

Discipline, Interpretation, and Enforcement (DIE) Board

Ruling of the Board

(1) HEARING DETAILS

Style of Cause:	Reference re: Unregistered Sides
Hearing Number:	Ruling #6, 2009/2010
Hearing Date:	March 3, 2010
DIE Board Panel Members:	Jason Morris, Chief Tribune, Chair Chris Le, Tribune Christiaan Conradie, Tribune
Appearing for the Applicant:	Jennifer Huygen, Chief Returning Officer
Appearing for the Respondent:	None
Intervener(s):	Jon Osborne, Campaign Manager, Millennium Villages Yes Natalie Cox, Counsellor, associated with the Millennium Villages No group.

(2) ALLEGED CONTRAVENTION / INTERPRETATION QUESTIONS

[1] The CRO asked the Board the following question: What powers does the CRO have to deal with unregistered participants in a referendum campaign who violate the rules that would apply to registered participants?

(3) RELEVANT LEGISLATIVE PROVISIONS

[2] Excerpts from Bylaw 2000:

3. Mandate

This bylaw shall govern the conduct of all elections, plebiscites and referenda conducted by the Students' Union.

...

8. Duties of the Elections Staff

(1) The duties of the Chief Returning Officer shall include:

- a. overseeing the implementation of Bylaw 2000;
- b. such duties as may be required of the Chief Returning Officer under Bylaw 2000; and
- c. the submission to Students' Council of a written report of activities and recommendations prior to May 31.

...

36. Third Party Activities

(1) A candidate, slate, or side in a Students' Union election may distance themselves from a third party in the event the third party effectively conducts campaign activities under the following conditions:

- a. the candidate, slate, or side must demonstrate to the C.R.O. that the third party acted without consent of the candidate, slate, or side; and
- b. the candidate, slate, or side must demonstrate to the C.R.O. that steps have been taken to distance themselves from the third party and to attempt to halt unauthorized campaign activity by that third party.

(2) Should a candidate, slate, or side demonstrate the conditions specified under Section 36.(1) to the C.R.O.'s satisfaction, the candidate, slate, or side would not be subject to punitive fines as a result of the third party's actions, but could still be subject to counterbalancing fines.

...

70. Complaints

(1) The C.R.O. shall prepare and provide a complaint form which shall require complaints to indicate

- a. their names and student identification numbers;
- b. the specific bylaw and section, rule, or regulation that has allegedly been contravened;
- c. the specific individual or group that is alleged to be in contravention;
- d. the specific facts which constitute the alleged contravention; and
- e. the evidence for these facts.

(2) Where a complaint is received within twelve (12) working hours of the alleged contravention, and where the original complaint form is provided to the C.R.O., the C.R.O. shall rule on that complaint.

(3) The C.R.O. shall provide a copy of the complaint form, with the complainant's student identification number blacked out, to each respondent.

(4) Where a complaint is received and is found to be complete as set out in Section 70(1), the C.R.O. shall rule on the complaint within twelve (12) working hours of receiving the complaint.

(5) The C.R.O. shall post all of his/her rulings, including

- a. a summary of the complaint;
- b. a list of parties to the complaint;
- c. where the C.R.O. fails to possess jurisdiction as set out in Section 72(6), a summary of the reasons for this finding;
- d. a listing of all bylaws, rules, and regulations that apply;
- e. a finding regarding the facts;
- f. a ruling regarding the alleged contravention;
- g. the penalty assigned, if any;
- h. the time the ruling was posted; and
- i. the time limit for appeal.

71. Penalties Available

- (1) Where a candidate, campaign manager or volunteer has contravened a bylaw, rule, or regulation, regardless of the cause or the intent of the parties involved, and that contravention has provided an unfair advantage to a candidate, the C.R.O. shall assign a penalty that
 - a. fully counter-balances any advantage gained; and
 - b. where the contravention was intentional, penalizes the candidate or campaign manager who was or whose volunteer was guilty of the contravention.
- (2) Penalties available to the C.R.O. shall include
 - a. a fine, to be counted against the candidate's campaign expenses;
 - b. the confiscation or destruction of campaign materials;
 - c. limits, restrictions, and prohibitions on any type of campaign activities for any period of time up to the commencement of voting; and
 - d. disqualification of the candidate or campaign manager.
- (3) The C.R.O. shall draft a schedule of fines and penalties as an appendix to the rules and regulations concerning this bylaw.

