

Ponder v. Joslin

Zeno H. PONDER v. William JOSLIN, Chairman of, Warren R. Williams, Joseph E. Zaytoun, Hiram Ward and C. Bruce Hawkins, Members of the North Carolina State Board of Elections.

138 S.E.2d 143 (1964)

Supreme Court of North Carolina.

September 30, 1964.

Atty. Gen. T. W. Bruton, Deputy Atty. Gen. Ralph Moody and Staff Atty. Harold L. Waters, Raleigh, for State Board of Elections.

William J. Cocke, Asheville, and A. E. Leake, Marshall, for plaintiff.

* * *

DENNY, Chief Justice.

The plaintiff's first assignment of error challenges the correctness of the order entered by Huskins, J., on 8 August 1964, directing the defendants "to consider the evidence taken by said State Board of Elections during its investigations conducted in Madison County since 11 June 1964 * * *."

The plaintiff's second assignment of error challenges the order on the ground that, in effect, it presupposes the authority of the State Board of Elections to go behind the returns certified by the County Board of Elections in Madison County and to ascertain whether or not void, fraudulent or otherwise illegal votes were included in the certified returns to the State Board of Elections by the County Board of Elections in Madison County; and, in effect, recognizes the power of the State Board of Elections to require the Madison County Board of Elections to amend its returns and to declare which candidate, based on the amended returns, is entitled to be certified as the nominee of the Democratic Party for State Senator for the 34th Senatorial District.

These assignments of error will be considered together.

The plaintiff's position is that the State Board of Elections cannot go behind the returns certified to it by a county board of elections; that in such a situation the only duty of the State Board of Elections is to compile and tabulate the returns as certified by the various county boards of election and that this is merely a ministerial duty to be performed pursuant to the provisions of G.S. § 163-138. We do not concur in this view when a protest has been filed challenging the legality of the returns certified by a county board of elections.

In the case of *Burgin v. North Carolina State Board of Elections*, 214 N.C. 140, 198 S.E. 592, this Court said: "The fact that after the returns are in, the State Board of Elections is to canvass the returns and `determine

whom they ascertain and declare by the count' (C.S. § 5994, as amended by Pub.Laws 1933, c. 165, § 9) to be nominated or elected is not to be construed [**138 S. E.2d 147**] as a denial or negation of its supervisory powers, which perforce are to be exercised prior to the final acceptance of the several returns. Nor will the courts undertake to control the State Board in the exercise of its duty of general supervision so long as such supervision conforms to the rudiments of fair play and the statutes on the subject."

By the enactment of Chapter 165 of the Public Laws of 1933 (now codified as Chapter 163, General Statutes of North Carolina) the General Assembly gave broad supervisory powers to the State Board of Elections.

It would seem that by the enactment of G.S. § 163-10 and other sections of Chapter 163 of the General Statutes, the General Assembly gave the State Board of Elections power to supervise primaries and general elections to the end that, insofar as possible, the results in primary and general elections in North Carolina will not be influenced or tainted with fraud, corruption or other illegal conduct on the part of election officials or others, and we so hold. The people are entitled to have their elections conducted honestly and in accordance with the requirements of the law. To require less would result in a mockery of the democratic processes for nominating and electing public officials.

It is provided in G.S. § 163-10, among other things, that "It shall be the duty of the State Board of Elections:

"(10) To compel the observance, by election officers in the counties, of the requirements of the election laws, and the State Board of Elections shall have the right to hear and act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws pertaining to their duties thereunder. And the State Board of Elections shall have power to

remove any member of a county board of elections for neglect or failure in his duties and to appoint a successor.

"(11) To investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county, and to report violations of the election laws to the Attorney General or solicitor of the district for further investigation and prosecution. * * *

"(15) To have the general supervision over the primaries and elections in the State and it shall have the authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable: Provided same shall not conflict with any provision of the law."

We do not construe G.S. § 163-10(11) to limit the authority of the State Board of Elections merely to an investigation of alleged "frauds and irregularities in elections in any county," for the sole purpose of making a report of such frauds and irregularities to the Attorney General or solicitor for further investigation and prosecution. The State Board of Elections is a quasi-judicial agency and may, in a primary or election in a multiple county district, investigate alleged frauds and irregularities in elections in any county upon appeal from a county board or upon a protest filed in apt time with the State Board of Elections, and may take such action as the findings of fact may justify, and may direct a county board of elections to amend its returns in accordance therewith. *Burgin v. Board of Elections*, supra.

