

No. 09 SSC 008

Filed: 20th February 2010

IN THE SUPREME COURT)

Action No. 09 SSC 008)

Taylor Holgate,)

Plaintiff)

versus)

Peter Gillooly,
Chair, Board of Elections)

Defendant)

OPINION AND ORDER

Complaint by Plaintiff Holgate concerning Defendant Board of Elections’s decision to certify the results of the District 5 Student Congress race. Heard in the Supreme Court 17 March 2010.

Erik Davies, for plaintiff.

Student Solicitor General Kristopher Gould, for defendant.

CHRISTOPHER A. PHILLIPS, Associate Justice.

Plaintiff Taylor Holgate, Candidate Student Congress District 5, asked this Court to call for a re-election in the District 5 Student Congress election on the grounds that the Board of Elections violated VI S.G.C. § 501(A) by failing to comply with VI S.G.C. §§ 403(H) and 508 for acting negligently. This Court will call for re-election where the Board of Elections either (1) abuses its discretion under VI S.G.C. § 403(H), 511, or any other provision of the Code that gives the Board the power to call for re-election or (2) where the Board’s failure to comply with Title VI of the Student Code is so egregious that is improbable that a fair outcome would result. Because Plaintiff has failed to establish that the Board’s conduct rose to a level of egregiousness from which a fair outcome was improbable, we will not call for a re-election for District 5.

I. PROCEDURAL BACKGROUND

The present action was commenced on 20 February 2010, when Plaintiff’s counsel notified the Court of Plaintiff’s intent to file an action following the Board of Election’s (hereinafter “the Board”) certification of the District 5 Student Congress Election. Prior to filing

this case, Plaintiff was a party in 09 SSC 007.¹ In 09 SSC 007, Plaintiff argued that the Board should have called for re-election under VI S.G.C. § 403(H) and challenged the Board's decision not to do so. Section 403 is only applicable, to campaign violations and not to the technical errors that the Plaintiff described in her complaint. Because Plaintiff alleged technical errors and did not allege any campaign violations, she failed to state a cause of action upon which relief could be granted, and her case was dismissed.

Although Plaintiff's original claim against the Board was dismissed, the Chief Justice granted Plaintiff leave to re-file her case upon certification of the results of the District 5 Student Congress election. Following the Board's certification, Plaintiff again brought an action asking this Court to call for re-election on the grounds that the Board violated VI S.G.C. §§ 501(A), 602(A), and was negligent in regards to VI S.G.C. § 302(A).

In response to Plaintiff's new complaint, Defendant filed an answer with the Court admitting in part and denying in part the allegations in Plaintiff's complaint on 24 February 2010. In addition to filing an answer, Defendant filed a motion to dismiss citing the plaintiff's failure to state proper grounds for relief under VI S.G.C §602(K)(1). In the motion to dismiss, Defendant argued again that Plaintiff had failed to cite provisions of the Student Code that would entitle her to relief under § 602(K)(1) and that she had again failed to cite a campaign violation that would warrant the Board calling for a re-election under § 403(H).²

At a pretrial hearing on 28 February 2010 the Chief Justice denied Defendant's motion to dismiss on the grounds VI S.G.C. § 403(L) instructed the Court to hear the case because Holgate challenged a non-administrative decision of the Board. The Chief Justice also framed the issues for the hearing in this matter as follows: (1) whether the Court may call for a re-election if the board of elections fails to comply with its duties under IV S.G.C. § 501(A) and (2) whether or not the board of elections in fact failed to comply with their duties.

II. JURISDICTION AND STANDING

III S.G.C. § 401 (2009) provides that this Court has jurisdiction over "both questions of law and fact, over controversies where the matter in controversy is the validity, under the Student Constitution or laws enacted under its authority of actions of the . . . elections board." Because Plaintiff's complaint challenges the validity of the certification of the election citing procedural violations in regards to IV S.G.C. § 501(A), IV S.G.C. § 602(A), and negligence in regards to VI, Section 302(A) the Court has jurisdiction over this matter.

