

This is an appeal from a decision of Student Senate Court of Appeals, which rejects a challenge to the Elections Commission's certification of the results of the Spring elections to the Student Senate.

On April 8, 2014, the day before the elections for the Student Senate began, the Elections Commission ruled that the Jayhawkers Coalition had filed an incomplete, inaccurate, or fraudulent weekly financial report in violation of S.S.R.R. 7.4.9.2.6. It disqualified the Coalition from participation in the election, reasoning that S.S.R.R. 7.4.10.6.10 makes disqualification the mandatory sanction for this violation. Under the Elections Code, the Jayhawkers had a right to, and did, appeal the Commission's decision. The appeal obviously was not heard and resolved until after the election, which was held on April 9th and 10th. Despite the Commission's disqualification decision, the Jayhawkers Coalition remained on the ballot. Each of the Jayhawkers' candidates received a plurality of the votes in the election. Overall, approximately 60% of the votes cast in the election were cast for Jayhawkers' candidates. On April 24th, the Judicial Board released its decision in which we upheld the Elections Commission's disqualification of the Jayhawkers. Shortly thereafter, the Elections Commission publicly announced the unofficial results of the election. This public announcement, although including information about the number of votes for all candidates, excluded from the unofficial tabulation all votes cast for the Jayhawkers' candidates. The Commission reasoned that because these votes were for disqualified candidates, they are invalid. On April 29th, the Commission certified the official results of the election, which, consistent with its prior public announcement of the unofficial results, excluded all votes for the Jayhawkers' candidates. The Commission certified candidates not affiliated with the Jayhawkers as the winners of the election.

On May 1st, Eli Hymson, a student who had voted for the Jayhawkers, appealed the Commission's official certification to the Student Senate Court of Appeals. Mr. Hymson made alternative arguments. First, he maintained that the Election Code requires that the Commission certify votes cast for the Jayhawkers, recognize that each of the Jayhawkers' candidates received the required plurality of votes, and certify the Jayhawkers' candidates as winners of the election.¹ Second, he argued that because the results of the election were materially distorted by the votes cast for the Jayhawkers' candidates, who were disqualified, the Election Code requires the holding of a new election. On May 2nd, the Student Senate Court of Appeals, on its own motion and without a hearing, dismissed Mr. Hymson's appeal as frivolous. It reasoned that certification of the Jayhawkers' candidates as the election winners would be inconsistent with, and undermine, the Commission's decision to disqualify the Jayhawkers. The Court also concluded that the alternative remedy of annulment and a new election was "unnecessary and impossible at this point in time."

This appeal to the Judicial Board followed.

We conclude that the only reasonable reading of the Election Code is that, first, the election results were "materially altered by a violation of the Code" and, second, a new election is required.

¹ In the appeals hearing, the appellant did not reaffirm this argument despite being given the opportunity to do so. It is with good reason that appellant has evidently abandoned this argument. Certification of the Jayhawkers' candidates as winners would obviously contradict both the Commission's decision to disqualify the Jayhawkers and our previous decision upholding the disqualification. We accordingly will not discuss this argument further.

Consequently, the Code requires that the Commission to oversee the new election contemplated by S.S.R.R. 7.4.7.10.3.

We begin by observing that we do not fault the Elections Commission's decision to keep the Jayhawkers' candidates on the ballot. Wholly apart from the practical difficulties of changing the ballot at the very last minute, the Commission could reasonably conclude that removing the Jayhawkers' candidates from the ballot would undermine the Jayhawkers' right to appeal. If the Jayhawkers' appeal had been successful, then, had the Commission removed that coalition's candidates from the ballot, a new election obviously would have been necessary. The Elections Code does not address what the Commission is to do if a Coalition is disqualified prior to an election but before it has had an opportunity to exercise its right to an appeal. The Commission therefore had discretion. The Commission acted reasonably in keeping the Jayhawkers' candidates on the ballot but nonetheless trying to inform voters of its appealable decision to disqualify those candidates. See U.S.R.R. 6.7.3.4.

This does not resolve the question of what the Code obliged the Commission to do thereafter. In Part I, we set forth our primary rationale for our conclusion that the Code requires a new election. Part II addresses the Commission's reasoning.

I.

