Torch Party v. Supervisor of Elections

JUSTICE STEELE delivered the opinion of the court, in which JUSTICE WECHSLER, AND C. JUSTICE KUSHNER, join. JUSTICE SIMON and JUSTICE BELL dissent as to part III.

Petitioner, the Torch Party, appeals the judgment of the Election Commission that affirmed the ruling of the Supervisor of Elections denying the Torch Party qualification as a political party for the upcoming student body elections. Because of the reasons set forth below, we reverse.

I. BACKGROUND

In late September of 2012 Jack Henmy, president of the Torch Party, applied to the Supervisor of Elections to have the Torch Party recognized as an official political party by the Florida State University Student Government Association. As part of the package, Mr. Henmy submitted application forms, the name, and a logo. The Supervisor of Elections denied the application – citing the background color used in the logo as being too similar to one of the colors used by the already recognized Ignite Party – and granted an opportunity for Mr. Henmy to resubmit a logo. After several email exchanges between Mr. Henmy and the Supervisor of Elections, Mr. Henmy decided not to revise the logo, and then the Supervisor made a final denial of the application.

As a result of the application denial, Mr. Henmy appealed the decision to the Election Commission Appeals Board for review. On October 2, 2012 the Appeals Board heard oral argument. At oral argument the Supervisor of Elections supplemented his original denial for color similarity with the additional reason that the Torch Party's logo incorporates a flame, which is also an element of the Ignite Party's logo. The Appeals Board affirmed the Supervisor of Elections' decision.

Torch Party timely appealed to this court. We have jurisdiction pursuant to section 3(c) of the Constitution of the Student Body.

II. ANALYSIS

Under section 710.4 of the Election Code the Supervisor of Elections is tasked with vetting applications for political party recognition. Subsection (b) says that the Supervisor "shall officially recognize a political party when the party… files a party name, acronym, or logo that does not duplicate or blatantly resemble

the name, acronym, or logo of any other existing FSU campus political party, copyrighted image or symbol, or any living individual." The Secretary argues that this section means that political parties seeking recognition are required to submit a logo in addition to a name and acronym, as part of a complete package. Further, the Secretary argues that utilizing any shade of a color already used by an existing political party is grounds for disqualifying the logo as a blatant resemblance. The Torch Party contends that the plain language of this section indicates that submitting a logo is optional and that the logo submitted does not blatantly resemble any existing party logo.

Our review of the Appeals Board's interpretation of statutory provisions is *de novo*. Per Chevron, when a court reviews an agency's construction of the statute which it administers, it must perform a two-step analysis:

1. In the first step, a court must determine *de novo* whether the legislature has unambiguously decided the issue. Whether there is ambiguity is a matter for the court to decide without regard to the agency's view. If legislative intent is clear, the court enforces that intent regardless of the agency's interpretation of the statute.[1]
2. The second step is only reached if the court finds the statute is ambiguous. When there is ambiguity, a court must examine how the agency resolved the ambiguity. In other words, was the agency's construction of the statute reasonable?[2]

Here, "ambiguous" does not mean "vague," "broad," or "general."[3] "Ambiguous" means that a statute can be read in two ways when applied to particular facts.[4] Merely having two meanings, however, is not sufficient; the meanings must both be plausible. For example, under one reading of the statute a reasonable person rejects the logo, while under a different reading of the statute a reasonable person accepts the logo.

Using the Chevron analysis, we will first determine if section 710.4 unambiguously addresses whether a logo must be submitted. In order to determine this we will read the statute "in pari materia." This canon of statutory construction holds that statutory language should not be looked at in isolation; rather the entire textual

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[1] Claire R. Kelly & Patrick C. Reed, Once More Unto the Breach: Reconciling Chevron Analysis and De Novo Judicial Review After United States v. Haggar Apparel Company, 49 Am. U. L. Rev. 1167, 1170 (2000).
[2] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984).
[3] Linda D. Jellum and David C. Hricik, Modern Statutory Interpretation, at 94 (2009).
[4] *Id.*

context is relevant. In short, it presumes internal consistency within a single statute.

