
Bovino v. Middlesex County Bd. of Social Services
Cite as 13 *N.J.A.R.* 474

RAY BOVINO,
Appellant,
v.
MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,
Respondent.

Initial Decision: October 28, 1986

Final Agency Decision: December 23, 1986

Approved for Publication: June 12, 1990

SYNOPSIS

Appellant, a welfare worker, was suspended for 20 days on charges of insubordination when he did not comply with his supervisor's direction not to counsel a client against having an abortion. Appellant claimed the disciplinary action violated his First Amendment rights. The matter was transmitted to the Office of Administrative Law for a hearing.

The administrative law judge assigned to the case affirmed the suspension as it applied to appellant's activity in the workplace in violation of his supervisor's orders. Noting that the United States Supreme Court in the *Pickering* and *Connick* decisions upheld the right of public employees to comment on public issues, the judge said nonetheless that appellant's speech in this case was not protected because it related to the client's personal decision about abortion rather than abortion as a public issue. In addition, appellant's actions disrupted the operation of the welfare agency and affected the State's interest in promoting the efficiency of its services. The judge concluded that appellant's First Amendment rights were not violated by the suspension. The sole basis for the suspension was appellant's insubordination and breach of discipline resulting from this violation of his supervisor's direct order.

Upon review, this initial decision was adopted by the Merit System Board.

The Appellate Division affirmed in an unreported decision. (A2634-86-T8, Dec. 24, 1987)

Richard F. Collier, Jr., Esq., for appellant (Norris, McLaughlin & Marcus, attorneys)

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Bernard H. Shihar, Esq., for respondent (Convery, Convery & Shihar, attorneys)

Richard J. Traynor, Esq., for intervenor, Americans United for Life (Traynor & Hogan, attorneys)

Steven F. McDowell, Esq., member of the Wisconsin bar, admitted *pro hac vice*, for intervenor, Catholic League for Religious and Civil Rights

MURPHY, ALJ:

STATEMENT OF THE CASE

This case turns on the delicate balance between the constitutional right of a public employee to express and advocate private moral views and the interest of the government in ensuring that services are provided to the public without undue disruption. The appellant, Ray Bovino, appeals from a 20-day suspension on charges of insubordination and serious breach of discipline based on allegations that he counseled a pregnant welfare client against abortion on religious grounds, contrary to the instruction of his supervisor, and did so both in his official capacity and on his own time. The question presented is whether the action of the respondent, Middlesex County Board of Social Services, in suspending appellant for giving abortion counseling after being directed to refrain from such activity, violated his constitutional rights guaranteed by the First Amendment. For the reasons set forth below, this opinion affirms the suspension as it applies to appellant's activity in the workplace in violation of his superior's order, and dismisses the appeal.

PROCEDURAL HISTORY

The Appellant appealed his 20-day suspension¹ on February 27, 1986, and the matter was transmitted to the Office of Administrative Law as a contested case on March 27. A hearing was held in South Amboy on May 23, and counsel were requested to submit briefs on the constitutional issues. On July 22, 1986, an order was entered allowing the Catholic League for Religious and Civil Rights to participate by filing a brief which was completed on July 11. On July 24,

1. Ten days with and ten days without pay.

the appellant filed his brief on the constitutional issues. Also on that day, a brief was filed by Americans United for Life, which organization was allowed to participate by order of August 27. Respondent's brief was filed on September 8, 1986, and the record was closed on September 13, after a five-day response period.

FINDINGS OF FACT

The facts are not in dispute.

At the time of his suspension, Ray Bovino was an income maintenance worker at the Middlesex County Board of Social Services and was generally responsible for making final determinations as to the eligibility of clients for various public benefit programs. Under the direct supervision of an income maintenance supervisor, appellant collected and analyzed facts enabling him to consider the various standards and complex factors involved in the eligibility determination. Income maintenance workers are specifically responsible for identifying needs and providing individualized assistance appropriate to a variety of specific problems in a wide range of cases without prior approval of the supervisor. In cases involving complex problems, the worker must explore possible solutions with the individuals concerned and recommend plans to a supervisor for suitable programs of supplementary assistance.

