Indiana University Supreme Court

DEFY, *Petitioner*

v.

INSPIRE, *Respondent*

Docket Number: SBSC-2020-01

Decided April 23, 2020

Before VOGTMAN, Chief Justice, and MURPHY, HARRINGTON, LAHEY, SCHANTZ, DREFCINSKI, HUDSON, NANCE, and CHAMBERS, Associate Justices. WESTFIELD and REITZ-BOUREN, Associate Justices, took no part in the consideration or decision of the case.

OPINION

JUSTICE SCHANTZ delivered the opinion of the Court.

I

Petitioners representing the Defy campaign for IUSG ("Defy") petitioned this Court for appellate review of the Indiana University Student Government ("IUSG") Election Commission ("Election Commission") decision entered April 18th, 2020. Defy filed a timely appeal (per HUDSON, J. and Clerk of the Court) in response to the decisions reached by the Election Commission wherein the complaints submitted April 18th were dismissed. Defy now petitions this Court for appellate review of this decision. The Student Body Supreme Court of Indiana University finds clear error in the decision of the Election Commission to dismiss Complaint (6) and remands the matter to the Election Commission for further investigation.

II

On Thursday, April 9th, Defy submitted a complaint against the Inspire campaign for IUSG ("Inspire") which made the following allegations:

1. That on April 1st, a mass email was sent to many Indiana University students. The email announced a "town-hall" event hosted by Inspire.
2. That this action was in violation of Information Technology (IT) policies IT-01 and IT-21, as established by the Information Policy Office; Management of Institutional Data (DM) policy (DM-01), as established by the Committee of Data Stewards; Indiana University policy on Disclosing Institutional Information to Third Parties; and the Acceptable Use Agreement for access to technology and information resources at Indiana University.
3. That this action was therefore in violation of Section 508 of the Procedural Election Code of the IUSG Election Commission ("Election Code").

The merits of these allegations and the Election Commission's dismissal of it on April 15th are not taken up here.

On April 18th, Defy submitted two complaints, both of which were dismissed the same day by the Election Commission. The merits of the

allegations contained in the first of these complaints, Complaint (5), and the Election Commission's dismissal thereof, are not taken up here as well. Complaint (6) submitted by Defy included the following allegations:

1. That on April 1st, a mass email was sent to many Indiana University students. The email announced a "town-hall" event hosted by Inspire.
2. That this email was sent to high school seniors yet to matriculate into Indiana University.
3. That some recipients of the email were potentially minors under the age of 18, whose parents may not have been given the opportunity to opt-out of FERPA-protected directory information release.
4. That the disclosure of this information to any outside service would constitute a violation of FERPA.

In its dismissal of Complaint (6) issued on April 18th, the Election Commission provided the following reasoning, directly quoted:

> "The Election Commission has already invested considerable resources in determining the nature and validity of these allegations. Further adjudication of the use of emails by the Inspire ticket would likely lead to the same result as those previously discussed in Complaint Four, and now Five and Six.
>
> Complaints Five and Six were filed well after the original emails in question and per the UIPO's findings, the underlying actions did not violate university policy. These complaints are dismissed."

III

Pursuant to Section 708 of the Election Code, The Student Body Supreme Court of Indiana University finds clear error in the decision of the Election Commission to dismiss Complaint (6). "Clear error," as defined by the Election Code, requires a finding that no reasonable Election Commission could find the relevant decision. We hold the following:

1. That though the action in question is the same, the allegations contained within Complaint (6) are of a categorically different nature than those contained in Complaint (4).
2. That Complaint (6) contains allegations relevant to Indiana University's compliance with federal law.

3. That the findings of the University Information Privacy Office ("UIPO") were based on the content of Complaint (4), not Complaint (6), and that a relevant difference was contained therein, namely, regarding the acquisition of the publicly unavailable email addresses of minors and their distribution to a third party.
4. That this relevant difference renders the Election Commission's claim that "further adjudication of the use of emails by the Inspire ticket would likely lead to the same result" unwarranted.

