



THE STUDENT GOVERNMENT SUPREME COURT  
THE UNIVERSITY OF TEXAS AT AUSTIN

**Advisory Opinion: ESB's Authority**

JUSTICE BINDEMAN delivers the majority opinion. CHIEF  
JUSTICE MOORE and JUSTICE BIRENBAUM join in full.  
JUSTICE RICHARD abstains.

**SUPREME COURT OF THE STUDENT  
GOVERNMENT OF THE UNIVERSITY OF TEXAS  
AT AUSTIN**

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No. 2018 Spring – 004

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Delivered February 22, 2018

The Court is issuing an advisory opinion in regard to the powers of the Election Supervisory Board (ESB) over the candidates of the campus-wide election and their own procedures.

The Court has noted in *Guzman v. ESB*, 2018-002, that the authority granted to the ESB by the Campus-Wide Election Code to supervise the campus-wide elections are plenary. No provision of the Student Government-specific Election Code specifically operates to limit these powers.

**AUTHORITY TO DETERMINE CLASSES OF VIOLATIONS**

Section 4.12 of the Campus Wide Election Code states:

CLASSES OF VIOLATIONS. Violations of the Code shall be divided into four classifications:

- (a) Class A violation shall result in a fine.
- (b) Class B violation shall result in a moratorium of campaigning.



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- (c) Class C violations shall result in a combination of moratorium of campaigning and a fine.
- (d) Class D violation may result in a disqualification from the election

Section 4.13 of the same code states:

DEFINING CLASSES OF VIOLATIONS. Within the ranges established by the Election Supervisory Board, the Election Supervisory Board shall select the amount of the fine or length of the suspension most appropriate to both the severity of the infraction and the intent of the violator as determined by the Election Supervisory Board. At the candidate seminar, Election Supervisory Board shall clearly define what would constitute each class of a violation.

The Code establishes that the ESB's determination of which violations belong within each class of violation is entirely discretionary. The ESB also has the discretion to determine the possible ranges of fines or campaign moratoria applicable to each violation within each class. The Code provides that within such ranges, the ESB shall take into consideration the intent and severity of the offense when determining a sanction. However, it does not provide any further guidance as to the way those terms should be interpreted or applied.

For clarity, the ESB has the authority to determine each of the following without further regulation from the Elections Code:

1. The types of violations within each class of violations under Election Code § 4.12;
2. The range of available fine, moratorium, or both that is available for that violation under Election Code §4.13;
3. The severity of each violation and intent of the violator for each violation; and
4. The ultimate sanction resulting from such violation.

**REVIEWABILITY OF DECISIONS**



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Under Election Code §5.5:

APPELLATE REVIEW. The entity with appellate jurisdiction shall have full authority to fashion an equitable remedy appropriate to the circumstances of the case, but should endeavor to avoid remanding the case to the Election Supervisory Board.

The Elections Code does not provide meaningful guidelines for the basis of this Court's appellate review of findings made by the ESB, but instead grants plenary authority to fashion appropriate equitable remedies. This Court has endeavored to carry on the mandate contained in the Student Government Constitution, §5.16(e):

Upon a finding that there has been a material violation of this Constitution the Student Government Code of Rules and Procedures, or substantive rules, controlling authorities, regulations or bylaws approved by a two-thirds (2/3) majority vote of total sitting representatives in the Assembly, Supreme Court shall have the power, to issue appropriate rulings in all matters properly brought before it

In the context of §5.16(e), the Court finds that its authority to fashion an equitable remedy is to be interpreted within the boundaries of its limited role to review for violations of the relevant Constitution, rules, codes, and acts promulgated by the Student Government. The Court finds no basis for the position that it may review the findings of fact made by the ESB for accuracy.

This is suggested further by the explicit reference in the Election Code to the questioning of witnesses (§4.9(a)(i)), preparation of affidavits (§4.9(a)(i)(A)), assignment of the burden of proof (§4.9(a)(v)), and requirement that the ESB prepare a written opinion setting forth its findings of fact (§4.10(b)(i)). These functions are appropriate to a court of original jurisdiction whose task is to make findings of fact. It is generally inappropriate for a court of appellate jurisdiction, in the absence of such procedures, to review findings of fact or make its own findings of fact.



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This Court finds that its authority to review decisions of the ESB is limited to questions of law. This means a petitioner must bring a claim of a material violation of a rule indicated under §5.16(e) of the Student Government Constitution. This claim may be that the ESB violated such a rule, that its decision caused a violation of a rule in application, that it misapplied or misunderstood a rule, or that harm has otherwise resulted from the ESB's decision or procedure in violation of one of the rules. This review shall extend to alleged procedural violations and faults involved in the ESB's findings of fact but shall not extend to mere allegations that the ESB was incorrect in its finding of fact.

