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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1147**

Collegians for a Constructive Tomorrow,
Relator,

vs.

University of Minnesota,
Respondent.

**Filed April 24, 2017
Affirmed
Reyes, Judge**

University of Minnesota

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for relator)

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Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

REYES, Judge

Relator-student-group challenges respondent's final decision regarding relator's student-services-fee allocation. Because we conclude that respondent's proceedings were regular and respondent allocated fees in a viewpoint-neutral manner, we affirm.

FACTS

Relator-student-group Collegians for a Constructive Tomorrow (CFACT) is a conservative “non-profit, student-led advocacy and education group.” On January 22, 2016, CFACT submitted a funding request for \$174,370 from student-services fees for the 2016-2017 academic year to respondent University of Minnesota (the University) through its Student Services Fee Committee (the SSFC).

CFACT attended and presented its budget at an initial public hearing and provided requested supplemental information to the SSFC. The SSFC issued an initial allocation to CFACT of \$86,875 from student-services fees. The initial allocation included explanations of the allocation for 34 budget items, including CFACT’s campus-organizer position. In the initial allocation, the SSFC explained that it “allocates funds of \$2,000 per academic semester without benefits” for the campus-organizer position. The initial allocation, however, contained a clerical error that affected the total initial allocation to CFACT because the SSFC subtracted \$2,600 from the requested budget rather than subtracting \$26,000 for the salary and \$6,300 for the benefits associated with the campus-organizer position.

The SSFC held an additional public hearing, which CFACT attended, for student groups to discuss the initial allocations. The SSFC then sent CFACT notice of its final allocation of \$71,818. In the final-allocation letter, the SSFC informed CFACT of the clerical error that affected the total initial allocation. The allocation of \$2,000 per semester for the campus-organizer position in the final-allocation letter was consistent with the explanation provided in the initial allocation.

Following the final-allocation letter, CFACT's president notified the SSFC of CFACT's intention to appeal the final allocation. In its notice, CFACT requested access to documents and audio files containing the SSFC's discussions and rationales for the initial and final allocations. CFACT also requested an extension on the due date for the appeal.

The next day, the SSFC denied CFACT's request for an extension. The SSFC also provided CFACT the requested documents; however, the requested audio files were not made available until after the deadline to file an appeal had passed. To remedy this delay, the SSFC notified CFACT that it extended the deadline for CFACT to appeal by four days. CFACT filed its appeal before the original appeal deadline, claiming that the SSFC violated CFACT's right to due process, the SSFC did not exhibit viewpoint neutrality in its allocations, and the appeal process was not "real or fair." CFACT did not file a new or amended appeal during the extended deadline period.

The Student Services Fee Appeals Committee (the SSFAC)¹ denied CFACT's request for a formal appeal and affirmed the SSFC's decision. CFACT then appealed the SSFAC's decision to the Vice Provost for Student Affairs who also affirmed the SSFC's decision. This certiorari appeal follows.

¹ The SSFAC is made up of five voting members, three of whom did not attend the SSFC deliberations, and one non-voting ex-officio member.

DECISION

CFACT argues that the University failed to provide it with due process of law by failing to give CFACT notice and an opportunity to be heard and that its decision was not viewpoint neutral.² We address each argument in turn.

On certiorari appeal, this court's review

is limited to an inspection of the record of the administrative tribunal, and this court is confined to questions affecting the regularity of the proceedings and, as to the merits of the controversy, whether the determination was arbitrary, oppressive, unreasonable, fraudulent, made under an erroneous theory of law, or without any evidence to support it.

Chronopoulos v. Univ. of Minn., 520 N.W.2d 437, 441 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). This court generally gives deference to university decisions.

Tatro v. Univ. of Minn., 800 N.W.2d 811, 815 (Minn. App. 2011), *aff'd on other grounds*, 816 N.W.2d 509 (Minn. 2012); *see also Bd. of Regents v. Reid*, 522 N.W.2d 344, 346 (Minn. App. 1994) (“[The University’s] governing body, the Board of Regents, is generally free of legislative, executive, or judicial interference as long as it properly executes its duties.”), *review denied* (Minn. Oct. 27, 1994).

I. The University’s proceedings were regular.

CFACT argues that the University violated due process because the SSFC failed to give CFACT notice of the clerical error in the initial allocation and denied CFACT the

² CFACT complains in its reply brief that the University’s directive to allocate a set amount of student-services fees denied it due process because the directive created bias in the appeal process. We do not consider arguments first raised in a reply brief. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887 (Minn. 2010) (noting that raising issues for appeal in reply brief is not proper practice).

opportunity to be heard by challenging the initial allocation. CFACT further asserts that neither the SSFC's decision nor the subsequent decisions on CFACT's appeals made explicit findings on the denial of funding. In light of this court's limited review on a certiorari appeal, we construe CFACT's argument to be a challenge to the "regularity of the proceedings" involved in the allocation and appeal process for funding from student-services fees. Nevertheless, we are not persuaded.

Notice is satisfied if it "meaningfully inform[s] persons so that they can protect their interests" and make informed choices. *Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 834 (Minn. 1984). Here, the SSFC declined CFACT's request for a \$30,000 salary plus benefits for the campus-organizer position and awarded CFACT a \$4,000 salary for this position. In the initial allocation, the SSFC explained that it "allocates funds of \$2,000 per academic semester without benefits" for the campus-organizer position. In the final allocation, the SSFC noted that it made a clerical error on the campus-organizer position that resulted in an inflated total initial allocation. The final allocation included the same language contained in the initial allocation that explained how much funding to be allocated to the campus-organizer position. Thus, CFACT was meaningfully informed of the SSFC's denial of its request for \$30,000 plus benefits.

