

DIE BOARD RULING 2017-03

Hearing Details:

Style of Cause: *Liu v Bilak*

Hearing Date: March 5th, 2018

DIE Board Panel Members: Landon Haynes, Associate Chief Tribune
Dylan Gibbs, Tribune
Colin Basaraba, Tribune

Appearing for the Appellant: Tina Liu as herself

Witnesses for the Appellant: None

Appearing for the Respondent: Robert Bilak as himself

Witnesses for the Respondent: Ben Angus; and
Mitch Wilson

Intervener: None

[1] The DIE Board is unanimous in the following decision.

FACTS

[2] On January 23, 2018, the Respondent and Vice President Academic co-moved to approve a proposal numbered 2017-17/8a [the “Motion”]. This proposal involved a Faculty Association Membership Fee [“FAMF”] Referendum for the Organization for Arts Students and Interdisciplinary Studies [“OASIS”]. A vote of 14/10/2 carried the Motion.

[3] The Respondent helped OASIS complete the required FAMF proposal [“the Proposal”] at some point before the Respondent moved to approve the Proposal. Specifically, the Respondent provided oversight to OASIS during the time in which OASIS was drafting the Proposal, gave OASIS’ executive members his feedback on early versions of the Proposal, and actively had a hand in drafting the Proposal at some stage in this process.

[4] Personal friendships exist between the Respondent and multiple persons holding executive positions within OASIS. As a member of the Arts Faculty, the Respondent is a member of OASIS, but he does not hold an executive position and does not enjoy voting privileges at OASIS meetings. The Respondent has not attended any formal OASIS meetings but attended one informal OASIS meeting to discuss OASIS’ FAMF proposal.

[5] The Respondent voted on the Motion.

ISSUES

[6] The issues in this hearing are:

1. What is a “conflict of interest” for the purposes of Bylaw 100(18)(5)?
2. Did the Respondent have a conflict of interest that required him to abstain from voting on the Motion?

THE APPLICANT’S POSITION

[7] The Applicant argues the Respondent had a “conflict of interest” within the meaning of Bylaw 100(18) during the vote on the Motion. The Applicant refers to the following facts in support of her position:

- (i) the Respondent has personal relationships with multiple OASIS executive members;
- (ii) the Respondent has worked closely with OASIS in his capacity as a councillor;
- (iii) the Respondent helped OASIS draft the Proposal;
- (iv) the Respondent oversaw OASIS’ preparation of the Proposal; and
- (v) the Respondent advocated in support of carrying the Motion.

[8] The Applicant states the Respondent was obliged to report his conflict of interest to the Speaker of the Association pursuant to section 100(18)(5)(a). As the Respondent voted on the Motion and did not report his conflict of interest, the Applicant asserts the Respondent violated section 100(18)(5)(a).

[9] The Applicant also argues the Respondent’s conflict of interest precluded the Respondent from voting on the Motion under section 100(18)(4). By voting on the Motion, the Applicant argues the Respondent contravened section 100(18)(4).

[10] The Applicant requests this Panel retroactively change the Respondent’s vote on the Motion to an abstention.

THE RESPONDENT’S POSITION

[11] The Respondent argues no conflict of interests existed between himself and OASIS during the vote on the Motion within the meaning of the phrase in Bylaw 100(18). Therefore, the Respondent argues he did not violate subsection 100(18)(5)(a) because there was nothing for him to report.

[12] The Respondent further argues OASIS is a Faculty Association within the meaning of the phrase in section 100(18)(4) and he was therefore allowed to vote on the Motion.

BYLAWS

[13] The relevant bylaw for this hearing is **Bylaw 100(18): Conflict-of-Interest**. While the material sections are 100(18)(4) and 100(18)(5), this judgment references multiple sections of Bylaw 100(18) and as such the Bylaw is reproduced in its entirety below:

1. No person shall use a Students' Union position that they hold to further personal business interests.
2. No person may hold a Students' Union position who
 - a. is party to any contract or agreement with the Students' Union, accepting contracts or agreements directly relating to that person's employment by the Students' Union; or
 - b. has any interest in a contract or agreement with the Students' Union, accepting contracts or agreements directly relating to that person's employment by the Students' Union.
3. Does not apply to any person by reason only
 - a. Of the receipt of any properly-approved honorarium, commission, or allowance from the Students' Union;
 - b. Of being a non-executive member of any registered student group which has any contract or agreement with the Students' Union; or
 - c. Of the sale of goods or services to the Students' Union in the ordinary course of business, at competitive prices, and in accordance with Students' Union procedures.
4. No member of Students' Council shall vote on a motion relating to a student group or organization of which they are a member unless that organization is a faculty association.
 - a. Membership in an organization shall be defined as
 - i. Regular meeting attendance and voting and/or speaking privileges at meetings; or
 - ii. Holding office within that organization
5. If a councillor has a conflict of interest and votes on a motion in Students' Council or any one of its committees
 - a. they will report that immediately to the Speaker of the Association
 - b. if unreported, any member of Students' Council may send a petition to DIE Board within four (4) months or before the conclusion of the session of Students' Council, whichever is longer. Petitions made are subject to Bylaw 1500.
6. In extraordinary circumstances a member of council should be allowed to retroactively change their vote to an abstention in the case of a conflict of interest. This would be done through a motion to Students' Council. Any member of Students' Council will have an option to petition DIE Board on the narrow issue of what constitutes extraordinary circumstances.

