Opinion of the Court in Re Alexander/Johnson v. ESB

The Court delivers its opinion *per curiam*. CHIEF JUSTICE Dodson and JUSTICES PETON, JAMES, HASTINGS, and JONNALAGADDA join.

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

Delivered February 28, 2020

I. Background

The Alexander and Johnson campaign ("Appellant") submitted a request for an appeal to the Court regarding ESB resolution 2020-003 at 8:43 PM on Tuesday, February 25, 2019. That resolution resulted from a complaint alleging that Appellant had engaged in "Pre Campaigning" and was the result of a hearing where both the complainant (represented by an agent) and Appellant were present.

Appellant made the following arguments on appeal:

First, that the ESB improperly denied Appellant's request to change their financial disclosure information to reflect campaign materials that had been purchased but not used.

Second, that Fox Walker's actions do not constitute pre-campaigning and his intentions and statements were mischaracterized in ESB Resolution.

Third, that the ESB improperly construed the burden of proof against Appellant instead of as belonging to the complainant in the initial hearing.

Fourth, that the ESB used a Class A fine as the vehicle for issuing the equivalent of a Class D violation, which is impermissible under the Code.

The Court unanimously voted to accept the appeal on Appellant's first three arguments but found that Appellant's fourth argument was facially invalid.

Appellant sought a remedy for the ESB's adverse decision disqualifying Appellant under §4.3 of the Student Government Specific Election Code ("SGEC"). The ESB disqualified Appellant on the basis that, given Appellant's $452.02 of campaign expenditures disclosed in their first financial disclosure, the 28% fine issued to Appellant in ESB resolution 2020-002, and the 5% fine issued in ESB resolution 2020-003, Appellant had exceeded the 120% limit outlined in §4.3[1].

[1] Regarding how this figure was reached, there was some initial confusion regarding the ESB issuing the fines in 2020-002 as "reductions" in the campaign's spending limits. The 121% figure is reached by taking the $452.02 in Appellant's campaign expenditures disclosed in their first financial disclosure divided by the $511 spending limit outlined in SGEC §4.1(a) to reach 88.46%. Then fines are simply added on to that percentage such that 88.46% + 28% (2020-002) + 5% (2020-003) = 21.46%.

II. In Regards to the ESB's Initial Factual Determinations:

In the ESB's initial hearing, the ESB made the following factual determination:

(1) The email sent by Fox Walker, purported to be Unauthorized Campaigning under §8.3 of the Campus-Wide Election Code ("CWEC" or "the Code"), was not personalized to an individual recipient and was sent to multiple recipients, which the ESB refers to in its resolution as "mass campaigning"

The Alexander/Johnson campaign ("Appellant") argues that Fox Walker's email was requesting only to meet with Livia Frost ("Complainant") in order to set up a time to discuss the campaign during the sanctioned campaigning period. Appellant offers evidence in their brief attempting to substantiate their claim.

On appeal, significant deference is given to the factual determinations made by the ESB in its initial proceedings. While this deference is defeasible, the standard for overturning such determinations is one where the ESB's initial determinations stand unless clearly erroneous.

The Court finds that, not only did Appellant not provide sufficient evidence to overturn the ESB's factual determination, but that the evidence submitted in the initial ESB hearing was sufficient to support the ESB's determination of a §8.3 violation based on the clear and convincing evidence standard adopted by the ESB.

In its resolution, the ESB discusses its previous decisions on whether to issue a class A or class B violation for §8.3 infractions. Class A violations are typically issued for instances of mass campaigning whereas Class B violations are typical of instances where a candidate is asking for support. The ESB issued a class A violation because of their factual determination that the email was, in fact, an instance of mass campaigning.

The ESB enjoys the plenary authority to determine which class of violation to issue for a given infranction (see *Spiler v. ESB*). Such determinations are not reviewable on appeal.

Furthermore, by Fox Walker's own verbal admission in the Court's hearing, the email was confirmed to have been sent to multiple recipients and not just to Complainant.

The Court finds that Appellant offered no evidence dispositive of their claim that the email did not violate CWEC §8.3. Therefore, in conjunction with this fact and the verbal admission of Fox Walker, the initial factual determination of the ESB stands.

III. In Regards to the Use vs. Expense Standard

Concerning the distinction between the use and expense standards, Appellant argues that §7.12 of the CWEC links the definition of "campaign… expenditures" to the definition of "campaign materials" in §2.10 of the CWEC.

§2.10 provides that campaign materials are "all materials and literature of any kind concerning any candidate that have or are **intended** to have the effect of soliciting votes, support, or interest for a candidate" (bold added). Appellant argues that §2.10 limits the definition of campaign materials to only those materials which have the *continued* intent of being used to solicit votes, support, or interest for a candidate. Under Appellant's reading, when a campaign no longer intends for certain materials to be used in this manner, they cease to be campaign materials.

Thus, according to Appellant, because §7.12 links "expenditures" to "campaign materials" as defined by §2.10 and because §2.10 limits campaign materials to only those materials which the campaign has the continued intent to use for campaigning purposes, when a campaign no longer intends to use already-purchased materials they cease to be expenditures and thus no longer need to be disclosed on a candidate's financial disclosure. Under this construction of §7.12, only when a campaign intends to use or actually uses materials need they be disclosed.

