

Report To

# The Mississippi Legislature



## A Limited Review of the Effectiveness of the State Board of Election Commissioners in Resolving Contested Legislative Elections

November 30, 1992

PEER evaluated the effectiveness of the Board of Election Commissioners (composed of the Governor, the Attorney General and the Secretary of State) in resolving qualifications disputes between candidates for the Legislature.

The Mississippi Supreme Court said in *Foster v. Harden*, 536 So. 2d. 905 (Miss, 1988) that qualifications disputes between legislative candidates are within the exclusive jurisdiction of the Mississippi House of Representatives and the Senate, based on Section 38 of the MISSISSIPPI CONSTITUTION.

PEER recommends that the Legislature authorize county elections commissions to collect information regarding candidates' qualifications for the House and the Senate when these bodies draw conclusions on candidates' qualifications in contested elections.

## The PEER Committee

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### *Executive Summary*

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The State Board of Election Commissioners, composed of the Governor, the Attorney General, and the Secretary of State, is charged by statute to hear disputes in contests involving candidates who must qualify through that board (at present, independent candidates only).

In response to a legislative request, PEER evaluated the effectiveness of the Board of Election Commissioners—specifically, whether the board has been effective in resolving qualifications disputes between candidates for the Legislature and, if legal impediments exist to making the board effective, what corrective procedures could be implemented.

Based on the Mississippi Supreme Court decision in *Foster v. Harden*, 536 So. 2d. 905 (Miss, 1988), qualifications disputes between legislative candidates are within the exclusive jurisdiction of the state House of Representatives and Senate. This is a constitutional limitation based on Section 38 of the MISSISSIPPI CONSTITUTION.

PEER recommends that the Legislature adopt a procedure by which county elections commissions collect information regarding candidates' qualifications and forward their conclusions to the House and the Senate so that the two houses may have investigative information on hand when they draw conclusions on candidates' qualifications in contested elections.

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# **A Limited Review of the Effectiveness of the State Board of Election Commissioners in Resolving Contested Legislative Elections**

## ***Introduction***

### **Authority**

At its meeting of September 28, 1992, the PEER Committee approved a legislative request to answer questions regarding the effectiveness of the State Board of Election Commissioners in adjudicating election disputes. The PEER Committee acted in accordance with MISS. CODE ANN. Section 5-3-57.

### **Scope and Purpose**

The PEER Committee obtained information relevant to addressing the following issues:

- Has the State Board of Election Commissioners been effective in investigating contested elections pursuant to MISS. CODE ANN. Section 23-15-963? What actions have been taken relative to contested elections since 1979?
- Are there legal imperfections which hinder the State Board of Election Commissioners relative to contested legislative elections? If so, what recommendations does the PEER Committee have for correcting these imperfections?

### **Methodology**

During the course of this review, PEER:

- Reviewed relevant provisions of the Mississippi Code of 1972;
- Reviewed relevant Mississippi case law; and,
- Reviewed minutes of the State Board of Election Commissioners since 1979.

### **Overview**

Statute law gives the State Board of Election Commissioners limited powers with respect to legislative elections. Since 1979, the board has, as a

result of legislative candidates' complaints, stricken two independent candidates from the ballot. In 1987, the board also heard two matters with respect to party candidates. In doing so, it did not act except as to accept the conclusions of the party committee responsible for rendering election disputes. In 1992, the board refused to hear two complaints by defeated incumbents. In doing so the Attorney General noted that, constitutionally, jurisdiction to resolve legislative election disputes is vested in the House of Representatives and the Senate. The Secretary of State noted that the board did not have jurisdiction over this type of dispute.

## ***State Board of Election Commissioners***

### **Authority**

The authority of the State Board of Election Commissioners is determined by provisions of the Mississippi Code of 1972. MISS. CODE ANN. Section 23-15-211 (1972) creates the State Board of Election Commissioners, composed of the Governor, the Attorney General, and the Secretary of State. This body is empowered to approve candidate withdrawals for non-political reasons (CODE Section 23-15-317), appointment of county election registrars (CODE Section 23-15-223), approval of certain non-party candidates for inclusion on the ballot (CODE Section 23-15-359), and pre-general election contests of qualifications of candidates who were qualified under the provisions of CODE Section 23-15-359.

