

Discipline, Interpretation, and Enforcement (DIE) Board

Ruling of the Board

(1) HEARING DETAILS

Style of Cause: Zhao v. C.R.O.
Hearing Number: Ruling #7, 2009/2010
Hearing Date: March 31, 2010
DIE Board Panel Members: Jason Morris, Chief Tribune, Chair
Amy Sanderson, Tribune
Christiaan Conradie, Tribune
Appearing for the Applicant: Sarah (Zhuyin) Zhao, Pharmacy Students' Council Candidate
Appearing for the Respondent: Jennifer Huygen, Chief Returning Officer
Intervener(s): Nick Boon, Pharmacy Students' Council Candidate

(2) ALLEGED CONTRAVENTION / INTERPRETATION QUESTIONS

[1] The applicant asked the Board to review and overturn the decision of the Chief Returning Officer #12, which resulted in her disqualification from the race for Pharmacy Students' Council Representative.

(3) RELEVANT LEGISLATIVE PROVISIONS

[2] Excerpts from Bylaw 2000:

2. Definitions

In this bylaw

...

q. "campaign activity" shall be 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;

r. "volunteer" shall be any individual who assists in campaign activities;

...

t. "campaign materials" shall be any physical or electronic media produced or distributed as part of campaign activities;

...

35. Requirements of All Candidates and Plebiscite/Referendum Sides

Each candidate, campaign manager and slate shall act reasonably and in good faith, and specifically shall

a. ensure that each volunteer engaging in campaign activities on his/her/its behalf is aware of all bylaws, rules, regulations, and orders;

b. ensure that each volunteer is in compliance with all bylaws, rules, regulations,

and orders while engaging in campaign activities on his/her/its behalf; and
c. report any contravention of a bylaw, rule, regulation, or order to the C.R.O. immediately.

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.

...

50. Campaign Material Removal

All campaign materials shall be removed by 21h00 the day before the commencement of voting.

...

61. Limitations During Voting

(1) During voting, candidates, campaign managers, members of sides and volunteers shall not encourage members to vote or engage in any campaign activities.

(2) During voting, candidates, campaign managers, and registered members of sides shall not be within twenty (20) feet of any polling station except to vote themselves.

...

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.

(4) FACTS

[3] The facts were not in dispute by the parties.

[4] On March 18, 2010, a voting day in the Student Council election, an e-mail was sent by Anita Gustafson, the text of which encouraged members of her graduating year of the Faculty of Pharmacy to vote for their classmate, Sarah Zhao, the Applicant. The e-mail provided a link to the online voting system and information on where voting booths could be accessed.

[5] Gustafson had taken this action unaware that the restriction against campaigning was in effect, and without the knowledge or consent of Zhao.

[6] Shortly after the e-mail was sent, another student questioned Gustafson on whether it was allowed for this sort of advertisement to be distributed to students on an election day. Gustafson then contacted Zhao, expressing concern that she may have accidentally violated the campaign rules. Zhao informed Gustafson that it was in fact a violation of the rules. Gustafson suggested sending an e-mail apologizing for the error, which suggestion Zhao expressed agreement with.

[7] The second e-mail apologized for an error, and contained the words “I still urge you to vote for a Pharmacy SU Councillor, but please disregard my earlier message.”

[8] Zhao declined to contact the C.R.O. about the matter because she felt that the situation was relatively small. The e-mail had only gone out to her graduating class, a list of somewhere between 114 and 128 people. She also testified that she felt as though she had been “pestering” the C.R.O. with e-mails up until this point and didn’t want to continue to pester her.

[9] The election was held, and the results in the first round were 70 votes for Zhao, 64 votes for her competitor Nick Boon, and 3 votes for None of the Above. Zhao was declared the winner.

[10] On March 24th, Boon became aware of the e-mail, and initiated a complaint with the C.R.O. Due to personal circumstances outside of her control, it took the C.R.O. a number of days to reply to this complaint. She initiated her investigation of the matter on March 29, 2010.

[11] On March 30, the C.R.O. issued Ruling #12, which is under appeal in this case. That ruling outlined the facts and relevant legislation of the case. In that ruling the C.R.O. cites a number of considerations, which were supported by her testimony in the hearing. Of concern to the C.R.O. were the following factors:

- a. Campaign Activities occurred on a voting day
- b. The Campaign Materials had not been approved
- c. Equal access to the resources was not afforded to all candidates in the race
- d. Zhao had not reported the matter to the C.R.O. as required

[12] A fine was levied against Zhao in the amount of \$26.40. This consisted of a \$11.40 “automatic” fine at a rate of \$0.10 for each use of “social media,” multiplied by the number of individuals on the list according to the C.R.O.’s best information at the time, 114. There was an additional \$15 fine for distributing the email during one of the voting days. The C.R.O. testified that half of this \$15 was intended to account for the further advantage received by sending such a message on a voting day, and the other half was punitive.

