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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 11, 2018 Session

JOSEPH H. JOHNSTON v. MARK GOINS

Appeal from the Chancery Court for Davidson County
No. 16-800-II Ellen H. Lyle, Chancellor

No. M2017-00809-COA-R3-CV

Action brought by write-in candidate for tax assessor seeking declaratory judgment relative to the duties of the State Coordinator of Elections in the administration of Tennessee Code Annotated section 2-7-133(i). Upon our review, we affirm the judgment of the chancellor.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Joseph H. Johnston, Nashville, Tennessee, Pro Se.

Herbert H. Slatery, III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; and Janet M. Kleinfelter, Deputy Attorney General; for the appellee, Mark Goins, Coordinator of Elections for the State of Tennessee.

Denty Cheatham, Nashville, Tennessee, Amicus Curiae.

OPINION

On December 17, 2015, Mark Goins, Coordinator of Elections for the State of Tennessee, permitted Joseph Johnston (“Plaintiff”), to review documents containing instructions that Mr. Goins had given to county election officials, relative to the rules and procedures for implementing Tennessee Code Annotated section 2-7-133(i).¹ Pertinent to

¹ Tennessee Code Annotated section 2-7-133(i) states:

Any person attempting to be elected by write-in ballots shall complete a notice requesting such person’s ballots be counted in each county of the district no later than twelve

this appeal, Mr. Johnston reviewed a page of written instructions and a slideshow. The page of written instructions stated:

- a. If a voter asks if there are any write-in candidates:
 - Your answer is that the ballot speaks for itself
 - Do not provide any names of write-in candidates to the voters
 - Do not provide any spelling of write-in candidate's name.

- b. Once a person has timely filed a certificate of write-in, the [county] election commission must adopt a uniform list of names that will be counted as a vote for that write-in candidate. . . .
 - That list must include acceptable spellings of candidates' names
 - That list will include many variations of phonetic spellings even though the name is spelled incorrectly
 - Look for the VOTER'S INTENT when counting a vote; you must give effect to that voter's intention

Additional instructions in the slideshow read:

a. "In order for a candidate to receive a party nomination by write-in ballots, if the write-in is [the] only candidate for that office, the write-in candidate must received [sic] a number of write-in votes equal or greater than five percent (5%) of the total number of registered votes of the district."

b. "Notice Required . . .

Once you receive notice you shall promptly notify the:

- Registry of Election Finance -

Write-in candidates must file campaign disclosure forms like any other candidate

o'clock (12:00) noon, prevailing time, fifty (50) days before the general election. Such person shall only have votes counted in counties where such notice was completed and timely filed. The notice shall be on a form prescribed by the coordinator of elections and shall not require signatures of any person other than the write-in candidate requesting ballots be counted. The coordinator of election shall distribute such form to the county election commissions. Upon timely receiving the notice required by this subsection (i), the county election commission shall promptly inform the state coordinator of elections, the registry of election finance, as well as all other candidates participating in the affected election. A write-in candidate may withdraw the notice by filing a letter of withdrawal in the same manner as the original notice was field no later than the fifth day before the election.

On January 7, 2016, Mr. Johnston sent Mr. Goins a public records request for “all written records maintained by your office on any proposed rules, regulations or procedures that have been adopted to implement Tenn. Code Ann. §2-7-133(i) since 2003.” After receiving no answer, Mr. Johnston made two additional requests, and on February 22, Mr. Goins advised Mr. Johnston that his office had no records that were responsive to his request.

On April 12, Mr. Johnson filed a Petition for a Declaratory Order with the Tennessee Secretary of State Elections Division seeking an order “clarifying which rules and/or regulations implementing Section 2-7-133(i) of the Tennessee Election Code relating to restrictions for write-in candidates are maintained by the State Coordinator of Elections in compliance with the Uniform Administrative Procedures Act.” On June 9, Mr. Goins denied the petition, holding that “the Division of Elections has no statutory or other authority under the Uniform Administrative Procedures Act to issue the requested declaratory order as it does not request a declaratory order as to the validity or applicability of any statute, rule or order.”

On July 22, Mr. Johnston filed this declaratory judgment action in the Davidson County Chancery Court pursuant to Tennessee Code Annotated section 4-5-322, alleging in pertinent part:

3. On March 21, 2016, Complainant went to the Davidson County Election Commission and pre-registered as a Write-In Candidate for the office of Metro Tax Assessor for the municipal election to be held on August 4, 2016.

4. In previous elections in Davidson County, the poll workers have been very diligent in instructing voters how to cast write-in votes on the electronic voting machines. However, they do not advise voters that, unless the vote is for a “qualified” write-in candidate who has pre-registered with the Davidson County Election Commission, the write-in vote will not be counted nor will it be counted as part of the total votes cast in the election. In addition, the poll workers have no knowledge as to the names of any write-in candidates who are properly pre-registered and qualified to receive votes.