Because the plaintiff's complaint challenges the certification of the election, standing in this matter is governed by III S.G.C. § 409. Section 409 provides that a candidate "alleging election error or fraud" has standing if his or her "challenging an action of the Board has standing if his or her "powers, rights, privileges, benefits or immunities [are] adversely affected,

¹ Ms. Holgate had originally filed 09 SSC 005. This case was joined with a similar action brought by Marc Seelinger through an order dated February 13, 2010.

² Interestingly, the Order stated "Though granting Defendant's motion to dismiss will cause Plaintiffs' claims against Defendant to lapse because of the statute of limitations, my order should not be construed to preclude Plaintiffs from bringing an action under VI S.G.C. § 511 . . ." In spite of this instruction, Plaintiff and her counsel did not cite § 511 in her amended complaint. Instead, they continued to rely on § 403(H).

restricted impaired or diminished.” Here, the Plaintiff argues that the Board’s conduct affected the outcome of the District 5 Student Congress election. Had the Board acted differently, Plaintiff reasons that she may have won her election. As such, Plaintiff’s “powers, rights, privileges, benefits or immunities [have been] adversely affected, restricted impaired or diminished.” Thus, Plaintiff has standing.

III. FINDINGS OF FACT

At the hearing, both parties presented documentary evidence regarding the actions taken by the Board in the days leading up to and on Election Day. No witnesses were called. Based upon the evidence the Court makes the following findings of fact:

- 1) Plaintiff was a candidate in the District 5 Student Congress race.
- 2) Student Government elections were held on 9 February 2010. Prior to the election the Board carried out two tests of the election system. The first test was on 26 January 2010, and the second was on 2 February 2010.
- 3) The evidence presented reported errors in regards to the second test election. In an email related to the 2 February 2010 test election, Rick Kinney, Applications Analyst for Information Technology Services (ITS), wrote, “[t]here was apparently some problem with local addresses fed to SIS the other night. If I understand what was going on, it should have been corrected last night. I will follow up on that to make sure everything is ok.” Mr. Kinney further instructed Mr. Gillooly to fill out a form indicating that he had “completed testing [the election software], moved the election to production, and done the proper testing there.”
- 4) The tests conducted by ITS assessed the election software. ITS did not check to see if students’ addresses provided on Student Central matched an address list maintained by the Department of Housing and Residential Education. Comparing these records would have revealed that 296 students’ addresses were incorrectly listed on Student Central. If a student’s address is not properly listed on Student Central, then he or she will not be able to vote in the correct Student Congress race.³
- 5) Even if ITS had compared records maintained by the Department of Housing to students’ records on Student Central, the Board of Elections could not change the records on Student Central. Individual students must update their housing information.
- 6) Mr. Gillooly did not obtain a letter from ITS “confirming that necessary computer systems are acceptably secure.” VI S.G.C. § 302(H). However, Mr. Gillooly did have ITS test the election software prior to the election. Mr. Gillooly also published the voting procedure and posted a provisional ballot on the Board of Elections’ website sometime before the election. Neither party was able to confirm when the provisional ballots were available on the Board’s website.

³ A student might be able to vote in the proper district if the incorrect address on Student Central was still within the student’s congressional district.

- 7) On 9 February 2010, Election Day, the two students submitted remedy tickets to ITS. One of the tickets dealt with a misclassification of congressional district. The other related to misclassification of the student's class standing.
- 8) Also on 9 February 2010, Rick Kinney reported to the Board that there was no feasible remedy to the situation via online voting, as students' residential information would not be updated on Student Central in time so that the students could vote in the election.
- 9) Following the receipt of the ITS tickets and additional reports of election errors to the Board, the Board contacted the *Daily Tar Heel* to publicize the availability of paper ballots to those who were having technical difficulties.
- 10) Chairman Gillooly also notified those who asked him about incorrect districts that an inability to vote in the correct congressional district was a records misclassification not a problem with the election software. Gillooly directed these students to fill out paper ballots.
- 11) Neither the Board, Plaintiff, nor ITS, could determine how many of the 296 students who were misclassified on Student Central actually tried to cast a ballot.
- 12) Although neither party could provide the Court with the actual number of the 296 students who attempted to vote, the Court has accepted statistics submitted by Defendant as accurate but does not consider these numbers the precise numbers of students who were affected by incorrect listing on Student Central. Specifically, of the 27,000 students attending UNC-Chapel Hill, 8,093 (30%) cast ballots on election day. Of the 8,093 students who cast ballots, 402 voted in District 5 (5%). Assuming that all 296 students voted, approximately 15 would not have been able to vote in District 5.
- 13) Plaintiff lost the District 5 Student Congress race by 25 votes.
- 14) An email was submitted on 13 February 2010 from Jerri Bland, Executive Director for Enterprise Applications, certifying the software and systems ran correctly with two reported errors in district misclassification and one reported in class misclassification

