Katherine Tylus,
On behalf of youMICH party,

Petitioner and Appellant,

-v.-

University Election Commission

Respondent.

/ Jeremy Keeney
Counsel for Plaintiff
jerekeen@umich.edu
(734) 787-2676

University Election Commission
Respondent
Peter Borock
CSG Election Director
peter.borock@gmail.com

/ BREIF IN SUPPORT OF PLAINTIFF'S COMPLAINT
Questions presented for the CSJ:
1. Can the UEC issue fractional demerits while still maintaining a uniform application of the Compiled Code?
2. In the alternative, can the UEC issue demerits for some violations, but not issue demerits for other identical violations while still maintaining a uniform application of the Compiled Code?
3. Does constructive ownership, estoppel, a non-candidate committing the violation, the UEC's role as an administrative body, the resulting disqualification from assessing demerits at full value, and the lack of serious harm constitute sufficient cause for the UEC to reduce demerits to .0073394 demerits per violation?
4. Did the UEC err in considering any one factor listed to be a mitigating factor?

I. ARGUMENT

A. Legal Standard

"The respondent and/or petitioner may appeal any decision of the University Election Commission to CSJ." Code Art. VI § (H)(4)(i) "Appeals". The CSJ has the authority to hear this claim that the UEC misinterpreted the Compiled Code under a de novo standard. CSJ Manual of Procedure, §51.724 (where the CSJ determines that a judiciary has... made an error in interpreting the... Compiled Code... CSJ may remand the case to the judiciary). The de novo standard allows the CSJ to act as though it were considering this issue for the first time, and the CSJ can substitute its judgment about whether the UEC correctly applied the law. Ballentine's Law Dictionary 3d.

If the CSJ finds that several mitigating factor found by the UEC were not appropriate, but believed each of them to be harmless, the cumulative effect of these errors has the potential to prejudice a party to the same extent as a single reversible error. United States v. Rivera, 900 F.2d 1462, 1469 (10th Cr. 1990). Due to the possibility of this cumulative error, the CSJ should be aware of this possibility.

B. The UEC's mitigation of demerits against Parikh was clearly erroneous because 584+ emails were sent, the election was decided by a small margin, and both Parikh/Andrews intended to send this email to lists neither of them owned.

1. The UEC correctly found Parikh guilty of 584 violations of the CSG Compiled Code.

The CSG Compiled Code defines "Inappropriate and Irresponsible Use of Email Privileges Prohibited" as:

"No party or candidate may knowingly send an unsolicited electronic communication or email to members of the University Community... also... prohibited... sending campaign email to groups or email lists that the sender does not own."
Code. Art. VI § (G)(4)(b)(iv). The UEC recognizes a clear distinction between official university listservs and social listservs when dealing with ownership. See Plumly v. Gallagher and CSG: Statement of General Terms and Conditions, p.4. During the mandatory candidates meeting hosted by the Election Director, candidates are explicitly notified that "sending campaign email to individuals who are not students (eg, faculty, staff, alumni) and sending campaign to official (departmental) email groups" is prohibited, but a candidate may send an email to an unofficial (non-departmental) email group with permission of the group owner. CSG: Statement of General Terms and Conditions, p.4. This clearly states that one cannot email an official email group, even if they have permission from an owner. The UEC has adopted the commonly understood definition of "owner" as an individual listed as owner of the listserv on the Michigan Directory (mcommunity.umich.edu). See Plumley v. Gallagher (Defendant was listed an owner of the 'social listserv' on the Michigan Directory and received explicit permission from another owner to send out a specific campaign email).

The UEC properly found beyond a reasonable doubt that Parikh violated the CSG Compiled Code by knowingly sending out an email to groups or lists that the sender did not own, and that Parikh and Andrews coordinated when the email was sent.

2. The UEC did not evaluate "sufficient cause" when it used mitigating factors to reduce demerits from a minimum of 2 to .0073394 demerits per violation.

The UEC erred by not evaluating sufficient cause before deciding to mitigate damages, and sufficient cause does not exist to justify .0073394 demerits.

The Assembly did not give the UEC authority to assess demerits outside of the guidelines because a mitigating factor exists. The mitigating factor needs to be sufficient cause for evaluating demerits outside of the guidelines. "Sufficient" means as much as is needed; equal to the purpose proposed. Ballentine's Law Dictionary. "Cause" means a consideration that affects a result. Id. Sufficient cause is also "cause that is deemed enough to provide an excuse under the law." Reading the passage as a whole, the UEC cannot assess demerits outside of the guidelines unless if the factors necessitates this assessment of demerits. The existence of a mitigating factor itself is not enough to allow the UEC to mitigate demerit, the mitigating factor must be sufficient or meet a certain threshold of severity as determined by the CSJ.

Sufficient cause for discharge of an employee includes: misconduct, bad attitude, lack of skills, insufficient performance, and incompetence. Here sufficient cause is used as a minimum threshold device to prevent an abuse of discretion. A pattern of poor performance needs to be shown before an employee can be fired for sufficient cause; one violation is not enough to constitute sufficient cause.

