Callahan v. Academic Senate of Long Beach City College

No. B183886

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Appellant Dr. Mary Callahan, vice president of Academic Affairs of Long Beach City College, filed an action for declaratory and injunctive relief against Dr. Janice Tomson, president of the Academic Senate of the college, and the Academic Senate of the college. The action was predicated on a series of meetings of the Academic Senate that culminated in a vote of no confidence in Dr. Callahan. The cause of action for declaratory relief sought a declaration that the defendants had violated the Ralph M. Brown Act (Brown Act), set forth in Government Code section 54950 et seq.[1] the second cause of action sought an injunction enjoining further violations of the Brown Act. The trial court granted summary adjudication as to the first cause of action on the ground that the defendants had cured the violations of the Brown Act. As to the second cause of action, the trial court granted a permanent injunction, which we discuss in detail below. The trial court also awarded Dr. Callahan attorney fees in the amount of $34,383.60. Dr. Tomson was dismissed as a defendant during the trial of the cause of action for injunctive relief.

Dr. Callahan contends on appeal that the cause of action for declaratory relief should not have been dismissed, and that the award of attorney fees is inadequate. We agree with the rulings of the trial court and affirm the judgment for that reason.

On January 5, 2006, we granted the motion of attorneys Wendy Gabriella and Carol A. Sobel to withdraw as counsel for the Academic Senate. Our order advised the Academic Senate that it could participate in this appeal only through an attorney; we also advised the Academic Senate of the consequences of not appearing and participating in the disposition of this appeal. The Academic Senate has not appeared, and we decide the appeal based on Dr. Callahan's briefs and the record.

FACTS

On May 9, 2003, the Academic Senate voted to establish a "Joint Committee" to "investigate contractual and shared governance issues and conflicts" related to Dr. Callahan as the vice president of Academic Affairs. This committee reported back on June 13, 2003, and recommended that a "no confidence" vote be taken regarding Dr. Callahan.

At some point in July 2003, the chief human resources officer of the college advised Dr. Tomson that the Brown Act applied to the Academic Senate, and that closed sessions violated the Brown Act. Dr. Tomson received contrary advice from attorney Gabriella. At a

[1] All further references are to the Government Code, unless otherwise noted.

meeting held on July 18, 2003, a copy of the Joint Committee's report was distributed; the report listed "issues and conflicts" with Dr. Callahan.

The Academic Senate, with Dr. Tomson presiding, met on August 8, 2003, to consider, in closed session, an agenda item described as the "appointment, employment, evaluation of performance, discipline, or dismissal of a public employee." The language in quotation marks tracks the provision of section 54957, which provides that a public body may meet in closed session to consider the matters described in the agenda item. The subject of this agenda item was Dr. Callahan.

There were three more meetings of the Academic Senate, called under auspices identical to the August 8 meeting, that took place on August 27, September 5 and 19, 2003. During the meeting of September 19, 2003, Dr. Tomson stated that only those persons who had filled out speaker cards would be allowed to speak, and that no additional speaker cards would be accepted. Dr. Callahan's attorney, Douglas Otto, requested to be allowed to address the Academic Senate, but his request was denied. When he renewed his request, Dr. Tomson instructed an armed member of the Long Beach Police Department to escort Mr. Otto out, who did so and who told Mr. Otto not to come back. Thereafter, the meeting was declared closed and a vote was taken by secret ballot with the result that 27 voted in favor of "no confidence," 4 voted against, and 1 abstained.

Dr. Callahan's action was filed on November 17, 2003. On March 24, 2004, the Academic Senate held a special meeting and voted to rescind the September 19, 2003 "no confidence" vote.

At some point, but in any event prior to the time the motion for summary judgment was heard, Dr. Callahan retired.

DISCUSSION

1. The Trial Court Was Correct in Dismissing the Cause of Action for Declaratory Relief

The first cause of action was for declaratory relief. This cause of action sought a declaration that the vote of no confidence was taken at a meeting that violated the Brown Act, and that this vote had to be rescinded. This cause of action also sought judicial declarations that the following events violated the Brown Act: the meetings of August 8 and 27, 2003, in that they were closed; not giving Dr. Callahan notice that she would be discussed at those sessions; refusing to allow attorney Otto to speak at the September 19, 2003 meeting; declaring the meeting of September 19, 2003, closed; and not disclosing the vote of individual members of the Academic Senate on the "no confidence" vote.

The first cause of action was brought under section 54960.1, subdivision (a), which provides in relevant part that any interested person may commence an action "for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section."

The section alleged to have been violated is section 54953, which requires all meetings of the legislative body of a local agency to be open and to be public; the remainder of the

sections referenced in section 54960.1, subdivision (a) (§§ 54954.2, 54954.5, 54954.6, 54956 & 54956.5) are not implicated in this case.

Subdivision (e) of section 54960.1 provides: "During any action seeking a judicial determination pursuant to subdivision (a) if the court determines, pursuant to a showing by the legislative body that an action alleged to have been taken in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 has been cured or corrected by a subsequent action of the legislative body, the action filed pursuant to subdivision (a) shall be dismissed with prejudice."

Dr. Callahan does not contest the fact that on March 24, 2004, the Academic Senate voted to rescind the September 19, 2003 "no confidence" vote. The trial court correctly determined that, under subdivision (e) of section 54960.1, this cured the action that had been taken on September 19, 2003, when the "no confidence" vote was taken.

Dr. Callahan contends that there were other violations of the Brown Act, and that the first cause of action of her complaint sought declarations that these other violations had also occurred. In addition to the allegations of the first cause of action setting forth these additional alleged violations, which we have summarized above, Dr. Callahan points to actions other than the no confidence vote that she contends violated the Brown Act. To give some examples, she contends that preventing attorney Otto from speaking; that following a procedure requiring speakers to fill out cards in advance; and that a denial of opportunity for public comment all violated the Brown Act.

