Advisory Opinion: In Response to the Election Supervisory Board's Request for an Advisory Opinion and Clarification of *Pease v. ESB*

The Court delivers the opinion per curiam. CHIEF JUSTICE DODSON and JUSTICES JAMES, PETON, HASTINGS, and JONNALAGADDA join in full.

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

No. Spring 2020 – 001

Delivered February 4, 2020

I. Introduction & Factual Background:

In March of last year, the Election Supervisory Board (ESB) handed out multiple disqualifications (Class D violations) for candidates' failure to file financial disclosures on time. Two of the candidates appealed their disqualification and the Court intervened. The Court decided in Pease v. ESB that a) a hearing must be held prior to disqualification as a fundamental due process guarantee required by §4.16 of the Campus-Wide Election Code (CWEC), b) the aforementioned hearing procedures are necessarily adversarial as per §4.3 and §4.9, and c) in order to deliver a judgment upon a candidate, the

hearing must be precipitated by a complaint from an aggrieved party outside of the ESB, a candidate for example.

The Pease decision had altered the ESB's deep-rooted practice of outlining the consequences of failure to meet a criteria/deadline and then automatically holding the candidates accountable of its own accord. Pease made it so the ESB could no longer take *sua sponte* — of its own accord — action against a candidate because information regarding financial disclosures is now accessible on the Dean of Students website. The ESB no longer has privileged knowledge and access to this information meaning that students who feels aggrieved due to lateness or failure to file financial disclosures can simply check the website and file a complaint.

In the fall 2019 first-year elections, the Court recognized that it too had disqualified candidates without a hearing in the past. The Court remedied this issue in its first Advisory Opinion of the season by a) deciding that the Court itself would not pursue any disciplinary action against a candidate outside of a complaint from an aggrieved party coupled with a hearing before the court evaluating their guilt and b) reserving the regulatory function formerly performed by the Court to the student body and opposing candidates

Given that this election season will be the first Campus Wide election to adopt this new regulation by the Court, the ESB has requested some clarification regarding the particular application of the Court's opinion on the matter.

II. The Central Holding of *Pease v. ESB*:

The central holding in *Pease v. ESB* is:

> "The Court finds that [issuing a Class D violation without a hearing] is a violation of section 4.16 of the Campus-Wide Election Code ("CWEC") which requires a hearing to a.) establish whether a violation has occurred and b.) to determine whether disqualification is an appropriate penalty."

While that holding arose from a fact scenario dealing only with Class D Violations, the Court extended the holding to include Class B and C violations — and, mistakenly, Class A violations (see below) — based on the similar requirement of a hearing found in §4.15.

Both of the reasons listed for requiring a hearing are crucial to understanding the Court's holding in *Pease*.

The text of sections 4.15 and 4.16 of the Campus-Wide Election indicates that a hearing is required not only to determine the severity and intent underlying the violation, but also to establish whether a violation has occurred. As such, it is not simply that the ESB cannot act upon a violation without a hearing, but rather it cannot know that a Class B, C, or D violation has occurred at all without a hearing, even when the evidence is clear and determinative.

The notion of the ESB as a blind adjudicator is further reinforced by §4.1's proscription on ESB members filing complaints against candidates. From these provisions, it is clear that, except where the ESB is specifically empowered with sua sponte authority such as in the area of Class A violations (see below), the framework of the election code entrusts the regulatory function to the vigilance of opposing candidates and the student body.

In such a system, it falls to students to decide the content of their interests. The Code, the ESB, and the Court give structure and power to the *common* interest in the integrity of campus elections, but they only do so through students and candidates who must decide their *specific* interests for themselves.

One element of a student or candidate's specific interests might be the interest they hold in seeing that candidates who don't file timely, accurate financial disclosures be punished according to the provisions of the code. However, a countervailing interest might be the interest that a student holds in seeing that no positions go unfilled. When these two interests conflict, such as when filing a complaint to serve the first interest might result in a candidate's disqualification and impinge on the second, the *student* must balance the risks and rewards and ultimately decide on a course of action. Under the Court's interpretation in *Pease*, no other actor, neither the ESB nor the Court, can make that decision for the student by acting in the absence of a complaint.