In contrast with its silence on whether to keep disqualified candidates on the ballot pending the outcome of an appeal, the Code *does* address the Commission's authority respecting election results. One set of provisions addresses the tabulation of ballots. See S.S.R.R. 7.4.7.9. Another set of provisions addresses the certification of election results. See S.S.R.R. 7.4.7.10. The tabulation of ballots, which yields what the Code terms the "unofficial" election result, must be publicly released. S.S.R.R. 7.4.7.9.3. The regulations give the Commission no authority to decline to tabulate votes appearing on a ballot. The validity of votes is not relevant to the Commission's tabulation function. Once the votes have been tabulated, the regulations provide for another phase of the Commission's work, that of official certification. No sooner than 48 hours after public release of the unofficial result, the Commission must certify the official result. It is only in this phase that the Commission has the authority to determine that the result of the tabulated votes, i.e., the unofficial result, is invalid or tainted by a "material distortion". S.S.R.R. 7.4.7.9.4 & 7.4.7.10.1. If the Commission does determine that the unofficial result is invalid or was materially altered by a violation of the Code, it must order that a new election be held. S.S.R.R. 7.4.7.10.3.

Because the Jayhawkers' candidates remained on the ballot, the "tabulation of *ballots*" required by S.S.R.R. 7.4.7.9 necessarily must include the votes cast for those candidates. The plain and unambiguous meaning of the Election Code does not give the Commission authority to disregard votes for a candidate in tabulating the unofficial election result. S.S.R.R. 7.4.7.10.1 makes clear what is already apparent from the structure of the pertinent provisions when it declares: "Upon completing the tabulation of *all* votes cast in the General Election, the Elections Commission shall publish the unofficial results." Votes were cast for the Jayhawkers' candidates and the Commission was obliged to include *all* votes in its tabulation of the unofficial result.

In the certification phase of the Commission's task the focus is different and the validity of votes becomes a live issue. In certifying the official result, the Commission does have authority to determine that the unofficial results are invalid or materially altered by a code violation. In the circumstances presented here, in fact, the Commission was *required* to determine that the unofficial result was so altered. This result included votes for the Jayhawkers' candidates. Approximately 60% of the votes had been cast for such candidates. But these candidates had been disqualified for code violations and this disqualification had been upheld on appeal.

The Election Code authorizes one and only one outcome when the Commission determines that the unofficial election results are affected by a material violation of the Election Code: A new election. The pertinent provision is unambiguous: "If the Elections Commission finds that the results of any electoral race have been materially altered by a violation of this Code, it *shall* declare the results of that race void and call for a new election for the affected office(s)." S.S. R.R. 7.4.7.10.3. This provision does not give the Commission discretion to devise a reasonable solution, taking into account practical difficulties. It does not set forth a menu of alternatives and give the Commission discretion to choose among them. The provision uses the term "shall"; it mandates the calling of a new election.

The only reasonable reading of the pertinent provisions, then, requires the holding of a new election. We conclude that the Commission's decision to the contrary must be set aside as inconsistent with the applicable regulations pursuant to U.S.R.R. 6.7.3.2 ("The decision of a hearing body shall be set aside if applicable provisions of the University Senate Code, University Senate Rules and Regulations, Handbook for Faculty and Other Unclassified Staff, Board of Regents policies or procedures, or state or federal law require a contrary result.").

II.

We find unpersuasive the arguments to the contrary. The Commission's principal rationale is that, first, it properly excluded votes for the Jayhawkers' candidates in announcing the unofficial election result and, second, it properly determined that the exclusion of these votes did not materially distort the unofficial election result. As we have explained above, this reasoning confuses the Commission's role in *tabulating ballots* with its role in *certifying official results*. The regulations concerning the tabulation phase of the Commission's task give the Commission no authority whatever to disregard votes recorded on a ballot on the ground that these votes were invalid or improper. The Commission's authority to take into account the validity of votes comes into play only in the certification process. The regulations as written frame the question to be asked in the certification process as whether the unofficial tallies, *which included votes for the Jayhawkers' candidates*, were materially distorted by a violation of the code. As explained above, the only possible answer to this question is yes because approximately 60% of the ballot votes went to disqualified candidates. In addition, the only permissible remedy in these circumstances is a new election.

As a result of its misreading of the regulations, the Commission instead framed the question as whether the unofficial result, which the Commission obtained by wrongly *excluding all votes for the Jayhawkers' candidates*, was materially distorted by a code violation. Framing this question in the way this way was

inconsistent with the Election Code. It was not the result of a reasonable interpretation of ambiguous regulations; it was the result of misreading of regulations whose meaning is clear. The Commission, as we have observed, had no authority to exclude votes for the Jayhawkers' candidates in tabulating the ballots, as part of its task of ascertaining the unofficial election result.

Furthermore, even if we were to assume that the Commission rightly framed the question, we think that the Commission gave the wrong answer. For purposes of argument, let us assume (incorrectly) that in tabulating ballots the Commission may exclude votes it determines to be invalid. For purposes of argument, let us ask (again incorrectly), as the Commission did, whether the election result obtained by excluding all Jayhawker votes was "materially altered by a material violation of the Election Code." Because approximately 60% of the voters had their ballots effectively discarded, we conclude that the only reasonable answer to this question is yes. If effectively throwing away the ballots of more than half of the voters does not constitute a material alteration of the election result, we are hard put to imagine what does constitute such an alteration. At the appeals hearing, the Commission gave three explanations for its conclusion that the election result was not materially altered by excluding all votes for the Jayhawkers' candidates.