The provisions of Section 23-15-359 allow the State Board of Election Commissioners to hear disputes in qualifications contests involving the qualifications of candidates who had to qualify through the state board. At present the only legislative candidates who must qualify through the State Board of Election Commissioners are independent candidates. A representative of the Attorney General's Office has noted that the board has authority to approve placing persons on the ballots under the decision in *Powe v. Forrest County Election Commission*, 163 So. 2d. 656 (Miss. 1964).

### **Constitutional Limitations**

Regardless of the scope of the authority vested in the board by statute or 1960's case law, recent case law from the Mississippi Supreme Court limits the commission's authority to act in matters related to the qualifications of legislative candidates. In *Foster v. Harden*, 536 So. 2d. 905 (Miss, 1988). the court affirmed a circuit dismissal of a legislative election contest, and in so ruling, held that Section 38 of the MISSISSIPPI CONSTITUTION was the appropriate remedy for contesting the qualifications of a legislative candidate. Section 38 provides: "*Each house shall elect its own officers, and shall judge the qualifications, return and election of its own members.*"

In *Harden*, the courts considered this provision and concluded that it places questions of qualifications in the Senate. Specifically, the court noted:

*Section 38 vests competence of Harden's qualifications for office, including whether she meets the residency qualifications in the Senate. Consequently, there is no authority in the Judiciary to hear this case. . . (see Harden, supra at 907)*

By the same logic, if the courts are not competent to perform a function which Section 38 of the CONSTITUTION vests in the houses of the Legislature, a body consisting of three elected members of the executive branch of government would be no more competent constitutionally to carry out this function of the Legislature than the judiciary.

### **Effectiveness Of the State Board of Election Commissioners in Resolving Election Disputes**

Because of the previously mentioned case *Foster v. Harden*, it is doubtful that the State Board of Election Commissioners will play an effective role in the resolution of elections disputes without a constitutional amendment specifically authorizing the board to play such a role.

### **Past Resolutions of Contested Qualifications Disputes**

Prior to the *Harden* case, the State Board of Election Commissioners struck an independent candidate for the Legislature from the ballot in 1979. In 1992, the board invalidated an independent candidate's petition.

In two other instances, the board heard contests involving party candidates for office. By what authority this was done was not noted in the minutes of the board. Both matters were heard in 1987, and did no more than accept a party committee decision. In two other contested matters brought to the board in 1992, the Attorney General and the Secretary of State noted a lack of jurisdiction.

## *Conclusion*

The State Board of Election Commissioners has rarely become involved in resolving elections qualifications disputes between legislative candidates. This can be attributed to the narrowness of the board's authority noted above, and to the Mississippi Supreme Court's ruling in the *Harden* case. (See Appendix A, page 7.)

As to the future resolution of qualifications disputes between legislative candidates, it appears that the only post-election remedy will be petition to the appropriate house of the Legislature. MISS. CODE ANN. Section 23-15-955 provides for a contesting candidate to give notice to the other party, take necessary depositions, and have such read by the House or Senate.

As to pre-primary and pre-general election contests, CODE Sections 23-15-961 and 963 continue to provide a remedy of appeal to the county or state executive committees of parties regarding qualifications of candidates. Contests of independent candidates are made under CODE Section 23-15-963 to the State Board of Election Commissioners. If the text of Section 38 of the MISSISSIPPI CONSTITUTION is to be read as literally as it is in the *Harden* case, these statutory means of contesting legislative candidate qualifications could now be constitutionally suspect.

### *Recommendation*

The Legislature should consider enacting provisions of law which would authorize county election commissions to investigate complaints of a legislative candidate's lack of qualifications. Such investigative results should be forwarded to the House of Representatives or the Senate to be reviewed prior to a resolution of the qualifications question. (See Appendix B, page 9, for proposed legislation concerning the Board of Election Commissioners.)



## *Appendix A*

### *Legislative Election Matters Contested by Candidates or Former Candidates Before the State Board of Election Commissioners Since 1979*

**1979**

*Parties:* Senator Theodore Smith contests qualifications of independent candidate Inmond Dean for Senate District 4. Matter considered September 26, 1979.