In the course of his duties as an income maintenance worker, the appellant had contact with J.M. (hereinafter client), who had applied for public benefits. In addition to assisting J.M. with questions of eligibility, the appellant claimed that on numerous occasions over the course of the year before December 1985, she had discussed with him her concerns for her daughter V.

On December 27, 1985, J.M., then pregnant, came to the Middlesex County Board of Social Services to inquire as to an extension of Medicaid eligibility, which she was seeking in order to terminate the pregnancy. She spoke to Bovino, who was initially unaware of her pregnancy, and was advised by him that she was not eligible for Medicaid. Bovino confirmed this with his supervisor, Deborah Chambers. He then explained to J.M. the basis for ineligibility. When the appellant commented that her pregnancy was the only way she would be eligible for Medicaid, J.M. indicated that she was pregnant. At this point, Ms. Chambers asked Bovino to leave the interview booth so she could privately discuss J.M.'s intentions and need for

benefits. Ms. Chambers left the booth briefly to determine if Medicaid was available for abortion, and she advised Bovino to complete any other income maintenance business matters while she checked the procedure. When Chambers returned to the booth, she overheard a conversation in which Bovino was advising J.M. that she could have the baby adopted rather than aborting the pregnancy. Chambers interrupted the conversation and advised the client that she was eligible for Medicaid and stated that she would get a social worker to assist. At this time, she also indicated to Mr. Bovino that he was to finish any income maintenance business with the client but that he was not to "preach" to her. Chambers then contacted social worker Joan Israel, who attempted to see the client being interviewed by Bovino. When Chambers returned to the booth, she found Bovino and Ms. Israel arguing over who was going to see the client. She advised Bovino that his function as an income maintenance worker was completed, and that the social worker would handle the matter from there. He insisted that he had something else to discuss with the client, but left the booth when Chambers restated her position that his job was finished.

Shortly after that, Chambers again spoke to Bovino and advised him that he should not attempt to change a client's mind if the client came in and requested a service. His response was that it was his responsibility to advise her and to continue attempts to convince her that she should not commit "murder." She advised him that his income maintenance function did not extend to advising or explaining to a client the options and possible social services available for continuing or terminating a pregnancy. He further stated that he intended to continue to persuade the client not to have an abortion and that he would ensure that Ms. Chambers would not find out about his efforts. In response, she advised the appellant that the agency regulations stated that he would be disciplined or fired if he violated her instructions.

Subsequent to this discussion, appellant saw the client in the waiting room and asked her if an appointment had been scheduled for an abortion. She replied that one had been scheduled and cancelled. Bovino then requested that she not schedule another appointment until he could talk to her. According to the appellant, the client indicated some hesitation about the abortion and wished to speak with him.

The next day, the appellant, accompanied by a female friend,

went to the client's home unannounced, and left with her a cassette tape, some literature, and a letter which stated the following:

I want to be fair to you in realizing both sides to your decision. The enclosed literature will help you understand things better.

There also is a place called the Alpha Pregnancy Center that will help you in any way they can. They will even find you a home to live in. Their number is (609) 921-0494. If you want I would be more than glad to take you there Monday night.

Please call me and let me know what you would like to do. I don't want you to make any decision but your own. But I do want to help you as best I can to do what's right in your heart.

The next contact between appellant and the client occurred on December 30, 1985, when she came to the agency to discuss the possibility of putting her daughter V. up for adoption. Bovino asked why she did not place the child in the custody of her parents, and further stated that V. was a gift of God that she should be grateful to have. He also asked her why she was having another child, and claimed that it was not her baby; it was God's baby. There was no discussion during this interview concerning the proposed abortion.