It may be that this results in some candidates being elected who display not even the minimal effort required to submit timely financial and campaign staff disclosures. If our fellow students want to allow that outcome, the Court and the ESB will help them. It's our job[1].

Second, as is addressed in *Pease*, a hearing is required to determine the severity and intent of a violation under §4.13 of the election code. The Code clearly indicates that, even when the facts are clear and determinative, some consideration, even if only perfunctory, must be given to how severe the impact of the candidate's violation is and the intent of the violator.

[1] Here parodying Oliver Wendell Holmes. https://www.bartleby.com/73/327.html

Frequently, it will be the case that the severity of the violation is decisive. Financial and campaign staff disclosure requirements exist to provide students and opposing candidates with the means of enforcing their legitimate interest in a fair election. Depriving students and opposing candidates of such information essentially deprives them of the secure knowledge that a given elected position fully and accurately reflects the electoral will of the student body. Such a violation would have a severe impact and when considering the intent of the violator, the ESB would be well within its rights to dismiss sob stories, "the-dog-ate-my-homework" excuses, and various other rationalizations that fall within the normal scope of college life.

Where the severity of the impact is such that students are potentially deprived of their faith in the integrity of the electoral process — as would be the case with a late, missing, or inaccurate financial or campaign staff disclosure — the bar of intent is likely insurmountable absent some extreme circumstances or technical difficulties outside the candidate's control. This Court is unlikely to accept as valid appeals that base their argument solely on the issue of intent and will give broad deference to the ESB's consideration and determination of a violator's intent in its initial proceedings.

III. *Pease* and Candidate Seminar Attendance:

The ESB requests a clarification of the applicability of the Court's *Pease* holding to candidate seminar attendance.

In SGSC Advisory Opinion 2019-002, the Court stated that failing to attend the first-year candidate seminar "does not result in

disqualification from candidacy but rather that the student does not become a candidate in the first place," and thus no hearing is required.

However, §2.7 of the Campus Wide Election Code defines a candidate as "any student consenting and/or endeavoring to be elected as expressed by filing to run for office in accordance with this and all applicable election codes." In addition, §7.5 of the code states that "the filing period shall open at 9:00am on the first day of the spring semester and shall remain open until 12:00pm noon the day of the candidate seminar."

Any individual who would be expected to attend the seminar would already have filed the necessary documents and fit the formal definition of candidacy provided in the code. Therefore, any disqualifying ruling from the ESB regarding a candidate's lack of proper representation at this seminar must adhere to the structure outlined in Pease. Before the ESB can disqualify a candidate on these grounds, an unaffiliated individual must submit a complaint and a hearing must be held.

A central element of the *Pease* ruling is the role students and opposing candidates play in enforcing the provisions of the election code through the complaint and hearing process. However, for students and opposing candidates to adequately fulfill this role, information pertinent to filing a complaint with regards to candidate seminar attendance must be made publicly available and accessible. Obviously, a list of those in attendance and those not in attendance at the candidate seminar is vital information to the filing of such a complaint and must, therefore, be made publicly available once the ESB has a confirmed list of candidate seminar attendees.

This ruling does not overrule or in any way impact this court's holding in SGSC Advisory Opinion 2019-002 that attending the candidate seminar is constitutive of being a candidate with regards to first-year elections. The definition of "candidate" given in §2.7 of the Campus-Wide Election Code is nowhere found in the Student Government Specific Code — the code governing first-year elections. As such, the Court's interpretation of the code in this section is limited in its application to campus-wide elections.

IV. *Pease* and §4.6 of the Student Government Specific Election Code:

The ESB requests a clarification of *Pease*'s applicability to filed campaign materials as per §4.6 of the Student Government Specific Election Code.

§4.6 states:

"Candidates who distribute, publish, or disseminate their campaign materials prior to approval from the Election Supervisory Board shall be appropriately sanctioned for each violation of this section."

Under this system, the ESB has been responsible for "pre-approving" campaign materials before they are distributed to the student body to ensure that they comply with the provisions of the Code and the University's acceptable use policy. *Pease* in no way curtails the ESB's role in this approval process.

