

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
NO. _____

May 1st We Are One America Committee,)
)
Plaintiff)
v.)
)
City of Asheville, a Body Politic)
and Corporate Entity; and)
William Hogan, Chief of Police,)
In his Official Capacity,)
)
Defendants.)

COMPLAINT

Now comes the Plaintiff in this action, and for its complaint, alleges and says:

I. PARTIES

1. Plaintiff “May 1st We Are One America Committee” (hereinafter, “Plaintiff”) is an unincorporated association that has filed a certificate of information with the Buncombe County Register of Deeds, pursuant to N.C. Gen. Stat. § 66-68. Plaintiff is thereby authorized to sue on behalf of its members pursuant to N.C. Gen. Stat. § 1-69.1.

2. Defendant City of Asheville is a municipal corporation and a “city,” as defined by N.C. Gen. Stat. § 160A-1(2). Said defendant maintains and administers a police department, known as the Asheville Police Department (hereinafter, the “Police Department”), over which it exercises supervisory responsibility.

3. Defendant William Hogan is the Chief of Police for the City of Asheville. In his capacity as Chief of Police, Defendant Hogan exercises supervisory authority, under the color of state law, over the enforcement of ordinances in the City of Asheville. Moreover, the ordinances of the City of Asheville specifically grant Defendant Hogan enforcement authority over the particular city ordinance here at issue. He is sued in his official capacity only.

4. Defendants City of Asheville and Hogan (collectively, “Defendants”) are “persons” within the meaning of Civil Rights Act of 1872, 42 U.S.C. § 1983, and each has the capacity to be sued for the claims presented in this action.

5. Upon information and belief, Defendants are protected by one or more policies of liability insurance purchased pursuant to N.C. Gen. Stat. § 160A-485 or other applicable state law with respect to all acts and omissions complained of herein, or participate in a government risk pool pursuant to Article 23 of Chapter 58 of the North Carolina General Statutes, and to such extent, Defendants have waived any official, sovereign, or governmental immunity to which they might otherwise be entitled in their official capacities. To the extent that may be required by law, Plaintiff hereby waives its right to a jury trial on all issues of law or fact relating to insurance coverage.

II. JURISDICTION AND VENUE

6. This is an action for declaratory and injunctive relief and recovery of an unconstitutionally assessed parade permit fee, brought under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202.

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this Complaint alleges violations of the Free Speech Clause of the First Amendment to the United States Constitution. This Court also has jurisdiction over the claims under 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1343(a)(3)-(4).

8. This Court has supplemental jurisdiction over related claims arising under state law pursuant to 28 U.S.C. § 1367(a).

9. Venue is proper in this District under 28 U.S.C. § 1391(b)(2), because the relevant facts giving rise to Plaintiff’s claims occurred in this District.

III. FACTS

10. Plaintiff was the organizer of an immigrants’ rights march that took place in Asheville on May 1, 2006 (hereinafter “the March”). Plaintiff’s membership organized the

March in connection with similar immigrants' rights marches scheduled throughout the country on the same day.

11. On April 3, 2006, Plaintiff gave informal notice to the City of Asheville Police Department (the "Police Department") of its intent to hold the March on May 1, 2006 in downtown Asheville.

12. On Monday, April 24, 2006, Plaintiff applied for a permit, as required by Section 16-115(e) of the City of Asheville Code. A copy of Plaintiff's permit application is attached hereto as Exhibit "A."

13. City of Asheville Code Section 16-115(e) provides in relevant part:

(e) Application

(1) A person seeking issuance of a parade permit shall file a completed application with the chief of police on a form provided by the chief of police.

(2) An application for a parade permit shall be filed with the chief of police not less than 48 hours, excluding weekends and holidays, before the time when it is proposed to conduct the parade.

A copy of City of Asheville Code Section 16-115 is attached hereto as Exhibit "B."