7. Neither any member of the Students' Union Executive Committee nor the Chief Returning Officer of the Students' Union shall apply for a remunerated position with the Students' Union unless the selection of that position is ratified by Students' Council.

ANALYSIS

What is a "conflict of interest" for the purposes of Bylaws (100)(18)(5)?

[14] This Panel, while not generally bound by Canadian common law precedent, is guided by the approach to statutory interpretation set out by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27. Bylaw 100(18) does not expressly define "conflict of interest." Interpreting its use requires reference to the grammatical and ordinary sense of the phrase, in light of the entire context of Bylaw 100.

[15] At the outset, it is important to recognize that conflict of interest and bias are two related, but conceptually distinct, concepts. A conflict of interest requires an individual to have an actual private or personal interest. A reasonable apprehension of bias arises in broader circumstances, where an objective observer would reasonably perceive that a decision maker has pre-judged the matter before them.

[16] The Supreme Court of Canada's decision in *Old St Boniface Residents Association v Winnipeg (City)*, [1990] 3 SCR 1170 is instructive. At paragraph 92, the Supreme Court differentiated between bias and conflict of interest in the context of municipal councillors, which bears resemblance to the present case:

I would distinguish between a case of partiality by reason of prejudgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of prejudgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. [Such an interest] is commonly referred to as a conflict of interest.

[17] In other words, a conflict of interest requires an actual interest, while prejudgment or bias does not. Bylaw 100(18) refers to "conflict of interest"; it does not refer to prejudgment or bias. This Panel therefore concludes that section 100(18)(5) will only apply where a reasonably informed person would conclude that a councillor has an actual private or personal interest that would influence the exercise of that councillor's professional duties.

[18] Section 100(18)(5) does not apply where a councilor has taken a strong position in favour of a motion and appears to have a closed mind with respect to that position. Where a councilor has raised a reasonable apprehension that they have prejudged a motion before them, that would not currently violate Students' Union bylaws. Concerns relating to this issue should be addressed

through Bylaw enactment or amendment and not through a DIE Board Ruling. We therefore find it unnecessary to comment on whether the Respondent raised a reasonable apprehension of bias or prejudice.

[19] Further interpretive difficulty arises from the fact that the term “conflict of interest” is used only within subsection 100(18)(5) and nowhere else in Bylaw 100(18). This raises the question of whether 100(18)(5) covers a broader range of conduct than the conflicts that are described in sections 100(18)(1)-(4).

[20] This Panel interprets sections 100(18)(1), 100(18)(2), and 100(18)(4) as describing the conflicts of interest that are meant to be remedied by section 100(18)(5). Section 100(18)(1) prohibits persons from using their Students’ Union position to further personal business interests. Section 100(18)(2) prohibits persons from holding Students’ Union positions where they are a party to, or have an interest in, a contract with the Students’ Union. Section 100(18)(4) prohibits councillors from voting on motions relating to student groups that they are a member of, unless that group is a faculty association.

[21] Section 100(18)(5) does not create a separate category of problematic conduct, but rather outlines what can and should be done if a councillor votes on a motion, despite having a conflict of interest under sections 100(18)(1), 100(18)(2) or 100(18)(4). Section 100(18)(5) is remedial in nature. It requires councillors to immediately report such a conflict. It also allows other Students’ Council members to send a petition to the DIE Board when this obligation is not met.

[22] Where the DIE Board receives a petition under section 100(18)(5), the Board can retroactively change a councillor’s vote to an absence if the conflict is made out. This was recognized in DIE Board Ruling 2012-02 at para 15. This Panel concludes that the conflict would only be made out where one of sections 100(18)(1), 100(18)(2), or 100(18)(4) are violated.

[23] We note that DIE Board Ruling 2012-12 may be viewed as inconsistent with our decision. At paragraph 12, the Panel in that Ruling stated:

The Panel acknowledges that there is no stated remedy if a conflict-of-interests is found. [A]s the potential conflict-of-interests did not relate to a student-group motion ... the individual would not be compelled to abstain.

[24] To the extent of the inconsistency, we conclude that Ruling 2012-12 was decided incorrectly. Ruling 2012-12 implies that there is no remedy for conflicts of interests other than those set out in section 100(18)(4), because that is the only provision that mentions abstention. We prefer the view that section 100(18)(5) is a remedial provision that addresses the problematic conduct set out in sections 100(18)(1), 100(18)(2), and 100(18)(4).

