

STUDENT ASSEMBLY REVIEW BOARD

YANNIE CHANG V. INDEPENDENT ELECTIONS COMMISSION

ON PETITION TO HEAR AN ELECTION APPEAL

Case No. 24-ELE-00001

Decided April 03, 2024

The Review Board rules in favor of the Petitioner.

Opinion of the Board, by Robert Drake, Jr. (JD '24)

Under SA Code §5.2-10(1), “[a]ny candidate who feels that the elections process has not met the requirements of a fair and unbiased election . . . may appeal the election to the Review Board.” In these cases, the Review Board is statutorily bound to declare an election invalid if it finds “the alleged infraction could have altered the outcome of the election.” SA Code §5.2-10(3). Consistent with the quorum requirements of SA Code § 4.4-4(1), five members of this Board heard this case, and unanimously concluded that at least one of the alleged infractions “could have altered the outcome of the election.” For the following reasons, the Review Board decides for the Petitioner.

I

Election appeals are unique amongst other cases within the Review Board’s jurisdiction. Unlisted in the Board’s original jurisdiction, *see* SA Code §4.2-1, the Student Assembly designated the Review Board as the first, and final, arbiter of these claims. Further, the Student Assembly separately enunciated a standard of review for the Review Board to apply and limited the Board’s expansive remedial powers when dealing with these cases. *Compare* SA Code §5.2-10(3) (limiting the remedy to declaring a race invalid and holding a special election) *with* SA Code §4.6-1(1) (“Review Board has the authority to impose whatever remedies it sees fit”). These limitations suggest that the Student Assembly specifically communicated an intention for the Review Board to follow in election appeal cases through its separate grant of jurisdiction over election appeals.

The Review Board finds these intentions instructive, but not conclusive. As addressed by the Respondents, a standard too low would leave elections susceptible to near-automatic reversal upon pleadings that allege infractions with only a remote possibility of impacting the outcome. However, this does not adequately account for the Student Assembly’s deliberate use of the word “could” in enunciating its standard. Thus, before deciding this case, it is necessary to clarify the exact standard of review the Review Board is meant to apply in election appeals.

The Respondent’s position is an excellent place to begin this analysis. In an abstract sense, anything could affect the outcome of anything. As is the nature of possibilities, there are few things so far from the grips of reality as to not have even a remote chance of affecting an outcome. In this sense, the Respondent is correct that the Review Board must apply a standard more stringent than accepting any pleading that raises a remote possibility of affecting the outcome of an election.

The Review Board declines the Respondent's invitation, however, to raise the standard above what can be reasonably contemplated by the definition of the word "could". The Student Assembly's choice to use "could" instead of "would" must be construed as an intentional decision; a holding that rejects the plain text of the SA Code would run afoul of the Student Assembly's intent and impermissibly substitute our judgment for that of the legislature. To be sure, "would" is defined as "express[ing] probability or presumption" by the Meriam Webster Dictionary, as opposed to "could", which is defined as describing something merely "conditional." This difference is significant because a probability implicates a certainty, bringing this definition too far from what can be reasonably understood as the definition of the word "could". Had the Student Assembly intended otherwise, not only could they have used different word choices, but they also could have refrained from specifically enunciating a standard in these cases.

Thus, the proper standard lies somewhere in between these two definitions. For this case, it will be sufficient to base our ruling on an allegation that rises above a remote probability of affecting the outcome of an election, even if it is not probable to affect it. In the Review Board's opinion, this is the only way to remain consistent with the implied intent of the Student Assembly's standard.

II

Amongst the variety of allegations raised by this appeal, one of the Petitioner's allegations was that the Student Assembly Attorney General's participation in their opponent's campaign could have impacted the outcome of this election. Compared to the rest of their claims, this allegation operates uniquely: the Petitioners do not wholly assert that this involvement influenced the voters. Instead, this claim rests upon the idea that having the Attorney General on the campaign staff for the opposing candidate could have raised procedural impediments to maintaining a fair election. The candidate with the Attorney General on their staff could have unequal access to the enforcement process, or at least gain some sort of advantage through the Attorney General's expertise before these adjudicative bodies.