Likewise, the discovery of a mitigating circumstance does not automatically entitle the UEC to assess demerits outside of the guidelines. Likewise there needs to be a connection between the mitigating factors, and the end result of demerits issued. Examples of mitigating circumstances that may constitute sufficient cause are discussed below.

The UEC erred in considering constructive ownership, estoppel, the non-candidate committing the violation, the UEC's role as an administrative body, the resulting
disqualification from assessing demerits at full value, and the lack of serious harm as mitigating factors.

The CSG Compiled Code allows the UEC to "assess demerits outside of the guidelines specified in this article if it finds sufficient cause to do so given by mitigating factors, extreme circumstances, or a lack of intent on the party accused." Code Art. VI § (H)(3)(b). Due to the language of this clause, the intent of the Assembly was to give the UEC some discretion to prevent unconscionable results from occurring, an equitable power that most judicial bodies possess. The ability to assess demerits outside of the guidelines is not absolute, and is clearly limited by a requirement of sufficient cause. Previously, the UEC tried to "issue demerits outside of the guidelines" by only charging a former candidate with two demerits for each listserv emailed, but this was invalided by the CSJ in a decision that is still binding on the UEC. Mandell v. UEC (intent of the drafters was clear, each receipt of an email is a separate violation). Courts have defined the term "mitigating factor" to include the following circumstances (U.S. v. Basham, 561 F.3d 302 (S.C. 2009)):

- Impaired mental capacity
- Duress
- Emotional disturbance/ provocation
- Age at the time of the crime
- Other factors in Defendant's background

All of these factors are outside of the control of the defendant and limit the mental culpability of the defendant. These factors limit the defendant's ability to either control his/her actions or appreciate the consequences of his/her actions.

Each individual mitigating factor raised by the majority is assessed below. [Assessment below is a modified version Commissioner Eral's dissenting opinion in Bowen and Tylus v. Parikh]

a) Constructive ownership (misapplies Plumbley)

The UEC defies the intent of the Assembly and breaks precedent by inventing a lenient definition of "constructive owner."

The Assembly chose the word "owner" because it has a commonly accepted meaning with a bright line rule- either you are an owner on the Michigan Directory, or you are not. The assembly purposely did not choose administrator, creator, or moderator as the level of permission needed to email a social group. In light of Samaymantri being removed from the ballot after sending an email in good faith to a university listserv, the Assembly had an opportunity to change the definition of ownership, and it did not. The UEC continued to recognize the definition of owner in Plumbley. (UEC looks to the owner specified in the Michigan Directory to see if a sender is actually an owner of the 'social listserv').

Andrews and Parikh both testified that Parkih knew Andrews was not the owner of the listserv. Going on mcommunity.umich.edu, one can simply search ssw.msw and see the list of
owners. A "constructive owner" of a list clearly does not exist, which is why the UEC is trying to address this under mitigating factors, not under the rule violation itself. Since the Assembly clearly intended to adopt a bright-line rule, the finding of "constructive ownership" does not constitute sufficient cause to mitigate damages.

b) Estoppel

Estoppel was not raised during the UEC hearing and estoppel cannot be used to mitigate youMICH's right to bring a complaint.

Estoppel is meant to prevent a party, which is guilty of a similar offense, from bringing a complaint against another party. ourMichigan violated the Compiled Code by sending an email to the MSW listserv at some point before Parikh sent his email. youMICH's cause of action should not be mitigated because ourMichigan violated the code and Parikh did not bring a complaint. The CSJ held in Mandell that every recipient's rights are violated when an unsolicited mass email is sent out, so the actions of one recipient cannot preclude another recipient from having their dispute fairly heard by the UEC. Since the UEC clearly erred in applying estoppel to both parties, Estoppel cannot be used as sufficient cause for mitigating demerits.

c) Respondent was not the person to commit the violation

The Assembly clearly intended to hold candidates responsible for the actions of non-candidates, and to rule otherwise would completely ignore "Violations by a non-candidate."

Compiled Code Article VI, Section H(3)(d) is titled “Violations by a non-candidate” and states that the UEC is able to assess demerits to a candidate if a non-candidate committed a violation “working in coordinate with a candidate.” To say that it is a mitigating factor to reduce demerits because the candidate didn't violate the code, completely ignores this provision and the intent of the assembly to prevent candidates from circumventing the CSG Compiled Codes through their non-candidate campaign volunteers. The UEC held Parikh liable for Andrews' violation of the CSG Compiled Code when it found 584 code violations that resulted from Andrews' email. Clearly this result was expected because candidates are assessed demerits on behalf of their campaign volunteers for every other violation in the CSG Compiled Code, so why should this situation be any different?

While the majority correctly notes that the word “must” does not appear with reference to a single candidate, it doesn’t necessarily give the UEC discretion, as it only says that it “may assess demerits only against that specific candidate.” Code Art. VI § (H)(3)(d)(ii). In the citation of this clause in the majority opinion, they conveniently leave out the world “only” and simply write that the UEC “may assess demerits against that specific candidate." There is a major difference between “may only assess” and “may assess”. One limits the recipient of demerits; the other gives discretion as to even applying them. The inclusion of this clause ensures the candidate is held responsible for their campaign volunteers by preventing the UEC from assessing demerits against the party or the volunteer. Since the UEC clearly misapplied "may assess demerits only," the CSJ should rule as a matter of law that this is incorrect and
cannot be sufficient cause to mitigate demerits.

d) **Underlying role as an administrative body (promote voter turnout)**

The UEC was clearly serving in its role as a judiciary body, and has no duty to promote voter turnout when deciding election complaints.

