

Discipline, Interpretation and Enforcement (DIE) Board

Ruling of the Board

Style of Cause: Appeal of CRO Ruling #1 (re. Killer Coke Materials)

Ruling # 3

Date heard: February 14 2007

Appearing for the D.I.E. Board:

Presiding Chair: Alan Cliff

Tribunes: Sharon Ohayon, Sarah Rossman

Appearing for the Applicant: Darren Lau

Appearing for the Respondent: Rachel Woynorowski, Chief Returning Office

Case summary:

CRO Ruling #1 found that posters and stickers disseminated by “Students’ Against Killer Coke” constituted campaign materials and therefore illicit pre-campaigning, and fined the Coke No election side \$900. The applicant argues that the CRO erred in ruling the posters and stickers to be campaign materials; the panel disagrees. Mr. Lau further submits that even if the materials were in contravention of the bylaw, the fine was too high. The panel finds that the fine was permissible under Bylaw 2000 and was not unreasonable, and therefore upholds the CRO’s ruling.

SUMMARY OF ALLEGATIONS

Mr. Lau alleges that the Chief Returning Officer’s decision in CRO Ruling #1 was erroneous in its classification of the SAKcoke materials as “campaign materials”. Lau argues that the dissemination of the materials should not be classed as campaign activity under Bylaw 2000 because they were not “[p]lanned or organized by or on behalf of [the Coke No side, and] calculated to convince members to vote in a given way”. He suggests that only actions committed by individuals who have deliberately set out to influence the vote should meet this criterion, and that the materials in question did not.

Mr. Lau further claims that even if the SAKcoke materials did violate Bylaw 2000, the penalty was excessive and should be reduced. He suggests that the need for counter-balancing the effect of the infraction was limited because of the time lag between the propagation of the material and the vote itself, and because the material did not mention the dates of the election, or indeed the plebiscite itself. He argues that any infraction of the bylaws was unintentional, and that a punitive fine would be inappropriate. Even were a punitive fine justified, he suggests that the costs of the material were likely around \$100, and that the punitive portion of the fine was disproportionately large. Finally, he challenges the CRO’s authority to levy an additional fine to compensate for costs associated with sticker removal.

FACTS

The applicant did not contest the facts as laid out in CRO Ruling #1.

RELEVANT LEGAL PROVISIONS

Bylaw 2000 s.62(2) gives all Students' Union members the right to "appeal a ruling of the C.R.O. to the D.I.E. Board". Under *Bylaw 1500* s.3.(a), actions brought before the board must be based on "a contravention of Students' Union legislation".

Bylaw 2000 s.22.(1) prohibits volunteers and campaign managers from "[engaging] in campaign activities between [...] Students' Council initiation of a plebiscite/referenda and the commencement of the campaign." S.2.(r) defines a volunteer as "any individual who assists in campaign activities". Campaign activities are defined in s.2.(q) as "any act, planned or organized by or on behalf of any candidate, slate or side, that is calculated to convince members to vote in a given way". Under s.2.(t), campaign materials are "physical or electronic media produced or distributed as part of campaign activities".

Bylaw 2000 s.60 provides for the C.R.O. to "assign a penalty" in instances where a contravention of the bylaw has resulted in "unfair advantage to a candidate". (The panel and the parties agree that this clause should be read to include plebiscite sides as well as candidates, because s.61(4) refers to the C.R.O. using s.60 penalties against sides, and because a narrow reading would result in the absurd conclusion that the C.R.O. is not permitted to use any penalties short of disqualification for campaign sides.) Such penalties are exercised under s.60(1)(a) to "fully counter-balance any advantage gained" and under (60)(1)(b) "where the contravention was intentional, penalize the candidate or campaign manager who was or whose volunteer was guilty of the contravention."

s.60(2)(a) provides for the C.R.O. to levy fines "to be counted against the candidate's campaign expenses". (Again, this is read to include campaign sides.)

ANALYSIS

A very narrow interpretation of *Bylaw 2000* s.2(q) would suggest that only activities pursued at the request of or with the coordination of an election side would constitute campaign activities. The problem with this interpretation is that it would allow for unrestricted campaigning by third parties without consequences. It would be clearly problematic if SAKcoke or any other group were permitted to distribute posters or other materials explicitly encouraging voting one way or the other the two days of balloting. The panel prefers to adopt a broader interpretation: activities are "on behalf of" a campaign side if they are intended to influence the outcome of the vote in a manner benefiting that side.

The appellant argues that activities only constitute campaign activities where "the individuals conducting the actions were doing so *deliberately* in order to assist the referendum or plebiscite side, and that such assistance was not merely a side effect." The panel would not necessarily rule out activities that assist a plebiscite side as a secondary effect, provided that the effect was calculated and deliberate. However, even accepting his analysis as correct, the panel agrees with the CRO's finding that the SAKcoke

activities were deliberately calculated to convince students to vote against the Coke plebiscite.