The federal government contemplated this concern with the Hatch Act, which limits political activity by certain federal employees. Employees under the act are broken down into two categories: "less restricted" employees and "further restricted" employees. Further restricted employees are barred from "campaign[ing] for . . . or otherwise engag[ing] in political activity in concert with . . . a candidate for partisan political office." The Department of Justice, headed by the United States Attorney General, issued guidance on this concerning its employees. Notably, the Department of Justice extends the limits on further restricted employees to all political appointees, "to ensure there is not an appearance that politics plays any part in the Department's day-to-day operations." This means that the United States Attorney General self-imposes a restriction on its own political activity to maintain an apolitical appearance.

The principles of this are self-evident as applied to the facts of this case. The Student Assembly Attorney General possesses a great deal of power that could implicate them in appeals of Independent Elections Commission decisions. Under SA Code §5.3-1(3) any "functional unit of Student Assembly . . . has the right to have the Attorney General to represent them" in cases

brought by individuals not affiliated with the Student Assembly. Using this provision, the Independent Elections Commission could call upon the Attorney General's services in campaign misconduct appeals to the Review Board. This is also supported by SA Code §5.3-2(4), which lists this right as part of the Attorney General's duties. ("Attorney General shall represent the Student Assembly or any institution of it thereof if a case is brought by an individual or group not affiliated with the Student Assembly"). Further, SA Code §5.3-2(2) charges the Attorney General with "investigat[ing] any perceived breaches of the . . . Code." As proven by the Respondent's evidence and briefing, the Attorney General could have exercised this authority during this election, contemplating whether the failure to bring a Review Board proceeding against the Chang Campaign would be "inappropriate" in a conversation about enforcement proceedings.

To be sure, the Hatch Act's prohibitions apply to partisan activity absent from Student Assembly elections. Despite the lack of partisan labels in these elections, the Hatch Act's relevance is best construed as an analogy to the underlying principle for removing the Attorney General from the political process. The United States Attorney General via the Hatch Act removes itself from the political process to avoid the appearance of impropriety. The fear is that, given the Attorney General's immense power, the public and other candidates may perceive the Attorney General's involvement as generally unfair, if not an impediment to holding a candidate accountable. The Student Assembly Attorney General's power under the SA Code raises these concerns here. Exercising the power to bring enforcement proceedings, or at least some ability to become involved with subsequent appeals, could chill opposing candidates' willingness to bring enforcement actions against the sitting Attorney General's affiliated campaign.

After all, the Student Assembly Attorney General is uniquely situated amongst its classmates to handle claims before the Review Board and similar adjudicative bodies. This expertise gives the officer an inherent upper hand over other students in the adjudicative process because of its exposure to the process. As applicable to these facts, Mr. Williams is an exceptionally skilled advocate. His arguments are thorough and persuasive, and he always does an excellent job of advocating for the Student Assembly's interests. This exceptional advocacy makes the decision to prevent future Attorneys General from participating in the campaign process even more important.

While it might not have been probable that this involvement influenced any specific decision, that is not the standard the Review understands itself to be constrained to in this case. Instead, the Petitioner's allegation must only allege this effect above a remote probability. Given the analogous federal practice of removing the Attorney General from political activity, the Review Board believes the Student Assembly Attorney General's participation in the campaign process could have raised similar concerns in this election. Accordingly, this involvement is sufficient to justify the Review Board's decision.

III

Given this holding, the Review Board must address the appropriate remedy for the Attorney General's involvement in future elections and the now upcoming special election. The Review Board's ultimate position is that the Student Assembly and the Independent Elections Commission are better positioned to regulate this matter than us. However, the Board certainly does not lack

possible remedies. One approach could bar the Attorney General's participation in the campaigns for this upcoming election to prevent any unfair advantages, but this is not the only remedy. Other approaches could address these issues by forcing the Attorney General to recuse itself from campaign conduct cases or by appointing a special counsel to investigate and enforce campaign misconduct violations. Ultimately, the decision whether to go with one approach over another involves a balancing of interests this Board lacks the expertise to handle. Out of respect for the Independent Election Commission's expertise and the Student Assembly's legislative authority, we refrain from imposing a specific remedy and instead defer the question to those bodies for resolution.