IV. BURDEN OF PROOF

This Court presumes that any act of the Board is valid unless it is proven invalid. Plaintiff has the burden of proving that there was an error on the part of the Board as "a matter of law and [that] there is reasonable probability that the error caused the injury." III S.G.C. § 608 (2009).

V. ANALYSIS

A. Section 501(A)

At the hearing in this matter, Plaintiff argued that the Court should call for re-election if

the Board fails to comply with VI S.G.C. § 501. Section 501 states that the Board “shall be responsible for monitoring the online election, verifying the results, and ensuring that the process was not corrupted.” Plaintiff argued that the Board failed to meet this standard because it “failed to make students aware of their voting options” and “did[not] correct problems that it knew about beforehand.” To support this argument, Plaintiff alleged that the Board failed to obtain a letter from ITS certifying that the voting software was secure as required by VI S.G.C. § 403(H) and that it failed to publicize the availability of provisional ballots seven days prior to the election as required by VI S.G.C. § 508(C).⁴ Plaintiff further argued that the Board acted negligently failing to check to see if students’ addresses were properly listed on Student Central and for not taking any steps beyond advertising the availability of provisional ballots on the Board’s website and on *The Daily Tar Heel* online edition on Election Day.

In response, the Board argued that Section 501 is “an overarching introduction to” the section of Title VI governing how the Board must conduct an election. If there was a violation, the Board reasoned that it would be of one of the specific provisions of Title VI, Article V, falling below § 501(A) and not § 501 independently. Defendant reasoned that the Board should be held accountable to the specific standards in Title VI, Article V in assessing whether the Board met its duties under § 501(A). Defendant further argued that in deciding to certify an election the Board makes a decision about whether it complied with Title VI, Article V, and if there were irregularities with the voting software. Defendant then reasoned that the Court should review this decision that it complied with Title VI, Article V and that there were no irregularities for abuse of discretion.

We agree with the Defendant that the Board should be held to explicit standards outlined in the Student Code for how the Board must conduct an election, monitor campaigning, sanction candidates, etc. Plaintiff’s argument that we should hold the Board to a negligence standard would hold the Board to a higher standard than that outlined in the Code and could lead to great legal uncertainty for future Boards. Nevertheless, we do not accept Defendant’s argument that this Court must review the Board’s implicit decision that it complied with Title VI in certifying the results of an election for abuse of discretion. The Board has a duty to comply with all provisions of the Code. Adopting an abuse of discretion standard in this area could potentially enable the Board to escape review and sanction by this Court. Instead, we will review alleged violations of the Board *de novo*. Because Plaintiff argues that the Board violated VI S.G.C. § 403(H) by failing to obtain a letter from ITS certifying that the voting software was secure and VI S.G.C. § 508(C) by failing to publicize the availability of provisional ballots seven days in advance of the election we must consider whether the Board complied with the Code and if these violations warrant calling for re-election.

⁴ A legal argument about VI S.G.C. § 508(C) was not originally part of Plaintiff’s complaint nor did Plaintiff’s counsel specifically allege that the Board violated this provision during Plaintiff’s legal argument. Instead, Plaintiff initially argued that publicizing the provisional ballots through the online edition of *The Daily Tar Heel* on election day was negligent. Section 508(C) was brought to Plaintiff’s attention by Student Solicitor Gould who had initially argued that the Board was not required to supply provisional ballots. During rebuttal, Plaintiff’s counsel specifically argued that the Board had failed to comply with § 508(C). At this point, the Student Solicitor General realized that he had incorrectly read the sections of the Code governing provisional ballots and brought this error to the attention of the Court. Although Mr. Gould was required to acknowledge his error to the Court under the Honor Code, the Court appreciates Mr. Gould’s forthrightness and promptness in correcting his mistake.

