

STUDENT GOVERNMENT ASSOCIATION SUPERIOR COURT

WILLIAMS v. SGA ELECTION BOARD

JANUARY, 2018

Gustafson, JUSTICE, delivered the opinion of the Court.

On November, 29 2017, the SGA Election Board voted not to disqualify Yaseen Shurbaji and Hannah Hardin, respectively the President-elect and Vice President-elect.<sup>1</sup> The Williams Campaign, Petitioner, challenges the Election Board’s decision. We have jurisdiction over this matter as an appeal of an Election Board ruling.<sup>2</sup> We find that the Election Board did not abuse its discretion in voting not to disqualify Yaseen Shurbaji and Hannah Hardin. We therefore AFFIRM the Election Board’s decision.

I

Throughout the past two years, this Court has heard more on election grievances than any other issue. In fact, SGA addressed election grievances last spring through the Election Rules Update Act of 2017.<sup>3</sup> The Act added a good faith requirement to file a grievance and reworked the election schedule.<sup>4</sup> The Act also made a candidate strictly liable for the actions of any volunteer campaigning on their behalf even if they did not direct the volunteer.<sup>5</sup>

Fast forward to this year when the changes went into effect. In the SGA Presidential Election, the Shurbaji Campaign had a total of fifteen grievances upheld by the Board. Shurbaji

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<sup>1</sup> Official Record, 15–16.

<sup>2</sup> SGACA tit. VII, ch. 4, § 26.

<sup>3</sup> See OU SGA Elections Rules Update Act of 2017, Congressional Bill 970802, Senate Bill GS17-12.

<sup>4</sup> *Id.*

<sup>5</sup> SGACA tit. VII, ch. 3, § 21(d). The former language stated that a candidate “shall take reasonable measures” to make sure volunteers were not violating the rules. The new language says candidates “must” make sure volunteers are not violating the rules.

and Hardin won a Run-off Election on November 6th. Another campaign, the Hiatt Campaign, had eight grievances upheld against it.

The grievances against the Shurbaji and Hardin are the following: seven for the use of the university logo, six for unsolicited electronic messages, one for the use unapproved campaign material, and one for campaigning on an OUIT's website.<sup>6</sup> Several weeks after the Run-off Election, the Election Board voted not to disqualify either the Shurbaji or Hiatt Campaigns.<sup>7</sup> The Election Board briefly reasoned that the grievances were not severe and the grievances did not sway the electorate.<sup>8</sup> In addition to the Board's reasoning the Election Chair gave an interview for OUDAILY ("The Daily") in which he elaborated on disqualifications.<sup>9</sup> Abernathy said that a disqualification vote considers several factors including margin of victory.<sup>10</sup>

## II

We first consider whether the Election Board abused its discretion by voting not to disqualify the Shurbaji and Hardin campaign. We find that the Election Board did not abuse its discretion. Therefore, we affirm the Election Board's decision not to disqualify the campaign.

The SGACA only gives guidance to the Election Board as what must happen for a candidate to be eligible to be disqualified.<sup>11</sup> There is nothing that would "force the Election Board to disqualify anyone at all."<sup>12</sup> So for this Court to overturn the decision of the Election Board, "this Court would need to find that the Election Board . . . abused its discretion in making its decision."<sup>13</sup>

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<sup>6</sup> Official Record, 3–4.

<sup>7</sup> Official Record, 15–16.

<sup>8</sup> Official Record, 20.

<sup>9</sup> Official Record, 35–36.

<sup>10</sup> *Id.*

<sup>11</sup> SGACA, Title VII, Chapter 4, § 26.

<sup>12</sup> *Shen v. SGA*, SC 2016-001.

<sup>13</sup> *Id.*

The Election Board has “great discretion and leeway in deciding whether or not to disqualify a candidate.”<sup>14</sup>

However, this Court never explained what an abuse of discretion would look like. We feel it is necessary to adopt an abuse of discretion standard that can be applied in this appeal and future appeals. Therefore, this Court defines an abuse of discretion standard, as used by Oklahoma courts, which states that an abuse of discretion occurs when a court “makes a decision on an erroneous conclusion of law or when its decision has no rational basis in evidence.”<sup>15</sup>

Since it is not being argued that the Election Board made an erroneous conclusion of law, we will turn our focus as to whether the Election Board’s decision had a rational basis in evidence.

