THE STUDENT GOVERNMENT JUDICIAL COURT
THE UNIVERSITY OF TEXAS AT AUSTIN

Madison GARDNER, Presidential Candidate
&
Antonio Guevara, Vice-Presidential Candidate, Petitioners
v.
The ELECTION SUPERVISORY BOARD, Respondent

Docket Number: 2012SE–005
Filed: 02/23/2012

Opinion and Order Denying Petition for Rehearing

Issued February 25, 2012

Harris, C.J., delivered the opinion of the Court.

On Friday, February 24th, petitioners moved for rehearing on the grounds that the decision of the Election Supervisory Board, *In Res Madison Gardener / Antonio Guevara (2)*, was influenced by bias or misconduct. Because we find no such bias or misconduct, and because we conclude that the ESB's decision was correct as a matter of law, we deny petitioners' motion for rehearing and again affirm the ESB's ruling.

Petitioners raise four points of error, which we summarize as follows:

1. That the ESB consulted with Rep. Philip Wiseman and made certain information available to him. This communication allegedly tainted the ESB's decision with bias, and/or constituted a violation of Election Code §4.06 which states that ESB deliberations need not be "open to the public."

2. That the ESB failed to maintain objectivity, as ostensibly evidenced by several comments made by ESB Chair Nimmer on February 23rd, around 9pm (at least a day after the ESB's decision to disqualify petitioners).

3. That Chair Nimmer wields "undue influence" and is "improperly privileged to additional information" because he helped author the current election code and concurrently serves on the ESB and Judicial Court.

4. That the Judicial Court committed procedural error by denying review of petitioners' previous appeal. This argument is based on §5.22 of the Student

Government Constitution which states that "[a]ny rule of standing enforced by the Court shall be no more than a minimal threshold to prevent frivolous complaints."

We address these arguments in the order presented, and conclude:

I. No bias or violation of the code resulted from any communications with Rep. Wiseman.

II. Chair Nimmer's comments do not demonstrate bias.

III. Even assuming, *arguendo*, that bias had been present as alleged by petitioners, any such bias was harmless error since the ESB's ruling was correct as a matter of law.

IV. Nothing about Eric Nimmer's role as code author, Chair, and Justice violates any relevant rules, nor is it "improper."

V. The Constitution's permissive language with respect to standing applies only to cases over which the Judicial Court has original jurisdiction. Furthermore, our decision to deny petitioner's appeal was based upon the merits of the appeal, not standing.

I

Petitioners' first point of error asserts that the ESB's ex parte communications with Philip Wiseman biased their decision.

In support of this argument, petitioners offer several images of text messages and Facebook chats exchanged by Mr. Wiseman and Rep. Amanda Goodson. Though some members of this Court have expressed skepticism as to the authenticity and completeness of these correspondences, we assume for the sake of our holding that this evidence is both completely authentic and without any relevant omissions. We will also assume that these communications in no way exaggerate Mr. Wiseman's role or influence.[1]

[1] This is not a trivial assumption. In these same communications Philip Wiseman claims to "advise the . . . J-Court," which is at best an overstatement. The only communication we have had with Mr. Wiseman came in the form of an amicus curiae brief he submitted on February 23rd after we had already completed our deliberations. Though we appreciated his effort in contributing the brief, we do not consider Mr. Wiseman to be an advisor to the Court in any way. His statement to this effect was clearly an exaggeration for the purpose of his

In these communications, Mr. Wiseman asserts that he "audited" some of the ESB's proceedings and "advised" the ESB with respect to some of its decisions. Rep. Wiseman also seems to suggest that he wielded some degree of influence over the ESB in this capacity.

No rule prohibits the ESB from engaging in ex parte communications. Though the ESB should refrain from any activity that might threaten their objectivity, consultation with knowledgeable outside sources can offer significant benefits to the ESB's decision making. In fact, we think that the ESB should be encouraged to take advantage of the expertise of outside advisors when they deem such expertise helpful.

From these communications, it appears that Mr. Wiseman was consulted partly to offer advice as to the proper interpretation of certain terms in the election code. As a person with significant knowledge of the rules, Wiseman would be a natural choice to advise the ESB on these matters.