On the merit of these determinations, we hold that no reasonable Election Commission could dismiss Complaint (6) on the grounds described above, and therefore find clear error in the decision. Complaint (6) warrants further investigation by the Election Commission in partnership with University Officials, and we remand the matter to the Election Commission to investigate further and render judgment on their findings.

IV

We believe that the allegations in Complaint (6) may compose two possible violations of university policy: the allegation that information pertaining to unmatriculated high school students was *obtained* in a manner inconsistent with University policy, and the allegation that information pertaining to unmatriculated high school students was *distributed* in a manner inconsistent with University policy. As such, we direct the Election Commission to enter into an investigation to determine if either such violation occurred.

In partnership with UIPO and the University Data Steward, we ask the Election Commission to determine the following:

1. How the emails of these unmatriculated high school students were obtained.
2. Whether the acquisition of these emails of unmatriculated high school students constitutes a violation of University IT policy.
3. Whether the distribution of these emails of unmatriculated high school students constitutes a violation of University FERPA-related policy.
4. Whether the acquisition or distribution of these emails of unmatriculated high school students constitutes a violation of University Data Management Policy.

We also request that all communication relating to the investigation be carbon-copied to HUDSON, J., the Clerk of the Court.

Additionally, we encourage the Inspire campaign to produce any evidence relating to the allegations contained in Complaint (6), and submit this evidence to the Election Commission.

It is so ordered.

Associate Justices HARRINGTON, LAHEY, DREFCINSKI, NANCE, and CHAMBERS join in the decision.

CONCURRENCE

JUSTICES MURPHY and HUDSON, concurring:

The Opinion of the Court describes the Election Commission (hereafter, "Commission")'s dismissal of Complaints Five and Six as a conjunction of two factors: that the complaints are time-barred due to submission after the 48-hour time period established in the Election Code; and that the complaints elicit no new allegations beyond complaints previously adjudicated by the Commission. The Court finds that if either part of the conjunction demonstrates clear error on behalf of the Commission, the entire conjunction fails as a justification. This allows the Court to invalidate the initial decision solely on the basis of potentially relevant allegations in the new complaints, without needing to contend with restraints on the timeliness of complaints. Nevertheless, the Court would have sufficient evidence to consider the constitutionality of the 48-hour bar on complaints in the Election Code, should it deign to do so.

Section 704 of the Election Code states that complaints against any ticket or candidate in an IUSG election "may only be issued about a violation that has occurred within the last 48 hours. If it has been more than 48 hours since the violation occurred, tickets or candidates may not file a complaint about that violation" (p. 11). This creates a time bar for complaints (such as a statute of limitations for criminal offenses, or a period of prescription for civil disputes). A host of reasons could justify the inclusion of a time bar for complaints in the Election Code—to encourage timely investigations, to dissuade superfluous complaints between tickets, to best enable the Commission to conduct its

business with limited resources—but the limitations and applications of the time bar would need to be reasonable. The 48-hour time bar, beginning at the time of the alleged violation, does not appear reasonable for the context of Indiana University.

The chief concern over the reasonableness of the time bar is its inception at the time of violation, rather than on the first appearance of evidence. In the case at hand, pertaining to emails sent on April 1st, 2020, the period for submitting complaints would extend to some point on April 3rd, 2020. However, as Complaint (6) demonstrates, potential evidence from high school students who received the April 1st emails did not come to light until on or around April 18th, 2020.

