No. 08 SSC 004

Student Supreme Court

Filed: 23 January 2009

TIM NICHOLS,
PLAINTIFF

v. **Opinion and Order**

J.J. RAYNOR
STUDENT BODY PRESIDENT

RYAN MORGAN
CHAIR, BOARD OF ELECTIONS
DEFENDANTS

Complaint by Plaintiff Nichols concerning actions of Defendants Raynor and the Board of Elections relating to the Childcare Services Fee Referendum. Heard in the Supreme Court 23 February 2009.

Tim Nichols, pro se, for plaintiff.
Student Solicitor General Kris Gould, for defendant.

STEPHANIE KELLY, Justice.

I. PROCEDURAL BACKGROUND

On February 16, 2009, the plaintiff, Tim Nichols, asked this Court to temporarily enjoin the Board of Elections from placing the Childcare Services Fee referendum on the ballot for the February 17 Special Election on the grounds that the Executive Branch of Student Government had violated VI S.G.C. §§ 402(L)(2) and 405 (2008). The Chief Justice granted the request to stop the election on the referendum, ordering the Board of Elections to halt the release of the final results of the vote on this matter.

Subsequently, Nichols filed a complaint against Student Body President J.J. Raynor as well as Board of Elections Chair Ryan Morgan, asking the Supreme Court to invalidate the results of the referendum and order that a new vote be held on a later date.[1] The defendants, in

[1] In a later brief filed, plaintiff also demanded relief in form of an injunction against the Student Government baring further violations of §§402(L)(2). However, such demand is not properly before this court, as an advisory brief is not a substitute for proper amending of a complaint. As

turn, filed a motion to dismiss, arguing that the plaintiff, having failed to file a complaint with the Elections Board before filing his complaint with the Supreme Court, lacked proper standing to bring his action. After considering the provisions in the Student Code addressing standing to bring an election action, this Court found that plaintiff had standing under III S.G.C. § 409(C) (2008) and denied defendants' motion to dismiss. This Court also denied Nichols' motion to amend his complaint to allege standing under III S.G.C § 408 (2008) on the grounds that it did not give him standing to sue the Board of Elections and because Nichols already had standing under III S.G.C. § 409 (2008).

II. JURISDICTION AND STANDING

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 executive branch, legislative branch, elections board . . ." III S.G.C. §401 (2008). Here, Nichols alleges that the Board violated Title VI by failing to act and that Raynor violated Title VI for her actions related to publicizing the referendum. Because this Court can order action by the Board or can enjoin Raynor from continuing to advocate for the referendum, Nichols has raised a live controversy. Because the violations Nichols has alleged arise under conflicting interpretations of the Student Code by Nichols and the defendants, this Court has jurisdiction to hear the case.

Plaintiff claims standing under III S.G.C. § 409 (2008). This section provides:

> Standing to bring an action before the Supreme Court for an election error or fraud in the acts, decisions and rulings of the Elections Board extends to plaintiffs who must have his/her powers, rights, privileges, benefits or immunities adversely affected, restricted impaired or diminished and the plaintiff must be: . . . (C) A student alleging election error in relation to a constitutional referendum, a constitutional initiative, a special referendum, an initiative election, or a review election.

Id.

Here, Nichols alleges an error relating to the Childcare Services Fee Referendum. As we concluded in our February 20, 2009 order, Plaintiff has standing to bring an action before this Court. Because Nichols has standing to bring this action, he need not allege separate standing against Raynor, who is a necessary defendant in this matter, unless the Court were to dismiss the Board as a defendant.

III. FINDINGS OF FACT

At the hearing, the parties presented documentary evidence about the conduct of President Raynor and other executive branch members related to the fee referendum. Based on this evidence, we make the following findings of fact:

---

the defendant had no notice and opportunity to respond, we will not reform the brief into an amendment.

1. At 9:49 pm on February 16, 2009, students received an email from Raynor with the subject line "Reminder: Vote Today (2.17.09) on Student Fee Referendum" over the Formal Notice email system. This email reminded students of that they could vote in the Childcare Services Fee Referendum on Tuesday, February 17, 2009 from 7 am to 10 pm. The email also provided a link the Executive Branch's website.

2. At 9:49 pm, the Student Government Website, in the portion concerning the Fee, contained a single link to a ".PDF" file of a presentation developed by Corrie Piontak, GPSF Childcare Advocate. The file contains testimonials of students who have received childcare assistance scholarships, statistics about the current program, and alternatives for students who are unable to enroll in the program and unable to pay for childcare services.

3. The website was updated at 11:40 pm on February 16 to include links to pro and con letters to the editor regarding the Childcare Services Fee referendum.

4. Although students were originally unable to send messages over the Formal Notice email system, Raynor recently negotiated a policy for providing student access to this email list due to problems with the informational email system. Under the student access policy, students will ask Raynor for clearance to send an email over the system. Based on a decision tree developed by Raynor and the University's Chief Information Officer, Raynor will determine whether the event warrants attention by the entire campus. If Raynor's approval is granted, students will then send their message to a Vice Chancellor to receive final clearance before being sent over the Formal Notice email system.