[13] At the time of the C.R.O.’s decision, the C.R.O. was of the understanding that Gustafson had been a volunteer for Zhao. The C.R.O. testified that if she had been concerned that Gustafson was acting as a third party under the terms of Bylaw 2000 s.36, she would have made further inquiries, and that those inquiries were not made.

[14] The fine of \$26.40 was added to Zhao’s expenditures in the campaign of \$11.85, creating a total of \$38.25. This amount was \$8.25 higher than the campaign expenditure limit, and as a result, Zhao was disqualified from the race.

[15] Zhao shortly thereafter appealed the matter to this tribunal.

(5) ANALYSIS

[16] The first question to which DIE Board set its mind was the significance of the fact that this contravention was reported six days after it took place. Section 70(2) of Bylaw 2000 could be interpreted as requiring that complaints be made within 12 hours of the contravention. The C.R.O. drew our attention to DIE Board Decision #3 of the 2007/2008 academic year, in which the Board held with regard to a similarly worded provision of Bylaw 2000:

... it is evident that this section does not refer to any time limits for submitting complaints, but rather describes the actions the C.R.O must undertake when s/he receives a complaint about an alleged violation that has taken place in the previous 12 hours. It does not remove from the CRO the discretionary power to hear complaints

after this time.

[17] We agree with this interpretation and find that the C.R.O. was authorized to investigate the matter despite the fact six days had passed from the date of the alleged infraction. Having established that the C.R.O. was within her authority to rule on the alleged infraction, the Board turned its attention to the substance of the C.R.O.'s decision.

[18] In her evidence to the Board, the C.R.O. indicated that the violations of concern to her were that a) unapproved campaign activities had taken place during the voting period in the form of one or both of the two e-mails, b) that equal opportunity had not been provided to Boon, and c) that Zhao had failed to report a violation of bylaw as required under s.35(c) of Bylaw 2000. It is worth repeating that the CRO also indicated that she was under the impression that Gustafson was acting as a volunteer for Zhao's campaign, and that Zhao would therefore have been responsible for informing Gustafson of the rules and ensuring her compliance with them. The C.R.O. testified at the hearing that she is now uncertain whether or not Gustafson qualifies as a volunteer under the definition in Bylaw 2000.

[19] The Board is certain that Gustafson does not qualify as a volunteer. If any person who might do something beneficial to one's campaign were considered a volunteer, then the s.61(a) requirement to inform volunteers of the rules and the s.61(b) requirement to ensure the rules are followed by one's volunteers would be an impossible requirement to adhere to. It would be unreasonable to interpret Students' Council intent to be that candidates would be responsible for informing the entire undergraduate population, and possibly beyond, on the intricacies of Bylaw 2000. Such a requirement would be a form of cruel and unusual punishment upon all the parties involved.

[20] Clearly, if Students' Council had meant for the objects of s.61(a) and (b) to include nearly anyone, they would not have specified the particular groups included in those sections. The Board is of the opinion that Students' Council intended for volunteers to include only individuals with sufficient connection to the candidate and/or the campaign in question to find that the individual was acting at least notionally as an agent for the candidate. We are of the opinion that this is what Students' Council meant when in the definition of campaign activity at s.2(q) of Bylaw 2000 it refers to actions taken "on behalf of" a candidate. That phrase should be read to connote the meaning "at the behest of," not merely the alternative connotation, "to the benefit of."

[21] With regard to the first e-mail, therefore, Gustafson was not a volunteer. Her actions, while to the benefit of Zhao, were not taken with sufficient connection to Zhao to suggest that Gustafson was acting at Zhao's behest. It was the undisputed evidence of Zhao and Gustafson that Zhao was entirely unaware of and uninvolved with the sending of the first e-mail. As such, s.61(1) does not apply to the sending of that e-mail.

[22] With regard to the second e-mail, at this time a greater connection existed between the two individuals. Zhao was aware of Gustafson's intent to send the second e-mail, and

encouraged her to do so. However, it was the undisputed testimony of Zhao and Gustafson that Zhao was not aware that the second e-mail would include an exhortation to vote. Zhao was rather under the impression that e-mail would consist only of an apology and retraction. Given this understanding, the board is not satisfied that there was sufficient connection between Zhao and Gustafson to find that Gustafson was acting as a volunteer for Zhao when the second e-mail was sent.

[23] The C.R.O. in her ruling also referred to the e-mails in question as “campaign materials” which under s.50 of Bylaw 2000 must be removed prior to the commencement of voting. Unlike s.61, s.50 does not specify to whom this requirement applies. The definition of campaign materials, however, refers to campaign activities. The definition of campaign activities in turn refers to activities undertaken “on behalf of” a candidate. The same interpretation of that phrase as indicated above should be applied here. If an item is not being used in a campaign activity at least notionally at the behest of the candidate, it is not a campaign material under the Bylaw.