The Election Code does contain a provision for extraordinary discoveries of evidence after submission deadlines in Section 709: "If any member of IUSG discovers extraordinary evidence (*e.g.*, evidence which they believe may have altered Election Commission decisions) and can show with good faith that such evidence could not be produced before the submission deadline, the member of IUSG may petition the Supreme Court before the Supreme Court certifies the election" (pp. 12-13). Authors of the Election Code clearly recognized the potential for evidence to surface after the 48-hour time bar. However, as currently described, the evidence must pertain to and justify altering previously adjudicated Commission decisions. There appears to be no mechanism for submitting a complaint that is wholly discovered past the 48-hour time bar. In this scheme, it seems the safest option for any party in an election is to submit complaints over any action of its rivals, and submit subsequent evidence that it can discover to the Supreme Court, which is an unreasonable process.

Should any ticket that allegedly commits a violation of the Election Code be allowed to move forward without investigation simply because evidence came to light two days after the incident? Few, if any, regulations at the University recognize such a time bar. If other student organizations violate the Student Code of Conduct, the Office of Student Conduct would hold a substantially longer period (perhaps months) during which it would consider proceedings—initiated upon receipt of a complaint or the deliverance of evidence to its office. Naturally, the Election Code's period for complaints could not extend by months, as such a move would be incompatible with certifying an election and promoting a smooth transition in student governance. Simply switching the start of the 48-hour period for complaints to begin at an IUSG member's demonstrable notice about a potential violation would be one reasonable solution.

DISSENT

CHIEF JUSTICE VOGTMAN, dissenting:

We are tasked with deciding whether to accept one party's appeal of a recent decision of the IUSG Election Commission to dismiss that same party's complaint alleging that the actions of the opposing party constitute a violation of the Procedural Election Code. The underlying complaint was not filed in time according to the language of the Election Code, and the Election Commission dismissed the complaint partly for this reason. I agree that the complaint must be dismissed as time-barred, and I would therefore vote to deny the appeal and affirm the judgment below. But the Court holds otherwise. Consequently, I write separately to dissent from today's decision.

I

A

On April 9, 2020, Petitioner (the "Defy" ticket) filed a complaint against Respondent (the "Inspire" ticket) in the campus-wide election for the 2020-21 Student Body President. The complaint referred to a mass email that Inspire sent on April 1, eight days earlier, to several Indiana University students. The email urged its recipients to tune in to a virtual "town-hall" meeting to be held the next night, and it also contained promotional and informational materials about the Inspire ticket and its campaign.

In its April 9 complaint, Defy argued that this mass email violated a litany of Indiana University computing and technology policies, and thus violated Section 508 of the Procedural Election Code ("Code").[1] The Indiana University Student Government (IUSG) Election Commission, however, did not find it necessary to adjudge the merits of these claims. Section 704 of the Code imposes a 48-hour deadline for the submission of all election complaints. Specifically, it dictates that candidates may file complaints about a suspected violation only if that violation "has occurred within the last 48 hours. If more than 48 hours have

[1] Procedural Election Code of the IUSG Election Commission §508: "Any ticket, candidate, or any person acting on behalf of any ticket or candidate found to have violated a publicly disseminated university policy, including the policies of the Student Life and Learning Office, University Information Technology Services (UITS), and those found in the Code of Student Rights, Responsibilities, and Conduct, for the purpose of promoting a candidate or ticket shall constitute a violation of this Code."

elapsed since the violation's occurrence, tickets or candidates may not file a complaint about that violation."[2] Accordingly, the Election Commission dismissed the complaint because it was filed on April 9 and the mass email—the allegedly-illicit action in question—was sent on April 1.[3]

B

On April 18, 2020, Defy filed two more complaints against Inspire, both of which again alluded to the April 1 mass email. Defy brought forward new evidence to further buttress its claims that the mass email violates several University policies (and by extension §508 of the Code). Crucially, Complaint Six presented evidence that current high school seniors—and thus potentially legal minors—who have committed to enroll at IU received Inspire's April 1 mass email. Consequently, Defy argued that the mass email no longer violates just University policy; it also amounts to a violation of federal law in the Family Educational Rights and Privacy Act of 1974 (FERPA).[4] Defy's complaint again cited §508 of the Code and requested the Election Commission to spearhead an investigation.