IV

Although the Review Board does not base its merits decision on the allegations regarding the spread of misinformation, it is still privy to the concerns raised by these claims. On the facts alleged, there is no device sufficient to impute liability upon either campaign for the rhetoric and misinformation alleged in this case, let alone one. The main issue concerns the standard required to prove a claim on this ground. To prove that misinformation could have affected the outcome of the campaign, the Petitioner must have proven beyond speculation that the alleged conduct is attributable to the Respondents. Any standard lower than that could lead to unfair outcomes and accountability for situations beyond either party's control.

At oral argument, it became evident that harsh rhetoric and misinformation have been issues affecting Student Assembly elections for a while. One of the Petitioners' main reasons for bringing this appeal was to address a pattern of behavior they believed predated their tenure in the Student Assembly. The Respondents conceded this issue, highlighting that their campaign had also been the target of misinformation spread on social media. Even the Independent Elections Commission noted the difficulties posed by social media.

The unfortunate truth of these facts is that claims made on YikYak cannot be sufficiently traced back to either campaign due to the anonymity of the posts. Further, the claims made by the third party are also not traceable back to the Respondent's campaign. Supported by each campaign's internal efforts to counter the spread of misinformation, the record conclusively determines that the alleged misconduct cannot be attributed to either campaign.

This does not lessen the threat posed by misinformation. With each passing election cycle, misinformation and rhetoric surrounding campaigns intensify, posing serious threats to the democratic process at every level. Especially because a solution has evaded federal lawmakers and the social media industry, the Review Board does not expect the Student Assembly or the Independent Elections Commission to make up for these shortcomings. This is not to say they are incapable of implementing a solution, though. Campaigns could be prevented from propagating information they know is untrue, and candidates could also be burdened with affirmative obligations to publicly denounce misinformation when they become aware of it. These reforms are likely within the authority of the SA Constitution; it is even unclear whether these obligations are implicit within the SA Code and Constitution as it stands. Nevertheless, the Review Board finds it inappropriate to distinguish between capitalizing on political misfortune and knowingly endorsing false statements in this case. The facts make it clear: each campaign took appropriate steps to

counter the spread of misinformation, and none of the alleged conduct is sufficiently traceable to either campaign.

V

Before concluding, I (speaking for myself) want to offer a brief aside about student government. Student government is an important exercise in self-governance and has been a long-cherished part of extracurricular activity. The skills practiced in these positions serve important pedagogical goals, preparing students for professional leadership and teaching students about how to work as a team. The students who decide to take time out of their busy class schedules and personal lives to not only run campaigns but also hold office, are often guided by the same motivation: they all want to make positive changes in their communities.

This principle must not be lost upon the facts of this case. Differences of opinion are natural, and in some senses required for a successful election. Despite the adversarial nature of an election, maintaining collegiality is still foundational to the democratic process. Ad hominem attacks, while provocative, will always be less effective than genuine policy disagreement because this clash of ideas challenges each side to produce better policy. This is the exact virtue contemplated by the free exchange of ideas.

I do not doubt that each of the candidates in this election contributed excellent ideas to the overall discourse. Through this process, the William & Mary community has benefitted from the quality of each candidate's platform. However, serving in student government is, unfortunately, not guaranteed for everyone. At the end of the day, somebody will have to win, and somebody will have to lose. Despite this fact, a candidate should never be derided for their decision to participate in this process. Because, as stated before, these students engage with this process out of their desire to make the communities a better place, and this value deserves celebration.

VI

Ultimately, the Review Board's job is not to determine whether an allegation conclusively impacted the election. We are only asked to determine whether an allegation could have affected the outcome of an election beyond a remote possibility. Accepting this standard acknowledges the uncertainty regarding the impact of these claims on the outcome of the election. Given the nature of the Student Assembly's standard, rendering factual conclusions about the effect of these allegations is beyond our contemplation. Upon the pleaded allegations, we are of the opinion that the Student Assembly Attorney General's involvement in a campaign poses a sufficient risk of insulating a candidate from enforcement. Whether this involvement had an actual effect is yet to be determined. That question is best decided by the voters, and with the facts laid out, we accordingly turn the question back to them to render the final decision on the impact of the Petitioner's allegations. Pursuant to SA Code §5.2-10(3), the Review Board hereby declares the 2024 Student Body Election for President and Vice President invalid and orders a special election between Terra Sloan & Oscar Lazo and Yannie Chang & Hashir Aqeel.

It is so ordered.