred by § 5.02 (1) (C).

Senator Saint concludes by asking the Judicial Council to strike “I will not tolerate language” from § 5.02 (1) (C). He claims that people can find discrimination in many places where they are left to rely on their subjective interpretations.

The Judicial Council met, and arrived at a decision for this request on October 4, 2023. We have chosen to reframe the issues and begin with the question of whether § 5.02 (1) (C) and § 5.02 (1) (D) are contradictory.

1. § 5.02 (1) (C) and §5.02 (1) (D) are not contradictory

§ 5.02 (1) (C), (D) provides:



1. As an elected and/or appointed *representative* of the Associated Students of the University of Wyoming Student Government (ASUW):

C. I will not tolerate language or actions that may discriminate *against* or discredit any individual student, group of students, or student organization(s).

D. I will endeavor to allow the presentation of all views, however diverse, of any student, group of students, or student organization(s) or subject, which may come before this governing body.

(emphasis added). Senator Saint misconstrues the language of the By-Laws in his RFI. He argues that a view in and of itself may be perceived as discriminatory. This is incorrect under § 5.02 (1) (C). § 5.02 (1) (C) is directed toward speech or actions that discriminate *against* an individual or group. Only those words or actions targeted toward specific individuals or groups violate § 5.02 (1) (C).

Where a member of ASUW shares a controversial opinion that is not targeted toward an individual or group, they have not violated § 5.02 (1) (C). Members of ASUW may rest assured that the normal political debates over policy matters will not violate § 5.02 (1) (C) unless their words or actions target an individual or group.

This raises a secondary question: what constitutes discrimination against an individual or group? Neither the By-Laws nor the ASUW Constitution define the term “discriminate.” Without a definition in the By-Laws, we will use the plain and ordinary meaning of the language. We turn to the dictionary to do so. In doing so, we will not presume that the authors of the By-Laws intended § 5.02 (1) (C) and § 5.02 (1) (D) to be contradictory. Where a definition can be used to avoid a contradiction within the By-laws, we will adopt it.

The Cambridge Dictionary offers the following definition of discriminate: “to treat a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their race, gender, sexuality, etc.” *discriminate*, *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/discriminate> (last visited Oct. 4, 2023). We accept this definition.

We find that § 5.02 (1) (C) has intended to use this commonly understood definition of “discriminate.” Incorporating this definition means that § 5.02 (1) (C) requires worse treatment of an individual, group, or student organization based on race, gender, sexuality, etc. An individual may be biased against a person or group of students based on race, gender, sexuality, or other immutable characteristics. Once a person speaks out or acts against an individual based on these characteristics, their view becomes discrimination. It is the harmful impact toward others that transforms a viewpoint into discrimination. Further, this harmful impact provides clarity on the difference between a “view” and discrimination. § 5.02 (1) (D) welcomes diverse views, and because discrimination is more



than a view, § 5.02 (1) (C) and § 5.02 (1) (D) are harmonious.

Having found a harmonious interpretation of § 5.02 (1) (C) and § 5.02 (1) (D), we refuse to accept Senator Saint's request to strike "I will not tolerate language" from the By-Laws. § 5.02 (1) (C) shall continue to read as follows: "I will not tolerate language or actions that may discriminate against or discredit any individual student, group of students, or student organization(s)."

2. § 5.02 (1) (C) is a constitutional restriction on freedom of expression

a. The Department of Education prohibits discrimination by universities

Senator Saint's second question raises the issue of whether § 5.02 (1) (C) is an unconstitutional restriction on freedom of expression. Accepting his contention would mean that those employed by a university could engage in discrimination, leading to our first sub-issue: May a university engage in discrimination? A quick observance of federal law answers this question in the negative.

Title IX prohibits universities that receive federal funding from discrimination on the basis of sex. 20 U.S.C. § 1681. As institutions, universities act through their employees. Allowing their employees to discriminate on the basis of sex would place universities in receipt of federal funds in violation of Title IX. Therefore, universities must ensure that their employees refrain from discrimination. Other titles prevent different forms of discrimination exist, but Title IX demonstrates the requirements placed on universities to prevent their employees from engaging in discrimination.

b. The US Constitution allows public employers to impose restrictions on free expression

In *Garcetti v. Ceballos*, the U.S. Supreme Court outlined a two-prong test to determine whether a speech restriction imposed by a government entity on its employees violates the First Amendment. 547 U.S. 410 (2006). This test first asks whether an employee speaks as a citizen on a matter of public concern. If the answer is no, there is no First Amendment protection. If the answer is yes, the question then becomes whether the government "entity had an adequate justification for treating an employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. at 418. Where an adequate justification exists, there is no First Amendment protection.

ASUW exists to "promote the general welfare of all students at the University, to represent the concerns of the student body, and to provide for and regulate such other matters." ASUW Const. preamble. Having members of ASUW engaged in hateful or discriminatory



conduct would defeat ASUW's stated purpose to promote the general welfare of *all* students. As the representative body of the student population, ASUW may hold itself to a code of ethics to better achieve this purpose. They may choose to require professional conduct from their members to preserve the office's character and to prevent unnecessary controversies. ASUW and, by extension, the University, would be significantly harmed should one of its representatives engage in discriminatory behavior. Further harm would follow should ASUW be unable to remove the representative. We consider this an adequate justification under *Garcetti* to impose certain limits on ASUW members' freedom of expression.