Ordinarily, §704 of the Code ought to have barred any consideration of the substance of Defy's complaint: it was filed on April 18 and adduced the same April 1 mass email. And indeed, the Election Commission dismissed the complaint, noting that it was "filed well after the original emails in question."[5] But then the Election Commission went further: The mass email "did not violate university policy," it said. How come? "The Election Commission has already invested considerable resources in determining the nature and validity of these allegations. Further adjudication of the use of emails by the Inspire ticket would likely lead to the same result as [that] in Complaint Four."[6]

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[2] *Id.*, §704 ¶2.
[3] See *Defy* v. *Inspire*, IUSG Elec. Comm'n Complaint Four Ruling (April 15, 2020), available at https://iustudentgovernment.indiana.edu/election-commission/Complaint-Four-Ruling.pdf (last accessed April 23, 2020).
[4] 20 U.S.C. §1232g *et seq*.
[5] *Defy* v. *Inspire*, IUSG Elec. Comm'n Complaints Five & Six Ruling (April 18, 2020), available at https://iustudentgovernment.indiana.edu/election-commission/Complaint-Five-and-Six-Response-1.pdf (last accessed April 23, 2020).
[6] *Ibid*.

Defy timely[7] appealed to us the Election Commission's decision to dismiss the complaint.[8] §708 of the Code creates three grounds for appeal: First, if "there is clear error by the Election Commission"; second, if "there is a matter of interpretation of the code, bylaws, or constitution"; and third, if "there is a case of bias of one or more members of the Election Commission."[9] §708 allows us—and does not require us—to accept an appeal only if at least one of these three prongs are met.[10]

II

Putting aside the fact that Defy's petition technically does not meet the filing requirements in §708,[11] the question before us is whether this case satisfies any of these three prongs. The latter two are not in question; no party has alleged that any member of the Election Commission was biased, and Defy's appeal does not ask us to interpret any provision of the Election Code, IUSG Bylaws, or IUSG Constitution.[12] The third prong allows us to accept Defy's appeal only if the Election Commission "clear[ly] err[ed]" in dismissing the complaint. Contrary to the Court's opinion, it unequivocally did not.

How do we know whether "clear error" is present? By "finding that no *reasonable* Election Commission could find the decision subject to the appeal."[13]

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[7] See Election Code §708 ¶1: "The appellant(s) must submit the appeal [to the Indiana University Supreme Court] no later than forty-eight (48) hours after the Election Commission posts its decision for public review." The Election Commission publicly posted its dismissal of Complaints Five and Six at 9:00pm EDT on April 18, 2020. We received Defy's appeal at 8:49pm EDT on April 20, 2020.

[8] *Defy* v. *Inspire*, Pet. for Rev. of Elec. Comm'n Decision, No. SBSC-2020-01 (April 20, 2020), available at https://iustudentgovernment.indiana.edu/election-commission/Request-for-Review1.pdf (last accessed April 23, 2020).

[9] Election Code §708 ¶1.

[10] See *ibid*.

[11] See Election Code §708 ¶1: "The appeal *must* contain a statement about the specific decision made [by] the Election Commission, an argument for why the decision should be overturned, and a specific request for relief" (emphasis added). Defy's petition does not contain a statement about Election Commission's decision. It instead asks us to skip straight to the merits and determine whether the April 1 mass email violates University policy. Thus, procedurally, we could dismiss this claim with no explanation beyond this footnote.

[12] See *supra* n.8, at 2. While the appeal does cite §508 of the Election Code, §508 is merely a bridge provision to connect violations of University policy with the election. Defy asks us to interpret the texts of several university policies (and determine whether the mass email flouts that language), not any provision of IUSG's governing documents.

[13] Election Code §708 ¶2 (emphasis added).

