In Re: Pease v. ESB

JUSTICE DODSON delivers the opinion. CHIEF JUSTICE BIRENBAUM, JUSTICE JEON, AND JUSTICE NGUYEN join. JUSTICE SLAGLE dissents.

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

No. 2019 Spring – 001

Delivered March 8, 2019

On March 7, 2019, the Court heard an appeal of ESB Resolution 2019-004 in which the Election Supervisory Board ("ESB") issued Class D violations, and therefore disqualifications, to multiple candidates for failure to submit their second financial disclosure by the deadline. The court heard arguments from the Pease and Ainsworth campaigns and ESB.

I. Regarding the Necessity of a Hearing when Issuing a Class D Violation

As per the facts of the case and as recognized by both parties, a Class D violation with the penalty of disqualification was issued without a hearing. The Court finds that this represents 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. The basis for this determination is further outlined in section 4.13 of the CWEC where it states that the ESB shall consider both "severity" and "intent" to determine the appropriate length of a suspension or weight of a fine.

Sec 4.16 reads:

> CONSEQUENCES OF A CLASS D VIOLATION OR OTHER DISQUALIFICATION RULING. If after a hearing, the Election

> Supervisory Board finds that provisions of this code or the decisions, opinions, orders, or rulings of the Election Supervisory Board have been violated by a candidate, or a candidate's agents or workers, or has committed a Class D violation, the Election Supervisory Board may disqualify the candidate.

Sec 4.13 reads:

> 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.

Based on section 4.16, the issuance of a Class D violation or "other disqualification ruling" requires that a hearing be held. Section 4.13 further clarifies why a hearing is required in these cases, stating that the ESB shall consider both "severity" and "intent" when establishing the weight of a fine or the length of a suspension.

While the job of the Court is typically to parse statutory ambiguities, here the meaning of the code is eminently clear. There is no coherent reading of section 4.16 which would allow for the issuance of a Class D violation or "other disqualification ruling" without a hearing.

It is from this foundational fact – that of the due process right to a hearing guaranteed in 4.16 – that the Court builds the rest of its opinion. Previous rulings, ESB advisory opinions, or Supreme Court advisory opinions must be reviewed in the context of this fact.

II. Regarding the Sua Sponte Authority of the ESB

In ESB 2019-004, the ESB holds that "failure to submit timely financial disclosures is punishable by the ESB sua sponte as outlined in Madison Gardner/Antonio Guevara, meaning the ESB has the ability to commence proceedings against a candidate without the filing of a complaint by an outside aggrieved party. While the specific section of the code referenced in Gardner no longer exists in the code, the ESB argued that its sua sponte authority is maintained through section 3.27 of the Student Government Election Code ("SGEC") which states "failure to file accurate financial disclosure statements by the deadlines listed in this section, or falsification of financial statements, shall allow for disqualification of the candidate(s) or executive alliance(s) by the

Election Supervisory Board" has been maintained in subsequent precedent (see Spiler v. ESB).

The Court finds that this sua sponte authority does not have a statutory basis in any of the documents governing campus elections. Additionally, the Court recognizes that the ESB itself may not play the role of complainant as per CWEC Sec 4.1:

> FILING OF COMPLAINTS. Members of the Election Supervisory Board are prohibited from filing complaints.

In oral arguments, the ESB held that a complaint from an outside party was required to precipitate a hearing according to sections 4.3 and 4.9. According to this argument, section 4.3 logically connects the holding of a hearing to a complaint because the only way to trigger a hearing is to not dismiss a complaint. This implies that the complaint must first be present to induce a hearing. Furthermore, the ESB's hearing procedures outlined in section 4.9 requires "that both the complaining and responding parties appear physically before the Board to discuss the issues" and the rest of the procedures outline a clearly adversarial hearing between the complaining and responding parties. The ESB cannot be both judge and a complaining party (it would have to hear and rule on its own arguments) and therefore the ESB cannot have a hearing without a complaining party.