14. With regard to permit and escort fees, the relevant section of the City of Asheville Code provides:

(d) Permit and escort fees. The city shall charge an administrative fee as set forth in the city's fees and charges manual to cover expenses incidental to processing the application and to cover expenses for police escorts, when requested. In case of indigence, the administrative fee shall be waived by the police chief. In determining whether an applicant is indigent, the police chief shall consider, but not be limited to, the following: whether the applicant is employed; the financial resources available to the applicant; whether the applicant receives federal, state or local financial assistance and the amount of that assistance; and whether the applicant owns real property. In considering an application on indigence grounds, the police chief shall have the right to look behind the application to determine the real party in interest.

City of Asheville Code Section 16-115(d).

15. With regard to the assessment of individual permit fees, relevant portions of the City's "Fees and Charges Manual," which is referenced in Section 16-115(d), are attached hereto as Exhibit "C."

16. On Tuesday, April 25, 2006, the Police Department informed Plaintiff that in order to hold the March as planned, Plaintiff would be required to pay \$1,000.00 to cover police protection, in addition to \$100.00 to rent parking meters along a city street; another \$100.00 to rent a town park called "Pack Square"; and another \$100.00 to rent city barricades, for a total of \$1300.00.

17. In articulating this amount to Plaintiff, the Police Department failed to point to any definite standards set out anywhere in the City Code or in the Fees and Charges Manual that had been employed in arriving at the total amount of the fee.

18. Plaintiff relies upon voluntary donor contributions to stay in existence and to carry out its advocacy on behalf of the immigrant community.

19. Although Plaintiff's organizers expressed concern that they would not be able to pay the required amount, Defendant Hogan failed to waive the fee on the basis of indigence, as required by City of Asheville Code Section 16-115(d).

20. On Wednesday, April 26, 2006, the Police Department informed Plaintiff's members that they would need to pay the \$1300.00 fee by Monday, May 1, 2006, in order to proceed with the March as planned.

21. The Police Department stated that it arrived at this total "in an effort to be consistent with all special events" and "[b]ecause of . . . the likelihood of counter-protesters" See April 26, 2006, E-mail correspondence from Captain Tim Splain to Ada Volkmer, attached hereto as Exhibit "D."

22. On Friday, April 28, 2006, the Police Department raised the fee even higher, notifying the Plaintiff that the new permit fee totaled \$1,500.00.

23. Specifically, the Police Department stated that the Plaintiff was required to pay \$1,000.00 for police protection; \$100.00 for rental of Pack Square; \$150.00 for 15 parking spaces that would not be accruing revenue through their meters as a result of the March; and \$250.00 for barricades. See April 28, 2006, E-mail correspondence from Janet Dack to Ada Volkmer, attached hereto as Exhibit "E."

24. Again, in articulating this even higher amount to Plaintiff, the Police Department failed to point to any definite standards set out anywhere in the City Code or in the Fees and Charges Manual that had been employed in arriving at the total amount of the fee.

25. The Police Department informed Plaintiff that the permit would only be issued if the fees were paid in full on or before May 1, 2006, at 11:00 a.m.

26. Plaintiff's organizers again expressed concern that they would not be able to pay the required permit fee. Nevertheless, Defendant Hogan again failed to grant Plaintiff an exemption based on indigence.

27. Plaintiff's organizers, at the last moment, were able to raise the requisite amount so that the March could occur. Plaintiff paid the \$1,500.00 fee to the Police Department on the morning of May 1, 2006, and Plaintiff held its March beginning at 4:00 p.m. that day.

28. When challenged on the amount of Plaintiff's permit fee, Asheville's Assistant City Attorney Curt Euler cited City of Asheville Code Section 16-115(g)(2) as authority for the Defendants' rationale for assessing the permit fee. See May 2, 2006, E-mail correspondence from Curt Euler to Azadeh Shahshahani, attached hereto as Exhibit "F."

29. City of Asheville Code Section 16-115(g)(2) provides:

Issuance Standards. The chief of police shall issue a parade permit when, upon submission of the completed application, he finds that:

- (1) Adequate provision can be made for the safe and orderly movement of the parade and of other traffic, pedestrian and vehicular, contiguous to its route.
- (2) Adequate provisions can be made for police protection which will not require diversion of so great a number of police officers of the city to

police properly the lines of movement and the areas contiguous thereto so as to prevent normal police protection to the city.