[25] The interpretation adopted in Ruling 2012-12 would mean that the DIE Board is entitled to receive applications under section 100(18)(5), but would never be entitled to grant a remedy unless the application relates to a student-group motion. In our view, this interpretation is not plausible.

Did the nature of the dynamic between the Respondent and OASIS constitute a conflict of interest under Bylaw 100(18)(5)?

[26] Bylaw 100(18)(4) was the only provision raised during this hearing that would suggest a potential conflict of interest in the present case. That section prohibits councillors from voting on motions relating to a “student group or organization of which they are a member *unless that organization is a faculty association*” [emphasis added].

[27] Under Bylaw 8100: A Schedule Respecting Student Representative Associations, OASIS is listed as a “Probationary Faculty Association.” OASIS is the only Faculty Association listed for the Faculty of Arts. This Panel finds OASIS’ probationary status does not disqualify OASIS from constituting a “Faculty Association” within the meaning of section 100(18)(4).

[28] The Respondent is a member of OASIS. Because OASIS is a Faculty Association, however, the Respondent was permitted to vote on the Motion under section 100(18)(4). Therefore, the Respondent did not violate section 100(18)(4) and no conflict of interest is made out that would warrant a remedy being granted under section 100(18)(5).

[29] The above conclusion is sufficient to dismiss the present application.

[30] Even if the term “conflict of interest” were to be interpreted without reference to the other sections of Bylaw 100(18), however, we conclude that a conflict of interest would not be made out in the present case. The Respondent did not have a personal interest in carrying the Motion beyond what is common to all Faculty of Arts students. We deem it appropriate to elaborate on this conclusion.

[31] As indicated above, the concept of conflict of interest requires a personal interest. Councillors, as elected representatives, will take strong positions on certain matters and advocate for those positions. It is appropriate for councillors to interact with members of faculty associations and to foster friendships with their executive members. These circumstances do not suggest that the Respondent had a personal interest in carrying the Motion.

[32] The material issue in this case is whether the Respondent’s involvement in preparing and drafting the proposal ventured into the realm of unacceptable conduct. This Panel rules that it did not.

[33] The Applicant argues that carrying the Motion would potentially boost the Respondent’s resume and may lead to OASIS dealing more favorably with the Respondent during future interactions. However, this Panel finds that these interests are consistent with those that all councillors have in moving to pass motions.

[34] Moreover, as discussed above, the concept of “conflict of interest” is narrower than the concept of bias or prejudgment. While the Respondent’s conduct *may* indicate that he had a closed mind with respect to the Motion, it does not indicate that he stood to benefit personally from it.

[35] Consequently, even if this Panel had found that Bylaw 100(18)(5) covered a broader range of conduct than the conflicts outlined in sections 100(18)(1), 100(18)(2), and 100(18)(4), we would

not have concluded that the Respondent had a conflict of interest that required him to abstain from voting.

PANEL COMMENTS ON THE RESPONDENT'S CONDUCT

[36] Despite this Panel's conclusion, we elect to comment on councillor conduct within Bylaw 100(18)'s context given the Respondent's actions leading up to this hearing.

[37] Bylaw (100)(18) treats conflicts of interest seriously. Notably, section (18)(5) both obliges councillors to hold themselves accountable in disclosing conflicts of interests and allows others to hold them accountable when this obligation is not discharged. Subsection (18)(5)(b) emphasizes the importance of ensuring disclosure of conflicts of interest by allowing any member of Students' Council to send a petition to the DIE Board in the event a councillor fails to discharge their disclosure obligations.

[38] This Panel recognizes the importance Bylaw 100(18) places on holding councillors to high standards of professionalism and ethical behavior and this bylaw's role of ensuring voting occurs in a transparent manner. Councillors should avoid acting in ways which could raise an appearance of impropriety.

[39] Councillors should not be encouraged to assist organizations with preparing proposals that are to be put before Students' Council for a vote, much less vote on proposals they have assisted in drafting. Liaison positions exist for the purposes of bridging the gap between organizations and councillors by ensuring a degree of separation occurs between councillors these organizations. In circumstances where a councillor believes they *may* have a conflict of interest, the values of professionalism informing Bylaw (100)(18) suggest a councillor should err on the side of caution and abstain from voting.

CONCLUSION

[40] The issues and the finding of those issues are:

1. What is a "conflict of interest" for the purposes of Bylaw (100)(18)(5)?

A conflict of interest generally arises where a reasonably informed person would conclude that a councillor has an actual private or personal interest that would influence the exercise of that councillor's professional duties. Based on the entire context of Bylaw 100(18), however, a conflict of interest under section 100(18)(5) will only be made out where a violation of section 100(18)(1), 100(18)(2), or 100(18)(4) has been established.

2. Did the nature of the dynamic between the Respondent and OASIS constitute a conflict of interest under Bylaw 100(18)(5)?

No.

Application dismissed.