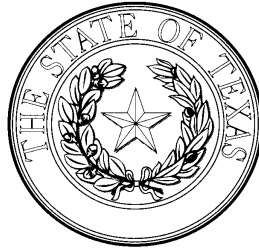


Opinion issued August 11, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00136-CV

RENEE JEFFERSON-SMITH, Appellant

V.

**THE CITY OF HOUSTON, TEXAS, HARRIS COUNTY, TEXAS,
CYNTHIA BAILEY, AND TARSHA JACKSON, Appellees**

**On Appeal from the 269th District Court
Harris County, Texas
Trial Court Case No. 2019-82952**

MEMORANDUM OPINION

This is an appeal¹ from a final judgment in an election contest² filed by appellant, Renee Jefferson-Smith, seeking to have another candidate in her race for

¹ TEX. ELEC. CODE §§ 221.002(f), 231.009.

² TEX. ELEC. CODE § 221.002(a).

the City Council of Houston declared ineligible and removed from the subsequent run-off ballot. After a bench trial, the trial court denied Jefferson-Smith's election contest. We affirm.

BACKGROUND

Tarsha Jackson, Cynthia Bailey, and Renee Jefferson-Smith were candidates in the November 5, 2019 general election for District B on the City Council for the City of Houston. In the election, Jackson received 3,324 votes, Bailey received 2,303 votes, and Jefferson-Smith received 2,139 votes. Because no one received a majority of the votes, a run-off election is required. TEX. CONST. art. XI, § 11(b); TEX. ELEC. CODE § 2.021; HOUSTON, TEX. CHARTER art. V, § 8.

Prior to certification of the results of the election, Jefferson-Smith pursued several actions to challenge the election results, through which she sought to prevent Bailey from participating in the run-off election. In each of these actions, Jefferson-Smith alleged that Bailey, as a convicted felon, was ineligible to hold a position on the Houston City Council.

First, on November 7, 2019, Jefferson-Smith judicially challenged the election by filing a petition for declaratory judgment and injunction in the 270th District Court of Harris County. After the trial court denied her requested temporary injunction, Jefferson-Smith appealed the denial, which this Court ultimately dismissed on Jefferson-Smith's own motion. *See Jefferson-Smith v. City of Houston,*

No. 01-19-00903-CV, 2020 WL 425290, at *1 (Tex. App.—Houston [1st Dist.] Jan. 28, 2020, no pet.). Jefferson-Smith also filed a petition for writ of mandamus, seeking to have this Court issue an injunction ordering the City of Houston to remove Bailey from the runoff ballot, which this Court denied. *See In re Jefferson-Smith*, No. 01-19-00910-CV, 2019 WL 6258861, at *1 (Tex. App.—Houston [1st Dist.] Nov. 22, 2019, orig. proceeding).

Concurrently with the proceedings above, Jefferson-Smith sought to have Bailey administratively disqualified by submitting a Demand for Administrative Declaration of Ineligibility [“the Demand”] to the Mayor’s Office of the City of Houston on November 13, 2019. In the Demand, Jefferson-Smith alleged that Bailey was ineligible to hold office on the Houston City Council because she was a “convicted felon whose disabilities have not been removed nor have all her rights been restored.” Jefferson-Smith attached the following documents to her Demand: (1) a 2007 Judgment showing that Bailey had a first degree felony theft conviction; (2) Bailey’s affidavit, which she filed in conjunction with her Application for a Place on the City of Houston November 5, 2019 General Election Ballot, asserting that she had not “been finally convicted of a felony for which I have not been pardoned or had my full rights of citizenship restored by other official actions . . .”; (3) an affidavit by Bailey from the parallel injunction action, in which Bailey stated: “I acknowledge that I was convicted of a felony but my disability has been removed

based upon me completing my sentence and having my voting rights restored”; (4) a copy of an Attorney General opinion, which opines that the right to seek and hold office is not restored simply by having one’s voting rights restored, but can only be accomplished through a pardon, clemency, or judicial release, and (5) Bailey’s records from the Texas Department of Criminal Justice.