Now, as explained above,[14] §704 of the Code requires all complaints to be filed within 48 hours from the time at which the alleged violation takes place. The alleged violation at issue here—the mass email—occurred on April 1, 2020. This complaint was filed on April 18, 2020. The Code does not say complaints must be filed within 48 hours after a party *becomes aware of* the alleged violation. Nor does it provide any exception to this rigid timeline. So, §704 clearly renders Defy's complaint untimely and invalid. No other provision in the voluminous Election Code changes this fact. While the substance of the complaint might evoke concern, a judge cannot consider the complaint's substantive evidence under §704. Thus, any *reasonable* judge—on Election Commission, Supreme Court, or otherwise—ought to dismiss Defy's complaint as time-barred. And the Election Commission did just that, reasoning that it was "filed well after the [mass email] in question" and coming to same conclusion as it did nine days prior with the first untimely complaint about the mass email.

III

Recall, however, what else the Election Commission said: It "has already invested considerable resources in determining the nature and validity of these allegations," and "[f]urther adjudication of the use of emails by the Inspire ticket would likely lead to the same result as" its April 9 decision.[15]

The Court uses this (perhaps naïve) addition as a springboard, invokes §708's first ground for appeal, and holds that this added language amounts to a "clear error" on the Election Commission's part. In doing so, it tosses overboard §704's rigid 48-hour complaint-filing deadline.

Its first holding begins, "[T]hough the action in question is the same," etc.[16] It should go no further. The Court finds that the act that purportedly violates University policy—the April 1 mass email—is the same as that at issue in the April 9 complaint, which the Election Commission dismissed as time-barred. Thus, the Court should hold nothing other than this: "§708, the statute-of-limitations for election complaints, mandates dismissal of this complaint and precludes any judicial review of its merits."

Yet then the Court does the exact opposite. Its first holding continues, ". . . the allegations contained within Complaint (6) are of a categorically

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[14] See *ante*, Part I-A, at 6-7 (VOGTMAN, C.J., dissenting).
[15] See *supra*, n.5.
[16] *Ante*, Part III, at 2.

different nature than those contained in Complaint (4)."[17] The Court thus engages with the *merits* of the complaint now before us, determining that the evidence presented here materially differs from the evidence presented in the April 9 complaint. It thus scrutinizes the substance of the record. But §704's time-bar *invalidates* this complaint, and so invalidates the substance of this complaint too—somewhat similar to "fruit of the poisonous tree."

But the Court still does not stop there: It then weighs in on the merits of Defy's actual *appeal*. Based on its findings about the substance of Defy's complaint, it suggests that the mass email "may" constitute "two possible violations of university policy" as well as FERPA.[18] It then orders the Election Commission to investigate more fully the new evidence presented in the complaint, and to liaison with university officials to guide its determination whether the mass email violates university policy or FERPA. This is unprecedented. With an ode to judicial fiat, the Court renders §704's 48-hour deadline meaningless and gives flexibility to an inflexible statute. Moreover, consider what this means for future election candidates: *Is* there an exception to the 48-hour complaint-filing deadline? It would appear the Court has just created one, even though §704's plain text says nothing of the kind. But more importantly, when can this exception be invoked? Whenever the Court feels the merits of a complaint warrant greater scrutiny than what the Election Commission gave it? This appears to be the closest answer, given the majority's reasoning. Ultimately, however, the Court's decision gives no guidance whatsoever—indeed, it *can't*, because the exception's inception is conceived in the merits of an untimely complaint.

