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JUSTICE BUILDING, LITTLE ROCK 72201

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(501) 371-2007

OPINION NO. 85-222

The Honorable Mike Beebe
State Senator
211 Arch
Searcy, AR 72143

Dear Senator Beebe:

This official opinion is written in response to your request as to whether the Arkansas Fair Managers Association may reject offers of membership and if so, on what basis. Also, you ask whether the Association may terminate someone's membership and if so, on what basis.

Arkansas Statutes Annotated §63-1309(Repl.1980) provides for agricultural and mechanical fair associations to be constituted as bodies politic and corporate in the same manner as other corporations. Under this authority and that of the Arkansas Non-Profit Corporation Act, Ark. Stat. Ann. §§64-1901-64-1921(Repl.1980), the Arkansas Fair Managers Association was incorporated as a non-profit corporation on March 14, 1977.

General powers of the Association include the power:

To manage its internal affairs in any manner so desired so long as the provisions of this [Non-Profit Corporation] Act. . . or any other laws are not violated.

Section 64-1907(f). Specifically, §64-1914 states:

A corporation may have one [1] or more classes of members, as provided in the articles of incorporation. . .

The Fair Managers' Articles of Incorporation list no requirements or incidents of membership, but state at Paragraph 4(C) that it shall have the authority to:

(E)xercise each and every right and power necessary and incidental to the operation of the business and purposes of the corporation and to perform all other acts which the law may authorize.

In Rohrscheib v. Barton-Lexa Water Association, 246 Ark. 145, 146, 437 S.W.2d 230(1969), a water association, designed to construct and maintain a private water system, which proposed to sell water to a corporation, was sued. Plaintiff, a member of the association, alleged that a corporation was not eligible for membership. The Court held the association was not prohibited from extending membership to a for-profit corporation and noted in dicta at page 146:

Under the by-laws the corporation will admit as members water users; however, the association is not required to admit members if the capacity of the water system is already exhausted by the needs of the present membership.

The only other recent Arkansas case dealing with this topic is Gilbreath v. East Ark. Planning and Dev. Dist., Inc., 471 F. Supp. 912 (E.D. Ark. 1979) There, Plaintiff Gilbreath had been terminated from his employment with the East Arkansas Planning and Development District, a non-profit corporation. Only an oral contract for employment existed between Plaintiff and the District. Plaintiff challenged his firing under 42 U.S.C. 1983. In order to have violated §1983, the District would have had to act under "color of state law". In determining whether the requisite state action had occurred, the Court listed the following factors:

Where. . .a non-profit corporation has been created by virtue of state law, the state government has provided significant financial support for the activities of the corporation, the state has delegated functions relating to the planning and delivery of public services to the corporation, the corporation has engaged in activities normally performed by governmental agencies, the corporation with various agencies or instrumentalities of state government and the supervision of affairs of the corporation has been vested in a board of directors, the majority of which are local elected officials, the conduct of the "private" non-profit corporation has become so entwined with governmental policies an so impregnated with a governmental character as to subject the conduct of the corporation to the institutional limitations placed upon state action.

Id. at 922.

The Court goes on to state tht due process considerations do not arise, however, unless the Plaintiff can show that termination adversely affected his "property" or "liberty" interests. Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L. Ed.2d 548 (1972). Additionally, a property interest must be more than an abstract need involving a legitimate claim of entitlement and must stem from state laws, rules or understandings that secure certain benefits and which are supportive of the claim to entitlement.
Id. at 922-923.

Finally, the Court held at page 923 that even though a person may not have a right to a valuable benefit, once the benefit has been conferred, it may not be denied or taken away for a constitutionally impermissible reason.

These precedents indicate what a person ousted from the Association would have to prove in order to be able to successfully challenge his ouster. He would have to prove, for instance, that the Association was acting as a state sponsored entity, that the benefits conferred upon him by Association membership were of great enough significance to be considered his "property", that some rule of regulation of the Association led him to a reasonable expectation of continued membership and if he couldn't establish a legitimate property interest, that the Association had terminated his membership for a constitutionally impermissible reason, i.e. exercise of free speech.

As you can see, a person suing the Association would have an almost insurmountable burden of proof. The Rohrscheib case, supra, indicates membership in non-profit corporations can be limited for legitimate reasons and certainly membership in the Association does not connote the same level of "property interest" that might be present with respect to employment by a non-profit corporation.

In making this decision, the Association should review its by-laws as to membership, review its status as to whether it routinely performs governmental functions and whether its decision to terminate is based on deprivation of a constitutionally granted right. For instance, it should not base a decision to deny membership based on the prospective member's race or sex.

It is unlikely that a person denied membership for constitutionally permissible reasons or one whose membership was terminated on that premise would be able to prevail in a legal action against the Association.

The Honorable Mike Beebe
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This opinion, which I hereby approve, was prepared by
Special Counsel to the Attorney General R.B. Friedlander.

Sincerely,



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