A previous decision held that the Election Board could disqualify a candidate if he or she had three violations, or it could not disqualify a candidate even if he or she had seven violations.<sup>16</sup> This Court said that those two scenarios are “within [the Election Board’s] right” to do.<sup>17</sup> That decision only discussed the number of grievances as a reasons for disqualification. Solely based on that decision, Petitioner makes a strong argument as to why the Shurbaji and Hardin campaign should be disqualified. Petitioner’s argument mainly focuses on the total number of grievances upheld against the Shurbaji and Hardin campaign. Petitioner is correct that the Election Board can consider the number of grievances. However, that is not the only factor the Election Board should consider during a disqualification vote.

When the Election Board has to make a disqualification vote, it should factor in *all the surrounding facts and circumstances* of the upheld grievances. The number of grievances is just

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<sup>14</sup> *Id.*

<sup>15</sup> *Childers v. Childers*, 2016 OK 95, ¶ 28, 382 P.3d 1020.

<sup>16</sup> *Shen v. SGA*, SC 2016-001.

<sup>17</sup> *Id.*

one factor the Board should consider. The Election Board should also consider the severity and frequency of grievances against the campaign. For instance, there is a difference between election fraud and an unauthorized use of OU materials. Election fraud is more severe than the unauthorized use of OU materials, which often are the result of a mistake.<sup>18</sup>

The Election Board should also consider the actions of the campaign. In other words, to what extent did the campaign try to prevent grievances? The severity of the grievances would increase if the candidate repeatedly violated the same election rule without trying to mitigate or prevent those grievances. These are examples of surrounding facts and circumstances that the Election Board should consider during a disqualifying vote.

Albeit brief, the Board did consider some of the surrounding facts and circumstances. The Board stated that it “did not find substantial cause *through these grievances* for disqualification.”<sup>19</sup> Additionally, the Board said “the grievances were not severe enough to justify disqualification.”<sup>20</sup> The Election Board held that the grievances were not “severe.” The record supports this conclusion for several reasons.

First, almost half of the upheld grievances were based on a provision in the SGACA making the candidates potentially liable for the actions of 24,000 students.<sup>21</sup> Any student—regardless of whether they know the candidate—can give a candidate a grievance by sending a mass text in support of that candidate. This is a harsh policy. As this Court has said, “we feel the rule holding

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<sup>18</sup> For example, there have been infractions for the use of a blurry OU logo—100 feet in the background—in a candidate’s Instagram post.

<sup>19</sup> Official Record, 20 (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> Official Record, 6. This number is based on the assertion that if any OU student, regardless if they know the candidate, sent a group message in support of a given candidate, then that candidate would be liable for those actions.

candidates strictly liable for *anyone* who campaigns may not be the wisest of policies.”<sup>22</sup> It is difficult for a campaign to police this kind of behavior, especially when there is a plethora of messaging apps. It reasons that because it is difficult to control every OU student, the Election Board would reduce the severity of committing these types of infractions. This is exactly what it did.

Secondly, seven of the upheld grievances deal with improper use of the OU logo. The pictures that contained the logos were posted within a few hours of each other.<sup>23</sup> And one of them was small face tattoo. Those pictures in that small time frame cost the campaign seven out of its fifteen grievances. Since these grievances occurred in a short amount of time, it is reasonable to hold that these are less severe. Essentially, it was a mistake that spawned seven infractions. It was not the same infraction seven times spread out over the course of the campaign. If that was the case, then the campaign should correct that behavior because it is in its control.

Finally, the Election Board already heard and ruled on each grievance. The Election Board is the fact finder for each grievance and deference should be shown to the Election Board’s findings.