Although section 710.4(b) says that the "Supervisor of Elections shall officially recognize a political party when the party does all of the following," this cannot be read in isolation and must be read in conjunction with 710.4(b)(4), which says that a party seeking recognition need submit "a party name, acronym, or logo…" Here we note that the Senate purposefully used "or" in subsection (4) instead of "and." "And" is generally thought to be conjunctive (joining or connecting), while "or" is disjunctive (separating or contrasting). In Florida, courts assume that the conjunction/disjunction's literal meaning was intended, and, if not, it is for the legislature to address by amendment, not for the court to address through interpretation.[5] Here we hold that the plain meaning of the statute is that either 1) a party name, OR 2) a party acronym, OR 3) a party logo, is required to be submitted to the Supervisor of Elections, and not that all three are required.

While administrative interpretations are given deference by the courts, such interpretations are not entitled to deference if they are in direct conflict with the statutory language.[6] A court ordinarily will find the agency's interpretation to be controlling unless it is plainly erroneous or inconsistent with the statute.[7] If the Senate has directly spoken to an issue then any agency interpretation contradicting what the Senate said would be unreasonable.[8] The Appeal Board's ruling that the Torch Party failed "to submit everything required, specifically a proper logo" is counter to the text of the statute. What is more, the Student Government Association's argument that once a logo has been submitted it becomes part of the entire package is unconvincing. This presumption is not rooted in any applicable statute or decision. Indeed, this presumption is also counter to the text of the statute. The Supervisor could simply have rejected the logo, while approving the party as a recognized party.

Turning now to the question of use of color: to determine whether utilizing any shade of a color already used by an existing political party is grounds for disqualifying the logo as a blatant resemblance, we must determine whether "blatantly resembles" is ambiguous. In the absence of a definitions section in the statute, courts rely on the plain dictionary meaning of the word in question. The plain meaning of "blatant" is "brazenly obvious." The plain meaning of "brazen" is "boldly shameless." Since "brazenly obvious" is necessarily subjective and open to differing reasonable

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[5] Corfan Banco Asuncion Paraguay v. Ocean Bank, 715 So. 2d 967, 970 (Fla. Dist. Ct. App. 1998).
[6] 82 C.J.S. Statutes § 467.
[7] *Id.*
[8] Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 173 L. Ed. 2d 369 (2009).

interpretations, we find that this section of the statute is ambiguous.

We withdraw to a supervisory role when agency interpretations fall within a zone of ambiguity left by the legislature.[9] In that oversight role, courts may ask whether an agency employed appropriate processes or reasoning in making an interpretive choice.[10] A court ordinarily will find the agency's interpretation to be controlling unless it is plainly erroneous or inconsistent with the statute.[11] The Secretary's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result.[12] The Secretary's interpretation will not be set aside unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[13] Decisions are entitled to deference provided that the secretary articulates a satisfactory explanation for his actions, including a rational connection between the facts found and the choice made.[14]

Here we must decide if disqualifying a political party on color choice alone is a reasonable interpretation of "blatantly resembles." We find that it is not and hold that color alone, independent of some design or symbol, cannot be a factor for disqualifying a logo.[15] Doing so would risk creating a monopoly.[16] "The primary colors, even adding black and white, are but few."[17]

In reaching this decision we take into account that both logos in question utilize a different shade of red, and that the coloration in the Torch Party logo is merely a background color and not a primary element. Given that the overall appearance of the Torch Party's logo is different than the Ignite Party's logo, we are strained to find that there is blatant copying. Blatant copying would exist when there is the intent on the part of the person submitting the logo for review to fool voters into thinking that the party in question is actually another party already established.[18] In other words, there is blatant copying when the logo is calculated to deceive the ultimate ordinary voter.[19] A supervisor of elections

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[9] See Kenneth A. Bamberger & Peter L. Strauss, Chevron's Two Steps, 95 Va. L. Rev. 611 (2009).

[10] Kenneth A. Bamberger & Peter L. Strauss, Chevron's Two Steps, 95 Va. L. Rev. 611 (2009).

[11] 82 C.J.S. Statutes § 467.

[12] Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

[13] Palczeski v. Nicholson, 21 Vet. App 174 (2007).