The Commission first argued that because it had announced its appealable decision to disqualify the Jayhawker Coalition the night before the election, voters made an informed decision to vote for the Jayhawkers nonetheless. It is fair to hold these voters to the consequences of their informed decision. The first problem with this argument is practical. Although the disqualification decision was announced on the Commission's website and in the UDK on the first day of the election a number of voters must have been unaware of the disqualification decision when they voted. We do not know how many voters fall into this category. We are unwilling to declare this problem irrelevant. This would effectively impose an obligation on student voters to check the Commission's website or that day's issue of the UDK before voting. The imposition of such an obligation would have no discernible legal basis and when they voted students did not have reasonable notice of such an obligation's existence.

The second problem with the Commission's position is that it puts voters to an unacceptable choice. A voter who had the Jayhawkers' candidate as his or her first choice could decide to vote for that candidate in the hope that the Jayhawkers' appeal of the Commission's disqualification decision would succeed. But because the appeal might fail, a voter employing this strategy risked having his or her vote set aside, thereby effectively losing the right to vote. Indeed, if the Commission's certified election results are upheld, that is exactly what will have occurred. Alternatively, to guard against the possibility that the Jayhawkers' appeal would fail, such a voter could vote for his or her next best choice. But because the appeal might succeed, a voter using this strategy risked subverting his or her first preference for the Jayhawkers. An overriding purpose of the Code is to make the result of elections turn on the voters' informed judgments regarding the policy matters likely to come before the Student Senate and the qualifications of the candidates running for office. It would undermine this fundamental purpose to interpret Election Code so that the election result might be influenced by how many voters correctly guessed the outcome of a Judicial Board appeal. The only reasonable means of eliminating the influence of such irrelevant guesswork, given that approximately 60% of the voters cast votes for the

Jayhawkers' candidates, is to ask those voters which eligible candidate they prefer. And the only feasible mechanism for doing this is to hold a new election.

At the appeals hearing, the Commission made a second argument in support of its conclusion that the election results were not materially affected by excluding votes for the Jayhawkers' candidates. It maintained that it had no reason to believe that the outcome of the election would have been any different if the Jayhawkers' candidates had been removed from the ballot. Again, we think that this is the wrong way to frame the question. The fundamental purpose of the Election Code is to encourage students to vote and register their informed preferences by voting for the candidates of their choice. See S.S.R.R. 7.3.6.1.5 ("The Elections Commission shall . . . [a]ctively promote the election with the goal of continuously increasing voter turnout"). That purpose must guide how the question is framed. The question, then, is not whether there are strong reasons to believe that the result would have *different* had the Jayhawkers been omitted from the ballot. The right question is whether there are compelling reasons to believe that the result would have been *the same*. In other words, due to the importance of the right to vote, the presumption must be in favor of enabling the approximately 60% of voters whose votes were discarded to be heard. Those who voted for the Jayhawkers were not in any way responsible for the code violations that led to the disqualification of the Jayhawkers' Coalition. It is presumptively wrong to certify the results of an election in which more than half of the voters have been effectively disenfranchised.

We have no basis for determining how those who voted for disqualified candidates would have voted if presented with a choice only between or among candidates who had not been disqualified. The Commission presented us with no reason to conclude that the outcome of such a choice would somehow magically coincide with percentages each candidate received once all votes for the Jayhawkers are simply bracketed and ignored. Unsupported speculation about how those who voted for the Jayhawkers would have voted is insufficient to overcome a right as fundamental as the right to vote.

At the hearing, the Commission also mentioned concerns about the workability of conducting a new election. We share those concerns. The Code requires that the election take place in April. In light of the necessary time for challenges and appeals, it is unlikely that a new election could be held in the same semester when the election results are affected by code violations. Furthermore, although the Code requires a new election when the results are materially altered by code violations, it does not set forth the rules pursuant to which the new election is to be conducted. However, the Code plainly requires a new election in circumstances such as these. The Commission's concerns furnish grounds to revise the Code, not to "interpret" it in a manner that contradicts its plain text. It must have been obvious to those who drafted and approved the Code that a new election almost certainly could not be held in the Spring semester. But the Code nonetheless unambiguously requires a new election when, as here, the unofficial results have been materially altered by code violations.