Later that day, the appellant took the client to his parents' home for dinner, and discussed the possibility of going to the Alpha Pregnancy Center to get both sides of the abortion issue. Later that night, the appellant accompanied the client to her parents' home, had another dinner, and engaged in general conversation without any mention of the pregnancy or the proposed abortion. On January 2, 1986, the appellant had further contact with the client and she indicated that there were problems at home and that her parents wanted her out of the house. The appellant responded by contacting a female friend to put her up. He then took her to the Alpha Pregnancy Counseling Center in Pennsylvania, where she was counseled by an individual identified as "Nick," who showed her a picture of a 12-week old fetus and a film, during which the client became upset and asked that it be shut off. Appellant took her to his friend's house, where they talked further about the abortion. She stayed with the friend the next day and the subject of adoption was discussed by the appellant when he returned to the friend's house that evening.

The next contact came shortly thereafter at the appellant's parents' home where the appellant learned that the putative father of the client's unborn child, F.M., had come looking for her at the agency. At this point, appellant took the client to the police station to make a complaint against F.M., who had made various threats

against her. The police report reflects that F.M. had slapped J.M. and threatened to kill her and to perform the abortion with a coat hanger. F.M. apparently was aware of Bovino's role and had complained to the respondent agency as to his interference.

After filing a police report, appellant suggested that the client go to Pennsylvania to stay and have her baby in a home that he had arranged for her. J.M. testified, at this point, that she was reluctant to go to Pennsylvania and intended to enlist in the army after she aborted the child. Appellant picked her up after talking to the recruiter and intended to take her to Pennsylvania. She requested that he stop at her parents' house and let her out of the car, but he declined to do so stating, he claims in jest, that she would have to open the door and jump out of the moving car. The two stopped at the home of the abortion counselor "Nick," and at that time the client stated she did not want to go to Pennsylvania with appellant, and she called her boyfriend F.M. to pick her up. At this point, appellant ceased his efforts to counsel the client on her pregnancy and she obtained the abortion.

Appellant further testified that all contacts between him and the client, beyond his discussions at the welfare office and initial visit to her home on December 28, 1985, were initiated by her. The client does not dispute this. After the client's boyfriend complained to the agency, the appellant was charged with a number of offenses, including insubordination, serious breach of discipline, conduct unbecoming, misuse of official position, and breach of client confidentiality. The last three offenses were dismissed at the departmental hearing on January 28, 1986, with the remaining charges of insubordination and serious breach of discipline sustained.

There is no dispute as to the above facts, and I so **FIND**.

ISSUE

Did the action of the respondent agency in suspending the appellant for providing abortion counseling to a welfare client, as discussed above, violate his constitutional rights?

ARGUMENTS OF THE PARTIES

Appellant first argues that there was no violation of the directive in question because it was limited to activities within the workplace and, as Bovino had no discussions with the client after the "no preaching" directive, there was no violation of this directive. Alterna-

tively, appellant argues that the respondent Board's disciplinary action against him violated his First Amendment rights as enunciated by the Supreme Court in the cases of *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). Under those cases, appellant argues that the subject of abortion is a matter of political, social or other concern to the community, and is not an individual grievance limited to his private interest. In that the respondent agency did not prove any substantial or material disruption to its ability to provide services as a result of appellant's action, he argues that he is protected by *Pickering* and subsequent cases from being disciplined for his actions outside of the office on his own time. Appellant further argues that the "no preaching" directive is facially overbroad and, therefore, unconstitutional, in that it contained no limitations as to time, place, subject matter or other circumstances. The directive was further invalid, appellant contends, because it had an improper religious motivation and was intended to impose pro-abortion beliefs. Appellant further cites the so-called New Jersey conscience law, *N.J.S.A. 2A:65A-3*, which prevents persons from being disciplined for refusing to perform or assist in the performance of abortions or abortion services. Bovino also claims entitlement to back pay, interest and attorneys' fees, pursuant to *N.J.A.C. 4:1-5.5, 5.6*, and case law.