However, the central holding of *Pease* does apply to violations issued under §4.6, albeit with some provisos.

In an ideal world, the campaign materials filing system would operate similarly to the financial and campaign staff disclosure system. The ESB would maintain publicly-accessible records of what campaign materials have been approved with time and date stamps so that interested parties can determine whether a given campaign's materials were approved prior to use. For those materials not approved, the actual materials needn't be made publicly accessible (that would obviously defeat the purpose of §4.6), but records of the time and date of submission for approval would be made available.

However, the Court recognizes that technical limitations might prevent such a system from being fully implemented in time for the upcoming elections. So long as those limitations are legitimate on their face, then a central element of *Pease* — the ability for students and opposing candidates to access the information required to submit a complaint — would be absent. Such a case could be distinguished from the fact scenario supporting *Pease* and that decision would not hold.

What this means in practical terms is that the ESB should make a good faith effort to determine whether a publicly accessible system can be made available in time for the upcoming elections. If the ESB determines that this is not feasible, then it returns to the position of privileged knowledge that underlies the Court's holding in Gardner/Guevara v ESB (2012) that the ESB had *sua sponte* authority in the domain of financial disclosures. Thus, where the ESB is legitimately constrained by technical limitations and is the only agent reasonably positioned to enforce the requirements of §4.6, it enjoys *sua sponte* authority to instigate proceedings against a violator.

As discussed in *Pease*, the provisions of §4.9 clearly outline an adversarial hearing where the ESB is restricted to the role of an impartial

judge. However, where the ESB must act *sua sponte*, no opposing party will be available to fulfill the role of an adversarial complainant.

Rather than require that the ESB hold a Star Chamber trial with only one party present for violations of §4.6, the Court finds that where an essential element of the *Pease* holding is absent and where the ESB maintains a position of privileged information, the ESB enjoys limited *sua sponte* authority in accordance with the Court's ruling in Gardner/Guevara v ESB (2012).

If these conditions obtain, the ESB is not *required* to hold a full hearing as outlined in §4.9. However, that is not to say that the ESB cannot *choose* to afford candidates some of the procedural measures (fair notice and a chance to respond and present evidence) outlined in §4.9. Likewise, candidates cited without a hearing for a §4.6 violation may still appeal to the Court on the basis of *Pease* if they believe that the technical limitations preventing the ESB from making pertinent information publicly available are not legitimate on their face.

V. *Pease* and Financial Disclosures:

The ESB requests a clarification of *Pease*'s applicability to financial disclosures and the ESB's role in adjudicating violations of the code with regards to financial disclosures.

The original fact scenario in *Pease* arose from violations of the financial disclosure provisions of the election code. As such, *Pease* is most clearly applicable in such scenarios. An example case may prove demonstrative:

> Candidate John Smith is something of a wastrel. On a rare productive whim, he filed for candidacy, attended the candidate seminar — at which he barely paid attention — and has since become too busy "just livin' life, man" to follow through with his campaign. He misses the first financial disclosure and the ESB issues Smith a Class A violation, citing its §4.14 authority to do so. However, not planning on spending any money anyways, Smith is relatively unaffected by the fine. Some days later, Smith blows past the second financial disclosure without submitting anything. No complaints are filed and Smith assumes that he got off free. However, when Smith fails to submit the third financial disclosure, a chagrined student files a complaint citing §3.27 of the SGEC. Both the student and, surprisingly, Smith show up to the hearing. The complaining student adduces the publicly-accessible financial disclosure database as determinative of Smith's violation. The ESB finds in favor of the complainant and issues a Class D violation resulting in Smith's disqualification.

Smith's would be a paradigmatic case of the *Pease* holding playing out in the realm of financial disclosures. The ESB exercises it sua sponte authority in the instance of a Class A violation and reserves to the student body's discretion any further enforcement.

In the case that Smith showed some uncharacteristic gumption and appealed the ESB's decision, the Court would likely dismiss his appeal unless he could make the unlikely argument that mitigating circumstances outside his control — such as some type of technical glitch in the financial disclosure system — should so absolve him of malicious or, more likely, mindless intent that they should outweigh the severity of the impact.

