

Discipline, Interpretation, and Enforcement (D.I.E.) Board

Ruling of the Board

HEARING DETAILS

Style of Cause:	Yamagishi v. C.R.O.
Hearing Number:	Ruling #5 2010/2011
Hearing Date:	March 9, 2011
D.I.E. Board Panel Members:	Megan Mickalyk, Chief Tribune, Chair; John Devlin, Tribune; Kelsey Norton, Tribune;
Appearing for the Applicant:	Colten Yamagishi, Sangram Hasra
Appearing for the Respondent:	Jaskaran Singh, Chief Returning Officer, Students' Union
Interveners:	Natalie Cox, David McBean, Eric Belinger, Steven Dollansky

BACKGROUND

[1] On March 8th, 2011 Candidate McBean sent a text message to the C.R.O. to inquire about sending out an email via listserv later that night. The C.R.O. responded and confirmed that it would be okay to send the email. The C.R.O. gave McBean permission to write and send an email 24 hours later. Candidate McBean asked whether it would not be more appropriate to send the email from the C.R.O.'s account. McBean raised this concern three times, and the C.R.O. made it clear that he believed the email ought to be sent from the listserv moderator. He also instructed McBean that it be sent out before the 9:00 deadline that night. After already confirming that it would be permissible to send the email, the C.R.O. indicated that he would like to see the message. When McBean sent it to him, the C.R.O. indicated that McBean may want to remove the "OPC (Orientation Programs Coordinator)" portion of the email. By the time McBean received this message, the email had already been sent out to certain members of the student body.

[2] The email in question was sent out at 7:45:58 pm by the listserv manager. The content was as follows:

Hey Guys!

Its David McBean, the OPC (Orientation Programs Coordinator) of last year. The SU elections are March 9th and 10th. Please come out and vote!

Thanks,

David McBean

[3] A third party issue was raised because the email was sent out by an individual who was not the candidate, and further the candidate thought the email would be sent out at a later time that evening. However, the third party issue was not relevant to the decision ultimately reached.

[4] Candidate Yamagishi became aware of the distribution of the email later that evening. He believed it to be in contravention of r. 3.12 of the Internet and Email Policy within the Rules and Regulations. Yamagishi attempted to contact both the C.R.O. and Candidate McBean and left voicemails for both individuals.

[5] Early in the morning on March 9th, 2011, Candidate Yamagishi emailed the C.R.O. expressing the above-stated concern. Yamagishi subsequently phoned the C.R.O. later in the morning to follow up with him regarding the email. The C.R.O. acknowledged that he had made a mistake in approving McBean's email and had done so contrary to the Rules and Regulations.

[6] Following this, Yamagishi was contacted by McBean. The candidates agreed that the C.R.O. had erred in his decision to approve the email. Both candidates also agreed that the C.R.O. had made a mistake.

[7] Yamagishi then contacted the C.R.O., who alternatively suggested remedies of allowing Yamagishi to send out a similar email or fining McBean \$70.00. Yamagishi was of the opinion at that time that neither of these options produced a sufficient remedy. He contended that not only would an email be contrary to the Rules and Regulations, but it would also not provide an appropriate counterbalance. He also felt that a fine would not be an adequate remedy, given the time-sensitive nature of the issue.

[8] The C.R.O. did not impose the fine, and the parties instead opted to bring the matter before the D.I.E. Board.

DECISION

[9] The issue before us is whether the C.R.O.'s actions contravened the Rules and Regulations and/or Bylaw 2000 when he allowed Candidate McBean to send an email via listserv. The D.I.E. Board has been asked to determine what would be a fair resolution to this issue. A decision must not only consider any disadvantage to Candidate Yamagishi, but also any unfairness which would result from punishing Candidate McBean for following the inaccurate instructions of the C.R.O. Several possible solutions were suggested to us by the parties, but only one adequately addresses the fairness issue. Allowing Candidate Yamagishi to send out his own mass email at this late hour (voting already having started!) could not possibly serve as an adequate remedy, even if an order permitting it were tailored narrowly to ensure he only contacted as many people as McBean before him had.

[10] Similarly, it would not be just to disqualify Candidate McBean on the basis of an action that he had every reason to believe was authorized by the C.R.O. It is significant that Yamagishi did not target McBean in his initial application to the D.I.E. Board; his complaints were primarily directed at the C.R.O. As per the Rules and Regulations, the C.R.O. had an obligation to inform other candidates and provide them the opportunity to also put forward an email. He also had an obligation to review the content of an email prior to approving its dissemination. There is only one suitable remedy here—a second election.

ANALYSIS

[11] The resolution of this matter relied heavily on the D.I.E. Board's interpretation of s. 41(1) of Bylaw 2000. That provision reads as follows:

41. Campaign Materials

- (1) All campaign materials shall be approved in form, content, and cost by the C.R.O. before they may be used in campaign activities.