[14] *Id.*

[15] See generally In re Walker-Gordon Lab. Co., 53 F.2d 548 (C.C.P.A. 1931); Also see Diamond Match Co. v. Saginaw Match Co., 142 F. 727, 729 (6th Cir. 1906).

[16] See generally In re Gotham Silk Hosiery Co., 20 F.2d 282 (D.C. Cir. 1927).

[17] Diamond Match Co. v. Saginaw Match Co. at 729.

[18] See generally N.K. Fairbank Co. v. R.W. Bell Mfg. Co., 77 F. 869, 870 (2d Cir. 1896).

[19] Ohio Baking Co. v. Nat'l Biscuit Co., 127 F. 116, 119 (6th Cir. 1904).

should not interfere when ordinary attention by the voter "would enable him at once to discriminate the one from the other."[20] The public must be likely to misidentify the parties.[21] Public confusion is shown by evidence that voters believed that the established party is the one that produced the questionable logo,[22] or that the established party is a sponsor or otherwise approves of the other party.[23] This will usually mean that the logo is almost identical in all respects to the other.[24] Actual confusion is the best evidence of likelihood of confusion.[25]

With respect to the argument first raised by the SGA at the Appeals Board that the torch element in the Torch Party's logo also resembles an element used in the Ignite Party's logo, we note that the appeals board has to constrain its review to the record transmitted,[26] and cannot entertain post-hoc reasoning by the Supervisor of Elections to justify a decision made. The jurisdictional statute of the Appeals Board specifically states that the Commission is to rule "by majority vote on whether the decision of the Supervisor of Elections is sustained or overturned." Thus, the review must be constrained by the decision made, and it was an abuse of discretion by the Commission to incorporate the post-hoc reasoning of the Supervisor to justify the original decision of the Supervisor.

With that said, and in the interest of justice, we will examine whether the torch element of the Torch Party's logo "blatantly resembles" the torch element of the Ignite Party's logo. The question here is whether the torch element is a dominant element of Ignite Party's logo. If two logos share a dominant element, confusing similarity could be established.[27] "The dominant feature of a trademark is whatever is most noticeable *in actual conditions;* whatever most attracts the attention of the public."[28] But, when a certain part of a logo is non-dominant, descriptive, or ornamental, it cannot be said to cause voter confusion.[29] "One who uses less than the whole may perhaps infringe, but if so, it must appear that the part he has taken identifies the owner's product without the rest." [30] Here we find that, because the torch in Ignite Party's logo is merely

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[20] N.K. Fairbank Co. v. R.W. Bell Mfg. Co at 871.
[21] Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204 (2d Cir. 1979).
[22] See Syntex Laboratories, Inc. v. Norwich Pharmacal Co., 437 F.2d 566, 568 (2d Cir. 1971); Boston Professional Hockey Association v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1012 (5th Cir.).
[23] Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., at 204-05.
[24] Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd. at 204.
[25] AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1543 (11th Cir. 1986).
[26] See e.g. Fla. Stat. Ann. § 120.68.
[27] 3A Callmann on Unfair Comp., Tr. & Mono. § 21:18 (4th Ed.).
[28] *Id.*
[29] *Id.*
[30] *Id.*

ornamental and not a dominant element, the use of a torch in Torch Party's logo is unlikely to cause voter confusion and thus the post-hoc reasoning by the Supervisor is unpersuasive.

Thus, for the above reasons we reverse the Appeal Board's decision to uphold the Supervisor of Election's denial of the Torch Party's application for political party recognition.

III. Prayer for Relief

Reversing the decision of the Election Commission, we now turn our attention to the prayer for relief requested by Petitioner. The Torch Party requests that this court postpone the election date by one week. In our jurisdiction elections are mandated by statute and the precise date is set by the Senate through resolution. Once the election date is set, statutory requirements are triggered that regulate campaigning, allocation of student funds, etc. In the instant case, the election is set for two days from this appeal, and campaigning has proceeded in accord with statute, voters have been apprised of the election date, funds have been allocated and spent, and volunteers have been procured. Although our learned dissenting colleagues would like this court to ignore the larger impact to the student body, and instead focus solely on the impact that postponing the election would have on the Torch Party, for reasons of public policy we simply cannot grant the Petitioners prayer for relief.