Intervenors also argued that Bovino's suspension violates First Amendment rights because his activities involved commenting on matters of public concern, albeit in a private manner, and did not disrupt the work of the office. The Americans United for Life Legal Defense Fund argued that although Bovino did speak with the client in the waiting room of the welfare board, it was a public place and not part of the workplace. Further, Bovino's actions on the job did not disrupt the functioning of the office. With respect to conversations on his own time away from the workplace, both intervenors argued that these were entitled to constitutional protection because the subject was of public concern, and there was no showing of interference with governmental interests and efficiency in providing public services. Both intervenors stressed that most of appellant's conduct occurred off the job, away from the workplace.

Respondent agency argued, under the balancing test set forth in *Pickering* and *Connick*, that the conduct of the appellant went far beyond the lawful dissemination of information or addressing of matters of public concern. Further, it had a potentially disruptive effect on the Board's operation because it constituted pressure upon

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clients by individual case workers, based upon their political or moral philosophy. Such actions, respondent claimed, also disregard the client's right to confidentiality and further disrupts the public employer's ability to provide necessary public services.

DISCUSSION AND CONCLUSIONS OF LAW

The primary issue here is whether the respondent agency's suspension of the appellant for his activities is invalid because it violated his First Amendment rights. Under the balancing test enunciated by the Supreme Court and the *Connick* and *Pickering* cases, among others, I **CONCLUDE** that the action of the respondent agency in suspending the appellant did not violate his First Amendment rights because his speech did not involve a matter of public concern, and his actions did disrupt the operation of the respondent agency and adversely affected the state's interest in promoting the efficiency of the public services it provides. It is further **CONCLUDED** that the appellant's actions at the workplace in this instance are alone sufficient to support his suspension.

It is reasonably clear from the *Pickering* case and its progeny that the extent to which public employees can be disciplined for making public or private statements turns on both the nature of the statements and their effect on the efficiency of government operations. The essential interest being protected by the First Amendment is the right of public citizens, whether or not they are public employees, to comment on matters of public concern and thereby participate in what is sometimes called the "dialogue of democracy." Public employees who speak of matters of purely private or personal concern are not entitled to the same level of First Amendment protection. See, *Connick v. Myers* at 148. The matters of public concern entitled to First Amendment protection extend to such issues as the allocation of public school funds as in *Pickering*, or racial discrimination practices in public employment as in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). The internal affairs of the district attorney's office which touched on personal employment interests were held not to constitute a matter of public concern by Supreme Court in *Connick*.

In the case at hand, while abortion is undeniably a matter of considerable public concern, the subject of J.M.'s pregnancy is not. As the Supreme Court said in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. _____, 90 L. Ed. 2nd 779 (1986), "Few decisions are more personal and intimate, more properly

private, or basic to individual dignity than a woman's decision . . . whether to end her pregnancy." (90 L. Ed. at 801). Her pregnancy and her personal and intensely private right to end or continue it was the sole subject addressed by the appellant. He was not speaking on the issue of abortion as a matter of general concern, but rather was attempting to intervene in this most intimate and private of individual decisions. While it may be argued that there is public concern in any abortion, the protective veil of privacy has, subject to limitations, been draped over the choice of abortion by Supreme Court decisions, as it has in other matters of procreation and family life. Whether or not J.M. determined to end or continue her pregnancy is therefore not the sort of matter of public concern protected by the *Pickering* line of cases, although abortion in the more general sense might well be.