*Result:* Dean found to be not qualified.

**1987**

#### *First Matter*

*Parties:* Candidate Thompson contests Candidate Gadd's qualifications for House District 13. Both ran in the Democratic primary. Matter was delayed in the board meeting pending outcome of Democratic Appeals Committee action. Matter brought before September 4, 1987, meeting.

*Result:* Board accepts results of Appeals Committee decision at the September 9, 1987, meeting. No specific statutory authority authorizes the board to become involved in party candidate contests.

#### *Second Matter*

*Parties:* Candidate Shaw contests the qualifications of Candidate Posey for Senate District 36. Both ran in the Democratic primary. Matter was delayed in the board meeting pending outcome of Democratic Appeals Committee action. Matter brought before September 9, 1987, meeting, and held not to be properly before the board, as no winner had been certified by the Democratic Party.

*Result:* On September 15, 1987, the board accepted the certification of Posey as Democratic nominee. No specific statutory authority authorizes the board to become involved in party candidate contests.

**1992**

#### *First Matter*

*Parties:* Senator Pat Welch contested the qualifications of Robert Johnson in Senate District 38 race. Both had been candidates in the Democratic

primary. This matter was brought before the September 9, 1992, meeting of the board.

*Result:* The Attorney General's Office raised an issue under Section 38 as to whether the board had jurisdiction. The Secretary of State's Office also raised a standing question because the complainant was not now a candidate.

#### *Second Matter*

*Parties:* Representative Ashley Hines contested the qualifications of Jimmy Thornton in the House District 50 race. Both had been candidates in the Democratic primary. This matter was brought before the September 9, 1992, meeting of the board.

*Result:* The Attorney General's Office raised an issue under Section 38 as to whether the board had jurisdiction. The Secretary of State's Office also raised a standing question because the complainant was not now a candidate.

#### *Third Matter*

*Parties:* Bennie Turner contested the qualifications of independent candidate Albert Bush in the Senate District 16 race. Questions arose as to the proper form of Bush's petition.

*Result:* Bush was not placed on the ballot.

*Appendix B*

*Proposed Legislation Concerning the Board of Election Commissioners*  
Mississippi Legislature Regular Session, 1993

BY:

BILL

AN ACT TO ESTABLISH A PROCEDURE FOR INVESTIGATING AND RESOLVING LEGISLATIVE ELECTION CONTESTS; TO AMEND SECTIONS 23-15-955, 23-15-961, AND 23-15-063 TO CONFORM THERETO; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. (1) Whenever a candidate for election to the Mississippi House of Representatives or the Mississippi Senate wishes to contest the qualifications of his opponent, the candidate, or former candidate, shall make his complaint to the Speaker of the House or the Lieutenant Governor. The complaint shall be made no later than ten (10) days following the general election, and shall request that the House of Representatives or the Senate, whichever is appropriate, shall not seat a candidate based on such candidate's failure to meet qualifications. The complaint shall further detail what qualifications the subject of the complaint fails to meet.

(2) Whenever such complaint is filed with the Lieutenant Governor or the Speaker of the House, such officer may refer the matter to the County Election Commission of the county in which the subject of the complaint has alleged to be in residence. The county election commission shall respond by preparing a completed report within thirty (30) days of the complainant's initial filing with the House of Representatives or the Senate, and shall transmit such completed report, including all statements, records, and investigative findings, to the Clerk of the House or the Secretary of the Senate.

(3) The election commissions of each county shall investigate and find facts in any matter referred to them as provided for in subsection 2 of this section, wherein one candidate for the Legislature contests the qualifications of another candidate to serve in the Legislature. Such investigations and the investigative report prepared shall include:

(a) The taking of any statements relative to the qualifications of a candidate,

(b) A complete review of records with respect to a candidate's qualifications. Such shall include records of criminal conviction, proof of residence, or any other record relevant to the allegations made against a candidate.

residence, or any other record relevant to the allegations made against a candidate.