The ESB remains free to outline the likely consequences of a financial disclosure violation at the offset of campaigning as it has done so in the past (see ESB advisory opinion 2019-003). However, under the *Pease* holding, these are to serve only as guidelines and must be *susceptible* — but susceptible only — to change with the adjudgment of severity and intent that results from a hearing. It may and likely will be the case that, after a hearing, the violations issued by the ESB mostly adhere to the guidelines set out in such an opinion. This is perfectly acceptable.

This is the basic system of *Pease* and it will operate likewise in the area of campaign staff disclosures and, to the greatest extent feasible (as discussed above), in the area of campaigning materials disclosures.

VI. *Pease* and Class A Violations:

The ESB requests a clarification of the Court's holding in *Pease* that "§4.15 also extends the requirement to hold a hearing to Class A, B, and C violations."

The Court recognizes the mistaken inclusion of Class A violations in the Pease opinion's interpretation of §4.15 of the Campus-Wide Election Code. The code states the following:

> If, after a hearing, the Election Supervisory Board finds a candidate, or a candidate's agents or workers, has committed a Class B or Class C violation, the Election Supervisory Board may restrict the candidate, or the candidate's agents or workers, from engaging in some or all campaign activities for some or all of the remainder of the campaign period.

By long-standing practice, the specific inclusion of terms in a statutory provision is to the exclusion of those terms not included. Further, §4.12(a) states that a "Class A violation shall result in a fine" and §4.14 specifically empowers the ESB to issue fines where it finds that a candidate or a candidate's agents or workers have violated the code in such a way that would merit a fine.

As such, the Court acknowledges the necessity of a hearing only for Class B, Class C, and Class D violations. Class A violations, in accordance with §4.12 and §4.14 of the Campus Wide Election code, may result in a fine delivered under the authority of the Election Supervisory Board.

It is so ordered.

ESB's Original Request

January 28, 2020

Student Government Supreme Court
2201 Speedway, Suite 2.102
Austin, TX 78712

Re: Request for an Opinion

Dear Student Government Supreme Court:

Please accept this letter as a request for an opinion interpreting the 2019 *Pease v. ESB* decision and its impact on the 2020 Campus-Wide Elections. Specifically, the Election Supervisory Board has a few matters it would like clarification on before the election process begins.

First, the Board would like clarification as to the applicability of *Pease* to candidate seminar attendance. In the Fall of 2019, the Supreme Court issued 2019 SGSC Advisory Opinion 1 where the court stipulated that "Candidates who fail to attend or send an agent to attend the first-year candidate seminar will not be afforded a hearing; attending or sending an agent to attend is constitutive of being a properly certified candidate."

The Election Supervisory Board would like clarification as to whether or not this same standard is applicable to Campus-Wide Elections. If so, would the Election Supervisory Board be able to issue violations to candidates that fail to attend the Candidate Seminar without a hearing?

Second, the Board would request information related to *Pease* and its applicability to filed campaign materials governed under §4.6 of the Student Government Specific Election Code.

Third, the Board would like clarification on the continuing impact of *Pease* on the filing of financial disclosures and the role of the Board in adjudicating violations of the requirements for them outlined in the Election Code. Since this is the first Campus-Wide Election since the *Pease* decision, the Board would like to ensure a clear understanding of the Court's previous holding before the election cycle formally begins.

Lastly, the Board requests clarification on the conclusion outlined in *Pease* related to the requirement of a hearing when issuing violations. The Court stated that "the Court finds that §4.15 also extends the requirement to hold a hearing to Class A, B, and C violations." However, §4.15 of the Campus Wide Election Code only mentions the consequences of Class B and C violations, not A. The Election Supervisory Board would like clarification on whether this inclusion of Class A violations was purposeful.

The Board greatly appreciates your assistance with this, and we look forward to a productive and efficient campaign cycle.

Sincerely,

The 2019-2020 Election Supervisory Board

Sergio Cavazos (Chair)

Nicholas Eastwood (Vice Chair)

Devika Manish Kumar (Secretary)

Jessica Zhang

Katherine Birch

Jenny Ainsworth

Hyun Jung

Chris Brooke

Molly Comeaux