5., Emily Joy Rothchild, a member of Student Congress, created a Facebook Group, "Embrace Inclusivity: Support the Childcare Services Fee Increase." Leah Josephson, a member of the Student Government Public Service and Advocacy Committee created "Vote YES on the Child Care Services Fee referendum!" Facebook Group. Raynor joined both of these groups but declined an invitation to join a vote no group.

6. Raynor invited her approximately 1,700 Facebook friends to join the "Vote YES on the Child Care Services Fee referendum!" and approximately thirty friends to join the Embrace Inclusivity: Support the Childcare Services Fee Increase" group. These invitations went directly to the friends' email accounts. Raynor did not include any additional message in these requests to join the group. The subject line for the email to the friends said "J.J. Raynor invited you to join Vote YES on the Child Care Services Fee referendum!" or J.J. Raynor invited you to join Embrace Inclusivity: Support the Childcare Services Fee Increase!"

7. Both Leah Josephson and Emily Joy Rothchild sent messages to members of their Facebook groups in support of the referendum. Students who are sent a message over Facebook are notified of the message and may read its contents through their email accounts.

8. Materials in support of the referendum were stored in the common area of Union Suite 2501, "The Office of Student Activities and Organizations." This room is commonly known as the "Student Government Suite."

9.The Board of Elections has not decided whether these activities are violations of the elections code.

IV. DISCUSSION

A. ALLEGED CODE VIOLATIONS BY PRESIDENT RAYNOR

Both parties submitted arguments before the Court with regard to the appropriateness of President Raynor's use of the university's email notification system and Facebook groups in support of the Child Care Services Fee Referendum. Nichols argues that the prohibition of Student Government emails "to advance the candidacy of any individual or support the passage or failure of a referendum" in VI S.G.C. § 402(L)(2) (2008) precludes the use of both the email notification system—a system whose access to students is controlled by the Student Body President (SBP)—and Facebook group invitations to endorse a candidate or referendum. Kris Gould, counsel for defendants, argues in the alternative that there is no prohibition on electronic representation by the SBP in the Code, reasoning that VI S.G.C. §402(L)(2) (2008) applies to internal email lists utilized only by members of Student Government, executive appointees, and the like. Therefore, defendant contends that the provision does not bar President Raynor's use of the email notification system nor Facebook group invitations.

In regulating elections, the Code does not provide that any action violating its provisions has a tangible effect on the election; it provides only that such an action is wrong. A wrong action alone, without tangible effect does not warrant the annulment of an entire election. Therefore, we do not need to examine the validity of each of President Raynor's actions under the Code, only their ultimate effect. Nullification of results is not a punishment for wrongdoing.

This Court need not resolve the presence or absence of elections code violations on the part of President Raynor. The dispositive question in this case is whether the alleged violations are of a nature that voiding the election would be an appropriate remedy, in the event violations are found. As we hold the nature of the alleged violations do not rise to the level that voiding the results is an appropriate remedy, we decline to reach the question of the presence of those violations.

B. INVALIDATION OF THE VOTE

Plaintiff Nichols argues that the actions of President Raynor tainted the election process to such a degree as to warrant invalidation of the results of the referendum. Nichols argues that the purpose underlying VI S.G.C. §§ 402(L) and 405(A) (2008) of the Code is to prevent Executive and Student Government members from exerting undue influence on the process and the outcome of elections and referendums. Further, Nichols proposes a test for the invalidation of an election based upon VI S.G.C. § 403(H) (2008), which provides that the "Board of Elections may call for a re-election if a violation occurred and it could have affected the outcome or compromised the integrity of the election. " His proposed test would require this Court to consider three key factors in determining whether the integrity of an election is compromised:

the time of the violation, the number of people affected by the violation, and the reversibility of the effects of the violation. In effect, Nichols' test would focus on the fairness in the process of the election, rather than upon the effect of the alleged violations upon the results of the election itself.

Counsel for the defendants argues, in the alternative, that the analysis should be results-focused; elections should be overturned only when it is clear that the outcome was impacted by the violation. In response to Nichols' argument regarding the integrity of the election, defendant argues that this ground for invalidation should only be used when a violation so egregious has occurred that the entire election should be nullified, regardless of the results of the vote. Such a violation would occur only in instances of bad faith. We are more inclined to agree with this argument.

The Board of Elections (BOE) has the power to invalidate an election under VI S.G.C. § 403(H) (2008). This provision lays out the standard required for invalidation by the Board which, as referenced above, requires the outcome of the election to be affected or the integrity of the election to be compromised. The Student Supreme Court, on the other hand, is given the authority to "issue permanent…injunctions to…execute the effect of its judicial determinations" under III S.G.C. § 410(C) (2008), and as such we are not constrained to VI S.G.C. § 403(H) in analyzing the validity of elections. Nevertheless, short of some clearly erroneous polling result that demands equitable relief, we look to the same general harms that the Board would assess, namely an error or violation that adversely impacted the outcome or the integrity of the process.