Finally, let's return to §708's "clear error" ground for appeal. "Clear error requires a finding that no reasonable Election Commission could find the decision subject to the appeal."[19] The Court ultimately concludes—based "on the merit[s] of [its] determinations"—that "no reasonable Election Commission could dismiss Complaint (6)" and thus "find[s] clear error in the decision."[20] Assuming, *arguendo*, that this holding is correct, what does §708 say is the next step in the process? The Court must "institute the finding that would be *reasonable in accordance with the code*."[21] What would be the "reasonable" action to take with this complaint according to the language of the Code? To do precisely

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[17] *Ibid*.
[18] *Ante*, Part IV, at 3.
[19] Election Code §708 ¶2.
[20] *Ante*, Part III, at 3.
[21] Election Code §708 ¶2 (emphasis added).

what §704 says to do: dismiss the complaint as filed late. And of course, had my vote of *no* "clear error" carried the day, §708 instructs the Court to "leave the decision in place."[22] Thus, the *reasonable* action to take would be to dismiss Defy's complaint as time-barred pursuant to §704 of the Code, *notwithstanding* the ultimate finding on clear error vis-à-vis the Election Commission's decision. The Court's decision simply does not square with the dictates of §704.

IV

As with any case, today's decision has consequences. While these practical effects in no way guide my vote, they are certainly worth pointing out. The Court's decision to remand the case and have the Election Commission orchestrate an evidentiary investigation further delays the conclusion of the 2020–21 IUSG Student Body President Election. So far, the election has been run to a tee. The Election Commission has timely conducted every event listed in the election timeline under §108 of the Code (to the best of my knowledge, at least). The votes have been cast, final campaign financial statements have been posted, and no violations of the Election Code have been found to-date. Until today, the election itself was (unofficially[23]) final and without blemish.

Now, however, voters must wait to hear the results of the election—whatever they are—while a technical proceeding plays out above them. While in one sense the Court is the final voice of the election,[24] the real arbiter is the electorate, the thousands of students who have already cast their ballots.

As if all this weren't enough, there is one more noteworthy (albeit technical) point. Suppose at the end of the day that Inspire's April 1 mass email is found to violate University policy or FERPA and, by extension, §508 of the Code. What happens? In the grand scheme of things, *nothing*. The Election Commission employs a point system for confirmed violations of the Election Code—much like the point system a state uses for one's driving record.[25] If a ticket receives 10 points, it and each of its members are disqualified from the election. If a ticket accumulates a certain amount of points below 10, the ticket does not receive any tangible sanctions; the proximity of disqualification simply serves as a deterrent

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[22] *Ibid*.
[23] Subject to this Court's formal certification of the election results.
[24] See the above footnote, which describes a process of mere formality.
[25] See Election Code §707.

to future infringements.[26] So, let's turn to the complaint at issue here. If the mass email is ultimately found to violate §508 of the Code, Inspire would rack up either 4 or 6 points, the choice of which is at the discretion of the Election Commission.[27] As mentioned earlier, no ticket has violated any provision of the Election Code, and thus both tickets currently sit at 0 points. Thus, *irrespective* of the answer to the ultimate question—whether Inspire's mass email violates §508 of the Election Code—the results of the Election will remain exactly as they are now, whatever the content of those results.

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Today the Court overturns a decision of the Election Commission to dismiss an untimely petition as untimely. In the process, it creates out of thin air an exception to an exceptionless filing-deadline provision. And its disposition runs contrary to the clear dictates of the "clear error" ground for appeal as applied to this case. I deeply admire Defy's firm conviction that it is their "responsibility to hold people accountable," "[r]egardless of the election outcome."[28] And while I do not necessarily disagree with the Court that the alleged actions in Defy's complaint—*if true*—are considerably unsettling, the plain language of the 48-hour deadline in §704 of the Election Code enjoins us from taking that into consideration. I would hold that Defy's complaint requires dismissal since it was not filed pursuant to §704, and I would affirm the Election Commission's decision. I respectfully dissent.

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[26] See Election Commission Point System, available at https://iustudentgovernment.indiana.edu/election-commission/Point-System.pdf (last accessed April 23, 2020).
[27] *Id.*, at 4.
[28] *Defy* v. *Inspire*, Defy Complaint Five Initial Filing at 1 (April 18, 2020), available at https://iustudentgovernment.indiana.edu/election-commission/Complaint-Form-5.pdf (last accessed April 23, 2020).