The Court accepts this argument and, in the context of the due process right to a hearing clearly articulated in section 4.16, carries it to its logical conclusion:

Without a complaint (A), the ESB can't hold a hearing (B). (ESB argues, Court accepts)

The ESB must hold a hearing (B) to issue a Class D violation (C) (4.16)

-Therefore-

The ESB must originally have a complaint to eventually issue a Class D violation (If not A then also not B, if not B then also not C, therefore, if not A then also not C)

The ESB does not accept the second premise (a decision based on a reading of precedent which is discussed later and reflecting no fault of the ESB) and therefore invokes sua sponte authority to enforce the timeliness of financial disclosures (a decision which also has a sound precedential basis).

The argument that the ESB requires sua sponte authority to enforce the timeliness of financial disclosures as per section 7.14 of the CWEC is outlined by the Court in Gardner:

> Furthermore, we believe that the ESB is specifically empowered by the code to sua sponte raise omissions and errors in financial disclosures without a complaint having been filed. Title III Article III Section 3.23, upon which the ESB based its judgment of disqualification, specifically empowers the ESB to disqualify a candidate who fails to file accurate or timely financial disclosures, and contains no notice or hearing requirement. It would be an absurd reading of 3.23 to require that a non-ESB member must file a complaint in order to enforce this section, since no one but the ESB is able to know whether the disclosure was timely. If the ESB could not enforce this section sua sponte, it would be forced to recruit straw-man complainants to file under this section, a result which we think could not possibly have been intended by the code authors.

*Procedural note: The referenced section, 3.23, is dead but is sufficiently similar in text to the current section 3.27 for this argument to be relevant to the current code.

In Gardner, the Court found that the ESB was in a privileged position to know the timeliness and accuracy of financial disclosures and that requiring a complaint was unreasonable because other candidates and the student were in no position to know this information. Whether this was true at the time or not is irrelevant; this state of affairs no longer exists.

The Dean of Students website is open to the public and the ESB posts the financial disclosures of all candidates with a time stamp on this website. This negates the privileged knowledge argument because other parties who feel aggrieved by the lateness or perceived inaccuracy of financial disclosures are more than capable of ascertaining the timeliness and investigating the accuracy of the disclosure and bringing a complaint if they so choose. In fact, this is the process that occurred in the recent case of ESB 2019-005.

In both of the appeals that were heard by the Court, the candidates were not running in contested races and the ESB did not show that there was an aggrieved party. Furthermore, in oral argument, the ESB claimed that its members “could walk by twenty violations being committed” and still be powerless to act. In the case of most all other violations, it is incumbent on the aggrieved parties to bring a complaint in order to precipitate a hearing. The Court finds that, in light of the publicly available listing of financial disclosures with time stamps, aggrieved

parties are in a reasonable position to assess whether they have been harmed by the lateness of the financial disclosure and bring a complaint against the late filer. Therefore, sua sponte authority by the ESB in this matter is unnecessary.

This is not to suggest that candidates become unrestrained because no rules apply with regards to financial disclosures. Students, journalists, and opposing candidates all have a vested interested in being privy to timely and accurate financial disclosures and are justified in claiming harm if those disclosures are not timely or are not accurate. The Court merely holds that, as in other matters that the ESB rules on, it is up to these parties to assess whether they have been harmed and bring a complaint if they so choose.

The University of Texas at Austin is home to thousands of critical, inquisitive minds. Students are capable of assessing the balance of harms between a late financial disclosure and the state of affairs that would result from the disqualification of the late filer. If all of the relevant parties assess that greater harm would arise from filing a complaint than does arise from a late or even missing financial disclosure, that is, ultimately, their prerogative.

III. Regarding the Decision to Overturn versus to Remand

In a previous case (see Guzman) with similar circumstances – a Class D violation was issued without a hearing – the Court remanded the case to the ESB and ordered the ESB to hold a hearing. However, considering the procedures for a hearing outlined in section 4.9 and the fact that the deadline for filing a complaint has passed, the Court does not believe that remanding the cases of the candidates disqualified in 2019-004 is an actionable solution.