Obviously, the ESB should choose its advisors judiciously, and in extreme cases it may be that an advisor is so clearly biased as to taint the validity of an ESB ruling. For example, if the ESB consulted with a presidential candidate during disciplinary proceeding against another presidential candidate, this would almost certainly be improper. However, in the case before us we have no reason to conclude that the ESB's communications with Mr. Wiseman resulted in any bias against the petitioners. Mr. Wiseman is not associated with any presidential campaign, and petitioners do not assert any other basis for concluding that Wiseman is biased against them.

Petitioners also argue that, under Election Code §4.06,[2] Mr. Wiseman should not have been allowed to participate in deliberations. First, we have no reason to believe that Mr. Wiseman was present at deliberations, given his statements that he only advised the ESB after they had reached a decision.[3] Second, the language of §4.06 is permissive, not mandatory, with respect to deliberations. Under §4.06, deliberations need not be "open to the public," but

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conversation with Rep. Goodson, and it's not unlikely that his statements about his relationship with the ESB were likewise exaggerated in some way.

[2] §4.06 states: "All Election Board hearings, proceedings, and meetings must be open to the public except for the deliberations that determine the outcome of complaint hearings."

[3] The following quotes are taken from the evidence submitted by petitioner, and are attributed to Mr. Wiseman: "Well I wasn't 'in the room' I only advised from outside of it" and "I didn't give input until a preliminary decision had been reached because I'm not on the ESB."

nothing in the language of that section prevents the ESB from opening their deliberations in whole or in part when they see fit to do so.

II

Petitioners next advance the position that ESB Chair Eric Nimmer was personally biased against them. They offer as evidence several audio recordings of a conversation involving Chair Nimmer. From the context of these recordings, it appears that he was engaged in a causal and informal conversation, and that he was not aware he was being recorded.

Each of the four of us who signed on to this opinion has carefully and thoroughly reviewed these audio recordings, and we unanimously agree that they do not demonstrate any bias against Mr. Gardner, Mr. Guevara, or their executive alliance. Because we have serious concerns about the clandestine manner in which these recordings were obtained, we will not reproduce or transcribe them in this opinion. However, we will address in the abstract the arguments advanced by petitioners.

Petitioners cite four statements made in these recordings by Chair Nimmer. The first two statements cited are general expressions of frustration which are in no way directed at petitioners. These statements are completely irrelevant to the issue of bias. The second two statements are directed at the manner in which petitioners conducted themselves *subsequent* to their disqualification. Though Chair Nimmer appears to demonstrate some negative sentiment toward petitioners in these two statements, these statement are completely irrelevant to the judgment rendered by the ESB, as they refer only to subsequent conduct.

Furthermore, these recordings were taken at least a day after the ESB had rendered judgment against petitioners. At this time, Chair Nimmer and the entire ESB had already concluded that Gardner and Guevara committed a serious offence which warranted disqualification. It would be very bizarre to expect Chair Nimmer to manifest a positive or even neutral affect towards the individuals whom he had concluded committed this serious violation. The fact that Chair Nimmer may have had a low opinion of the offending party *after judgment was rendered* is neither improper nor unexpected, and clearly does not represent bias.

III

Bias in-and-of-itself is not actionable. When a party alleges bias, they must show not only that such bias existed, but that it influenced the outcome of the proceedings in some way. We have concluded that no bias was present; however, even assuming for the sake of argument that bias did exist, we hold that the ESB issued the proper ruling and punishment as a matter of law. In making this determination, we view all contested facts in the light most favorable to petitioners.

Petitioners admit that their campaign materials featured images of a University Unions candidate. That these materials were widely distributed is likewise not contested. We have previously ruled, upon *de novo* review, that petitioners are in violation of Title III Article III Subchapter A §3.02 of the Election Code[4] as a matter of law.

With the issue of culpability settled, all that could be contested by petitioners is the severity of the punishment imposed. Of note, §3.02 explicitly suggests disqualification as a possible (though not mandatory) remedy. The only other sections of the Code containing this language relate to fraud and misrepresentation—we interpret this to mean that the framers of the Code considered violations under §3.02 to be especially severe.