The Court has already found, above, that the severity of a violation and the intent of the violator are determinations left to the ESB's discretion. Because §4.13 of the Election Code qualifies these factors with, "as determined by the Election Supervisory Board," the Court must find that such factors are questions of fact and not law and cannot review the ESB's conclusions regarding those factors in the absence of a procedural fault.

The ranges of sanction available for each offense are similarly unreviewable in the absence of a procedural fault, because the Election Code qualifies the ranges, "established by the Election Supervisory Board." So long as the ranges match the available sanction within each class of violation under Election Code §4.12, the ESB has discretion to promulgate its own ranges, which the Court cannot otherwise review for error unless there is procedural error.

The Court finds that within Election Code §4.13, only "the amount of the fine or the length of the suspension most appropriate to both the severity and the intent of the violator" is reviewable. Unlike "severity" and "intent," which are questions of fact, "most appropriate [sanction]" is a question of equity and law. This Court is charged under the Election Code §5.5 to fashion equitable remedies and will review allegations that the ESB has failed in its duty to determine the "most appropriate" or most equitable sanction



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given its determination of severity and intent. Thus, a petitioner could challenge the fit of a sanction to a violation's severity and a violator's intent but must accept the ESB's determination of severity and intent in the absence of procedural fault.

### **ESB'S CONTROL OVER ITS OWN RULINGS**

Under Election Code §4.10(d):

Upon consideration of prior written opinions, the Election Supervisory Board may negate the decision but must provide written documentation of reasons for doing so.

The ESB is authorized to negate prior opinions at its discretion. The Court takes notice of the term "negate," meaning "nullify, make ineffective." This word was chosen by the legislative body and must be given effect. The Election Code does not constrain the ESB in its negation based on the age of the prior written decision, and so must be able to negate decisions made within the current elections cycle.

Under Election Code §4.2:

**DISMISSAL OF COMPLAINTS.** The Election Supervisory Board may dismiss a complaint if:

- (a) The complaint was not filed within a reasonable amount of time; [or]
- (b) The complaint fails to state a cause of action for which relief may be granted.

The use of the word "may" must be interpreted as permissive, in contrast with "shall" and "must," used often in other sections within this chapter of the Code. The ESB may also choose to hear complaints which are "dismissable" under §4.2.

The Election Code and Student Government Constitution do not provide for any equivalent of "Res Judicata," or claim preclusion. There are no rules requiring, or allowing, the ESB to dismiss complaints which have already been decided or refusing to hear



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disputes which have been substantively remedied or otherwise addressed. One might interpret §5.2 of the Elections Code to speak to this issue:

DECISION OF THE ELECTION SUPERVISORY BOARD. The decision of the Election Supervisory Board shall stand and shall have full effect until the appeal is heard and decided by the entity with appellate jurisdiction.

One reading of §5.2 is that the only body with the power to change the decision by the ESB is this Court. However, this could only be the case while the appeal and decision is pending, because it would otherwise come into conflict with §4.10(d). Further, §4.10(d) is not qualified by reference to the pendency of appeal. Thus, the intent of §5.2 must be to notify aggrieved parties that a stay on the sanction chosen by the ESB is not available during the pendency of the appeals hearing and decision. It does not operate to limit the authority of the ESB to negate a prior written opinion.

This Court finds that the ESB must have the authority to negate a prior written opinion, except to the extent that any such negation would violate a mandate by this court under §5.16(h) of the Student Government Constitution.

This Court again references the plenary equitable authority of the ESB to fashion appropriate remedies to the violations and complaints it reviews. This Court finds that the ESB has the authority to negate prior written opinions at any time after the opinion is published and may do so at its discretion so long as its reasoning is also published. This Court finds that while it is unclear if the ESB may refuse to hear a complaint which has already been addressed, it has the authority to hear such a complaint or further evidence on any prior written opinion at its discretion. It may also choose to negate an opinion without such a hearing.

**SUMMARY**



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This Court advises that the ESB has the plenary authority to determine which violations belong in each class of violations under Election Code §4.12

This Court advises that the ESB's determinations of which violations belong in each class of violations and the range of sanction available under each violation under Election Code §4.13 are its exclusive domain.

This Court advises that its authority to review the findings of the ESB is limited to questions of law and procedural violations associated with any ESB finding (of fact or of law).

This Court advises that the factors under Election Code §4.13 of "severity of the infraction" and "intent of the violator" are questions of fact and the ESB's findings of those factors are not reviewable by the Court unless an associated procedural violation is alleged.

This Court advises that the ESB has plenary authority to negate any of its own prior written decisions at any time with or without a supplemental hearing so long as such a negation is accompanied by written reasoning.