The relief Petitioner seeks would amount to a judicial amendment of the statute – a measure beyond the power of this court. While we certainly can identify with the issue of fairness raised by the dissent, laws typically serve more than one complex policy and we must balance the weight of the competing values. Values and interests often conflict; the law represents a compromise among the pull of their competing aims. As Judge Cardozo notes, a judge is:

> not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."[31]

Thus, we restrict our balancing of the competing values by principles of jurisprudence. Per the "goal matrix of the law," whenever one ordering of a pair of conflicting goals will maximize only the first goal at the extreme expense of the second, while the converse ordering will maximize the second goal and produce minimal

[31] Benjamin Cardozo, The Nature of the Judicial Process 141 (1921).

interference with the first, a court should generally utilize the second ordering.[32] Here we find that postponing the election will have a much greater adverse impact on all constituent parties to the election, and that this outweighs the minimal adverse impact to the Torch Party that would result from not postponing the election. In reaching this weighing we note that the individual candidates that are members of the Torch Party are not barred from campaigning as independents – indeed Petitioner noted during oral argument that they are campaigning – and the Torch Party has been tabling throughout the campaign week despite having their application for political party recognition denied. Therefore, we deny the Petitioners prayer for relief.

IV. CONCLUSION

The Election Commission erred by affirming the Supervisor's erroneous statutory interpretation that the election code requires a logo be submitted, and the Supervisor abused his discretion by finding that when an applicant utilizes in a logo any shade of a color already used by an existing political party there is grounds for disqualifying the logo as a blatant resemblance. Accordingly, we vacate the Election Commission's decision and remand the issue for proceedings consistent with this opinion; however, we deny the Petitioners prayer for relief.

REVERSED.

J. Simon writing for the dissent in part. Joining J. Bell,

In this case, two issues came before the Court. The first question was whether the Elections Commission abused its discretion by finding the Torch Party's (Torch) logo blatantly resembled the Ignite Party's logo leading to disqualification. The second issue before the Court was if indeed the Elections Commission abused its discretion what would be the appropriate remedy for Torch.

The Supervisor of Elections argues that Torch's logo blatantly resembled that of the Ignite Party. From the facts presented, Torch complied with all statutory requirements to run as a party. To say that the logos were blatantly similar is to say that one party has a monopoly on all shades of red. The Court unanimously agrees that the Elections Commission abused its discretion. While I agree with the majority on the former issue, I cannot say the same for the latter.

The second issue was what would be the appropriate remedy for Torch. The majority feels there was insufficient harm suffered by

[32] Wilson Huhn, The Five Types of Legal Arguments 143 (2008).

Torch to justify postponing the election one week. The majority considers the consequences of postponing the election and these consequences include inconvenience, time and money. I respectfully disagree with the majority on this contention for two reasons.

First, the Court overstepped its boundaries and failed to uphold its duty to ensure justice. No evidence of these consequences was presented to support these contentions. Additionally, there was no evidence that the other political parties would be affected negatively. In fact, this could have affected other parties positively by providing more time etc.

Second, when balancing test, it would seem that justice still demands a postponed election. It's quite clear and the majority did not disagree that Torch suffered some harm, though the majority disagree to the extent of the harm. Nonetheless, other political parties had 6 days to campaign for election that Torch did not have by no fault of their party. The majority finds no issue allowing other parties seven days to campaign and leaving Torch with only one day. This is distinct enough to show that the other parties have and continue to have a distinctive advantage over Torch.

The record does not indicate that Torch had the advantage of presenting themselves as a party, they did not have fliers saying they were a party (at least there's no evidence of that) and they did not campaign as party. However, the majority once again speculated on facts not in the record.

The Court was swayed by evidence that was not provided by the parties and thus should not have been taken into consideration. There was no evidence of costs presented by the parties. Regardless, our decision today should not be based on these considerations alone. The majority was persuaded by these considerations, but if we allow these considerations to influence all of our decision what role does the Court really serve? The decision handed down by the Court is erroneous and sends a conflicting message to the student body. The role of this Court is to ensure fairness and that was not done in today's decision. For these reasons I respectfully dissent.