

DIE Board Ruling 2014-5

Hearing Details:

Style of Cause: Sleiman (Appellant) v. CRO

Hearing Date: March 9th, 2015

DIE Board Panel Members: Sam N. Alzaman, Associate Chief Tribune (Chair)

Harvir Mann, Associate Chief Tribune

Asmaa Mohamed, Tribune

Issues:

[1] Did the CRO err in Ruling #6 by failing to following the appropriate complaint procedures, as set out in *Bylaw 2200* s.47?

[2] Did the CRO further err in Ruling #6 by disqualifying Mr. Sleiman on the grounds that:

(a) he was guilty of a contravention that substantially prejudiced another candidate or slate (*Bylaw 2200*, s.49(1)(b)); or

(b) he was guilty of a contravention involving tampering with ballots, voting procedures, or counting procedures?

Relevant Legislation:

[3] From *Bylaw 2200*:

47. 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.

...

(4) Where a complaint is received and is found to be complete as set out in Section 47(1), the C.R.O. shall rule on the complaint within twelve (12) working hours of receiving the complaint.

48. Penalties Available

(1) Where a candidate, side 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 side 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.

...

49. Disqualification

- (1) A candidate 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.

Decision:

Majority:

S. N. Alzaman, Associate Chief Tribune (Chair),

A. Mohamed, Tribune.

Dissent:

H. Mann, Associate Chief Tribune

The following are the reasons of the majority [Note that references made in this section to the Panel refer only to the majority of the Panel]

Judgment delivered by S. N. Alzaman (A.C.T.):

[4] The parties agree that if Mr. Sleiman is found guilty of a contravention in accordance with section 49, *Bylaw 2200*, that disqualification is the appropriate outcome. The Chief Returning Officer's (CRO) facts are laid out in "CRO Ruling #6". However, this appeal is substantially driven by the Appellant's dispute of the facts set out in Ruling #6.

CRO's Findings in Ruling #6:

[5] The CRO found that on March 4th, 2015, Mr. Sleiman was in the Central Academic Building (CAB) soliciting votes on Election Day. The 'complainant', Ms. Gwozdz, told the CRO that while she was sitting in CAB Mr. Sleiman approached her. At this point she was asked if she had voted, to which she replied that she had not but was planning to. Mr. Sleiman asked if she wanted help logging in to vote. She replied, yes. Mr. Sleiman provided a

phone and logged onto the website, turning it over to Ms. Gwozdz to enter her CCID and password. She did and the phone was returned to Mr. Sleiman. Pleasantries were exchanged and Mr. Sleiman left. Later that day Ms. Gwozdz attempted to vote but was unable to. At this point she realized that her vote may have been cast on her behalf by Mr. Sleiman, without her consent. She contacted the CRO and had her ballot voided and was allowed to vote again.

[6] This brought forward the CRO's investigation into the situation. At this point Mr. Ward, a technical specialist for SU elections, was contacted. He provided the CRO with information that the IP address that casted the vote on Ms. Gwozdz's ballot also casted 32 other votes.

Findings and Analysis on Appeal

(1) Did the CRO err in Ruling #6 by failing to following the appropriate complaint procedures, as set out in *Bylaw 2200 s.47*?

[7] In regards to the first issue, s.47 of Bylaw 2200 was recently considered by the DIE Board in Ruling 2014-04, *Azimi v. CRO (Azimi)*. Due to technical delays in posting the decision, neither the CRO nor the Appellant had sufficient time to review the decision that was provided to them at the start of this hearing. The Panel have read that decision and reproduced the relevant portions as follows:

The complaint-in-question that led to Ruling #5 did not follow the procedure outlined in Bylaw 2200(47)(1). The CRO argued that only 'official' complaints are required to follow this procedure, and that complainants may instead choose to submit unofficially. Under this logic, since the complainant did not follow this procedure, Bylaw 2200(47) did not apply and thus she was not required to rule within twelve working hours.

The Panel agrees that the wording in Bylaw 2200(47) is vague. Specifically, the Panel finds that the phrase "...which shall require complaints to indicate" [subsection (47)(1)] is silent with respect to including all forms of complaints. Where rules are silent, discretion lies with DIE Board.