The procedures for a hearing outlined in section 4.9 reflect what the ESB, the University, and the Court all agree is the standard for due process in campus elections. This hearing is fundamentally adversarial, requiring two parties: one allegedly aggrieved complainant and a respondent. The rhetorical combat between these two parties is foundational to the truth-seeking process.

The deadline for filing a complaint with the ESB regarding a violation occurring in the 2019 elections was 9:00 p.m. on Monday, March 4, 2019. Because this deadline has passed, there is no possibility for complainants to be present at a hearing as required by section 4.9 and thus no possibility for the adversarial hearing outlined in section 4.9.

ESB 2019-004 was a violation of the right to a hearing guaranteed in section 4.16, the adversarial nature of which is outlined in section 4.9.

Now that the complaining period has passed, substantive due process according to section 4.9 is no longer available in this case. Therefore, the Court cannot remand and must instead overturn the decision in ESB 2019-004.

IV. Regarding Previous Precedent now Held Invalid

This opinion reflects the most recent reading of the code by the Court and holds binding precedential authority. Any language in any previous Court ruling, opinion, or other document which either a.) establishes the ability of the ESB to issue Class D Violations, "other disqualifications ruling(s)," or Class A, B, or C violations (section 4.15) without a hearing or b.) establishes the sua sponte authority of the ESB with regards to any violation currently within their purview is rendered invalid and of no precedential value hereafter. While this applies to all previous rulings and opinions, including those not specifically mentioned in this document, a discussion of a few cases and opinions is relevant to clarify the Court's new reading.

IV(a). Gardner/Guevara v ESB

ESB 2019-004 cites the 2012 Supreme Court case of Gardner/Guevara v ESB. In this case, the Court established the sua sponte authority of the ESB regarding the enforcement of financial disclosures based on the argument from privileged knowledge. The Court found a statutory basis for this authority in the then section 3.23 which is now unavailable but sufficiently similar to the current section 3.27 of the SGEC.

Section 3.27 reads:

> DISQUALIFICATION. Failure to file accurate financial disclosure statements by the deadlines listed in this section, or falsification of financial statements, shall allow for disqualification of the candidate(s) or executive alliance(s) by the Election Supervisory Board.

The Court finds that the argument from privileged knowledge fails and that 3.27 does not grant sua sponte authority to the ESB to enforce section 3.27. The text reads that "failure to file accurate financial disclosure statements by the deadlines listed in this section, or falsification of financial statements, shall allow for disqualification. . ." but does not establish the basis for mandatory disqualification or sua sponte authority for some sort of "automatic disqualification" procedure. Furthermore, the clear requirement for a hearing found in sections 4.16 and 4.15 of the CWEC – a document which supersedes the SGEC – combined with the procedures for a hearing in section 4.9 indicate that

the ESB does not have sua sponte authority in the issuance of any Class A, B, C, or D violation or "other disqualification ruling."

IV(b). Spiler v. ESB

In Spiler, the Court cites the ESB's "plenary authority to determine which violations belong in each class of violations under Election Code §4.12" and does not require the ESB to hold a hearing or overturn the disqualification.

Under the reading of the code in this opinion, this case was not correctly decided. While the ESB does enjoy the plenary authority to determine the class of the violation, this does not absolve it of the requirement to hold a hearing as required by sections 4.15 and 4.16 nor does it absolve the responsibility to consider "severity" and "intent" when considering the class of the violation, which the Court holds is not possible outside of a hearing.

IV(c). Guzman v. ESB

In Guzman, the Court offers the readings of the CWEC sections 4.15, 4.16, and 4.9 that most comport with the readings in this opinion. The Court establishes that with regards to the issuance of Class D violations concerning non-attendance of the candidate seminar, the ESB is required to hold a hearing on the matter. This opinion echoes much of the logic found in Guzman but applies it to all classes of violations and "other disqualification ruling(s)" to require that the ESB have hearings for all classes of violation.

Guzman also includes an extended discussion of "regulatory" versus "judicial" functions of the ESB. The Court suggests that these functions are in some ways combined in the ESB with the ESB holding the ability to both administrate and arbitrate the provisions of the documents governing campus elections.