Thus the record does support the Election Board’s holding that the grievances were not severe, but that is not to say that the Election Board could not have done better. The Election Board used a margin-of-victory analysis as a part of their argument. This is incorrect. The correct analysis looks at the surrounding facts and circumstances *but does not depend on whether the candidate received more votes*. Suppose one campaign went door-to-door and forced every student to vote for them. Later, the results came in and that candidate received 100% of the vote. If a margin of

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<sup>22</sup> *Shurbaji v. SGA*, SC 2017-006, 4.

<sup>23</sup> Official Record, 7.

victory analysis was used, then clearly this candidate did nothing wrong because of the wide margin of victory. This should not be the case. The candidate's actions and the nature of the grievance control. If a candidate did something wrong, then the candidate did something wrong—the margin of victory does not matter. The OU Daily interview reflected the Election Board's—especially the Election Chair's— imperfect judgement. Although the Election Board exhibited poor judgment, this Court does not find that it rises to an abuse of discretion because, as previously noted above, the record contained sufficient evidence to support the Election Board's ruling that the grievances were not severe enough for disqualification.

Accordingly, we find that there was enough evidence in the record to support a rational basis for the Elections Board's decision not to disqualify. Therefore, the Election Board did not abuse its discretion.

### III

Although the Election Board did not abuse its discretion, this Court needs to clarify the “Court's role in an appeal challenging a decisions to *not* disqualify a candidate.”<sup>24</sup>

There is some confusion as to whether this Court can disqualify a candidate by overturning an Election Board decision to not disqualify and remanding back to the Election Board with instructions to disqualify.<sup>25</sup> According to the SGACA, this Court “shall have no authority to disqualify any candidate except when confirming a decision of the Election Board.”<sup>26</sup> However, the SGACA also states that this Court is the “final appellant review of any action arising under the

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<sup>24</sup> *Shen*, SC 2017-001, nn. 6-7.

<sup>25</sup> Official Record, 12.

<sup>26</sup> SGACA, Title VII, ch. 4, § 41.

SGA Constitution and acts of the Legislative Branch.”<sup>27</sup> At first glance, these two provisions look incompatible but they can be reconciled.

Remanding with instructions to disqualify is different than directly disqualifying a candidate. This is because the former is pursuant to this Court’s appellate authority while the latter is not. The SGACA grants this Court appellate authority over *any* action under OU SGA. Furthermore, if this Court did not have any authority over disqualifications then, theoretically, a decision to remand to the Election Board could result in a continuous appeal-remand loop between this Court and the Election Board. It would remove any remedy for an appeal, and, in effect, remove the ability for a student to appeal this issue because of a lack of a remedy. This we cannot do. The OU SGA Constitution protects students’ rights to an appeal and so does this Court.<sup>28</sup> Therefore, this Court would be well-within its rights to reverse a decision of the Election Board not to disqualify with instructions to disqualify the campaign.

#### IV

This Court also feels the need to express concern over SGACA Title VII, Chapter 1, § 1. That statute defines “campaign spending,” but more importantly defines what campaign spending is not. According to the SGACA, campaign spending does “not include any fines assessed under this Code.”<sup>29</sup> Petitioner’s concern is that the SGACA encourages a “Pay-to-Win” system by including fines in the definition of campaign spending. This Court shares that concern.

If, for example, a candidate violates several campaign rules, then the candidate could just pay the fine without dipping into their campaign budget. That money comes out of their personal

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<sup>27</sup> SGACA, Title IV, ch. 2, § 4.

<sup>28</sup> Article XI, § 5.

<sup>29</sup> SGACA, Title VII, ch. 1, § 1.

assets. This could encourage a wealthy candidate to break a few rules and just pay the fine. This Court does not think this is a wise policy.

Instead, SGA should include fines as a part of campaign spending. The candidate then will have to consider the costs of campaigning and breaking any rules because candidates are capped on spending. Therefore, candidates will be more diligent in running a clean campaign to maximize their expenditures for campaigning and not for fines.