Finally, the Commission maintains that it was, and we are, without authority to order a new election because prior to the Commission's certification of official results no voter or Coalition requested this remedy. The Commission relies on S.S.R.R. 7.4.7.9.4, which provides:

Any individual who was eligible to vote in any electoral race may contest the results of that race by filing a written complaint with the Elections Commission no later than twenty-four (24) hours after the public release of the election results. If a race is contested, the Elections Commission shall conduct a hearing to determine whether the results are valid and free from material distortion. The Elections Commission shall not certify any contested electoral race until this determination has been made.

Prior to certification of the election result, the Commission asked the candidates involved if they wanted to lodge a complaint of this nature. None of the candidates came forward to do so. In the Commission's view, it was not obliged to call for a new election because prior to certification no one had made such a request.

There are two flaws in this reasoning.

The first is that in challenging the certification in the Student Senate Court of Appeals, the appellant did request a new election. According to the Commission, the appellant's request was not timely because it was not made before certification in accordance with S.S.R.R. 7.4.7.9.4. However, another provision in the Code, S.S.R.R. 7.6.1, states that "any" decision of the Elections Commission may be appealed to the Student Senate Court of Appeals within 48 hours. The appellant filed his appeal, which included a request for a new election, within 48 hours of the Commission's certification of official results on April 29th. These two provisions, S.S.R.R. 7.6.1 & 7.4.7.9.4, must be read in harmony with one another so as to furnish nonexclusive alternatives. Pursuant to S.S.R.R. 7.4.7.9.4, a voter or a coalition may raise an argument to the Commission once the certification phase has begun and before the Commission has certified official results. But, in addition or in the alternative, a voter may utilize S.S.R.R. 7.6.1 to challenge the Commission's official certification decision after the fact in the Student Senate Court of Appeals. The language of the two provisions supports this conclusion. S.S.R.R. 7.4.7.9.4 says that a voter "may" file a written complaint with the Commission prior to certification. It does not say that a voter "shall" file a written complaint with the Commission prior to certification. In addition, the Commission's decision regarding official certification plainly qualifies as "any" decision of the Commission and so is subject to S.S.R.R. 7.6.1's right of appeal.

The second flaw in the Commission's reasoning is that the remedy of a new election does not depend on the request of a candidate, coalition, or voter. The Election Code declares that, "Before the results may be considered official, the Elections Commission *shall* certify to the Student Executive Committee that the results are valid and free from any material distortion." S.S.R.R. 7.4.7.10.1. The Code declares, "If the Elections Commission finds that the results of any electoral race have been materially altered by a violation of this Code, it *shall* declare the results of that race void and call for a new election for the affected office(s)." S.S.R.R. 7.4.7.10.3. These provisions do not say that "*after someone complains*, the Commission shall" certify the unofficial result as free from distortion and, if it cannot, call for a new election. It is the Commission's job to call for a new election if it finds that the unofficial result has been tainted by a code violation, whether or not anyone requests this. Calling for a new election in the circumstances presented here follows from the core duties that the Commission must fulfill as part of

doing its job. The regulations expect that the Commission will do its job whether or not anyone formally insists that it do so.

It also merits emphasis that the Commission informed us at the hearing that prior to certification it actually considered whether to order a new election. The path to the conclusion that a new election is required is not so mysterious and esoteric that it would be a miscarriage of justice to conclude that the Commission's certification decision is inconsistent with the applicable regulations and must be set aside. See U.S.R.R. 6.7.3.2.

III.

We conclude that the Commission's certification decision must be set aside and that a new election must be held. This decision is required by the plain text of the Election Code and therefore by the standard of review governing our decisionmaking, which requires us to set aside decisions that are inconsistent with pertinent regulations. This decision is also faithful to two of the overriding purposes of the Code, which are to encourage students to vote and to make elections turn on the informed preferences of voters. These purposes would be defeated by setting aside the votes of more than 60% of eligible voters, almost all of whom were entirely blameless in the disqualification of the candidates for whom they voted.

We have great sympathy for the Elections Commission. The Commission is charged with the thankless task of interpreting and administering a substantially new Elections Code. As we noted in our previous decision, some of those provisions make little sense. The Commission's concerns about the practicability and workability of a new election are certainly reasonable. But the Elections Code does not give the Commission blanket authority to do whatever it reasonably determines is sensible or workable. As this decision and our previous decision emphasize, the Code in some areas contains directives whose clear meaning must be followed.

We stress that although the Code plainly requires a new election in cases such as this, it does not specify rules for the conduct of such an election. This means that the Commission necessarily has a large range of discretion in adapting and interpreting the Code for this purpose. It also means that many challenges to the Commission's conduct of the new election must surmount of the very high bar of showing that Commission has abused its discretion. See U.S.R.R. 6.7.3.4.

Signed,

Professor Thomas Stacy, Chair, Law

Michelle Ginavan Hayes, Liberal Arts & Sciences

Professor Lisa Wolf-Wendel, Education