72. Disqualification

- (1) A candidate or slate shall be disqualified where he/she/it is guilty of a contravention that
 - a. cannot be counter-balanced by a lesser penalty;
 - b. is malicious or substantially prejudicial to another candidate or slate; or
 - c. involves tampering with ballots, voting procedures, or counting procedures.
- (2) Where a slate is disqualified, all candidates running as a part of that slate shall also be disqualified.
- (4) Where the advantage gained by the "yes" side of a referendum or plebiscite due to a contravention cannot be fully counterbalanced by the penalties available to the C.R.O. as set out in Section 71, the C.R.O. shall cancel the referendum or plebiscite.
- (5) Where the advantage gained by the "no" side of a referendum or plebiscite due to a contravention cannot be fully counterbalanced by the penalties available to the C.R.O. as set out in Section 71, the C.R.O. shall counterbalance the advantage to the maximum extent possible, and may recommend to the D.I.E. Board that further disciplinary action be taken against the members guilty of the contravention under the Judiciary of the Students' Union Bylaw.
- (6) Where a side's campaign manager is disqualified, that side shall select a new campaign manager.
- (7) The C.R.O. shall be empowered to investigate and rule upon every contravention of this bylaw or any other bylaw, rule, or regulation related to the election, plebiscite or referenda.

(4) FACTS

[3] Because this is a reference question, and not a hearing, the facts are not pertinent to the specific decision. However, they were helpful for the Board in understanding the implications of the question that had been asked, and they are shared here, without comment or decision on their truth, to provide that same context for anyone who might read this decision later.

[4] This hearing took place, and this decision was drafted, on the first day of voting in an executive election. A referendum question is on the ballot, referred to as the Millenium Villages question. The procedures in Bylaw 2000 for the registration of sides were followed, and a "Yes"

side was registered, but a “No” side was not registered. Subsequently, some individuals have individually and collectively worked to oppose the adoption of the referendum, through means that were predominantly within the spirit of Bylaw 2000. Those actions have been of concern neither to the CRO, nor to the “Yes” campaign, which is to their credit. However, some individuals are also accused of taking actions that, if they had been taken by a registered “No” side, would violate Bylaw 2000, and would likely result in sanctions.

(5) ANALYSIS

[5] It was the shared submission of all the parties that a plain reading of Bylaw 2000 did not seem to grant the CRO any capacity to respond to the actions of unregistered campaigners for a side of a referendum. It was also the shared submission of all the parties that this is a problematic scenario, because it provides an incentive for individuals or groups for whom abiding by the rules applicable to registered campaigns would be detrimental to participate instead outside of those rules, eliminating the even playing field that Bylaw 2000 is intended to create. The Board shares this concern.

[6] The CRO and the “Yes” campaign submitted that it would be appropriate for DIE Board to interpret the powers of the CRO in such a way as to allow her either to punish individuals who are not registered as sides and violate the rules to their own benefit, or to allow her to compensate registered campaigns whose interests are injured by the illegal actions of such individuals.

[7] Natalie Cox, who it is noted appeared on her own behalf as there was no official group for her to represent, submitted that it would be inappropriate for DIE Board to interpret the powers of the CRO in such a way that they would interfere with students’ freedom of expression. It was her opinion that despite the fact it would better for the playing field to be kept more even, that the CRO simply had no jurisdiction over non-registered campaigners, and that to give the CRO jurisdiction over non-registered campaigners would be to extend too wide a net.

[8] The Board has some sympathy for Ms. Cox’s argument. It does seem, given the very broad definition of “campaign activity,” that it would be difficult to craft a change to Bylaw 2000 that would give the CRO jurisdiction over the sort of behaviour included in the facts above, but not also include myriad other benign actions taken by students every day during campaigns. We are also sensitive to the need to protect freedom of expression.