This, the Court describes as the "use standard": the burden to disclose items on a financial disclosure only arises when they are intended for use or actually used by the candidate for campaigning.

Appellant argues that a tension exists between "expense" in §3.21 of the SGEC — which clearly requires disclosure at the time of purchase — and "expenditure" in §7.12 of the CWEC which Appellant reads to only require disclosure at the time of use or where the continued intent to use is present. Thus, where a conflict of laws exists, Appellant urges the

Court to resolve this tension in favor of the use standard that they read into CWEC §7.12.

In short, the Court finds that the tension Appellant urges is illusory.

In full, §7.12 reads:

> Sec. 7.12 CAMPAIGN EXPENDITURE RECORDS. Each candidate must keep accurate and up-to-date records of all campaign receipts and expenditures. A template for financial disclosures for use by all candidates will be developed by the Election Supervisory Board and provided to each group by the first day of filing.

Appellant would have the Court read the first clause to include some implied reference to §2.10's definition of campaign materials and thus an "up-to-date" financial disclosure would reflect only those materials that have been used or that the campaign still intends for use in campaigning.

This is an attenuated reading of §7.12 that would have the Court break out it's red yarn and thumbtacks and draw connections between sections of the Code like Lee Strobel in *The Case for Christ* (the movie). The Court respectfully declines to read such *Beautiful Mind* complexity into the Code where a more parsimonious construction is available.

The Court reads CWEC §7.12's definition of "campaign…expenditures" to mean simply expenditures made by campaigns. §3.21(d) of the SGEC

supplements, not contradicts, §7.12 as it states that "all expenses must be included in the financial disclosure report."

a) The Merriam-Webster definition of "expense" is a "cause or occasion of expenditure." The definition of "expenditure" is "the act or process of expending," and "expending" is defined as "to pay out or spend." This indicates that "expense" and "expenditure" are not in tension, but instead logically interchangeable for the purposes of the election documents.

The Court rejects Appellant's argument linking "expenditures" to "campaign materials." Had the drafters of the Code wanted to use the term "campaign materials" as provided in §2.10 of the CWEC, they almost certainly would have done so. The simpler construction of §7.12's requirement that "[e]ach candidate must keep accurate and up-to-date records of all campaign receipts and expenditures" is that candidates must keep accurate and up-to-date records of "expenditures" made by the campaign, where this is logically equivalent to "expenses incurred by the campaign." This is the construction the Court here accepts.

Given the definitions of "expense" and "expenditure" provided above and the requirement found both in CWEC §7.12 and in SGEC sections 3.18, 3.19, and 3.21 to maintain receipts (which are produced by financial outlays on materials, not use on those materials)[2], it is clear that the burden to disclose an expense/expenditure on a campaign's financial

[2] In fact, SGEC §3.18 contains the exact same requirement as §7.12 that candidates "must keep accurate and up-to-date records of all campaign receipts and expenditures" and the SGEC later provides in §3.21(d) that "[a]ll **expenses** must be included in the financial disclosure report" (bold added). To read the provisions of these documents as being in tension strains credulity.

disclosure arises concurrently with the outlay of campaign funds. This, the Court will refer to as the "expense standard."

The expense standard safeguards against misuse of the financial disclosure system, which is designed to increase the transparency of campus-wide elections. One can easily imagine a scenario where campaigns submit particular expenses in their financial disclosures, only to request removal upon an adverse decision from the ESB. The possibility of this occurrence would be likely in the event that the Court established as precedent the system urged by Appellant. Such a reality is unacceptable to the Court and anathema to the election documents.

IV. In Regards to Amending Financial Disclosures

Appellant argues that they should have the ability to retroactively amend their financial disclosures to account for campaign materials that were no longer being used by the campaign. Appellant emailed ESB chair, Sergio Cavazos, requesting to remove several items that were no longer intended for use as campaign materials. The chair of the ESB issued an unofficial response to Appellant's email finding that these requests were improper. The Court agrees.

Even if there were an established process to amend a campaign's financial disclosure after it had been submitted to the ESB, the amendments sought by Appellant are not consistent with the expense standard outlined in the previous section. The campaign materials that Appellant sought to remove fall under the provided definition of

expenditure so their basis for removal in the case of an amendment process would still be invalid.

The ESB has indicated that it handles requests from campaigns to amend financial disclosures on a case-by-case basis in cooperation with the Office of the Dean of Students. While the Court recognizes that significant ambiguity attends the process of amending financial disclosures, establishing clarifying precedent on this issue would exceed the fact scenario in this case because the amendments sought by Appellant are improper under the expense standard.

Determinations that are not required to resolve the current dispute in front of the Court and which exceed the fact scenario of the dispute are advisory in nature and would be subject to a challenge on the grounds that such determinations are mere *dicta*. The Court feels that, as the amendments sought by Appellant are not proper under the expense standard, the fact-scenario in this case does not support delving into the details of when an amendment is proper. This would more properly be within the scope of an advisory opinion which could offer guidance until a fact-scenario arises providing the basis to articulate a rule or standard on the matter in response to a live controversy between adverse parties.