We base this determination on a number of grounds. The anti-coke posters and stickers were proliferated on campus immediately prior to the start of the campaign. Such materials had not been present previously. While the appellant suggests that the materials were spread following the SAKcoke I-Week event, rather than in anticipation of the election, the former rationale does not obviate the latter one. SAKcoke was eminently aware of the plebiscite, having presented to Students' Council on the issue. Indeed, Steph Shantz, a prominent member of SAKcoke, had expressed interest in serving as campaign manager for the plebiscite No-Side. Despite her retraction, this speaks to a general disposition not only against Coca-Cola in general, but also against the passage of the plebiscite in particular. The appellant argues that because posters had appeared off campus as well, the intent of the materials was not primarily to influence the vote but rather to mobilize social opposition to the Coca-Cola Corporation in general. However, when it comes to the on-campus material, it strikes us that such mobilization is in large part calculated precisely to influence the vote.

The CRO argues that the posters and stickers with their invitation to "Campaign for a Coca-Cola Free Campus" are interpreted by students as references to the election. This connection is particularly strong when some of the materials appeared on or in close proximity to SU Election posters, and at a time when the plebiscite was receiving attention in the Gateway. Given that the materials were disseminated by a group with a record of opposing the plebiscite, spearheaded by an individual intending to campaign against it, and presented in a manner that implied connection with the elections, the panel upholds the CRO's findings that the posters and stickers were "calculated to convince" voters to turn against the plebiscite, and were therefore illicit campaign materials and subject to sanction.

Furthermore, the panel finds that the CRO was correct in ruling the infractions to be intentional. SAKcoke ignored repeated requests from the elections office to remove the material, and in fact expressed intent not to remove it. Once SAKcoke was notified that the materials would violate *Bylaw 2000* if they remained after the Students' Council vote, failure to take steps to remove them constituted wilful contravention. While the panel would by no means advocate slavish devotion to the CRO's whims, our system is founded upon a degree of deference for both the bylaws and the elections' office's applications thereof. Blatantly ignoring requests to remove campaign material is unacceptable, and clearly merits application of s.60(2)(b).

The appellant goes on to argue that the penalty imposed by the CRO was unreasonably high. In the first place, he claims that the costs of the materials was likely less than \$100, and that their effectiveness would be reduced because of the delay between their dissemination and the vote itself. However, because the materials were posted prior to the start of campaigning, there was no opportunity for Coke Yes (which did not exist at the time) to effectively refute their claims. As well, postering during campaigning is a fraught business, with many posters vying for attention. In the panel's view, it would cost

significantly more than \$100 for Coke Yes to generate a similar amount of attention and electoral effect once campaigning begins.

The appellant argues that “punitive fines in the amount of eight or nine times the counterbalancing fines is plainly excessive.” In the first place, the multiplying factor in this case is significantly lower than eight or nine. Beyond that, the panel does not see a large multiple as inherently unreasonable. When it comes to establishing the appropriate magnitude of a punitive fine, the board sees the Chief Returning Officer as having been invested with considerable discretion by Students’ Council. While this discretion is subject to oversight by the Board, we do not have the same competency to determine the precise effects of a given fine. Accordingly, we would apply a standard of reasonability in evaluating CRO determinations of appropriate punitive fines. While the panel may not have chosen the precise number that the CRO did, we are not convinced that the fine was unreasonably high.

Finally, the appellant posits that the application of an additional fine to compensate the elections office for the costs of sticker-removal was not within the scope of the CRO’s authority under *Bylaw 2000* s.60. The panel did not hear sufficiently compelling arguments to undermine this latter analysis. Even in s.33, which was not applied in this case, penalties for permanently damaging property are effected through the punitive and counter-balancing mechanisms specified in s.60(1), rather than a new compensatory mechanism. Accordingly, the panel rules that the fourth penalty section in the C.R.O.’s ruling, “the cost of [the removal of the stickers] being applied against the Coke No campaign budget,” should be considered as part of the \$900 fine rather than added on top of it.

DISPOSITION AND REMEDY IMPOSED

The panel affirms the CRO’s finding that the SAKcoke activities constituted illicit pre-campaigning, and upholds CRO Ruling #1, with the exception that the cost of removing the posters not be levied as an additional fine.

RECOMMENDATIONS

If third parties disagree with a CRO’s warnings to remove campaign materials, they would be well advised to initiate a complaint with the D.I.E. Board to challenge the C.R.O., rather than waiting to appeal.

The panel would remind all election participants of the Board’s finding in Ruling #4, 2003-4 that “it is a candidate’s responsibility to ensure that they comply with all the requirements and regulations listed in Bylaw 2100. Candidates should err on the side of caution if confronted with possible breaches.”

The Discipline, Interpretation And Enforcement (D.I.E.) Board functions as the judicial branch of the Student’s Union, and is responsible for interpreting and enforcing all Students’ Union legislation. If anyone has any questions regarding the D.I.E. Board, feel free to contact the Chair, Guillaume Laroche, at ea@su.ualberta.ca .