

IN THE SUPREME COURT FOR THE  
ASSOCIATED STUDENTS OF THE UNIVERSITY OF ARIZONA

ORIGINAL

**Daniel Hernandez, Petitioner**  
Candidate for ASUA President

vs.

**Michael Colletti, Respondent**  
in his official capacity as ASUA Elections Commissioner

Argued: ~~March 29~~, 2011  
Decided: ~~March 30~~, 2011

DANG, C.J. delivers the opinion of the Court, in which DIPPEL, J., HUM, J., and WARD, J. joined. CHASE, J. dissents in part.

**OPINION**

DANG, C.J.:

**FACTUAL AND PROCEDURAL BACKGROUND**

Petitioner, Daniel Hernandez, brings this appeal after automatic disqualification in the race for ASUA Student Body President. Prior to March 8, 2011, Petitioner accumulated five checks for violations of the ASUA Elections Code. Those checks are not at issue in this appeal. Between the evening of March 8, 2011 and the day of March 9, 2011, Petitioner received five complaints, resulting in five violations and six checks as levied by Respondent Elections Commissioner. Thus, on March 9, 2011, Petitioner had 11 checks, exceeding the threshold for disqualification by two checks and resulting in automatic disqualification.<sup>1</sup> Petitioner timely appealed the six checks to the Elections Commission, in which the Commission upheld all six checks against Petitioner. Petitioner timely appealed the six checks to this Court. This Court has jurisdiction pursuant to section 6-1.05 of the Elections Code.

**DISCUSSION**

**I. Standard of Review**

This Court adopted a standard of preponderance of the evidence for the Elections Commissioner to apply in reviewing allegations against a candidate for ASUA office.<sup>2</sup> *Allen v. Colletti I* (2011). In *Allen*, this Court stated, "Elections disputes are best

<sup>1</sup> Automatic disqualification results when a candidate receives 10 or more checks. 2011 ASUA Elections Violation Guide.

<sup>2</sup> Preponderance of the evidence means more likely than not, or just over 50% likelihood.

classified as civil matters and thus, the general civil standard of preponderance of the evidence should apply. Additionally, the Elections Commissioner has only 24 hours to make a determination regarding a violation. Any standard above preponderance of the evidence would not be practical in such a situation.” *Id.* Any higher of a standard would place an undue burden upon the Elections Commissioner in his duties to assure the smooth running of the election. *See ASUA 2011 Elections Code 1-4.01.*

Additionally, the Court must determine which standard to apply in reviewing a determination made by the Elections Commissioner. This Court gives deference to the findings of the Commissioner and members of the Elections Commission. *Tubbs v. Miller II* (2006). The *Tubbs* Court stated, “We make our decisions based on good faith reliance that the Elections Commissioner ... has done [his or] her job and adequately investigated the situation.” *Id.* However, “[t]his is not to say that the factual findings of the Elections Commissioner or the Elections Commission cannot be challenged.” *Id.* This Court will review the Election Commissioner’s determination under the abuse of discretion standard. *Allen.*

## II. Formal Complaint One

The first complaint listed by Respondent alleges that Petitioner sent an automated message to random phone numbers campaigning for Petitioner and his slate, “Team Red” or the “Red Slate.”<sup>3</sup> The complaint alleged that an individual received an unsolicited text message from the Red Slate. The individual did not know how they obtained his number and did not wish to receive such a message.

Respondent determined there was sufficient evidence that Petitioner and his slate violated section 8-2.04 of the Elections Code, which states, “Sending unsolicited messages including but not limited to Facebook messages, email, text messages, and instant messages [is] strictly prohibited. Messages must be addressed to specific individuals including at least the recipient’s first name in the body of the message and/or to specific clubs or organizations including at least the club or organization name in the body of the message.” As a result, Respondent issued two checks based on the violation of section 8-3.01 and the blatant nature of the violation.

Petitioner asserts that he does not know who sent the message and argues that Respondent has the burden of proof to show which candidate or campaign staff member sent the unsolicited text message. This Court agrees. While it is easy to identify a recipient of an unsolicited text message, proving the message’s originator is a more difficult task. The advent of free mass text messaging software allows essentially anybody to distribute unsolicited messages. The burden of proof requires Respondent to identify the message’s sender. To hold otherwise would encourage adversaries to send unsolicited messages guised as the candidate himself.

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<sup>3</sup> Slates are official groups of multiple candidates that have registered with the Elections Commission. 2011 ASUA Elections Code 4-3.01. Slates are responsible for the actions of all slate members. *Id.* at 4-3.06.

Although it was clear that the text message encouraged recipients to vote for Petitioner and the Red Slate, the Respondent could not identify the sender of the message. The evidence was insufficient for Respondent to issue the violation. The Court finds that Respondent abused his discretion in doing so and vacates the violation and the two checks associated with it.