The Mayor of the City of Houston did not administratively disqualify Bailey. Accordingly, two days later, on November 15, 2019, Jefferson-Smith filed the underlying election contest, challenging the election based on the Mayor’s failure to administratively disqualify Bailey.

On January 24, 2020, a bench trial was held before Judge Grant Dorfman, a Special Judge assigned to hear the matter.³ Two exhibits were admitted into evidence at trial: (1) the Demand and its attachments that Jefferson-Smith had filed with the Mayor’s Office of the City of Houston, and (2) a certified copy of the ordinance tabulating the votes cast and canvassing the returns for positions in the City of Houston races that were on the November 5, 2019 ballot. Two witnesses testified: (1) Pat Jefferson Daniels, the Interim City Secretary for the City of Houston, who received the Demand for the City of Houston and (2) Nicole Bates, Jefferson-Smith’s attorney, who filed the Demand with the City of Houston.

³ See TEX. ELEC. CODE § 231.004(e).

During the trial, Jefferson-Smith read into the record an excerpt from Bailey's testimony in the parallel injunction proceeding, in which Bailey stated that she had never sought a pardon or been issued judicial clemency. However, Jefferson-Smith acknowledged that she had never provided the Mayor's Office with this excerpt from the injunction proceeding; she argued instead that, because the City of Houston's Legal Department participated in the injunction proceeding, the Mayor's Office had "notice" of Bailey's testimony therein.

On February 4, 2020, the trial court rendered judgment against Jefferson-Smith, "find[ing] that Contestant Exhibit P-1 (the November 13, 2019 Demand and enclosures) does not conclusively prove Contestee Bailey's ineligibility" and that "the true outcome of the election for City of Houston District B City Councilmember . . . is known and is reflected accurately in the November 18, 2019 certification of the results by the City[.]" The trial court further found that "[a]lthough the Court admitted portions of the testimony presented at the temporary injunction hearing before the Hon. Dedra Davis on November 15, 2019, there was no evidence that the testimony or hearing transcript was presented to 'the appropriate authority' and/or 'the authority with whom an application for a place on the ballot for the office sought by the candidate is required to be filed.'" The trial court expressed concerns that "notice" to the Mayor by the participation of the City of Houston's Legal Department in another matter "would impose unfair burdens upon election authorities and could,

further, unduly complicate time-pressured Election Code contests by potentially miring the parties in wide-ranging and discovery-intensive investigations concerning who knew what when—especially where, as here, a large bureaucratic entity like the City of Houston is the election authority.”

Jefferson-Smith brings this appeal from the trial court’s February 4, 2020 final judgment denying her election contest and dismissing her claims with prejudice.

Standard of Review and Applicable Law

At trial, an election contestant is required to show by clear and convincing evidence that illegal votes were counted and that not counting them would cause a different and correct result in the election. *See Tiller v. Martinez*, 974 S.W.2d 769, 772 (Tex. App.—San Antonio 1998, writ dism’d w.o.j.); *Green v. Reyes*, 836 S.W.2d 203, 208 (Tex. App.—Houston [14th Dist.] 1992, no writ); TEX. ELEC. CODE §§ 221.003(a)(1), 221.011. The contestant may also show that the outcome of the election was affected by an election official (1) preventing eligible voters from voting, (2) failing to count legally cast votes, or (3) engaging in other fraud, illegal conduct, or making a *mistake*. *See* TEX. ELEC. CODE § 221.003(a)(2) (emphasis added). The trial court is to declare the outcome of the election if it can determine the true outcome and if it cannot, it is to declare the election void. *See* TEX. ELEC. CODE § 221.012. The standard of review for an appeal from a judgment in an election contest is whether the trial court abused its discretion. *Tiller*, 974 S.W.2d at 772;

Green, 836 S.W.2d at 208. The well-known test for abuse of discretion is whether the court acted without reference to any guiding rules or legal principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). If the trial court acted within its discretion, we cannot reverse the judgment simply because we might have reached a different result. *Id.* at 242.