Although the appellant claims that all complaints must follow the procedure outlined in Bylaw 2200(47), the Panel finds that this would limit complainants to students, as under subsection (1)(a), complainant forms require student identification numbers. This would mean that complaints could not be issued by professors, non-student staff, or through anonymous tips. The CRO also expressed an obligation to follow through with all reasonable complaints, regardless of whether they follow the outlined procedure.

While the appellant argued that twelve working hour limitation periods for CRO rulings exist in Bylaw as a matter of fairness, the Panel finds that the delay in its release did not unfairly

prejudice the appellant to due process and appeal mechanisms...

(Azimi v CRO, 2014-4, at para 10-15, 23-24)

[8] The Panel agrees with this interpretation. While the Appellant argued that this meant sections of *Bylaw 2200* are not being strictly adhered to, this is untrue, as the ruling fell on both interpretation of vague clauses in addition to practical limitations.

[9] Thus, the Panel supports the CRO's position that the "complaint provisions" in *Bylaw 2200(47)* do not provide all the methods in which an issue or complaint may be dealt with. Accordingly, the Panel rejects the CRO Ruling being struck down on the basis of *Bylaw 2200(47)*.

[10] Although the DIE Board is not bound by its previous decisions, the Panel accepts the CRO's submissions and finds that a valid complaint is present, and was brought forward within an appropriate period of time. Furthermore, the Panel agrees that the Appellant has not been substantially prejudiced by these findings.

(2) Did the CRO further err in Ruling #6 by disqualifying Mr. Sleiman on the grounds that: (a) he was guilty of a contravention that substantially prejudiced another candidate or slate (*Bylaw 2200, s.49(1)(b)*); or (b) he was guilty of a contravention involving tampering with ballots, voting procedures, or counting procedures?

(I) Relevant Evidence Provided At Appeal

[11] The Appellant did not deny being in CAB on the voting days. The Appellant did not deny using mobile devices to vote for people or approaching people and asking them to vote. In fact the Appellant adhered to the requirements by registering a mobile device for use on Election Day, and had the costs associated with the expense taken from his allotted campaign funds. Upon questioning, the Appellant, and his Counsel, argued that it is common for candidates on Election Day to approach undergraduate students and ask if they have voted. Moreover, it was submitted that it is not a contravention of the election rules for candidates to vote on behalf of students who provide their consent. The CRO agreed that there is nothing inherently wrong with this conduct; however, she reiterated that it was allowable only if the voter **had given consent**

[emphasis from CRO].

[12] The Appellant offered testimony that he approached multiple people that day. Although he did not directly address the interaction with Ms. Gwozdz he explained his general procedure as follows: He would approach an individual and ask whether they had voted in the SU elections yet? If answered in the negative, he would inquire into the individual's interest in having him show them how to vote (i.e., "would you like me to show you how?") The Appellant would go to the voting site, provide a phone (or use a voter's laptop or the voter's phone) and have the voter enter their CCID and password. After that, the candidate would have them enter their student identification number. The Appellant would at some point during this exchange, potentially at the beginning or as voters entered their login details, have general conversation with the sole purpose of pitching his platform and requesting a vote for himself. Eventually, he would ask: "Do you want me to vote for you?" (or "would you mind me voting for you?"). His actions would vary depending on the outcome of the last question.

[13] We stress again that although this conduct may appear to be the equivalent of a politician staring over your shoulder at a voting pole and to some an affront to the secret ballot that is fundamental to the democratic process; **it is permissible by current Students' Union election rules.** It is beyond our statutory authority to pass any comment on our thoughts on whether this type of campaigning is appropriate. Its relevance to the issue goes only as far as providing that the Appellant was not conducting himself in an inappropriate manner. As the CRO points out, this is not the reason for his disqualification. The issue rests on whether or not the Appellant voted on Ms. Gwozdz's behalf **without her consent.**

[14] The Appellant also provided several witnesses corroborating that this was the procedure he followed. A witness appeared in person testifying that an identical situation had happened with her, except she had provided consent and testified that she had not met Mr. Sleiman before that meeting. Two typed witness statements were also provided on the Appellant's behalf, without an objection from the CRO. All three statements support the Appellant's narrative. The CRO did not object to the panel accepting the written witness statements. In her opinion it made no difference whether or not the Appellant brought 3 witnesses or 20; the only

issue was whether he committed fraudulent voting in the case of Ms. Gwozdz. While we agree with the CRO's opinion, this evidence supports the notion that the Appellant had a procedure, or script, which he reiterated with **any** individual he approached.