B. When the Court will Call for Re-Election

Although we could potentially call for re-election for any violation of the Student Code by the Board, our concern is that disgruntled candidates could potentially force re-election for *de minimis* violations of the Code by the Board. For example, the Board might place a candidate's nickname in quotations after the candidate's surname on a ballot. Although this would be an express violation of VI S.G.C. §507, which requires the Board to list nicknames enclosed by quotation marks "before the candidate's surname," we do not believe that asking students in the affected district to re-cast ballots would be warranted nor would it be fair to other candidates in the race. Thus, we will only call for re-election in two instances. First, we will deem a re-election necessary where the Board of Elections abuses its discretion under VI S.G.C. §§ 403(H), 511, or any other provision explicitly empowering the Board to call for re-election. Second, we will deem a re-election necessary where the Board's failure to comply with Title VI of the Student Code is so egregious that a fair outcome in an election is improbable.

Although we cannot with certainty state every instance where the Board's failure to comply with Title VI would be so egregious that a fair outcome in an election would be improbable, we can offer a few clarifying examples. One example is a situation where the Board shows bias to a particular candidate by placing the candidate's name at the top of a ballot instead of determining ballot placement based on a random lottery as required by VI S.G.C. § 507. Another example is a situation where the Board disclosed the results of the election to students before the conclusion of the election which is barred by VI S.G.C. § 509(B).

C. Plaintiff has not Established that the Board's Violations Were So Egregious that a Fair Outcome was Improbable

Here, Plaintiff argues that the Board violated VI S.G.C. § 403(H) by failing to obtain a letter from ITS certifying that the voting software was secure and VI S.G.C. § 508(C) by failing to publicize the availability of provisional ballots seven days in advance of the election. At trial, Plaintiff clearly established that the Board failed to obtain a certification letter from ITS, but she did not establish when that the Board violated § 508(C). In rejecting Plaintiff's argument that the Board violated § 508(C), we note that there are two components of this section—(1) the Board must publicize the voting procedure and (2) it must do so seven days before the election. Here, publishing the provisional ballots on the Board's website would be publicity for purposes of § 508(C) which states that the Board may publicize voting procedures, including provisional ballots, "by any forms of media it deems appropriate," including its own website. While publicizing the availability of the provisional ballots on election day on the online edition of *The Daily Tar Heel* would clearly not meet the seven days prior requirement of § 508(C), Plaintiff did not establish that the Board failed to publish the provisional ballots on its website seven days before the election. Accordingly, we are unable to conclude that the Board failed to comply with § 508(C).

Before considering whether Plaintiff's argument that the Board's failure to obtain a letter under § 403(H) was so egregious that a fair outcome would be improbable, we are deeply dismayed that the Board, has failed to comply with VI S.G.C. § 403(H). Although Chairman Gillooly ran tests of the ITS software and the § 403(H) letter would merely provide

documentation that he had done so, the provisions of Title VI are not optional. The Board must comply with Title VI, and our opinion should not be construed to condone this conduct.

Nevertheless, Plaintiff's allegation that the Board failed to comply with VI S.G.C. § 403(H) does not rise to a level that it was improbable that a fair outcome would result. Indeed, the evidence submitted and agreed on by the court does not demonstrate a situation in which securing this letter would have changed the outcome of the election process. Although we are concerned that ITS does not currently compare students' actual residences to those on Student Central before an election and we share students' frustration that they were not able to vote online, the Board is not currently required to check residency status nor does it have the capability to do so. We encourage other branches of student government and the Board, specifically, to work with ITS to determine if the test is warranted and if affected students can be adequately notified. If the test is not feasible, we would encourage the Board to take other steps—for example, an informational email reminding students to check their residency status on Student Central before an election to ensure that they can vote online.

IV. ORDER

Because the Board's violation of VI S.G.C. § 403(H) was not so egregious that a fair outcome in the District 5 Student was improbable, we **DECLINE** to call for a re-election.

Chief Justice EMMA J. HODSON, Justice KATHLEEN OPPENHEIMER, Justice ANALISE JENKINS, AND JUSTICE JESSICA HARDEN join in the opinion.