Findings of fact and conclusions of law made by the State Board of Elections may be reviewed in an action instituted in the Superior Court of Wake County pursuant to the provisions of G.S. § 143-307. In such action, however, the appellant is not entitled to a jury trial. In *Burgin v. North Carolina State Board of Elections*, 214 N.C. 324, 199 S.E. 72, this Court said: "* * (T)he judge of the superior court will proceed to

determine as a matter of law on the facts found, without the intervention of a jury, whether complete, legal and final returns from all the counties in the * * * District have been made, filed and accepted, or as a matter of law ought to have been accepted, by the State Board of Elections. If it be made to appear that such returns have been so made, the court shall thereupon dissolve the restraining order * * *, and determine whether upon such returns the plaintiff has shown a clear legal right to the writ of mandamus, and enter judgment accordingly. Unless so shown, plaintiff's application therefor should be dismissed."

The case of *Ledwell v. Proctor*, 221 N.C. 161, 19 S.E. 2d 234, was a civil action in the nature of a quo warranto to try title to the office of alderman of the town of Sanford. On appeal this Court said: "In canvassing the returns and judicially determining the result the board of canvassers must pass upon the legality of any disputed ballots. *Burgin v. [North Carolina State] Board of Elections*, 214 N.C. 140, 198 S.E. 592.

"It follows that the board of elections has authority, judicial in its nature, to examine the returns and decide upon their regularity, correctness and sufficiency, and to accept or reject them. *Gatling v. Boone*, 98 N.C. 573, 3 S.E. 392; *Barnett v. Midgett*, 151 N.C. 1, 65 S. E. 441. It constitutes an essential part of the machinery provided by statute for the ascertainment of the successful candidate in an election to which contesting candidates must first resort for the determination and declaration of the results of the election. The returns made by the registrars and judges of election merely constitute a preliminary step and such returns alone do not entitle the apparently successful candidate to the office."

While returns certified to the State Board of Elections by a county board of elections, nothing else appearing, will be deemed to be prima facie correct, such certification, however, is not conclusive. *Ledwell v.*

Proctor, supra. Returns certified by a county board of elections may be collaterally attacked. Barnett v. Midgett, 151 N.C. 1, 65 S.E. 441.

There is a well defined distinction between a primary election and a regular election, as pointed out in the case of Rider v. Lenoir County, 236 N.C. 620, 73 S.E. 2d 913, in which case it is said: "A primary election is a means provided by law whereby members of a political party select by ballot candidates or nominees for office; whereas a regular election is a means whereby officers are elected and public offices are filled according to established rules of law. In short, a primary election is merely a mode of choosing candidates of political parties, where as a regular election is the final choice of the entire electorate. G.S. §§ 163-117 to 147; 29 C.J.S., Elections, § 1d and e; 36 Words and Phrases [Permanent Edition, Vol. 36,], p. 667 et seq."

A county board of elections is the proper agency to canvass the returns in a primary for the selection of party nominees for county offices as well as in a general election to fill such offices. G.S. § 163-86; Strickland v. Hill, 253 N.C. 198, 116 S.E.2d 463. However, G.S. § 163-93 provides: "The State Board of Elections shall constitute the legal canvassing board for the State of all national, State and district offices, including the office of State Senator in those districts consisting of more than one county. * * *"

Therefore, we hold that the State Board of Elections is the appropriate agency to canvass and judicially declare the results of a primary for the nomination of a candidate in a senatorial district composed of more than one county.

Whenever a protest is filed before a county board of elections in a multiple county senatorial district, charging fraud and misconduct in connection with the conduct of a primary or election in such county, and there is an appeal from said board, or upon protest filed in apt time with the State Board of Elections, the

State Board has the legal right and the duty to investigate such charges and determine the actual [138 S.E.2d 149] total of valid ballots cast in such county and to require the county board of elections to amend its returns accordingly; and, based upon its findings and the returns amended in accord therewith, to determine which candidate is entitled to be certified as the nominee in such multiple county senatorial district.

These assignments of error are overruled.

The plaintiff's third and last assignment of error challenges the correctness of the court below in dissolving the restraining order theretofore issued by McLean, J. on 6 July 1964, and in failing to continue said order during the pendency of the action and to the final determination of the cause.

The appellant is not entitled to have the State Board of Elections restrained in order to keep said Board from completing its investigation of the protest filed, finding the facts with respect thereto and making its conclusions of law based thereon. Furthermore, since there is no protest before the State Board of Elections involving the returns from any of the counties composing the 34th Senatorial District except from Madison County, when the amended returns from Madison County are certified in accord with the findings of fact and conclusions of law made by said Board, it will have the legal duty to declare the results of the primary election held on 30 May 1964 and to certify the nominee. This assignment of error is overruled.

The defendants challenge the right of the plaintiff to the relief sought in this action. The plaintiff has applied for a writ of mandamus to be entered against the defendants to compel them to declare and certify the plaintiff as the Democratic nominee for State Senator in the 34th Senatorial District. In this action the plaintiff also sought and obtained a temporary restraining order, restraining the defendants from entering any "order or direction altering the vote in

Madison County as officially reported to them * * * and from certifying any person other than the plaintiff as Democratic nominee for Senator * * * in the 34th Senatorial District of North Carolina."