Having found that the University of Wyoming does have an adequate justification for treating its representatives in ASUW differently from any other member of the general public, we find that § 5.02 (1) (C) is constitutional. Even if the restriction fails under a constitutional analysis, it survives because ASUW members voluntarily accept the code of ethics freely and without coercion.

c. ASUW members voluntarily agree to conform to the code of ethics without coercion

ASUW members have voluntarily consented to abide by the code of ethics, thus making the constitutional issue moot. Members of ASUW are given the privilege to serve by article four of the ASUW constitution. Should a student choose to join ASUW, they must agree to the code of ethics in the By-Laws. This occurs when a candidate agrees to the candidate responsibility statement, which provides:

"I verify, that I am, to the best of my knowledge, qualified to run in the ASUW Elections. I have read all the rules governing the ASUW Elections, and understand I am responsible for abiding by these rules. I will *conduct myself* in a fair, democratic fashion, representative of the ASUW Student Government *consistent with the ASUW Code of Ethics.*"

ASUW Elections Policy § 1.05 (4) (A) (emphasis added). An exchange in an enforceable agreement may include relinquishing a legal right. See *SH v. Campbell County School Dist.*, 2018 WY ¶ 6, 409 P.3d 1231, 1233 (2018). Where one party chooses to forbear a legal right in exchange for something else as part of an agreement, courts will enforce it as a valid contract. This includes rights to certain forms of expression legally protected by the First Amendment.

For example, nondisclosure agreements (NDAs) have long been recognized as valid. Parties to NDAs waive their rights to free expression on specific subjects, such as intellectual property or company trade secrets. In consideration of waiving these rights, they are offered payments or jobs by the other party to the NDA. These agreements



facilitate mutually beneficial arrangements and lead to cooperation where it would otherwise be too risky. Without enforceable restrictions on expression, companies would operate in constant fear that their trade secrets would be betrayed without consequence.

So, too, do members of ASUW agree to certain restrictions on their legal right to free expression. Should they choose not to abide by the code of ethics, they will be subject to the consequences they have also agreed to. ASUW members who find this overly burdensome may resign and be free from the restrictions within the code of ethics.

Finding that ASUW members may be subject to the code of ethics due to a contractual relationship, we find no issues leaving § 5.02 (1) (C) as written.

Conclusion

Senator Saint's request for interpretation has been provided in the foregoing. We reject the request to strike language from the By-Laws and find § 5.02 (1) (C) constitutional. Additionally, ASUW members consent to abide by the code of ethics and are bound by their agreement.

[1] In the request form itself, Senator Saint requests the JC to interpret ASUW Bylaws § 6.02 (C), (D). While § 6.02 exists, it does not contain subsection (D). § 6.02 (6) (C) does exist but is out of context with the RFI. § 6.02 addresses impeachment procedure. Contextually, it is clear from the request that Senator Saint intends to refer to § 5.02 (1) (C), (D). Senator Saint identifies specific language found in § 5.02, including "I will not tolerate language," "all views," and "language that discriminates or discredits another student, group of students, or student organizations." Given this context, we are confident in interpreting the section at issue.

[2] Senator Saint's choice of words adds a certain color to his RFI that we wish to preserve. We believe "popped" to mean removed from office on the basis of an ethics code violation.

[3] Senator Saint also refers to an incident he heard about second-hand in which a senator was "popped" in 2019 for saying negative things about the student organization: TPUSA. We have not been provided any specific information about this alleged incident and will not incorporate it into our consideration of the present RFI.



Appendix

Request for interpretation:

Request for Interpretation Form

Please submit to asuwjc@uwyo.edu. Following the submission of your request for interpretation, the ASUW Judicial Council will convene and release a decision with ten (10) academic days. The Council intends to release a decision quicker, but the decision is still binding if the timeline is met.

Details

Name: Senator Gabriel R. Saint Date: 9/26/23

Document(s) being Interpreted: ASUW Bylaws

Clause(s) Interpreted: Article 6, S 6.02, Subsec C & D

Questions

Question #1: Does Subsection C limit the free expression of members of ASUW?

Question #2: Do subsections C and D contradict each other?

Please provide the context in which this request for interpretation arose; please also provide the Council with background on the clause(s) being interpreted (when they were implemented, the legislation that changed them, etc.). You may also provide a written argument to the Council on how it has been interpreted, why the Council should interpret it in such a manner, and the impacts the clause(s) has on the workings of ASUW. Also note that other interested parties may submit briefs of a similar nature as Friends of the Council to advocate for the outcome they would like to see.

Subsection C states that no member of ASUW may use any language that discriminates or discredits another student, group of students, or student organizations. Discriminating action is one thing, but who determines what speech is discriminatory? This is vague and can be abused by certain groups to target another. It is also a violation of civil liberties according to constitutional case law. It opens up ASUW to potential legal action. This clause causes senators to fear speaking out about things in fear that another senator will try to pop them with this part of the ethics code. For example, according to a former JC advisor, a senator and director got popped 2019 for saying negative things about the student organization Turning Point USA, which I now currently head. I think this is wrong and a violation of freedom of speech. How can people in ASUW freely confront each other and exchange ideas if something negative can be labeled as discriminatory?

Subsection D contradicts subsection C because it says all views are welcome, but what if said views are considered discriminatory? Evidently not all views are welcome, especially in a day and age when no

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Joshua Rogers
Chief Justice

one knows what is tolerable. We cannot improve the culture of ASUW and campus if ideas are not allowed to freely be put out into the marketplace of ideas. The purpose of a university is to pursue truth, the things that are good and beautiful. We cannot do that if ideas are passively suppressed.

I think the part in subsection C where it says "I will not tolerate language" needs to be struck from the bylaws. Discriminatory actions can be clearly seen where language is vague and subjective according to any given individual. It is unconstitutional and ASUW is in violation of civil liberties.

Thank you for your consideration!