[24] While it is a reasonable extension of the requirement that campaign materials be removed in s.50 that no additional campaign materials may be added, particularly in light of the prohibition in s.61 against campaign activities during voting, it is not a reasonable extension to include in campaign materials items created by individuals who were not acting at the behest of the candidate in question.

[25] The Board is therefore of the opinion that the requirement of s.50 and its associated regulations does not place on a candidate the obligation to remove campaign materials placed by other people acting on their own accord, and Zhao cannot be held accountable for the publication of the first e-mails under s.50. Furthermore, because the definition of a campaign activity includes the requirement that it be designed to encourage people to vote “in a given way,” the second e-mail, because it did not name any particular candidate, was not a campaign material.

[26] The issue of the interpretation of s.36 of Bylaw 2000 “Third Party Activities” was also raised in the Board’s deliberations. This section would seem to allow candidates to held liable at least for the counter-balancing aspects of a decision of the C.R.O. for the actions of an individual over from which the candidate had distanced themselves by proving they were done without the candidate’s consent and were disavowed by the candidate.

[27] It might seem that this section is made somewhat redundant, at least with regards to ss.50 and 61 of Bylaw 2000, by our interpretation of “campaign activity” as requiring sufficient connection to the candidate. However, we are of the opinion that “third party” is not a category of individual mutually exclusive with “volunteer” in Bylaw 2000. Section 36 rather creates a defence for candidates against the actions of individuals who have in fact violated Bylaw 2000, but for which violations it would be unfair to hold the candidate fully liable. This might include the actions of individuals who are volunteers “gone bad,” as well as the actions of completely independent persons, if such people can be found to have actually violated Bylaw 2000.

[28] As has been mentioned, if “campaign activity” was not read in such a way as to require sufficient connection to the candidate, this would make ss.61(a) and (b) impossible to adhere to. Worse, however, would be the fact that it would be an invitation to individuals who dislike a candidate to take actions without their knowledge, to their benefit, in violation of Bylaw 2000, and of such severity that the counter-balancing fines for which the candidate would still be liable under s.36 would be enough to ensure that the candidate would be disqualified for having exceeded their campaign budget.

[29] As an example, any individual with 301 facebook contacts (at the scheduled rate of \$0.10 per social media contact) in the Faculty of Pharmacy would be capable, on their own, of violating Bylaw 2000 by updating their facebook status to read “Vote for X.” Candidate X would thereafter be subject to a fine of \$30.10 under the current schedule of fines, exceeding the \$30 budget for Students’ Council elections in that faculty, and causing them to be automatically disqualified. It was surely not Students’ Council’s intent that this should be so.

[30] Having established that there was in fact no violation of ss.50,61 of Bylaw 2000 in this case, it therefore also follows that it was not a violation of s.35(c) for Zhao to have failed to inform the C.R.O. of the matter. Given the difficult facts of this case, we believe that it was an error of judgement for Zhao to have failed to do so. She was under the impression that the Bylaws had been violated, and should have been aware she was under an obligation to report such violations to the C.R.O. She testified that she had considered contacting the C.R.O. and decided against it, which makes the error in judgement more severe. She is saved only by the fact that her interpretation of Bylaw 2000 was incorrect.

(6) DECISION

[31] The Board recognizes there is no totally satisfactory outcome to this scenario. Our analysis suggests that the C.R.O.’s decision was fundamentally flawed, and should be nullified. If that happens, however, Zhao takes office as Students’ Councillor for the Faculty of Pharmacy, despite the possibility that her election might not have occurred but for the intervention of a third party doing something that the candidate herself would not have been authorized to do. As mentioned, we are of the opinion that Zhao demonstrated a concerning lack of diligence in adhering to Bylaw 2000 by virtue of failing to inform the C.R.O. of what she incorrectly believed was a violation of Bylaw 2000.

[32] However, if on the other hand we uphold the C.R.O.’s decision, Zhao is denied office by the actions of an individual over which we are convinced she had no control or influence. Furthermore, failing to interpret “campaign activity” in the way we have – the only way in which the C.R.O.’s ruling could be upheld – would effectively invite candidates to dispatch rogue “volunteers” against one another in future contests.

[33] More important than either of these problems, however, is the disservice that has been done to the students of the Faculty of Pharmacy, whose reasonable expectation that the outcome

of the vote for their representative on Students' Council will reflect the result of a fair process. The process has been distorted by Gustafson's actions. The Board notes that she expresses a sincere regret for her error, and we share the frustration she expressed that her actions cannot simply be undone.

[34] The Board's sense of injustice notwithstanding, it is our responsibility to interpret the Bylaws of the Students' Council as written. For the reasons above, we find that Bylaw 2000 does not allow the C.R.O. to hold the Applicant liable for the actions of Gustafson. Therefore, Ruling #12 of the C.R.O. is hereby overturned in its entirety. Ms. Zhao is reinstated as the Students' Councillor for the Faculty of Pharmacy.

[35] The Board would like to thank the Applicant, Respondent, and Intervener for their helpful contributions to their deliberations.

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>.