5. Not only are poll workers ignorant of the requirements of Tenn. Code Ann. §2-7-133(i), there have been no written instructions explaining the statute in the form of public information pamphlets or other printed educational materials available at polling places. The voting machines do have instructions on how to cast write-in votes but do not explain the legal consequence of voting for qualified or unqualified write-in candidates.

6. In previous elections in Davidson County, there have been no lists of “qualified write-in candidates” posted at the polling places to instruct voters of the names of write-in candidates who had properly qualified, or whether or not any write-in candidates had qualified for a particular office.

The petition then alleged the history of interactions that Mr. Johnston had with Mr. Goins and the request he filed for a Declaratory Order and asserted:

19. The response to Petitioner’s public records request that no records exist relating to rules, regulations or procedures for implementing Tenn. Code Ann. §2-7-133(i) of the Election Code suggests that Respondent’s actions with respect to implementing this Section of the code are being carried out by an agency rule not adopted in compliance with the Uniform Administrative Procedures Act and such actions are therefore void and of no effect. Tenn. Code Ann. §4-5-216.

20. The prohibition against any disclosure of the identities of qualified, preregistered write-in candidates is unfair and prejudicial to Petitioner’s write-in candidacy for the office of Metro Tax Assessor in the general election set in Davidson County on August 4, 2016.

21. Respondent Coordinator of Elections, therefore, erred in denying Complainant’s Petition for Declaratory Order on grounds of lack of statutory authority under the Uniform Administrative Procedures Act to determine the validity of rules and practices relating to the applicability of Tenn. Code Ann. §2-7-133(1) in this case.

Mr. Johnston sought a judgment declaring:

[T]hat the Coordinator of Elections is an agency within the scope of the Uniform Administrative Procedures Act; that the Coordinator of Elections does have statutory authority to issue a declaratory order in this case; that Complainant’s Petition for Declaratory Order does request a determination of validity of rules or practices related to the applicability of Tenn. Code Ann. § 2-7-133(i); that actions taken by Respondent which implement the restrictions on write-in candidates contained in Tenn. Code Ann, §2-7-133(i) are not in compliance with the Uniform Administrative Procedure Act and are therefore null, void and of no effect; that county election administrators are no longer prohibited from disclosing the identities of qualified, preregistered write-in candidates, including that of Petitioner, when requested to do so by voters at polling places; that the names and spellings of all qualified. pre-registered candidates be prominently posted along with other voting instructions at every polling place; that all properly

pre-registered write-in candidates be provided campaign finance disclosure forms with instructions: and further, that write-in candidates for a party nomination is not required to receive at least five percent (5%) of the total registered votes of the district if he/she is the only write-in candidate for that office.

Mr. Goins moved to dismiss the petition on the basis of *res judicata*² and failure to state a claim on which relief can be granted under Tennessee Rule of Civil Procedure 12.02(6). Mr. Johnston thereafter filed an Amended Complaint and responded to Mr. Goins' motion. On February 28, 2017, the trial court entered an order granting the motion, holding that the complaint failed to state a claim for relief; the court ruled further that, because it concluded that the Complaint failed to state a claim, it was unnecessary for the trial court to rule on the question of whether the claim was barred by *res judicata*.³

Mr. Johnston moved to amend the trial court's order, asking the court to clarify whether Mr. Goins has "the duty to furnish instructions to local election officials by rules and regulations, as authorized by Tennessee Code Annotated section 2-11- 202(a)(7), to help in the administration of election laws," and, assuming he did have the duty, "[whether] the instructions to all local administrative officials, complained of in this action, which prohibit disclosure of names or spelling of names of write-in candidates who have pre-registered constitute a regulatory duty (not a statutory duty) that must comply with the rule-making process mandated by the Uniform Administrative Procedures Act." Defendant responded, and the trial court entered an order denying Plaintiff's motion concluding that Mr. Goins' "instructions" were provided for in Tennessee Code Annotated sections 2-4-108(a) and 2-11-202(a)(8) and thus did not constitute a rule.