This opinion recognizes the distinction between these functions but finds that the regulatory or "watchdog" function resides primarily, if not wholly, in the student body. As the code establishes (section 4.1) and the ESB recognizes, members of the ESB cannot bring complaints against candidates based on violations that they witness. In the more colorful terms of the ESB in oral argument, its members "could walk by twenty violations being committed" and still be powerless to act. The Court finds that because the argument from privileged knowledge fails, the ESB does not have a sufficient claim that financial disclosures are uniquely within their purview to act on. Here, as elsewhere, students are capable of the vigilance required to witness violations and bring complaints.

The adversarial nature of elections will ensure that candidates are each other's "watchdogs" and in the absence of a candidate performing this function, as in the cases heard on appeal, it is the prerogative of the members of the student body to determine the balance of harms and take action accordingly.

V. Conclusion

In conclusion,

(a) Regarding the necessity of a hearing when issuing a Class D violation, the Court finds that section 4.16 of the CWEC clearly establishes that a hearing is required to determine that a violation occurred and to consider the "severity" and "intent" as per section 4.13. Therefore, the Court holds that the ESB cannot issue a Class D violation or "other disqualifying ruling" without first holding a hearing according to the procedures outlined in section 4.9. Furthermore, the Court finds that section 4.15 also extends the requirement to hold a hearing to Class A, B, and C violations.

However, the Court recognizes the authority of the ESB to determine the format and manner in which the hearing takes place, as long as the requirements of section 4.9 of CWEC are met.

(b) Regarding the sua sponte authority of the ESB, the Court finds the ESB must hold a hearing to issue a violation of any class or "other disqualifying ruling" and the Court also accepts the ESB's argument that section 4.3 logically ties the holding of a hearing to the submission of a complaint. Considering these two facts, the Court finds that a complaint is necessary to precipitate a hearing which is necessary to issue a violation and that therefore the ESB cannot act sua sponte to commence proceedings and issue a violation or "other disqualifying ruling."

Furthermore, the Court finds that the procedures for a hearing outlined in section 4.9 establish the adversarial nature of these hearings and thus further reinforce the need for a complainant outside of the ESB to act as the aggrieved party. Here, the Court finds that the ESB cedes its former regulatory function in large part to the student body and other parties with standing to bring a complaint. Elections are adversarial in nature and the competitive incentives ensure that candidates will serve as each other's "watchdog." Where these competitive incentives do not exist, it is ultimately the prerogative of students to weigh the harms caused by violations against the potential harms caused by filing a complaint and use their judgment to act accordingly.

Therefore, the Court holds that ESB does not possess sua sponte authority to commence hearing proceedings in the absence of a complaint by an aggrieved party.

(c) Regarding the decision to overturn versus remand the case, the Court holds that because the decision to issue a Class D violation with a penalty of disqualification was not the result of hearing as required by section 4.16, it violated the due process rights of the disqualified candidates. Furthermore, the Court holds that because the deadline for filing complaints has passed, the due process requirements of a hearing outlined in section 4.9 cannot be met and therefore the disqualified candidates would not be afforded due process were the Court to remand the case.

Therefore, the Court overturns ESB resolution 2019-004 and its disqualification of the candidates. The following candidates should be reinstated:

- Caroline Pease
- Holly Ainsworth
- Nico Rago
- Winston Hung

(d) Regarding previous precedent now held invalid, this opinion reflects the most recent reading of the code by the Court and holds binding precedential authority. Therefore, any language in any previous Court ruling, opinion, or other document which either a.) establishes the ability of the ESB to issue Class D Violations, "other disqualifications ruling(s)," or Class A, B, or C violations (section 4.15) without a hearing or b.) establishes the sua sponte authority of the ESB with regards to any violation currently within their purview is rendered invalid and of no precedential value hereafter.

(e) This decision does not invalidate previous decisions and does not form the basis of an appeal for those decisions. This means candidates who were issued a 5% reduction in spending limit in ESB Resolution 2019-001 and did not issue an appeal, for example, cannot retroactively have that spending limit reinstated. An appeal would have been necessary to explain the circumstances, specifically that a hearing did not take place.

It is so ordered.