With respect to the opportunity to be heard, between the initial and final allocations, and in accordance with the student-services-fee-request handbook, the SSFC

held a public hearing on the initial allocation, which CFACT attended.³ After CFACT received the final allocation, CFACT appealed to the SSFAC and then the Vice Provost. The SSFAC decided not to grant CFACT a formal hearing because it unanimously determined that the SSFC “did make mistakes, but ultimately took corrective measures” and “did not violate its own rules.” The Vice Provost supported this decision. Thus, in addition to the public hearing that CFACT attended following the SSFC’s initial allocation, CFACT was provided with the opportunity to be heard twice after the final allocation. Accordingly, the University’s proceedings were regular because it provided CFACT sufficient notice and opportunity to be heard.⁴

II. The University’s decision regarding CFACT’s budget was viewpoint neutral, and, thus, was not arbitrary and capricious.

CFACT argues that the University’s decision regarding its budget was not viewpoint neutral, thereby making it arbitrary and capricious, because (1) the University exhibited unbridled discretion in making its allocation to CFACT by not explaining why it decreased CFACT’s campus-operator funding and “applyi[ng] an unwritten, ad hoc rule to CFACT” and (2) it allocated more funds to a different student group. We disagree.

³ At oral argument, counsel for CFACT acknowledged that “the organization has many leaders, and maybe one person would have had the knowledge [of the SSFC’s clerical error] and others may not have” known about the clerical error at the time of the public hearing that occurred after the initial allocation.

⁴ To the extent that CFACT raises a due-process claim, and assuming without deciding that CFACT has a due-process right to funding from student-services fees, there was no due-process violation because the University provided CFACT with a reasonable opportunity to be heard.

A decision is arbitrary and capricious if it is made without findings or if it violates the institution's own procedures. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 923 (Minn. App. 1994). A student group is not entitled to receive funding, "but when funds are made available, they must be distributed in a viewpoint-neutral manner, absent other considerations." *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 366 (8th Cir. 1988); *Bd. of Regents v. Southworth*, 529 U.S. 217, 233, 120 S. Ct. 1346, 1356 (2000) (*Southworth I*). The University's own procedures require decisions in funding to be made in a viewpoint-neutral manner. "[T]he prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement." *Southworth v. Bd. of Regents*, 307 F.3d 566, 579 (7th Cir. 2002) (*Southworth II*).

A. The University did not exercise unbridled discretion.

CFACT asserts that the University exhibited unbridled discretion in allocating funds from student services fees to CFACT. Unbridled discretion can occur where the policy at issue "was unwritten and, prior to its application . . . , entirely unenforced," such that "there [a]re no standards by which the [University's] officials could be limited." *OSU Student All. v. Ray*, 699 F.3d 1053, 1063, 1065 (9th Cir. 2012). Conversely, evidence of limitations on discretion exists where there are set standards in place for the committee allocating funds, "detailed procedural requirements for hearings," disclosures of funding documents, written statements of reasoning for funding decisions furnished upon request, set deadlines, and an appeal process. *Southworth II*, 307 F.3d at 588.

Here, the record indicates that there are limitations on the University's discretion. The SSFC used the student-services-fee-request handbook, which contained a discussion

about viewpoint neutrality and appropriate factors to consider during deliberations. The handbook stated that “[f]unding decisions may not have any relationship to the particular viewpoint of the group or activity.” The handbook also contained the SSFC’s operating procedures, which detailed hearing requirements. Upon CFACT’s request, the SSFC disclosed initial and final rationales, applications, and budget sheets of all student groups. The SSFC also made available to CFACT the audio files of deliberations and recommendations. Further, the SSFC published a timeline for the funding request and appeal process. Thus, the SSFC’s discretion was not unbridled.

B. The University did not discriminate against CFACT in its funding allocation.

CFACT contends that the University discriminated against its viewpoint because it allocated more funds to Minnesota Public Interest Research Group (MPIRG), a student group that CFACT claims to have modeled itself after but that has a liberal viewpoint. CFACT cites to *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107, 121 S. Ct. 2093 (2001), *Southworth II*, 307 F.3d 566, and *Badger Catholic v. Walsh*, 620 F.3d 775, 777 (7th Cir. 2010), in support of its argument. Here, unlike in *Good News Club*, in which the club was excluded from the school, and *Badger Catholic*, in which six organizations were denied funding, the SSFC provided CFACT with funding. For the 2015-2016 academic year, CFACT received \$92,452 and MPIRG received \$113,267 in funding. For the 2016-2017 academic year, CFACT requested \$174,370 in funding and received a final allocation of \$71,818. MPIRG requested \$173,267 and received a final allocation of \$88,362. In other words, for the 2016-2017 academic year, CFACT was

allocated 77.7% of the funds it received the previous year and MPIRG was allocated 78.0% of the funds it received the previous year.

CFACT does not cite to any authority indicating that its funding must match that of MPIRG. Moreover, CFACT asserts that it should receive the same funding as MPIRG solely because it “is modeled after MPIRG.” CFACT does not present any other evidence in support of its argument that there is “no good reason” for the difference in funding allocations between MPIRG and itself. In addition, for the 2016-2017 academic year MPIRG was the second-highest-funded student group and CFACT was the third-highest-funded student group. The highest-funded student group received \$89,415 in student-services fees and has a viewpoint similar to CFACT’s. Thus, we have no basis to conclude that the University exhibited viewpoint discrimination against CFACT. Accordingly, the University’s decisions on CFACT’s budget were not arbitrary and capricious.

Affirmed.