[15] Mr. Ward testified at the appeal on behalf of the CRO. Given Mr. Ward's technological expertise was connected to the evidence, the panel was assisted by his testimony. In brief, his analysis of the data established that 32 votes were casted from the same IP address. The ballots originated from both an android phone, used exclusively on March 5th, and an iPhone, used on March 4th, that casted nearly all the votes. Mr. Ward's testimony established that an iPhone on either the Telus or Koodoo network casted these votes. However, it was also found that the votes did not have to originate from the same iPhone. Although the iPhone belonging to these networks must have been running the most recent version of iOS, it also could have been the result of several iPhones on those two networks running the most recent version of iOS.

[16] On this basis, although Mr. Ward's testimony is useful in explaining the process, its relevance in deciding the issues in question, is nonexistent. Although due partially to the uncertainty of his findings, the largest reason for attributing no weight to this evidence is that the SU bylaws do not forbid this kind of conduct. In fact the Appellant had registered his phone and paid appropriate campaign costs to use it in this manner. The Appellant does not deny that these events occurred, and this evidence is irrelevant to the issue of consent.

[17] The CRO opened her case by having Ms. Gwozdz provide her statement. At that time Ms. Gwozdz essentially stated an identical account of what the CRO provided in ruling #6 (our summary of that account is at paragraphs 5 and 6 of this decision). The Panel found, however, that issues arose in her testimony when subject to cross-examination by the Appellant's Counsel. At this point it was made clear that a mobile device exchanged hands twice between her and Mr. Sleiman. Ms. Gwozdz could not state with certainty that she saw Mr. Sleiman cast the vote on the mobile device.

[18] The evidence became complicated as Ms. Gwozdz's testimony began to change under cross-examination. It was disclosed that during her

interaction with the Appellant, a friend of hers approached and she may have become distracted in conversation. This detail had not been formerly raised in the email exchange and interview with the CRO. Counsel for the Appellant also argued that this account of events was implausible; given the short timeframe between the phone twice changing hands, and Ms. Gwozdz's account of the timeline, there would not have been enough time for the Appellant to have reached the voting webpage from the student login webpage. Appellant Counsel also points to the fact that Ms. Gwozdz would have seen the ballot page immediately after putting in her student ID number. Ms. Gwozdz did not see the ballot page at that time; although, she admitted that she may have been distracted by the friend who had approached her sat down next to her.

[19] The Appellant also pointed to the fact that Ms. Gwozdz's first email to the CRO stated that Mr. Sleiman thanked her "profusely" at the end of the conversation. The Appellant argued that if he were attempting to tamper her vote, it is unlikely that he would stay to thank her. The Appellant Counsel also suggested that the witness might know the other VP OpsFi candidate, who stands to benefit from the Appellant's disqualification. Ms. Gwozdz denied this accusation, and the Panel accepts Ms. Gwozdz testimony on this point.

[20] This Panel finds that based on her demeanor and candor in answering questions; she was providing her recollection honestly and to the best of her ability. However, its accuracy in recounting the situation also goes towards the Panel's weighing of evidence.

(II) The Law

[21] In CRO Ruling #6 the CRO cited sections 48 and 49 of *Bylaw 2200* for the appropriate punishment, should a candidate contravene a rule, regulation or bylaw. The relevant contravention relates to the tampering of ballots under *Bylaw 2200(49)(1)(c)*.

[22] In comparing *Bylaw 2200* sections 48 and 49, the Panel found ambiguity relating to the issue of intent. In a plain reading, section 48 seems to [Penalties Available] apply to contraventions made regardless of intent, whereas section 49 [Disqualification] makes no reference to intent.