### **III. Formal Complaint Two**

The second complaint alleges that a member of Petitioner's campaign staff wore a "Team Red" shirt in the ASUA office. After Respondent spoke with a witness that photographed the violation on a camera phone, Respondent found that there was sufficient evidence that Petitioner and his slate violated section 5-3.04 of the Elections Code, which provides, "No campaigning is allowed at any time in the ASUA offices." Respondent issued one check based on the violation of section 5-3.04.

Petitioner claims that because he and his slate distributed over 150 "Team Red" t-shirts, it would be impossible to control the actions every t-shirt recipient. Although Petitioner explained the campaign rules as outlined by the Elections Code to every recipient, he argues that he should not be held accountable for any violations caused by them. The Court disagrees.

T-shirts that explicitly endorse a candidate or slate are distributed to staff members and friends with the intention of soliciting votes. Their effect is the same – if not more effective – than leafleting, posting material, or other forms of communication. As a form of campaigning for the candidate's benefit, a candidate who distributes t-shirts must bear the responsibility of those recipients. Those recipients, whether knowledgeable staff members or merely aloof acquaintances, become an extension of the candidate's campaign. A candidate that reaps the benefits of campaigning must also assume its risks. The ASUA office is clearly designated as a neutral, campaign-free zone, and to expose in explicit material in such an area (whether intentionally or unintentionally) provides an unfair advantage to the candidate and is a violation of that policy and the Code.

The Court finds that there was no abuse of discretion by Respondent and affirms the violation and resulting check against Petitioner.

### **IV. Formal Complaint Three**

The third complaint involved members of the Red Slate handing out fliers in the Integrated Learning Center (ILC) at the University of Arizona Main Library. The complaint alleges that members of the Petitioner's slate were purposely leaving fliers on the table and in the study rooms. Respondent determined from witness testimony that there was sufficient evidence that Petitioner and his slate violated section 8-1.11 of the Elections Code, which provides, "No posters shall be placed at any University of Arizona computer lab." Subsequently, Respondent issued one check based on a clear violation of section 8-1.11.

Petitioner called upon the testimony of slate member, Erik Lundstrom. Mr. Lundstrom indicated that the slate distributed approximately 9,000 pieces of campaign material through the campaign period. Additionally, Mr. Lundstrom explained that he and other slate members (not including Petitioner), campaigned in ILC study rooms, leaving campaign materials with the occupants of said rooms.

While the study rooms are separated by glass windows and doors from the actual computers, this Court finds that such rooms are in such close a proximity to the computer area that it is included in the term "University of Arizona computer lab," as outlined in sections 8-1.11 and 8-3.04. As Respondent states in his brief, "The ILC is strictly off limits for a plethora of reasons but mainly because the computers inside the ILC represent polling stations." As the study rooms are clearly a part of the ILC, the distribution of campaign materials on computer tables and study rooms is prohibited either by sections 8-1.11 or 8-3.04.

The Court finds no abuse of discretion by Respondent affirms the violation and the check associated with it.

#### **V. Formal Complaint Four**

The fourth complaint states that members of Team Red and their campaign staff were campaigning within 75 feet from a polling station. A photo accompanied the complaint, which showed members holding posters in the restricted area. Upon investigation, Respondent determined that Petitioner's slate members were campaigning 70 feet away from the official ASUA polling station. Therefore, Petitioner was in violation of section 5-3.10 of the Elections Code, which states, "During the dates of the Primary and General Elections, candidates shall not campaign within a seventy-five (75) feet radius of a polling station." Respondent issued one check based on the violation of section 8-1.11.

It is unfortunate that Petitioner's campaign staff was a mere five feet away from being in compliance with the Code. However, because of the sufficiency of evidence, the Court finds that there was no abuse of discretion in issuing the violation. The Court does suggest that the Commissioner and the Elections Commission effectively indicate the accurate boundaries of the no-campaign zone during future elections. The Court affirms the violation and the resulting check.

#### **VI. Formal Complaint Five**

The final complaint stated that Petitioner wore a "Team Red" shirt at the ASUA sponsored event "Learn Without Concern." Respondent determined from witness testimony that there was sufficient evidence that Petitioner violated section 5-3.06 of the Elections Code, which provides, "No campaign is allowed at any ASUA sponsored events not including Elections Commission sponsored events." Respondent issued one check based on the violation of section 5-3.06.

Petitioner argues that he was unaware that ASUA was co-sponsoring the Learn Without Concern event. He listed the three sponsoring groups known to him at the time: Students Against Guns in Education, Graduate and Professional Student Council, and Brady Campaign to Prevent Gun Violence. Despite Petitioner's lapse in knowledge, Respondent indicated that the event was on the ASUA website. Further, a GPSC press release on March 4, 2010 provided, "The event is hosted by the Graduate and Professional Student Council (GPSC) ... The Associated Students of the University of Arizona (ASUA) are co-sponsoring the event. These two representative bodies will hold a public, non-partisan speaker series to facilitate civil discussion."