Analysis

In this case, Jefferson-Smith contends that the outcome of the election was affected because an election official, here, the Mayor of Houston,⁴ made a “mistake” by refusing to administratively declare Bailey ineligible and that, as a result, illegal votes were cast and counted for Bailey.

The procedures for administratively declaring a candidate ineligible are found in section 145.003 of the Election Code, which provides in relevant part:

(a) Except for a judicial action in which a candidate’s eligibility is in issue, a candidate may be declared ineligible only as provided by this section.

* * * *

(d) The presiding officer of the final canvassing authority for the office sought by a candidate may declare the candidate ineligible after the polls close on election day and . . . before a certification of election is issued.

⁴ In this case, the responsible election official is “the presiding officer of the final canvassing authority for the office sought.” TEX. ELEC. CODE § 145.003(d). The final canvassing authority for District B is the Houston City Council. *See* TEX. ELEC. CODE § 67.002(a)(2). The presiding officer of the Houston City Council is the Mayor of Houston. HOUSTON, TEX. CHARTER art. V, § 13.

* * * *

(f) A candidate may be declared ineligible only if:

(1) the information on the candidate’s application for a place on the ballot indicates that the candidate is ineligible for the office;

or

(2) facts indicating that the candidate is ineligible are conclusively established by another public record.

TEX. ELEC. CODE § 145.003(a), (d), (f).

Thus, the issue this Court must decide is whether the trial court abused its discretion in finding that Jefferson-Smith failed to present the Mayor’s Office with a “public record” that “conclusively established” that Bailey was ineligible to serve on the Houston City Council.⁵

⁵ We note that an election authority’s duty to declare a candidate ineligible when required to do so under section 145.003 is a “duty imposed by law” and is subject to mandamus relief. *See In re Cullar*, 320 S.W.3d 560, 565 (Tex. App.—Dallas 2010, orig. proceeding). As a result, most cases applying section 145.003 are mandamus proceedings in the appellate courts. *See, e.g., In re Kherkher*, No. 14-20-00310-CV, 2020 WL 3422251 (Tex. App.—Houston [14th Dist.] June 23, 2020, orig. proceeding); *In re Walker*, 595 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding); *In re Wooten*, No. 05-19-01499-CV, 2019 WL 6728376 (Tex. App.—Dallas Dec. 11, 2019, orig. proceeding); *In re Martin*, No. 05-18-00542-CV, 2018 WL 2147949 (Tex. App.—Dallas May 10, 2018, orig. proceeding). Indeed, Jefferson-Smith filed a Petition for Writ of Mandamus in this Court, asking that we grant a writ of mandamus to compel the City of Houston to remove Bailey from the run-off ballot, which this Court denied. *See In re Jefferson-Smith*, 2019 WL 6258861, at *1. However, Jefferson-Smith’s mandamus before this Court did not address section 145.003, the issue presented in her election contest.

Jefferson-Smith argues that Bailey is ineligible because she is a convicted felon. “To be eligible to be a candidate for, or elected or appointed to, a public elective office in this state, a person must . . . have not been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities.” TEX. ELEC. CODE § 141.001(a)(4). Therefore, the issue before the trial court was whether Jefferson-Smith presented the Mayor’s Office with a “public record” that “conclusively established” that Bailey was a convicted felony who had not “been pardoned or otherwise released from the resulting disabilities.”⁶

To do so, we first consider what it means to “conclusively establish” a fact.

The United States Fifth Circuit has described it as follows:

The governing standard [in Government Code section 145.003(f)(2)], “conclusively established,” bears emphasis. Something is “conclusive” when, by virtue of “reason,” it “put[s] an end to debate or question,” usually because of its “irrefutability.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002). Accordingly, Texas courts have explained that public records must leave no factual dispute concerning the conclusiveness of ineligibility. *See In re Jackson*, 14 S.W.3d 843, 848–49 (Tex. App.—Waco 2000, orig. pet.) (holding that a state actor under § 145.003 has “no fact-finding authority;” instead, she may “administratively declare that a candidate is ineligible only when the record conclusively establishes the candidate’s ineligibility”) (emphasis in original); *Culberson v. Palm*, 451 S.W.2d 927, 929 (Tex. Civ. App.—Houston [14th Dist.]