[23] When section 48 is read as a whole it provides that:

Where a candidate, side 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 fully counter-balances any advantage gained; and where the contravention was intentional, penalizes the candidate or campaign manger who was or whose volunteer was guilty of the contravention. Penalties available to the C.R.O. shall include... disqualification of the candidate or side manager. [Emphasis Added]

[24] The Panel agrees that the CRO has the ability to penalize candidates who have contravened a bylaw, rule, or regulation, and that under section 48(2)(d), disqualification is one of the permissible penalties. However, the power to penalize comes from both sections 48(1), where intent is irrelevant, and s. 48(1)(b), which explicitly provides that the contravention must be intentional for the CRO to penalize a candidate. There is an explicit disconnect between section 48(1)(b) requiring intent and section 48(1)(a) not.

[25] The question then arises: why does section 48(1)(b) require intent to penalize a candidate? This Panel finds that section 48(1)(a) applies to the campaign generally in the way of counterbalancing fines, whereas section 48(1)(b) applies to penalties issued directly to persons (candidate, campaign manager, volunteers, etc.). **Therefore, since disqualification is a penalty applied directly to persons, to disqualify a person requires that their contravention be intentional.**

[26] The Panel interprets *Bylaw 2200* section 48 to read that penalties to persons require an allegation, and proof thereof, of intention. In other words, the Panel finds that, pursuant to *Bylaw 2200(48)*, the CRO cannot disqualify a candidate, where the contravention of the bylaw, rules, or regulations has not occurred with intent.

[27] When s. 49 is read as a whole, it provides that:

A candidate shall be disqualified where he/she/it is guilty of a contravention that... involves tampering with ballots, voting

procedures, or counting procedures

[28] The issue of intent is silent in section 49. As per provision 4 of the DIE Board Protocols, where rules are silent, discretion lies with the Panel.

[29] Since section 48 explicitly requires intent for disqualification of a candidate, the Panel finds that section 49 should be kept to the same standard. As a general rule, without language to contrary, intent is often required to come to a finding of guilt. Since disqualification is the most serious penalty available through the CROs discretion, it is also reasonable to include intent on this basis. Under this working interpretation, section 49 provides that: A candidate shall be disqualified where he/she/it is guilty of an intentional contravention that involves tampering with ballots.

[30] The Panel also finds that if the intent to tamper votes were not a requirement, it would in essence require proof of the act only. In the current Students' Union election scheme, campaigning is permitted on election days, and honest mistakes in communication may happen. It is not appropriate to potentially disqualify a candidate and set aside, hundreds, if not thousands, of voters' intentions on this basis alone.

[31] The SU has clearly created, in section 48, a provision that shows where intent is and is not required. The Panel rejects the idea that conflicting Bylaws may co-exist (i.e., that section 48 **only** permits disqualification when intent can be proven, but section 49 does not). The Panel also notes that all of Bylaw 2200(49)(1) would be compromised by this conflict, as subsections (a)-(c) would now lack an intent requirement. Specifically, where subsection (b) provides for malicious contraventions, it would seem more logical that malice include a mental intent.

(III) Application of Law to Facts

[32] In considering the evidence on the whole, the Panel remains uncertain as to whether the exchange between the Appellant and Ms. Gwozdz was an intentional act of voter tampering or not. The Panel found neither side sufficiently persuasive. Although the Panel found Ms. Gwozdz honest in her testimony, due to discrepancies the Panel is not confident in relying solely on her account of events in determining the factual outcome of the incident.

[33] Similarly, the Appellant has not persuaded the Panel based upon on his evidence that Ms. Gwozdz’s account of events is unlikely. He has provided affirmative evidence (witness statements and testimony) to the Panel that he approached individuals on voting day with an election registered mobile device, using a specific script/procedure that he followed with every individual he approached. However, the Panel remains skeptical in regards to his interaction with Ms. Gwozdz.

[34] Upon hearing all of the evidence this Panel remains unconvinced on the facts by either side. The Panel notes that there is a substantial difference between not believing that Ms. Gwozdz testifies honestly and to the best of her abilities, and this Panel questioning her account of the event. This arises from issues in the recalling of evidence correctly, the discovery of new portions of her story, testimony arising from the Appellant’s Counsel, and most importantly, the potential of distraction. It is very likely that something was lost in conversation between the two individuals that was critical to understanding the Appellant’s intent.