[9] However, we are more concerned by the balance between the proper place of DIE Board relative to Students’ Council. It is for Students’ Council to write the bylaws, and it is for DIE Board only to determine what they mean. The boundary between those two is at times fuzzy, but not in this case. Our concern here is not whether too wide a net *would* be cast, it is determining the size of the net that has *already* been cast by Students’ Council.

[10] In order to come to an interpretation that the CRO has the authority to deal with this sort of situation, Bylaw 2000 would need to be interpreted to contain a provision either a) allowing

the CRO to compensate a registered party for injury caused to them by the actions of a non-registered party, or b) allowing the CRO to punish individuals who violated the rules.

[11] Bylaw 2000 cannot be reasonably interpreted to mean either of these things. The powers of the CRO are set out always with respect to terms that are defined in such a way as to exclude non-registered sides. We note in particular that s. 71 sets out that there are penalties available to the CRO only with regard to “a candidate, campaign manager or volunteer.”

[12] It was suggested that s. 72 (7) of the bylaw does not limit the power of the CRO to specific entities. But the CRO’s ability to “rule” as set out in that section would still seem to be limited by the penalties set out in s. 71. Furthermore, it seems to the Board that this section, under the title “Disqualification,” is more reasonably interpreted to be concerned with violations of bylaws other than Bylaw 2000, as s. 70 already grants the CRO the ability to rule on contraventions.

[13] It was also suggested that s. 3 sets the scope of Bylaw 2000 quite broadly, and that the CRO is charged under s. 8(1)(a) with the “implementation” of Bylaw 2000. However, we are of the opinion that any number of provisions might exist that would serve the scope listed in s. 3, and the responsibility of the CRO is to “implement” only those provisions that are actually set out in Bylaw 2000. The ones that do are limited to registered parties.

[14] We also note that interpreting any of the existing provisions as being applicable to unregistered parties would be contrary to the evidence that Students’ Council specifically considered the impact on the elections process of individuals unassociated with a campaign. Section 36 sets out how a campaign can avoid liability for the actions of a person unassociated with their campaign who yet promotes it in violation of the Bylaw. In this section such a person is referred to as a “Third Party”. Students’ Council did not set out how a campaign might avoid the negative consequences of the illegal actions of a person who was opposed to their cause. But the fact that Third Parties are considered in the bylaw suggests that if Students’ Council had intended for the negative consequences of illegal actions of unregistered opponents to be included in the law, they would have put it in that section, not in the other sections considered, or they would have used the words “Third Party” in the other sections. There was no suggestion that s. 36 would cover the sort of situation described above.

[15] As for the possibility of giving the CRO the power to provide countervailing benefits to a registered party to compensate for the wrong-doing of an unregistered party, we have two objections. First, this would be to interpret the repeated use of the word “penalty” and the list of penalties as including “rewards,” which stretches the DIE Board’s interpretation role to unrecognizable lengths. Second, the only remedies that the parties before us could suggest, allowing a higher budget, or allowing campaigning outside of the usual periods, would in effect be violations of the Bylaw also. This would be an example of two wrongs making a right, with which the DIE Board is not comfortable.

(6) DECISION

[16] In answer to the CRO's question, the CRO under Bylaw 2000 has no powers to deal with actions taken by an unregistered party in a campaign. The Board recognizes that this may be a disagreeable situation, but it is not one that can be remedied without inserting the judgement of DIE Board where the judgement of Students' Council belongs. The Board strongly encourages Students' Council to bring their attention to this issue, and address it as they see fit.

[17] All of the parties who made written and oral presentations to the Board are to be commended. Their submissions were very helpful.

The Discipline, Interpretation, and Enforcement (DIE) Board functions as the judicial branch of the Students' Union, and is responsible for interpreting and enforcing all Students' Union legislation. Please direct all inquiries regarding the DIE Board or this decision to the Chief Tribune at: <ea@su.ualberta.ca>.