⁶ For the purposes of this Opinion, this Court will assume without deciding that (1) the documents attached to Jefferson-Smith’s demand are “public records,” as required by section 145.003(f) of the Election Code and (2) that the restoration of one’s voting rights does not equate to the restoration of one’s right to hold public office.

1970, orig. pet.) (holding that ineligibility was not conclusively established where there remained “a fact question”). Thus refined, the issue is whether, based on the evidence properly before [the election official] on June 7, 2006, there remained “a fact question” as to whether [the contestee] would reside in Texas on election day, November 7, 2006. *Palm*, 451 S.W.2d at 929.

Tex. Democratic Party v. Benkiser, 459 F.3d 582, 592 (5th Cir. 2006).

Under this standard, if the documentation presented to the election official leaves a fact question to be determined, the fact at issue has not been “conclusively established.” *See id.* And, with this standard in mind, we review the documents that Jefferson-Smith attached to her Demand, which include the following:

- (1) A 2007 Judgment showing that Bailey was convicted of first-degree felony theft;
- (2) Bailey’s affidavit, which she filed in conjunction with her Application for a Place on the City of Houston November 5, 2019 General Election Ballot, asserting that she had not “been finally convicted of a felony for which I have not been pardoned or had my full rights of citizenship restored by other official action.”
- (3) Bailey’s affidavit from the parallel injunction proceeding, in which Bailey stated: “I acknowledge that I was convicted of a felony but my disability has been removed based upon me completing my sentence and having my voting rights restored”;
- (4) a May 22, 2019 Attorney General Opinion, which opines that “the automatic restoration of the right to vote to a convicted felon through the completion of his or her sentence does not also restore his or her eligibility to hold public office”; and
- (5) Bailey’s file from the Texas Department of Criminal Justice.

The first document, a certified copy of Bailey's 2007 conviction for felony theft, conclusively establishes that Bailey has a felony conviction. However, it does not address the second part of the eligibility-requirements statute, requiring proof that the person "has not been pardoned or otherwise released from the resulting disabilities." *See* TEX. ELEC. CODE § 141.001(a)(4).

The second document, on its face, shows that Bailey has *not* "been finally convicted of a felony for which I have not been pardoned or had my full rights of citizenship restored by other official action." Even if erroneous, this document would not conclusively establish Bailey's ineligibility. At best, this document contradicts Jefferson-Smith's assertion of Bailey's ineligibility.

The third document establishes again that Bailey is a convicted felon, plus it adds the information that she has completed her sentence and has had her voting rights restored. The document, again, says nothing about whether Bailey has "been pardoned or otherwise released from the resulting disabilities." *See* TEX. ELEC. CODE § 141.001(a)(4).

The fourth document establishes only that the completion of one's sentence and the restoration of one's voting rights after a felony conviction does not also show that one is eligible to hold public office. This document, even if we accept its legal conclusion, says nothing about Bailey and whether she has "been pardoned or otherwise released from the resulting disabilities."

The fifth document, again, shows nothing more than Bailey’s felony conviction.

In sum, none of the public records that Jefferson-Smith provided to the Mayor’s Office in connection with her Demand, which were reviewed by the trial court, “conclusive[ly] establish[ed]” that Bailey “has been finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities” because, while the documents establish that Bailey is a convicted felon, they do not address whether Bailey has “been pardoned or otherwise released from the resulting disabilities.” In other words, there is a fact question—whether Bailey has been pardoned—that the Mayor has no authority to consider. *See Jackson*, 14 S.W.3d at 848–49 (holding that election official under section 145.003 has “no fact-finding authority;” instead, official may “administratively declare that a candidate is ineligible only when the record *conclusively establishes* the candidate’s ineligibility”).