It is also apparent that appellant's activities on the job disrupted both his working relationship with other employees of the Middlesex County Board of Social Services, as well as the critical service function that the agency is expected to provide to members of the public. Persons entitled to public services are also entitled to seek and receive them in a climate that is not clouded by the personal religious or moral views of public employees, however deeply and fervently they are held. A woman seeking assistance in terminating her pregnancy, or in continuing one for that matter, is entitled to do so without having pamphlets pressed in her hand or proselytizing pushed down her throat. Even if in this particular instance, the welfare client may have, in part, welcomed, or at some points, solicited the appellant's advice and assistance on her private choice to abort or carry, the agency cannot tolerate the chilling specter of having persons in dire need subjected to sermons as they seek public assistance. Accordingly, I **CONCLUDE** that appellant's actions in the workplace in disregarding his superior's directive and continuing to have contact with a client on the subject of her pregnancy justified respondent agency in suspending him for the 20-day period imposed. Although public employees are free to express their views on public matters, within the guidelines established in *Pickering* and following cases, public employment is not intended as a pulpit from which employees may express and advocate their private moral and religious views.² Because of the conclusion that appellant's actions on the job were sufficient to sup-

2. This general rule apparently does not apply to the presidency. See e.g. Teddy Roosevelt ("Bully Pulpit") and more recent precedents.

port the suspension, there is no need to reach the issue of whether his contact with the client on his own time, which she apparently initiated, would also justify the suspension. There are obvious concerns here as to the use of confidential information, such as that of this client's pregnancy, by public employees who wish to intervene in and interfere with their clients' lives. In this instance, it is specifically noted that the charges of breach of client confidentiality and misuse of official position were dismissed after the departmental hearing. The sole basis of this case is insubordination and serious breach of discipline resulting from the appellant's alleged violation of his supervisor's direct order to him.

With respect to that order, appellant argues fatal vagueness and overbreadth. I disagree and **CONCLUDE** that, under the circumstances, instructions given to the appellant not to "preach" to the client were sufficiently clear to put him on notice not to further discuss her pregnancy in his official capacity. It is further noted that the order was limited to the appellant's responsibilities within the agency and did not involve instructions as to activities outside of the office. Given that, I conclude that the direct order given in this instance was not facially overbroad under the cases cited by appellant, nor is it insufficiently clear to support the charge of insubordination. The direction to Bovino not to "preach" is also not void and unenforceable as an effort to impose religious beliefs, because it is limited to a direction to him to cease discussing matters beyond the scope of his proper job function as to the client's decision to abort her pregnancy. The order does not expressly or implicitly espouse or adopt any position with respect to abortion, but seeks merely to allow clients freedom of choice unfettered by sermonizing from public employees. Although the direction not to "preach" could have been more artfully phrased, it did further the essential function of ensuring that government benefits are dispensed without reference to matters that are left by law to private choice and conscience.

In that this opinion concludes that the action of the respondent agency in suspending the appellant should be affirmed, there is no basis for appellant's claim to back pay, interest and attorneys fees and that request is therefore **DENIED**.

I further **CONCLUDE** that the New Jersey Conscience Law, *N.J.S.A.* 2A:65A-3, is inapplicable here in that appellant had no function with respect to performing abortion or providing abortion services.

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DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is hereby **ORDERED** that the action of the respondent Middlesex County Board of Social Services in suspending appellant for a period of 20 days is hereby **AFFIRMED**, and the appeal **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE MERIT SYSTEM BOARD:

The appeal of Ray Bovino, Income Maintenance Worker, Middlesex County Board of Social Services, suspension for twenty (20) days, beginning January 13, 1986 and ending February 10, 1986 (period of January 13, 1986 to January 24, 1986, is with pay; period of January 27, 1986 to February 7, 1986, is without pay), on charges, was heard by Administrative Law Judge Richard Murphy, who rendered his initial decision on October 28, 1986. Exceptions were filed on behalf of the appellant. No cross exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Merit System Board at its meeting on December 10, 1986, accepted and adopted the Findings and Conclusion as contained in the Administrative Law Judge's initial decision.

ORDER

The Merit System Board finds that the action of the appointing authority in its twenty (20) day suspension of appellant was justified. The Board therefore affirms that action and dismisses the appeal of Ray Bovino.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.