In summary, we find that the Election Board did not abuse its discretion in deciding not to disqualify the Shurbaji Campaign. Through this opinion, we hope to offer guidelines and factors for future Election Boards to consider when weighing the potential disqualification of a campaign. Notably, however, that analysis should have nothing to do with the margin of victory. We further clarify that this Court does have the authority to reverse an Election Board's decision not to disqualify, and that such a reversal would take the form of a "reversal with instructions to disqualify." This would only occur if the Court found an abuse of discretion. Finally, we express concern over the wisdom of the policy excluding fines from a campaign's expenses.

IT IS SO ORDERED

Bourland, CHIEF JUSTICE, with whom Bollinger, JUSTICE, joins DISSENTING

A year-and-a-half after this Court's opinion in *Shen v. SGA Election Board*, SC 2016-001, we are again asked to reconsider a decision by the Election Board not to disqualify a candidate from a major campus election. In *Shen*, then-CAC Chair-elect Aimee Schnebeck had four grievances upheld against her. The Election Board decided that, even though Schnebeck was eligible for disqualification under the Code Annotated, the grievances did not warrant disqualification. We decided that the only way to overturn such a decision at the Superior Court

level (absent a finding that the Election Board somehow violated the Code Annotated or SGA Constitution) was to find that the Election Board abused its discretion in reaching its decision. We did not attempt to define what constituted an abuse of discretion in that case.

That was a mistake.

Had we given more thought to what criteria an Election Board should consider when deciding whether to disqualify a candidate, this task would have been easier. In fact, we may even be considering a different appeal altogether. But, we did not. Because we did not, we must, again, take up the difficult task of putting some sort of quantitative metric on a qualitative question. I agree with the majority opinion in several respects and with a vast majority of their analysis, particularly with Parts III and IV and pieces of Part II, but because I would ultimately decide this case differently and reverse the decision of the Election Board, I must write separately and dissent.

## I

The majority presented the facts, but some bear repeating. President-elect Shurbaji's campaign received the highest total number of grievances for a campaign in the collective memory of the SGA (possibly ever). The Shurbaji Campaign met the threshold number of grievances for a disqualification vote by the general election, but the Election Board opted to stay that vote until after the run-off election. The Shurbaji Campaign acquired a few additional grievances and brought their total up to 15 by the conclusion of the run-off election. Well-after the run-off, the Election Board held a hearing and a vote regarding Shurbaji's possible disqualification and unanimously voted not to disqualify the President-elect. Its reasoning was detailed in a single paragraph: Even though there were 15 upheld grievances, Shurbaji was not "unfit" for the presidency, there was not "substantial proof that the grievances changed the outcome of the

election,” and the “grievances were not severe enough to justify disqualification.”<sup>30</sup> The paragraph makes no mention of how the Board conducted its investigation into the matter, what went in to the discussion, how long they investigated the matter, and what else (if anything) played a role in helping the Board reach its decision.

But other filings in this case shed at least some light on other factors considered by the Election Board and how the Board reached its ultimate decision. For instance, Corey Abernathy, the Election Chair, in his statement to the Court seems to suggest that the margin of victory played a role in deciding whether to disqualify the Shurbaji Campaign.<sup>31</sup> Mr. Abernathy also mentioned margin of victory as a factor the Board would consider in an interview he gave with the *OU Daily* long before the ultimate disqualification vote.<sup>32</sup> The filings also mention a supposed addition to the Code Annotated that holds candidates liable for the actions of their volunteers. It is well-documented in prior cases before this Court that Mr. Shurbaji takes issue with the use and definition of “volunteer” in the Code Annotated, but it appears that a member of the Election Board believes and has (incorrectly) told Mr. Shurbaji that “volunteer” is an addition to the Code Annotated and that the Board is just now getting used to the new version of the Code.<sup>33</sup> So it seems the newness of certain provisions of the Code also played a role in deciding whether to disqualify the Shurbaji Campaign. None of these factors, I believe, should have anything to do with whether a candidate should be disqualified and the consideration of these factors should constitute an abuse of discretion.

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<sup>30</sup> Official Record, 20.

<sup>31</sup> Official Record, 14.