For purposes of discussion, these harms generally fit into following categories: (1) technical errors, where some misconfiguration or defect in the polling apparatus deprives students of their ability to vote in a meaningful manner;[2] (2) fraud or tampering, where a party directly manipulates the polling results by inserting false or ineligible votes in bad faith; or (3) violations of the elections code substantial enough to impact the outcome such that code-complying opponents of the violator were deprived of a fair poll. Here, the allegations fall squarely into the third category. Due to its nebulous nature, a claim under this category is necessarily the most difficult to advance, and this Court will not grant relief under its equitable injunctive powers absent stark wrongdoing.

It is impossible for us to assume that every violation of the Student Code rises to the level of demanding a revote. We must presume that the voter is a mature adult engaged in our "tradition of responsible student self-government"; the fact that one is presented with one-sided

[2] This would encompass the situation this Court dealt with in Tenyotkin v. Capriglione, No. 07 SSC ___ (Nov. 16, 2007) (order granting summary judgment), where a referendum was presented in an invalid form on the ballot. While consistent with our decision here, this order by its own terms caries no precedential effect.

information does not mean that the mature voter cannot make an unimpaired and legally valid decision. This Court lacks access to evidence of voter mentality which is necessary to determine if outcomes are affected by Code violations. We do not and will not know if a violation has either created more votes in favor of a candidate or referendum, or whether it has created hostility-driven anti-votes to the contrary. Additionally, we cannot presume that all violations of the Student Code will be caught. When debating whether violations impacted the outcome of an election, the unknown violations may impede a meaningful determination. These cases are highly fact-specific, and without a sophisticated model of voter behavior it is speculative to judge outcome based on impacts, even in the narrowest of cases. To avoid the flood of litigation that would likely ensue if candidates and/or concerned parties were to constantly question the BOE's decision-making on these fact standards, we hold that to warrant invalidation, there must be reason to believe that either the results were clearly affected, that students' ability to make a decision was impaired (e.g. through fraud or coercion,) or that the decision was lost (e.g. through technical error).

In analyzing any demand to void an election, we first begin with the presumption that the election results were valid, a procedural and democratic presumption laid out in III S.G.C. § 609 (2008). Such a presumption is core to ability of a student government to remain representative of its constituents. It is up to the plaintiff to rebut this presumption by a preponderance of the evidence, a burden which the plaintiff in this case just did not meet. A speculative conclusion as to impacts of asserted violations is insufficient as a matter of law. The proponent of an order to void an election must prove not just illegal conduct, but that conduct had an adverse impact on voters. Even if they are available, one cannot use the results of the election to draw an inference of adverse impact. Such inference presupposes an impact, and runs afoul of the presumption of able-minded voters. Rather, exogenous evidence must prove that the ability of voters to vote freely was impaired.[3] Furthermore, to avoid an inequitable result, the evidence must foreclose the possibility that there was off-setting conduct by the plaintiff or associated parties. The burden to prove such conduct necessarily must fall to the defendant. Finally, there must be evidence that remedy of re-voting will address the harm proven. If the harm is such that it will continue onto subsequent re-votes, then the remedy is inadequate. Given the inherent damage in disregarding a vote of the student body, the remedy of a re-vote must be ordered only when it will succeed in addressing harm.

There is no evidence here that the acts of President Raynor affected how students voted on the Child Care Services Fee Referendum in a manner adverse to the opponents of the referendum. Further, there is no evidence that President Raynor's acts were fraudulent or made in bad faith. As the Student Body President, Ms. Raynor believed her role to be one of an

[3] Such impairment could result from being misled to the effect of their vote, coerced to vote for one side or the other, prevented from recording their vote in-fact, or other doings. One-sided information alone does not impair a voter.

advocate. She had authority to organize a widely-publicized petition drive to place the same referendum on the ballot. Her emails were sent in good faith and were not created to mislead the student body in a fraudulent way. To the extent that the emails advanced approval of the referendum, no evidence was presented that such attributes impaired the ability of the voter to think critically on whether to actually vote yes. As such, the election was not tainted by violations so as to rise to the level of demanding a reelection. Finally, there is no evidence of any technical problems or tampering which would affect the character or results of the election. Therefore, we decline to invalidate the election or to order for a revote.

V. ORDER

For the foregoing reasons:

1. We find in favor of the defendants.
2. We lift the temporary injunction on the Board of Elections enjoining them from releasing the results of the referendum. We stress again that this injunction did not preclude them from carrying out their investigation of this matter but prevented them only from officially certifying and releasing the results of the contested election.

Done this 24th day of February, 2009, at 9:30 a.m.

Chief Justice EMMA J. HODSON and Justice ERICH M. FABRICIUS concur.