Petitioners advanced in the ESB several mitigating factors. Of note, they argued that these violations were not intentional, but were the result of an oversight. Giving complete deference to petitioner's arguments, we might be persuaded that a punishment less severe than Class D could be imposed. However, we would still impose a punishment fitting the severity of the violation—a fine of at least 20% of the alliance's budget—which we rule would result in immediate disqualification anyway since it would cause the alliance to substantially exceed their budget limit.

Based upon the foregoing, we separately render a judgment of disqualification against the Gardner and Guevara executive alliance for violating §3.02 of the election code.

IV

[4] "Only the Presidential and Vice Presidential candidates that compose an executive alliance are allowed to participate in campaigning together, all other candidates in the election must campaign separately, without endorsements from any fellow candidate. No association between candidates of any kind will be tolerated, with the exception of the executive alliance. Candidates found in violation of this rule can be subject to immediate disqualification."

Petitioners further assert that Chair Nimmer's tripartite role as code author, ESB chair, and Justice somehow disqualifies the judgment rendered against them. We disagree.

Nothing prevents an author of the election code from serving on the ESB or Judicial Court. In fact, having a framer of the code as a member of these bodies is likely a significant benefit, as that individual will generally possess a high degree of familiarity with the document.

Additionally, the language of the Constitution permits concurrent service on the ESB and Judicial Court. Though Justices may not "be appointed to any position external to the Judicial Branch by any member of Student Government," appointments to the ESB are made by the office of the Dean of Students, and so do not fall within this prohibition.

Further, recognizing the potential for a conflict of interest, Chair Nimmer has recused himself from each and every election appeal we have considered. We have not consulted with Chair Nimmer, either formally or informally, with respect to any election appeal, except in his capacity as an adverse party. In the case of this particular opinion, we chose to refrain from soliciting any briefing or consultation from Chair Nimmer or the ESB. The publication of this opinion will be, as far as we are aware, Chair Nimmer's first notification of allegations of bias leveled against him by petitioners.

V

Finally, we reach petitioner's argument that §5.22 of the Constitution prevents us from denying petitions for review in election appeals. §5.22 states:

> The court shall hear all cases in which any student, faculty member, staff member, administrator, or student organization at The University of Texas at Austin brings an actionable complaint. Any rule of standing enforced by the Court shall be no more than a minimal threshold designed to prevent frivolous complaints.

There are two problems with petitioner's position. First, this language only applies to cases of original jurisdiction before the court. Appeals arising from ESB decision are covered by §5.45, which, as we concluded in our previous opinion in this case, gives us discretionary jurisdiction over election appeals.[5]

[5] "Election disputes and grievances shall first be heard by the Election Supervisory Board.

Second, §5.22 only requires us to hear "actionable" complaints. The last sentence of that section relates only to standing. The Constitution's standing rule was designed to prevent the Court from refusing to hear cases on that basis that a party was, for example, insufficiently connected to the case, or was not directly harmed by the alleged error.[6] In this case, the decision to deny review was based on the merits, not on standing.

VI

In conclusion, we find no bias or improper conduct on the part of Eric Nimmer or the Election Supervisory Board. Furthermore, irrespective of bias, we hold that, as a matter of law, disqualification is the proper remedy for the violation at bar. We therefore wholly affirm the judgment of the ESB, and deny petitioner's request for rehearing.

We also note that secretly recording a conversation without the permission of the parties is ethically ambiguous at best. We therefore respectfully request that the ESB conduct an investigation to determine whether any laws, student rules, or election rules were broken in obtaining this recording. We will release the evidence in our possession at their request.

Petitioner's request for rehearing is DENIED.

The judgment of the ESB is AFFIRMED.

We hereby separately render judgment of DISQUALIFICATION against petitioner.

NIMMER, J., took no part in the consideration of this order.

Decisions of the Election Supervisory Board may be appealed and heard by the Judicial Court on
the basis that the decision of the Board contravenes this Constitution, the Election Code, or another rule, regulation, or bylaw pursuant to this Constitution."

[6] As the drafter of this rule, I intended it to prevent future Courts from limiting access to only SG "insiders" who were closely connected to the issues being litigated. My hope was (and is) that all students, faculty, staff, and administrators will see the Judicial Court as a conduit through which they can make their voice heard, even if they are not connected with SG in any way.