V. In Regards to the Role of the ESB in a Hearing

In regards to ESB hearings, the Campus-Wide Election Code provides the following:

1. §4.9(a) states that the general aim of an ESB hearing is "to gather the information necessary to make a decision, order, or ruling that

will resolve an election dispute" which establishes the role of the ESB as a fact-finder in these hearings. Additionally, nowhere in the CWEC is the ESB ever barred from asking questions to determine the factual validity or truth of a situation.

2. §4.9(a)(v) states without room for interpretation that "The complaining party shall bear the burden of proof".

Appellant is correct that the burden of proof lies with the complaining party, in fact §4.9(a)(v) of the Campus-Wide Election Code is fairly clear on that issue. However, this does not support the claim that complainants bear the burden of coming forward with allegations that are in exact conformance with the Code or that the full burden of prosecution lies solely on complainants in ESB hearings. The Court views this standard as unreasonable as it would saddle the student body with not only the burden of being the so-called "watchdog," but also that of being experts in the technical jargon of the various election documents.

In this particular situation, Complainant alleged "pre-campaigning." While the Court acknowledges that this is not a technical definition of a violation arising from the election documents, it is sufficient in that it refers to §8.3 Unauthorized Campaigning. The Court does not wish to place upon the student body the additional burden of being experts in the technical jargon of the Code.

Instead, the Court finds that, so long as a complaint obviously alleges a violation of the Code, the ESB can accept the complaint and delve into which provision(s) were violated during the hearing. Complainants may

allege such a violation by 1) specifically citing a provision of the election documents that they allege has been violated, 2) describing a fact scenario that they believe violates some provisions of the document (e.g., "I received an email in the fall asking me to vote for a candidate in the spring election. I am not sure which provisions of the election documents this violates, but I am pretty sure it's not allowed"), or 3) making reference to a term that, though not a term of art within the election documents, is sufficient alert ESB to a potential violation (e.g. "Pre Campaigning," or "mass campaigning," or "failing to register a campaign *employee"* [where the election documents use the term worker or agent]). This list is not exhaustive.

If a complaint clearly lacks any basis in the Code, e.g. "the candidate has ugly shoes," the ESB can throw the violation out as it would be a waste of time and energy to pursue it any further. But if the complaint alleges a violation that has a basis in the election documents, the ESB has the authority to set the complaint for hearing and to survey the election documents to determine which provisions are relevant to the fact scenario.

The fundamental purpose of requiring a Complainant to provide some basis for their complaint is so that candidates can prepare an adequate defense. So long as this purpose is fulfilled, the Court does not wish to impose the burden on students to become experts in the provisions of the election documents.

Given that the initial complaint alleged violations that can logically be housed under CWEC §8.3 and described a fact scenario supporting this

allegation, the ESB did not exceed the scope of its authority when it sought to resolve election disputes that arose from violations of this provision.

While the Court finds that the burden of production — the burden to produce evidence in support of their arguments — lies solely on the parties before the ESB, the Court rejects any contention that the full burden of prosecution lies solely on complainants in ESB hearings. §4.9(a) outlines a robust role for the ESB in seeking "to gather the information necessary to make a decision, order, or ruling that will resolve an election dispute."

The Court does not expect students to bear the burden of becoming legal experts on the provisions of the Code in order to submit a complaint and come to a resolution of the dispute. If accepted as precedent, such an expectation would eviscerate the regulatory functions that students play under *Pease* and leave the election documents without a party competent to ensure the enforcement of their provisions. Students have a full course load as it is — the Court sees no basis for adding a class in reading the runes of the election documents simply so that students can cast the technically correct legal hexes or utter the incantations of the Code word-for-word in a complaint or during a hearing.

VI. In Response to Appellant's Argument that ESB "Allowed" Inaccurate Financial Disclosures

Appellant argues in their brief that ESB "allowed" other candidates to submit financial disclosures that did not reflect the expense standard, but were instead prorated based on the amount used.

The Court in *Pease* holds that the ESB does not possess the *sua sponte* authority to act with regards to untimely or inaccurate financial disclosures and instead vests that power in opposing candidates and the student body. Therefore, it is inaccurate to suggest that the failure of the ESB to act where it is not authorized to do so somehow suggests "approval" by the ESB or that the ESB "allows" candidates to submit financial disclosures that violate the expense standard.

The Court is not here suggesting that Appellant is correct in their argument that another candidate has submitted an inaccurate financial disclosure. Such determinations would have to result from the process of a complaint and a hearing in accordance with *Pease*.

VII. Conclusion.

Given that the Court accepts the ESB's factual determinations, that Appellant's arguments regarding their ability to amend financial disclosures post hoc are unavailing, and that the ESB did not exceed its role in the hearing that resulted in the resolution, the decision of the ESB is affirmed and the disqualification of Appellant by the ESB issued under the authority of SGEC §4.3 stands.

It is so ordered.