Initially, we note that the trial court must have concluded that the Brown Act applied, both in terms of the Academic Senate qualifying as a "legislative body" under section 54952, and the meetings in question falling within the definition of meetings set forth in section 54952.2.[2] We cannot determine independently from the record before us whether the requirements of sections 54952 and 54952.2 were met, and therefore rely on the trial court's implicit ruling that the Brown Act applies.

Dr. Callahan is mistaken in contending that the Brown Act gives her the right to seek judicial declarations as to matters that were not "an action taken" by a legislative body. As noted, subdivision (a) of section 54960.1 gives a person the right to commence an action "for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section." (Italics added.) The term "action taken" is defined in section 54952.6.[3] Only the "no confidence" vote taken on September 19, 2003, qualifies as an "action taken" under this definition.

In discussing the fee award by the trial court, Dr. Callahan acknowledges that her action was brought solely under the Brown Act. The Brown Act gives her only the right to challenge an "action taken" by the Academic Senate, as that term is defined in 54952.6.

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[2] 2. We note that the chief human resources officer of the college was of the opinion that the Brown Act applied. Dr. Callahan has contended throughout that the Brown Act applies.

[3] "As used in this chapter, `action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (§ 54952.6.)

(See fn. 3, ante.) However, it is also true that, from a broader perspective, there is no longer an actual, present controversy[4] between Dr. Callahan and the Academic Senate. For one, Dr. Callahan has retired. It is also true that the permanent injunction that the trial court issued, which we discuss below, resolves a number of Dr. Callahan's complaints about the operations of the Academic Senate. In sum, to the extent that Dr. Callahan's action does not challenge the "action taken" by the Academic Senate, the action seeks an advisory opinion, which a court does not have the power to give. (Silva v. City & County of San Francisco (1948) 87 Cal.App.2d 784, 789.)

2. The Award of Attorney Fees Is Affirmed

Dr. Callahan sought an injunction prohibiting the Academic Senate from: (1) evaluating or taking any action in connection with her performance as vice president for Academic Affairs; (2) holding any closed sessions with regard to Dr. Callahan; (3) taking any secret ballot regarding Dr. Callahan; (4) holding any "serial meetings" regarding Dr. Callahan; (5) unreasonably restricting public comment in a debate regarding Dr. Callahan; and (6) denying Dr. Callahan the right to be heard through counsel.

The permanent injunction granted by the trial court ordered the Academic Senate: (1) to have an attorney present when going into closed session to discuss anticipated litigation; (2) not to use the exception of section 54957 (evaluation of employee's performance) to go into closed session for the purpose of discussing an administrator of the college; and (3) to provide the required 24-hour notice to any person when discussing specific complaints about such a person.

Following entry of judgment, Dr. Callahan made a motion for attorney fees. She sought $68,967 in fees, as well as a 1.5 multiplier to be applied to those fees, for a total fee award of $103,450.50. Dr. Callahan contended that the multiplier was justified because her action conferred a significant benefit on the public. In seeking a multiplier, Dr. Callahan relied on the "private attorney general statute," i.e., Code of Civil Procedure section 1021.5.

Section 54960.5 authorizes the award of costs and reasonable fees in a Brown Act case. The award of fees under section 54960.5 is not mandatory, but is a matter entrusted to the discretion of the trial court. (Bell v. Vista Unified School Dist. (2000) 82 Cal.App.4th 672, 686.) "There is no historical indication Code of Civil Procedure section 1021.5 was intended to affect already existing specific statutory fee provisions, such as section 54960.5. Rather, Code of Civil Procedure section 1021.5 was intended to provide specific guidelines for the exercise of inherent judicial power to award fees not specifically authorized by statute." (Common Cause v. Stirling (1981) 119 Cal.App.3d 658, 663.) Because section 54960.5 "expressly provides statutory authorization for recovery of attorney fees and costs for Brown Act violations," the trial court was not empowered to award fees under Code of Civil Procedure section 1021.5. (Bell v. Vista Unified School Dist., supra, at p. 690.)

Fees are awarded under section 54960.5 in order to make it economically feasible to rectify violations of the Brown Act when recoverable damages are trivial. (Bell v. Vista

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[4] "The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817, p. 273.)

Unified School Dist., supra, 82 Cal.App.4th at p. 686.) "[S]ome other considerations which the court should weigh in exercising its discretion [under section 54960.5] include the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit." (Common Cause v. Stirling, supra, 119 Cal.App.3d at p. 665.)

In awarding 50 percent of the fees sought, the trial court in this case found that Dr. Callahan did not obtain all the relief she sought by way of an injunction; as appears from our summary, this is correct. The trial court also noted that Dr. Callahan sought a finding of individual misconduct against Dr. Tomson, but that Dr. Tomson was dismissed at trial. On the other side of the ledger, the trial court found that the action could not have been resolved without litigation and that the injunction was necessary to prevent a recurrence of the Brown Act violations. Nonetheless, the court concluded that the issues presented were not overly difficult, obscure or complex, and Dr. Callahan's result "was certainly mixed."

The balance struck by the trial court between the various factors bearing on the issue of attorney fees is sound. While a reduction of 50 percent appears at first blush to be too deep a cut, we note that two lawyers billed over 310 hours of their time on this case. The trial court's measured evaluation of the issues in this case, which we think is correct, does not support the expenditure of such an amount of lawyers' time, and neither does the result obtained. We see no reason to disturb the trial court's exercise of its discretion.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

We concur: RUBIN, Acting P. J., BOLAND, J.