(4) When such report is received, the Clerk of the House or the Secretary of the Senate shall deliver such report to the presiding officer of the House of Representatives or the Senate. Such officer shall, upon receipt of the report, assign the complaint, and the investigative report of the county election commission, along with any other relevant evidence to any body of the House of Representatives or the Senate, consistent with the rules of each house, for review and disposition.

SECTION 2. Section 32-15-955, Mississippi Code of 1972, is amended as follows:

**§ 23-15-955. Proceedings with respect to election of member of Senate or House of Representatives.**

(1) Except as otherwise provided by Section 23-15-961, the person contesting the seat of any member of the Senate or House of Representatives shall, within thirty (30) days after the election, serve notice, in writing, upon such member, stating particularly the grounds upon which the election is contested. Thereupon either party may proceed to take the depositions of witnesses before any justice court judge, or other officer qualified to administer oaths in the district or county, as convenient as may be to the residences of the witnesses. The depositions so taken shall be read as evidence before the Senate or House as the case may be; but the opposite party shall have ten (10) days' notice of the time and place of taking the same.

(2) Nothing herein shall in any way affect the procedures established for contesting legislative elections established in Section 1 of this act.

SECTION 3. Section 23-15-961, Mississippi Code of 1972, is amended as follows:

**§ 23-15-961. Exclusive procedures for contesting qualifications of candidate for primary election; exceptions.**

(1) Any person desiring to contest the qualifications of another person as a candidate for nomination in a political party primary election shall file a petition specifically setting forth the grounds of the challenge within ten (10) days after the qualifying deadline for the office in question. Such petition shall be filed with the executive committee with whom the candidate in question qualified.

(2) Within ten (10) days of receipt of the petition described above, the appropriate executive committee shall meet and rule upon the petition. At least two (2) days before the hearing to consider the petition, the appropriate executive committee shall give notice to both the petitioner and the contested candidate of the time and place of the hearing on the petition. Each party shall be given an opportunity to be heard at such meeting and present evidence in support of his position.

(3) If the appropriate executive committee fails to rule upon the petition within the time required above, such inaction shall be interpreted as a denial of the request for relief contained in the petition.

(4) Any party aggrieved by the action or inaction of the appropriate executive committee may file a petition for judicial review to the circuit court of the county in which the executive committee whose decision is being reviewed sits. Such petition must be filed no later than fifteen (15) days after the date the petition was originally filed with the appropriate executive committee. Such person filing for judicial review shall give a cost bond in the sum of Three Hundred Dollars (\$300.00) with two (2) or more sufficient sureties conditioned to pay all costs in case his petition be

dismissed, and an additional bond may be required, by the court, if necessary, at any subsequent stage of the proceedings.

(5) The circuit court with whom such a petition for judicial review has been filed shall at the earliest possible date set the matter for hearing. Notice shall be given the interested parties of the time set for hearing by the circuit clerk. The hearing before the circuit court shall be de novo. The matter shall be tried to the circuit judge, without a jury. After hearing the evidence, the circuit judge shall determine whether the candidate whose qualifications have been challenged is legally qualified to have his name placed upon the ballot in question. The circuit judge may, upon disqualification of any such candidate, order that such candidate shall bear the court costs of the proceedings.

(6) Within three (3) days after judgment is rendered by the circuit court, the contestant or contestee, or both, may file an appeal in the Supreme Court upon giving a cost bond in the sum of Three Hundred Dollars (\$300.00), together with a bill of exceptions which shall state the point or points of law at issue with a sufficient synopsis of the facts to fully disclose the bearing and relevancy of such points of law. The bill of exceptions shall be signed by the trial judge, or in case of his absence, refusal or disability, by two (2) disinterested attorneys, as is provided by law in other cases of bills of exception. The filing of such appeals shall automatically suspend the decision of the circuit court and the appropriate executive committee is entitled to proceed based upon their decision unless and until the Supreme Court, in its discretion, stays further proceedings in the matter. The appeal shall be immediately docketed in the Supreme Court and referred to the court en banc upon briefs without oral argument unless the court shall call for oral argument, and shall be decided at the earliest possible date, as a preference case over all others. The Supreme Court shall have the authority to grant such relief as is appropriate under the circumstances.