As discussed in Section III of this opinion, wearing a t-shirt that endorses a candidate or slate is a form of campaigning, which must comply with the rules as outlined by the Code. It is incumbent upon the candidate to familiarize himself with those rules and be aware of when they apply. It is not unreasonable to require a candidate to investigate whether an event is ASUA sponsored before reaping the benefits associated with campaigning at said event.

The Court finds that there was no abuse of discretion by Respondent and affirms the violation and the check associated with it.

### CONCLUSION

The Court vacates Formal Complaint One and affirms Formal Complaints Two, Three, Four, and Five. This ruling leaves Petitioner with nine checks, one short of automatic disqualification.

According to section 1-1.07 of the Elections Code: "The Elections Commissioner shall have the discretion as to levy a violation and subsequent penalties in the form of warnings, reduction of spending limits, loss of campaign rights, and/or disqualification." The Violation Guide further states: "Disqualification may immediately result for certain violations as mentioned in the Code for extreme situations that violate university policy or are severely detrimental to the Election process."


We now remand the case to the Elections Commissioner. The Commissioner has 24 hours to make a determination regarding Petitioner's disqualification pursuant to the aforementioned sections of the Elections Code and Violation Guide.<sup>4</sup>

It is so ordered.

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<sup>4</sup> At the time of this written decision, the Elections Commissioner has made a determination that Petitioner's violations were not of such a severe nature that they warrant disqualification and consequently reinstated Petitioner as a qualified candidate.

DATED this 12<sup>th</sup> day of April, 2011.

  
Chief Justice Jennifer Dang

  
Justice Adam Dippel

  
Justice Matthew Hum

  
Justice Emily Ward

## DISSENT

CHASE, J. concurring in part, dissenting in part.

I concur with the majority in respect to parts I, II, IV, V, VI, and VII. I dissent with respect to part III, Formal Complaint Two.

The unspoken issue in this violation is one of agency law, or more specifically, apparent authority. The Elections Commissioner, and the majority, assesses a violation to Petitioner because of a violation someone supporting his campaign made. In order to do this, there is the implicit assumption that Petitioner has some control over this third party. The Respondent argued that an individual on campus would assume this person was a member of Petitioner's campaign after seeing the Team Red shirt, thus adopting a rule of apparent authority. Apparent authority is the "authority that a third party reasonably believes an agent has, based on the third party's dealings with the principal, even though the principal did not confer or intend to confer the authority." Black's Law Dictionary (9th ed. 2009). Here, the violation is assessed against Petitioner due to the fact that Respondent believes a student on campus would assume this third party was an agent of Team Red.

This use of apparent authority is clearly erroneous. If an individual sees a McCain '08 bumper sticker or Obama '08 bumper sticker, it would not be reasonable to assume that the driver of that vehicle is an agent of Senator McCain or President Obama. Supporting a candidate of an office does not make someone an agent of that campaign, nor would the reasonable person assume that they were. In the present case, Petitioner gave out over 150 shirts. At one point, Petitioner was distributing the shirts on the mall to anyone who asked for one. The fact that the shirts were available to the general student body is an indication that these shirts were not worn only by candidates of the campaign.

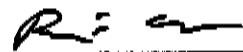
Despite the lack of actual or apparent authority, Petitioner did attempt to inform all recipients of shirts about the rules regarding where the shirts could be worn. According to Petitioner, and his witness, every person who received a shirt was told it could not be worn in the ASUA office. Respondent was asked by this court what more Petitioner could have done to make sure he didn't violate the rules, since he is going to be held to an extremely broad definition of agent. Respondent suggested limiting the number of shirts. In other words, limit advertising, limit speech.

Unfortunately, Petitioner did not raise a First Amendment Freedom of Speech issue in his argument and thus the court did not address the issue. However, limits on free speech is not a new issue for this court. *See Benkendorfer v. ASUA Elections Commission* (2010). Forcing candidates to limit their campaign materials to ensure that a third party does not violate one of the Election Code rules is an extreme limitation on freedom of speech. Such a limitation can only be imposed if there is a compelling state interest, and the limitation is narrowly tailored to meet that interest. *See Id.* Chase, J dissenting.

If the appeals of the last two years have taught us anything, it is that the ASUA Elections Code needs to be revised. A mere 3,000 students voted in this year's election. Less than 10% of the student body. Yet, despite that fact, the Elections Commissioner is suggesting even more restrictions on speech. It seems like more speech, not less, might help to improve voter turnout and generate more involvement for ASUA.

For the foregoing reasons, I respectfully dissent as to part III, Formal Complaint Two.

DATED this 12<sup>th</sup> day of April, 2011.



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Justice Brian Chase