<sup>32</sup> Hannah Pike, *Grievances unlikely to disqualify SGA presidential candidates*, [http://www.oudaily.com/news/grievances-unlikely-to-disqualify-sga-presidential-candidates/article\\_672f9de8-c0ca-11e7-9c8d-e396a0336e40.html](http://www.oudaily.com/news/grievances-unlikely-to-disqualify-sga-presidential-candidates/article_672f9de8-c0ca-11e7-9c8d-e396a0336e40.html) (Nov. 4, 2017).

<sup>33</sup> Official Record, 14.

## II

The most blatant abuse of discretion in this case is the consideration of margin of victory by the Election Board. I would go so far as to say that this factor was not just a piece of the puzzle, but the driving force behind the Election Board's decision. Time and again, the Election Board and Mr. Abernathy brought up the margin of victory. They believe that because the margin of victory was so high, they should not disqualify a candidate. This is an absurdity. What this should tell future candidates is that you can break as many rules as you want and subversively try to sway the election because, if you are successful and if the margin of victory is high enough, the Election Board won't touch you. This only serves to reward bad behavior. All this says to me is that if I cheat well enough, I won't be disqualified.

The scant record from the Election Board's hearings (in fact, there is no "record" despite numerous requests that one be created) leads me to take the Election Board at its word—margin of victory (*really*) mattered. Because of the little explanation we received from the Election Board, I would consider the Board's use of margin of victory to be an abuse of discretion.

I next take issue with the fact that Mr. Abernathy took an interview with the *OU Daily* in which he openly discussed the disqualification vote that was pending before the Election Board. The text of the article makes it sound, in my opinion, that Mr. Abernathy had already made up his mind despite the lack of a thorough and detailed investigation. I think this interview was improper and a poor decision on Mr. Abernathy's part; if he were a judge, he would be sanctioned. Giving an interview does not rise to the level of abuse of discretion, but it does indicate to me that decisions were made about the vote before a full hearing was conducted. That, to me, *would* be an abuse of discretion.

Finally, I take substantial issue with the erroneous belief that the word “volunteer” was added to the Code Annotated and that the newness of various code provisions should cause the Election Board to be less severe with the Shurbaji Campaign. To be absolutely clear: the word “volunteer” was not in any way added to the Code Annotated last year. The Election Rules Update Act of 2017 notes the additions and deletions in the Code Annotated. That bill clearly shows that the word “volunteer” was not an addition. The only change that applies here is the strict liability requirement for volunteers. Instead of a negligence standard, the Act proposed a strict liability standard. So the Election Board’s reliance on this “new” word in the Code is unfounded. The Election Board also suggests that the newness of election rules played a role in its decision. This is as absurd as using margin of victory in the Election Board’s analysis. This is simply not how laws work; you don’t get a pass because a law was new or because you were unaware of the change. These candidates are seeking election to the highest SGA office. To hold them anything less than accountable for knowing, following, and instructing others on the rules for elections is, in my mind, a dereliction of duty and an abuse of discretion.

When I examine the Official Record, especially the number of grievances upheld against the Shurbaji Campaign, I see an abuse of discretion by the Election Board. There were other factors that could have been and should have been considered; there were steps that could have been taken to document the investigation. But none of that happened.

### III

To be clear, I do not dissent from the majority because I necessarily think President-elect Shurbaji should have been disqualified. I dissent because I think there was a clear abuse of discretion on the part of the Election Board. I don’t know how I would have voted as a member of the Election Board, but I know that, from the record, I don’t see enough to justify its decision.

As I stated at the outset—there are substantial portions of the majority’s opinion with which I vehemently agree. I sign on to their analysis considering an abuse of discretion. I vehemently agree with the majority that this Court has the authority to reverse decisions of the Election Board with instructions to disqualify. I also agree that the current method of campaign finance creates a risk of a “pay-to-win” system—a *much* greater risk than slashing allowable expenses to prevent certain student organizations and their members from hijacking SGA elections. But I cannot agree with the majority’s conclusion. I would, at the least, reverse and remand with instructions to the Election Board to conduct a more thorough investigation, create a proper record, and avoid questionable criteria in reaching its decisions. At the most, I would reverse with instructions to disqualify.

I respectfully dissent.