(7) The procedure set forth above shall be the sole and only manner in which the qualifications of a candidate seeking public office as a party nominee may be challenged prior to the time of his nomination or election. After a party nominee has been elected to public office, the election may be challenged as otherwise provided by law. After a party nominee assumes an elective office, his qualifications to hold that office may be contested as otherwise provided by law.

(8) Nothing contained in this section shall apply to contests between candidates for legislative elections.

SECTION 4. Section 23-15-963, Mississippi Code of 1972, is amended as follows:

**§ 23-15-963. Exclusive procedures for contesting qualifications of candidate for general election; exceptions.**

(1) Any person desiring to contest the qualifications of another person who has qualified pursuant to the provisions of Section 23-15-359, Mississippi Code of 1972, as a candidate for any office elected at a general election, shall file a petition specifically setting forth the grounds of the challenge not later than thirty-one (31) days after the date of the first primary election set forth in Section 23-15-191, Mississippi Code of 1972. Such petition shall be filed with the same body with whom the candidate in question qualified pursuant to Section 23-15-359, Mississippi Code of 1972.

(2) Within ten (10) days of receipt of the petition described above, the appropriate election officials shall meet and rule upon the petition. At least two (2) days before the hearing to consider the petition, the appropriate election officials shall give notice to both the petitioner and the contested candidate of the time and place of the hearing on the petition. Each party shall be given an opportunity to be heard at such meeting and present evidence in support of his position.

(3) If the appropriate election officials fail to rule upon the petition within the time required above, such inaction shall be interpreted as a denial of the request for relief contained in the petition.

(4) Any party aggrieved by the action or inaction of the appropriate election officials may file a petition for judicial review to the circuit court of the county in which the election officials whose decision is being reviewed sits. Such petition must be filed no later than fifteen (15) days after the date the petition was originally filed with the appropriate election officials. Such person filing for judicial review shall give a cost bond in the sum of Three Hundred Dollars (\$300.00) with two (2) or more sufficient sureties conditioned to pay all costs in case his petition be dismissed, and an additional bond may be required, by the court, if necessary, at any subsequent stage of the proceedings.

(5) The circuit court with whom such a petition for judicial review has been filed shall at the earliest possible date set the matter for hearing. Notice shall be given the interested parties of the time set for hearing by the circuit clerk. The hearing before the circuit court shall be de novo. The matter shall be tried to the circuit judge, without a jury. After hearing the evidence, the circuit judge shall determine whether the candidate whose qualifications have been challenged is legally qualified to have his name placed upon the ballot in question. The circuit judge may, upon disqualification of any such candidate, order that such candidate shall bear the court costs of the proceedings.

(6) Within three (3) days after judgment is rendered by the circuit court, the contestant or contestee, or both, may file an appeal in the Supreme Court upon giving a cost bond in the sum of Three Hundred Dollars (\$300.00), together with a bill of exceptions which shall state the point or points of law at issue with a sufficient synopsis of the facts to fully disclose the bearing and relevancy of such points of law. The bill of exceptions shall

be signed by the trial judge, or in case of his absence, refusal or disability, by two (2) disinterested attorneys, as is provided by law in other cases of bills of exception. The filing of such appeals shall automatically suspend the decision of the circuit court and the appropriate election officials are entitled to proceed based upon their decision unless and until the Supreme Court, in its discretion, stays further proceedings in the matter. The appeal shall be immediately docketed in the Supreme Court and referred to the court en banc upon briefs without oral argument unless the court shall call for oral argument, and shall be decided at the earliest possible date, as a preference case over all others. The Supreme Court shall have the authority to grant such relief as is appropriate under the circumstances.

(7) The procedure set forth above shall be the sole and only manner in which the qualifications of a candidate seeking public office who qualified pursuant to the provisions of Section 23-15-359, Mississippi Code of 1972, may be challenged prior to the time of his election. After any such person has been elected to public office, the election may be challenged as otherwise provided by law. After any person assumes an elective office, his qualifications to hold that office may be contested as otherwise provided by law.

(8) Nothing contained in this section shall apply to contests between candidates for legislative elections.

SECTION 5. This act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965 as amended and extended.

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