[35] Essential to the analysis of issues in this case, is the Panel’s finding that vote tampering must be intentional in order to disqualify a candidate. Part 3 of the DIE Board Protocols, section 22, provides that: “an alleged infringement of Students’ Union legislation or rules must be proven on a balance of probabilities”. The Panel holds that the CRO’s finding of vote tampering has not overcome this burden, as there is insufficient evidence to prove on the balance of probabilities that Mr. Sleiman intended to tamper with Ms. Gwozdz’s ballot in their specific interaction. While the miscommunication warranted Ms. Gwozdz being allowed a revote, it does not necessarily infer the intent to tamper.

[36] Accordingly, we would grant the appeal, quash Mr. Sleiman’s disqualification, and order that Mr. Sleiman be reinstated as a candidate. We would further order the CRO release the election results as soon as practicable.

Appeal allowed, disqualification overturned

A. Mohamed (Tribune)..... I Concur

The following are the dissenting reasons of

H. Mann, Associate Chief Tribune

DISSENT-

[37] I respectfully disagree with the majority opinion.

[38] In considering the evidence on the whole, I concur with the other tribunes that there remains uncertainty as to whether the exchange that led to the misvote between the Appellant and Ms. Gwozdz was intentional or not. I agree with the other tribunes in recognizing this case stems from miscommunication on the subject of consent between the Appellant and Ms. Gwozdz. The Appellant provided evidence he approached individuals with a specific script and the testimony of his witnesses corroborates his submissions. However, I am not convinced Ms. Gwozdz's account of events is unlikely.

[39] I agree with the other tribunes in the understanding that Bylaw 2200 section 48 explicitly discusses intent while section 49 under the same bylaw is silent. I also agree that the contravention mentioned in Bylaw 2200(49)(1)(a) is found in Bylaw 2200(49)(1)(c). Furthermore, Bylaw 2200(49)(1)(b) has grounds for disqualification in a contravention being malicious or substantially prejudicial to another candidate. I find a contravention to Bylaw 2200(49)(1)(c), which mentions tampering with ballots, voting procedures or countering procedures, to be substantially prejudicial to another candidate and hence, recognize only Bylaw 2200(49)(1)(c) as the relevant statement in regards to allegations made by the CRO.

[40] I disagree with the other tribunes in regards to the implicit assumption of intent required for Bylaw 2200(49)(1). Bylaw 2200(49)(1)(c) clearly states that "a candidate shall be disqualified where he/she/it is guilty of a contravention that involves ... tampering with ballots, voting procedures, or counting procedures." I interpret this clause to be a standalone and succinct statement, devoid of the nature of intent. While the intention of the Appellant cannot be determined on the balance of probabilities, I understand this section to disqualify a candidate regardless of intent.

[41] The evidence of Ms. Gwozdz's ballot displaying the vote for the Appellant when she had instead wanted to vote for another candidate is sufficient to argue that there had been tampering with ballots. Tampering [with ballots] is only explicitly referenced in Bylaw 2200(49)(1)(c). The Oxford Dictionary defines tamper [with] as to "interfere with (something) in order to cause damage or make unauthorized alterations." While it cannot be claimed that the former event occurred, I am confident in stating that the latter scenario occurred as Ms. Gwozdz's ballot read a name she did not wish to vote for.

[42] With a contravention involving tampering established and the issue of intent irrelevant, I would find the candidate guilty of an offense. As stated in Bylaw 2200(49)(1)(c), I would have decided to uphold the decision of the CRO in Ruling #06 and disqualify the Appellant from the election race.

The Tribunal Is Unanimous in the Following Recommendations

[43] We would recommend that the wording of *Bylaw 2200(49)* be clarified in regards to whether the contravention must be intentional for disqualification to be considered. Furthermore, we would recommend a separate clause in *Bylaw 2200* altogether discussing the whole issue of tampering with ballots, voting procedures and counting procedures. We would leave it to the Bylaw Committee and Students' Council to develop appropriate election policies.

[44] It is clear that this decision leaves much to be desired. The Bylaw Committee should consider regulating the scope of candidates' ability to campaign on Election Day. Especially, in regards to voting on behalf of others. While we remain cognizant of the fact that there have been increases in voter turn out by allowing campaigning on election day; special consideration must be given to protect fundamental principles of voting.

[45] We also reiterate the problems in the complaint procedure under Bylaw 2200(47). We offer concurring recommendation with the one brought forward by the DIE Board in Ruling 2014-04, *Azimi v. CRO*.