IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN O'CONNOR,
Appellant,
vs.
HON. DEAN HELLER, SECRETARY OF STATE; AND HON. MIKE MCGINNESS, SENATOR FOR THE CENTRAL NEVADA DISTRICT,
Respondents.

No. 44402

FILED

DEC 0 8 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER DISMISSING APPEAL

This is a proper person appeal from district court orders denying a petition for a writ of mandamus and denying a motion for a "new trial" in an election matter. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

In 2004, appellant John O'Connor filed a district court writ petition challenging the eligibility of respondent Senator Mike McGinness to run for reelection that year, under the term limit provision of Article 4, § 4(2) of the Nevada Constitution. The court denied O'Connor's writ petition in September 2004. The court also denied O'Connor's subsequent motion for new trial. O'Connor timely appealed in December 2004.

Before O'Connor's notice of appeal was filed, however, McGinness was reelected for a fourth term in office. Accordingly, the relief sought by O'Connor—an order directing respondent Secretary of State Dean Heller to void McGinness's candidacy and to refrain from certifying votes for McGinness, but to instead certify O'Connor as the party nomination—is no longer available.[1]

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[1]See, e.g., 52 Am. Jur. 2d Mandamus § 25 (2005) ("To warrant the issuance of a writ of mandamus, the act sought to be performed must be capable of being performed.").

Moreover, as this court recognized in Secretary of State v. Nevada State Legislature,[2] the separation of powers doctrine prevents one governmental branch from infringing on the powers of another branch, and "is particularly applicable when a constitution expressly grants authority to one branch of government, as the Nevada Constitution does in Article 4, Section 6." That constitutional provision provides that "[e]ach House shall judge of the qualifications, elections and returns of its own members,"[3] and thereby, for the most part, "insulates a legislator's qualifications to hold office from judicial review."[4]

A court may act with respect to legislators' "qualifications, elections and returns" only when "the legislature has (1) devised a role for the courts by statute, such as election contests, (2) infringed upon personal constitutional rights, or (3) imposed extra-constitutional qualifications."[5] As a result, the resolution of most post-election challenges to the qualifications of a legislator by a court would violate the separation of powers doctrine, and any appeals raising such issues must be dismissed as nonjusticiable, even though the action was initially commenced in the district court before the elections were concluded.[6]

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[2]120 Nev. 456, 466, 93 P.3d 746, 753 (2004) (citations omitted); Nev. Const. art. 3, § 1(1).

[3]Nev. Const. art. 4, § 6.

[4]Secretary of State, 120 Nev. at 466-67, 93 P.3d at 753.

[5]Id. at 471, 93 P.3d at 755-56.

[6]See Buskey v. Amos, 310 So. 2d 468, 469 (Ala. 1975) (concluding that, under an Alabama statute reserving unto the legislature the authority to judge its members' qualifications, the court "lost jurisdiction of [an appeal challenging a senatorial candidate's residency] when the appellee became a member of the State Senate").

In the present matter, O'Connor's petition directly challenged McGinness's qualifications to run for a fourth term of office under the term limits amendment, and McGinness concedes that, before the 2004-08 term, he had served twelve years in the Senate. Therefore, our resolution of the primary issue of this appeal, whether the district court properly denied O'Connor relief based on its prospective interpretation of the term limits provision, would necessarily involve McGinness's eligibility to serve in office, an area expressly reserved to the Legislature.

None of the areas in which a court may act without violating separation of powers appears here: the Nevada Legislature has not crafted a role for the judiciary in reviewing current members' qualifications, no legislator is claiming that his or her right to sit has been unconstitutionally denied, and there is no claim that extra-constitutional qualifications have been imposed.[7] Thus, when the Nevada Senate seated McGinness as a member, it rendered this appeal nonjusticiable because only the Senate is allowed to judge the qualifications of its members.[8]

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[7]See Secretary of State, 120 Nev. at 472, 93 P.3d at 756.

[8]See McPherson v. Flynn, 397 So. 2d 665, 668 (Fla. 1981) (concluding, even though the complaint was filed before the legislator was seated, and whether defined as an issue of eligibility for candidacy or of qualifications for office, when the legislator is currently seated, "the [question] of qualifications is nonetheless within the purview of legislative powers" and therefore "unavoidably involves a nonjusticiable political question"); Carrington v. Human, 544 S.W.2d 538 (Mo. 1976) (concluding that a constitutional provision reserving to the legislature the right to judge its members qualifications deprives the courts of ability to decide questions regarding the eligibility of a candidate to hold office after the general election).

Further, although this appeal also raises several procedural and validity concerns with the district court's orders, those issues are moot because their resolution would not afford O'Connor any relief.[9]

For the above reasons, we conclude that this appeal raises nonjusticiable issues. Accordingly, we

ORDER this appeal DISMISSED.

_______________, C.J.
Becker

_______________, J.
Rose

_______________, J.
Maupin

_______________, J.
Gibbons

_______________, J.
Douglas

_______________, J.
Hardesty

_______________, J.
Parraguirre

cc: Hon. Michael R. Griffin, District Judge
John O'Connor
Attorney General George Chanos/Carson City
Legislative Counsel Bureau Legal Division
Carson City Clerk

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[9]University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004) ("[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." (quoting NCAA v. University of Nevada, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981))).