- (3) The applicant for the parade permit has agreed to abide by the standards set forth in this division which are necessary measures to promote the safety and welfare of the community.

City of Asheville Code Section 16-115(g)(2).

30. Mr. Euler stated that Section 16-115(g)(2) shifted responsibility to the Plaintiff “to hire off-duty officers to supplement the officers already working downtown during a large parade.” See Exhibit F.

FIRST CLAIM FOR RELIEF:
Violation of Federal Constitutional Rights

31. Plaintiff incorporates by reference, as if fully set forth herein, the allegations set forth in paragraphs 1 through 30 above.

32. The City of Asheville, by requiring Plaintiff to pay \$1,500.00 as a condition to issuing a parade permit for political speech, created an unconstitutional prior restraint on speech in violation of the First Amendment to the Constitution of the United States.

33. Defendants failed to employ any narrowly drawn, reasonable and definite standards in determining Plaintiff’s permit fee.

34. Instead, Defendant Hogan exercised unbridled discretion to determine Plaintiff’s permit fee, in violation of the First Amendment.

35. Further, by basing a portion of the permit fee on the likelihood of counter-protesters, Defendants engaged in content discrimination in violation of the First Amendment.

36. Finally, Defendants violated Plaintiff’s First Amendment rights by refusing to grant Plaintiff an indigence exemption with regard to the permit fee.

37. The acts and omissions of the Defendants in depriving Plaintiff of its rights secured by the Constitution and laws of the United States were taken under color of state law, statute, ordinance, regulation, custom, or usage, and Defendant Hogan was at all times acting within the scope of his employment by the Defendant City of Asheville.

38. Plaintiff is entitled to recovery of the unconstitutionally imposed permit fee.

SECOND CLAIM FOR RELIEF
Declaratory Judgment – City of Asheville Code Section 16-115 is Unconstitutional

39. Plaintiff incorporates by reference, as if fully set forth herein, the allegations set forth in paragraphs 1 through 38 above.

40. City of Asheville Code Section 16-115 is unconstitutional, both on its face and as applied to Plaintiff.

41. Section 16-115 is unconstitutional on its face and as applied because it delegates unbridled discretion to Defendant Hogan in violation of the First Amendment.

42. Further, Section 16-115 is unconstitutional on its face and as applied because it fails to provide narrowly drawn, reasonable and definite standards to aid the Defendants in determining permit fees. Additionally, no such standards are set forth in the Fees and Charges Manual, referenced in Section 16-115(d).

THIRD CLAIM FOR RELIEF:
Violation of State Constitutional Rights

43. Plaintiff incorporates by reference, as if fully set forth herein, the allegations set forth in paragraphs 1 through 42 above.

44. Defendants' conduct violated Plaintiff's rights to assembly, petition, and free speech protected by Article I, Sections 12 and 14 of the Constitution of North Carolina.

45. City of Asheville Code Section 16-115 is unconstitutional under the North Carolina Constitution, both on its face and as applied to Plaintiff, for the reasons set forth in Plaintiff's Second Claim for Relief.

46. Plaintiff is entitled to recovery of the unconstitutionally imposed permit fee.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

1. Entry of a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, declaring that City of Asheville Code Section 16-115 violates Plaintiff's free speech and assembly rights under the United States Constitution and the Constitution of North Carolina.

2. Entry of an injunction against the Defendants permanently enjoining the Defendants and their officials, employees, agents, assigns, and others who may be acting in concert with them, from invoking City of Asheville Code Section 16-115 as authority to charge arbitrary permit fees to citizens seeking to exercise their rights to free speech and assembly.

3. Judgment in favor of Plaintiff for recovery of the unconstitutionally imposed \$1,500.00 permit fee.

4. An award of Plaintiff's costs, expenses and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

5. Such additional and further relief as the Court may deem just.

Dated this 3d day of October, 2006.

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