[12] This provision creates two distinct sets of obligations; one on candidates and one on the C.R.O. Candidates are required to obtain approval from the C.R.O. before utilizing any campaign material. The

D.I.E. Board recognizes, that, in this case, the C.R.O. did not have access to the content of the impugned email before it was distributed. As a candidate, it was incumbent on McBean to afford the C.R.O. the opportunity to consider the content of any campaign materials, including emails. The C.R.O. was not initially granted such an opportunity, but communicated his approval of the message to the candidate notwithstanding this deficiency. S. 41(1) also imposes duties on the C.R.O. Specifically, the provision confers an obligation on the C.R.O. to refrain from approving campaign materials when he has not had the chance to fully canvass their “form, content, and cost”.

[13] As “approval” is not defined in the bylaws, it is the responsibility of the D.I.E. Board to ascertain its meaning. We interpret the s. 41 requirement that campaign materials be “approved” as placing an obligation on the candidate to seek general authorization from the C.R.O. before disseminating campaign material. Candidate McBean sought, and received, such authorization on several occasions before sending out the email. He acted reasonably and received repeated unequivocal responses to his inquiries as to the acceptability of the email. The C.R.O.’s later request to view the contents of the email came after he had already given his approval, albeit erroneously, to the use of the campaign materials. Although McBean did not provide the C.R.O. with the opportunity to view the message before distributing it, McBean’s actions, in light of his multiple attempts to secure approval, were Bylaw compliant. The C.R.O. erred in granting McBean permission to send the email when the C.R.O. was not familiar with the contents of the message. The C.R.O.’s disregard for the Rules and Regulations relating to elections was further evidenced by his suggestion that the situation could potentially be rectified by permitting the disadvantaged candidate, Yamagishi, to send out a similarly themed email in contravention of bylaws. If a situation does exist where two wrongs make a right, this is not it.

[14] Having determined that fault in these unfortunate circumstances lies with the C.R.O., the appropriate remedy cannot be one that punishes McBean. We now turn to what that remedy is.

REMEDY

[15] Although D.I.E. Board is, to be sure, not bound by its own authority, it is noteworthy that no prior decisions were cited to us during the hearing involving circumstances analogous to these. We find ourselves, therefore, in uncharted waters in crafting a remedy, and we thank the parties for their submissions on the question, which were of great assistance to us as we did so.

[16] We rely upon our general remedial discretion under s. 29 of Bylaw 1500 to “proscribe [sic] any remedy... appropriate and just in the circumstances” to order a new election for the VP Student Life

position, to be governed by the broad outline set out below. We conclude that the broad wording of s. 29 (and the language is *broad*) authorizes us to make this order, and in doing so to depart, where appropriate and strictly in the interests of restoring procedural fairness to this election, from certain provisions of Bylaw 2000. Again, we adopt as a governing principle that a remedy under s. 29 must be no broader than the bare interests of fairness require.

[17] Accordingly, we quash the March 9-10 election for VP Student Life, and further direct that the votes cast for the position of VP Student Life be sealed. The latter order is necessary to preserve the fairness of the new election we direct—the student body must not be left with the perception that one candidate is getting a “second chance” having been defeated the first time around.

[18] We have concluded, in the judicially minimalist spirit of these reasons, that the new election for VP Student Life should be conducted, so far as is practicable, in accordance with the existing By-Election procedures laid out in s. 75 of Bylaw 2000. Directing the use of this existing procedure is desirable for two reasons: first, having been enacted by the student council, s. 75 bears a degree of democratic legitimacy that simply cannot be equaled by a judicial decision, however eloquent. Secondly, council is fundamentally better suited than D.I.E. Board to the crafting of electoral policy, as the former body possesses expertise in this area that the latter is simply not expected to share.

[19] Therefore, our only departure from the existing s. 75 procedure relates to the specific nature of the unfairness in this case. A two-candidate race was derailed here, and we conclude that the new election we direct must, in fairness, also be a two-candidate race, involving the same candidates, should they choose to run. Accordingly, the nomination provisions of s. 75(3) will not apply.

[20] Other than this and other bylaw provisions related to nomination, including ss. 17-21, the new election is to be conducted in accordance with the existing By-Election procedure.

CONCLUSION

[21] We recognize that this result has occasioned the parties significant personal inconvenience. While this is regrettable, it must be remembered that the fundamental matter at issue here is not a race between two candidates. Rather, it is an electoral process, sanctioned, ultimately, by the Alberta Legislature through the *Post Secondary Learning Act*, and subject to stringent fairness regulation by the elected representatives of the students of this University.

[22] As a final hedge to ensure the fairness of our elections, the University of Alberta student government has vested D.I.E. Board with the powerful remedial jurisdiction discussed above. We do not exercise it lightly. That said, as there is nothing more fundamental to student democracy than the fairness and transparency of our electoral processes, we are satisfied that our actions are appropriate here. Nothing short of a new election could effectively remedy the damage that was done in this case. It might have been possible, in the minimalist spirit that should properly govern all discretionary judicial determinations, to devise a less intrusive remedy had the C.R.O.'s actions occurred sufficiently early in the election cycle, but that is not the case here.

[23] We hope the candidates will be able to agree between themselves on campaign conduct during this new election that will serve their best personal and academic interests. We have declined to rewrite Student Union legislation to achieve this end, however, as doing so would not accord with our approach to our remedial jurisdiction.

CORRIGENDUM

In the informal decision released on March 9th, 2011, reference was made to s. 71 of Bylaw 2000. This was incorrect. The correct section is 75, as referenced in this judgment.