Nevertheless, Jefferson-Smith argues that “[w]hile it is true that no court has directly addressed the issue [regarding whether a contestant must prove the lack of a release], those courts examining this issue in the context of a *temporary injunction* suggest that a felony conviction alone is enough to establish ineligibility.” (Emphasis added). However, we have no authority to disregard a portion of the eligibility-requirements statute and require only the showing of a

felony conviction. And, we would suggest that Jefferson-Smith’s argument suggests the answer regarding how to prove the absence of a pardon: Because fact-finding is often required to determine whether a contestee has been pardoned, an injunction may be more appropriate vehicle in which to challenge a candidate’s ineligibility based on a felony conviction rather than by administrative declaration of ineligibility.⁷ See *Jackson*, 14 S.W.3d at 848 (holding that, under section 145.003, election official “has no fact-finding authority” and “[s]uch disputes must be resolved in accordance with Section 273.081 of the Election Code,” which provides injunctive relief for “[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation” of Election Code). However, by pursuing an administrative declaration of ineligibility, Jefferson-Smith chose a vehicle that permits no fact-finding.⁸

Jefferson-Smith also asks this Court, as she asked the trial court, to consider admissions by Bailey that she had never sought a pardon, which she made during the parallel injunction proceeding. Jefferson-Smith argues that, even though she

⁷ We note again that Jefferson-Smith filed a petition for declaratory relief and a temporary injunction, which the trial court denied. She then appealed to this Court, but voluntarily dismissed her appeal. See *Jefferson-Smith v. City of Houston*, 2020 WL 425290, at *1.

⁸ We note that Jefferson-Smith could introduce new evidence in this election contest and that the trial court could have acted as a factfinder regarding such evidence, but she limited the issue raised in her election contest to whether the Mayor had made a “mistake” in denying her request to administratively disqualify Bailey.

did not present this evidence to the Mayor in her Demand, the Mayor's Office had "notice" of this evidence because it was presented during the parallel injunction proceeding, at which the City of Houston's attorneys were present. The trial court disagreed with this argument, noting in the Final Judgment that it "declin[ed] to hold that notice of the hearing transcript or its contents to the City of Houston's attorneys and/or Legal Department constitutes notice and/or presentment to the 'appropriate authority' as required under the Election Code." In so holding, the trial court noted that permitting such notice "would impose unfair burdens upon election authorities[.]"

We agree with the trial court. Notice to the city's attorneys in one judicial proceeding is not the same as presenting public records to the Mayor in connection with a Demand for an Administrative Declaration of Ineligibility. The relator in the case *In re Cullar*, filed a petition for writ of mandamus with the appellate court, to which he attached public records, contending that the election official violated a "duty imposed by law" by not declaring his election opponent ineligible. 320 S.W.3d 560 at 566. The relator argued that, by virtue of filing and serving the petition for writ of mandamus on the election official, the election official had "notice" of the public records attached thereto. *Id.* The appellate court disagreed, noting that "such a holding would improperly combine section 145.003(f)'s administrative, non-judicial procedure for initially determining

whether a candidate is ineligible with a judicial proceeding seeking mandamus relief.” *Id.* at 566–67. As in *Cullar*, we conclude that notice to the City of Houston’s attorneys in a separate injunction proceeding is not sufficient notice to the election official, here, the Mayor, in an administrative, non-judicial procedure for disqualification.

Because the documents that Jefferson-Smith presented to the Mayor’s Office in connection with her Demand for Administrative Declaration of Ineligibility present a fact question—whether Bailey has been pardoned or otherwise relieved of her disabilities—that the Mayor had no authority to resolve, the Mayor had no “duty imposed by law” to declare Bailey ineligible and made no “mistake” in declining to do so. As such, the trial court did not abuse its discretion in denying Jefferson-Smith’s election contest, which rested on her assertion that the Mayor had made such a “mistake.”

CONCLUSION

We affirm the trial court’s judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.