Mr. Johnston appeals, stating five issues for review; we have determined that the dispositive issue is whether the instructions issued by Mr. Goins to local election officials constitute a de facto rule, subject to the rule-making procedures of the UAPA. Because

² Mr. Johnston had previously filed two cases concerning Tennessee Code Annotated section 2-7-133(i). In the first case, *Johnston v. Davidson County Election Commn.*, No. M2011-02740-00A-R3-CV, 2014 WL 1266343 (Tenn. Ct. App. Mar. 26, 2014) ("*Johnston I*"), Mr. Johnston challenged the constitutionality of the statute; this court affirmed the dismissal of the case, holding that the statute was constitutional as written and as applied. In the second case, Mr. Johnston sought a declaratory judgment "which clarifies the duty of the Tennessee State Election Commission to publish instructions applying the restrictions of Tenn. Code Ann. § 2-7-133(i)"; the trial court dismissed Mr. Johnston's claim on the grounds of *res judicata*, and this Court held that the trial court lacked subject matter jurisdiction and vacated the judgment. *Johnston v. Tennessee State Election Commn.*, No. M2015-01975-00A-R3-CV, 2016 WL 5416339, at *1 (Tenn. Ct. App. Sept. 27, 2016) ("*Johnston II*").

³ Although the motion to dismiss was filed prior to the Amended Complaint being filed, the trial court and the parties treated the motion to dismiss as applicable to both the original and the amended complaint; this was confirmed at oral argument of the appeal.

we answer that question in the negative, we discern no reversible error in the judgment of the trial court.⁴

I. STANDARD OF REVIEW

This case was resolved on a motion to dismiss filed pursuant to Tennessee Rule of Civil Procedure 12.02(6); such a motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009); *Willis v. Tenn. Dep't of Corr.*, 113 S.W.3d 706, 710 (Tenn. 2003); *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999); *Sanders v. Vinson*, 558 S.W.2d 838, 840 (Tenn. 1977). A defendant who files a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010) (quoting *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005)). In considering a motion to dismiss, courts "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-2 (Tenn. 2007) (quoting *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002)). We review the trial court's legal conclusions *de novo*. *Brown*, 328 S.W.3d at 855.

II. ANALYSIS

Tennessee Code Annotated section 4-5-102(12) defines "rule" as "each agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency"; the definition excludes "statements concerning only the internal management of state government not affecting private rights, privileges, or procedures available to the public" and "general policy statements that are substantially repetitious of existing law." *Id.* at §§ 4-5-102(12)(A), (D). In a similar context our Supreme Court has interpreted "rule" to

[R]efer[] to a statement, of general applicability, of a state administrative officer or agency that (1) is legislative in nature and implements or prescribes law or policy, within the scope of the authority of such officer or agency, or (2) prescribes the rules of procedure or practice governing proceedings before such officer or agency; excepting, however, those rules

⁴ While this case was pending on appeal, Mr. Johnston filed a motion pursuant to Tennessee Rule of Appellate Procedure 14(b) for this court to consider the facts that he registered as a write-in candidate for the office of General Sessions Judge for election in the May 1, 2018 Davidson County election and for State Representative, District 55, in the November 6, 2018 general election. An order granting the motion was entered contemporaneously with the filing of this Opinion.

and regulations relating to the organization or internal management of the agency.

Chastain v. Tennessee Water Quality Control Bd., 555 S.W.2d 113, 116 (Tenn. 1977).

Included among the duties of the Coordinator of Elections is to “[f]urnish instructions for election officials as to their duties in the conduct of elections and copies of election laws manual and updating materials to the election commissions, primary boards, and administrators,” and to “provide materials for and conduct training programs for persons administering the election laws.” Tenn. Code Ann. §§ 2-11-202(a)(8),(9). In addition, the Coordinator of Elections is required to “create minimum standards for educating election officials throughout the state for use by county election commissions,” with the standards including “instructing election officials as to their duties during an election and educating the officials about the election laws of this state.”

We conclude that the material that Mr. Johnston reviewed in Mr. Goins’ office, which serves as the basis of his request for a declaratory judgment, does not constitute “rules” as defined in section 4-5-102(12), but rather are instructions “concerning the internal management” of the election law, specifically, the management of write-in candidacies, within the meaning of section 4-5-102(12)(A).

Further, the instructions do not “affect a private right or procedure available to the public,” in the manner and for the purpose contended by Mr. Johnston, i.e., responding to voters who have questions regarding specific write-in candidates. While there is no question that the right to vote is a fundamental right, there is no requirement in the election law statutes that the Coordinator of Elections promulgate rules to accomplish what Mr. Johnson seeks. Mr. Goins has the responsibility under Tennessee Code Annotated section 2-4-108(a) to “create minimum standards for educating election officials. . . which shall include instructing election officials as to their duties during an election and educating the officials about the election laws of this state.” Mr. Goins was acting within the powers granted him in this statutory mandate to issue these instructions, which do not constitute rules requiring promulgation under the UAPA.

For the foregoing reasons, we affirm the judgment of the lower court.

RICHARD H. DINKINS, JUDGE