If this is allowed to be a mitigating factor, the UEC will be able to use it in any decision where it doesn't want to follow the CSG Compiled Code. The Compiled Code charges the UEC with: 1) assisting the Election Director in fulfilling his obligations and executing the election, and 2) hearing and deciding upon all election complaints. Comp. Code §(C)(2)(e)(i-ii) "Duties." The Election Director is responsible with advertising the CSG election, which he does through campus wide emails, not through issuing demerits. The majority is worried that by upholding the code, voter turnout will decrease. This is outside of the UEC's listed duties. The Assembly clearly knew that banning campaign email on official university listservs may impact voter turnout. This is a decision for the Assembly alone to make, and not for the UEC to weigh when determining demerits for code violations. Illusionary policy considerations do not constitute sufficient cause for the UEC to mitigate demerits.

e) **The UEC was hesitant to disqualify Parikh**

The Assembly in choosing to assess demerits "per recipient" knew that any violation of this provision would likely result in disqualification; petitioners still need to satisfy the reasonable doubt standard.

Should we hold candidates who are at risk of disqualification, for violating the election code, to a lower standard? The authority to judge what actions result in disqualifications rests with the Assembly and its intent is clear: "emails... will be counted as one per recipient." Code Act. IV § (A)(12) "Emails." In Mandell, the CSJ explicitly mentions the intent of the drafters to include "per recipient" because they were not pleased with judicial attempts to be lenient. If the Assembly does not believe individuals such as Parikh should be disqualified for sending out thousands of emails through a campaign volunteer, then the Assembly needs to amend the code again. In choosing a "beyond a reasonable doubt standard" the Assembly properly protected the defendant from being unfairly disqualified.

The UEC cannot use its broad mitigation power to ignore precedent and its duty to uphold the election code. Samaymantri was disqualified for an almost identical violation, yet the majority sees fit here to use broad mitigation power to ignore this fact. Mandell. One candidate, acting completely in good faith by sending an email to a listerv he did not own, was disqualified from an election he had won. Id. Again we have a candidate, trying to send an email to a list that he knows he does not own, acting through a non-candidate but not being disqualified. The UEC is bound by equal application of laws to hold Parikh to the same standard in this case. Since the UEC is clearly acting outside the bounds of the intent of the Assembly, the result of the demerits themselves should not constitute sufficient cause to mitigate damages.

f) **No serious harm**
The CSJ in Mandell held that when an email is sent to a listserv by someone who is not the owner, the rights of each recipient are violated and must be treated as separate violations.

The egregious harm that occurred as a result of Andrews email is uncorrectable; thousands of students and hundreds of faculty were emailed. This significantly altered the outcome of the election, and for one that was so hotly contested, the UEC cannot allow such unfair practices to stand. The majority tries to contend that no one on the SSW listserv complained, so no harm was caused. This is problematic because ourMichigan entered into evidence at the hearing several emails sent from SSW, SOE, and Public Policy students to party chairs asking about the legality of the mass email. These students reported their complaints to both youMICH and ourMichigan to use as evidence when bringing complaints. Since the rights of 584 students were violated, and emails were entered into the record from SSW students, we find the UEC clearly erred in finding no serious harm existed. Also, no serious harm in this situation is not sufficient cause to mitigate demerits.

II. CONCLUSION

Overall, the actions of Parikh do not entitle him to mitigated demerits. Coordination between Parikh and Andrews was clearly and unquestionably established. Candidates were advised that only owners of listservs can send emails to groups. Parikh and Andrews both knew that Andrews was the not owner. Parikh asked Andrews to send out an email, which went to over 1,800 students and 100's of faculty. By using the voter turnout rate, one can estimate approximately 360 of these students voted in the election that was decided by less than half that number of votes. Parikh violated the code and gained a huge unfair advantage as a result, so he is not entitled to mitigated demerits. To mitigate the demerits would result in a non-uniform application of demerits which is clearly erroneous and unfair to other candidates who were either assessed demerits for far lesser violations, or who followed the rules during the campaign. See Commissioner Liu's dissent in Bowen and Tylus v. Parikh.

Petitioner respectfully asks the CSJ to:

- Issue at least 1,168 demerits to Manish Parikh pursuant to Code Art. VI § (G)(4)(b)(iv) because sufficient cause did not exist for only issuing ~.007 demerits per violation; or,

- Issue at least 1,168 demerits to Manish Parikh pursuant to Code Art. VI § (G)(4)(b)(iv) because the UEC erred in not finding sufficient cause for mitigation; or,

- Find at least one of the mitigating factors listed to not be an appropriate mitigating factor, and remand the case to the UEC to evaluate sufficient cause and to write a decision consistent with the CSJ's opinion.