The law in this State with respect to the circumstances under which a writ of mandamus or mandatory injunction may be legally issued, is succinctly stated in the opinion by Parker, J., in *St. George v. Hanson*, 239 N.C. 259, 78 S.E.2d 885, as follows: "* * * (A) party seeking a writ of mandamus must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required. *Hancock v. Bulla*, 232 N.C. 620, 61 S.E.2d 801; *Laughinghouse v. City of New Bern*, 232 N.C. 596, 61 S.E.2d 802; *Steele v. Locke Cotton Mills Co.*, 231 N.C. 636, 58 S.E.2d 620; *Ingle v. State Board of Elections*, 226 N.C. 454, 38 S.E.2d 566; *White v. Holding*, 217 N.C. 329, 7 S.E.2d 825; *Mears v. Board of Education*, 214 N.C. 89, 197 S.E. 752; *Person v. Doughton*, 186 N.C. 723, 120 S.E. 481. 'A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of mandamus. * * * Such writ (a mandamus) will not be issued to enforce an alleged right which is in question.' *Board of Managers of James Walker Memorial Hospital of City of Wilmington, N. C. v. City of Wilmington*, 235 N.C. 597, 70 S.E.2d 833, 836; *Harris v. Board of Education*, 216 N.C. 147, 4 S. E.2d 328.

"It is well settled law that mandamus cannot be invoked to control the exercise of discretion of a board, officer, or court when the act complained of is judicial or quasi judicial, unless it clearly appears that there has been an abuse of discretion. The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established. *Hayes v. Benton*, 193 N. C. 379, 137 S.E. 169; *Wilkinson v. Board of Education*, 199 N.C. 669, 155 S.E. 562; *Harris v. Board of Education*, supra." *Hinshaw v. McIver*, 244

N.C. 256, 93 S.E.2d 90; [138 S.E.2d 150] *Watson v. Watson Seed Farms, Inc.*, 253 N.C. 238, 116 S.E.2d 716.

A county board of elections in a multiple county senatorial district has no power to canvass the election returns and determine judicially the nominee in such district; that power is vested exclusively in the State Board of Elections. G.S. § 163-93. When the State Board of Elections obtains jurisdiction of an election protest upon an appeal from a single county in a multiple county senatorial district, or by the filing in apt time of a protest directly with the State Board of Elections, its decision can only be reviewed in the manner prescribed by Article 33, Chapter 143 of the General Statutes of North Carolina. The Superior Court does not have original jurisdiction to hear and determine such controversies.

G.S. § 163-118, in pertinent part, provides: "Unless otherwise provided in this article, such primary elections shall be conducted, as far as practicable, in all things and in all details in accordance with the general election laws of this State, and all the provisions of this chapter and of other laws governing elections not inconsistent with this article shall apply as fully to such primary elections and the acts and things done thereunder as to general elections * * *." *Strickland v. Hall*, supra. See also G.S. § 163-146.

In pertinent part, G.S. § 143-309 provides: "In order to obtain judicial review of an administrative decision under this chapter the person seeking review must file a petition in the Superior Court of Wake County; except that where the original determination in the matter was made by a county agency or county board and appealed to the State Board, the petition may be filed in the superior court of the county where the petitioner resides. * * *"

The County Board of Elections in Madison County did not originally determine the matters at issue in this proceeding. There was no appeal from the County

Board of Elections in Madison County. This investigation was instituted by the State Board of Elections upon a protest filed with said State Board by Clyde M. Norton, who alleged fraud and irregularities in the conduct of the primary election held in Madison County on 30 May 1964.

The plaintiff has not shown a clear legal right to a writ of mandamus to require the defendants to declare and certify him as the Democratic nominee for State Senator for the 34th Senatorial District, and the application therefor is dismissed. Nor has the plaintiff shown any right to a restraining order, temporary or otherwise, restraining the State Board of Elections from discharging its statutory duty and certifying a candidate as the Democratic nominee for said senatorial district.

The order entered below on 8 August 1964 is set aside, and the temporary restraining order entered on 6 July 1964 is dissolved, to the end that the State Board of Elections may proceed to declare and certify the Democratic nominee for the 34th Senatorial District.

Likewise, in light of the facts disclosed by this record, we hold that the Superior Court of Madison County is without jurisdiction to review an order of the State Board of Elections; hence, this action is dismissed. G. S. § 143-307 and G.S. § 143-309; *In re Halifax Paper Co., Inc.*, 259 N.C. 589, 131 S.E.2d 441; *In re Carter*, 262 N.C. 360, 137 S.E.2d 150.

Action dismissed.

