

Legislative Council Panel on Constitutional Affairs

Guidelines on Election-related Activities issued by The Electoral Affairs Commission

Introduction

This paper sets out the response of the Electoral Affairs Commission (EAC) to the comments and queries put forth by Members on the Guidelines on Election-related Activities in respect of the District Council (DC) Election at the meeting of this Panel on 15 December 2003, and to a written submission from the Democratic Alliance for Betterment of Hong Kong to the Panel.

Election Expenses

When Expenses incurred should be counted as Election Expenses

2. Under section 2 of the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”), Cap. 554, “election expenses” in relation to a candidate means expenses incurred or to be incurred, before, during or after the election period by or on behalf of the candidate for the purpose of promoting the election of the candidate or prejudicing the election of another candidate.

3. The same section defines “candidate” as a person who stands nominated as a candidate at an election and a person who at any time before the close of nominations for an election, has publicly declared an intention to stand as a candidate at the election.

4. On the basis of the provision set out above, if a person has publicly declared his intention to stand as a candidate in an election and provided that there is evidence to prove the same, expenses incurred for the purposes of promoting the election of that person or prejudicing the election of another candidate will be counted as election expenses.

Items which may be counted as Election Expenses

Whether the cost incurred for renting office and related operation costs should be counted as election expenses

5. According to Appendix G of the Guidelines on DC Election, the costs incurred for renting space used in connection with an election campaign should be counted towards the election expenses of the candidate and reported in his return on election expenses. If telephone and fax lines are installed for electioneering purpose, the expenses so incurred should also be counted as the candidate's election expenses.

6. If a candidate, who is an incumbent DC member, uses his ward office for electioneering purpose, he should declare the portion of the expenses incurred for electioneering purpose and count it towards his election expenses. The amount should not be claimed by an incumbent DC member as expenses incurred for discharging DC duties when he submits his claim for the Operating Expenses Allowance (OEA) for DC members.

7. The Home Affairs Department (HAD) has issued a set of guidelines on reimbursement of OEA to all DC members which set out clearly that the expenses for which the claim for OEA are made must be incurred exclusively for discharging DC duties. Before the DC election in November 2003, District Offices also issued a letter to DC members, reminding them that when submitting the claims for the OEA, expenses incurred for electioneering purpose should not be claimed as expenses incurred for discharging DC duties

Whether the cost of putting up advertisements on windows of public light buses should be counted as election expenses

8. According to Appendix G of the Guidelines on DC Election, the costs of advertisements in newspapers, taxis or other public transport should be counted as election expenses. If the window of a public light bus is normally used for displaying advertisements for commercial purpose, the actual rent charged or the usual rent that would normally be charged should be counted as the election expenses of the candidate concerned.

9. According to paragraph 15.21 of the Guidelines on DC Election, for services or goods obtained free of charge, a candidate must include in the election expenses return their estimated value as if the expenses had been incurred. In line with this provision, if the windows of a public light bus are normally available for rental as advertising spaces, then even if the owner or

operator of the public light bus chooses to allow a candidate to display EAs on a window free of charge, the usual rent that would normally be charged should be counted as the election expenses of the candidate concerned.

10. Paragraph 15.21 of the Guidelines on DC Election also states that where services are furnished by persons who do not deal in similar services or goods with the public, their estimated value should be assessed at the lowest market retail price at the time when they are furnished. In line with this provision, if the window of a public light bus is not normally used for displaying advertisements for commercial purpose but similar space belonging to other operators of other public light buses is normally available for commercial advertising, the market value of the space should be counted in the election expenses of the candidate.

Election Advertisements

Claim of Support

Pictorial representation

11. Members have commented that it would be difficult to decide whether the written consent of persons whose pictorial representation is included in an election advertisement (“EA”) should be obtained. Specifically, it would be practically difficult to obtain the written consent of all persons appearing in a photograph which aims to illustrate the candidate’s participation in community services.

12. According to section 27 of ECICO, any person including a candidate engages in illegal conduct at an election if the person publishes or authorizes the publication of an EA that includes a pictorial representation of another person, in such a way as to imply or to be likely to cause electors to believe, that the candidate or candidates with whom the candidate is associated have the support of the person appearing in the pictorial representation unless, before the publication of the EA, that person consented in writing to the inclusion of the pictorial representation.

13. The requirement of obtaining written consent protects candidates from unnecessary complaints and disputes which may arise if only oral consent is obtained. It also protects the electors from being misinformed as to whether a candidate has the support of a person. Where the inclusion of pictorial representation of person does not imply support of the candidate concerned, prior written consent is not required. What amounts to “support” will depend

on the circumstances of each case. The question to consider is whether any reasonable man who has seen the pictorial representation would have the perception that the persons appearing in the EA support the candidate.

14. Regarding the particular example cited in paragraph 11 above, if the photograph does not imply support of the candidate, prior written consent is not required. To minimize misunderstanding, a candidate could add a caption to the effect that the photograph shows the candidate's past community activities. The EAC will consider including this suggestion in the Guidelines for the 2004 Legislative Council (LegCo) election.

Use of Title of Office-bearer

15. Questions have been raised on whether it is necessary to seek the consent of the organization concerned if a supporter included in an EA bears the title of "the principal of a school" (for example, "陳大文校長") or "chairman of an owners' corporation" (for example, "陳大文立案法團主席").

16. According to paragraph 17.3 of the Guidelines on DC Election, if an office-bearer of an organization wishes to use his office title to support a candidate, he should be careful not to give the impression that it represents the support of the whole organization except where a decision has been so taken in a general meeting of all the members of the organization. The paragraph also states that depending on circumstances, the approval of an organization or a committee may or may not be needed if an office-bearer uses his office title to support a candidate.

17. As regards the example cited in paragraph 15, the EAC takes the view that photographs of such persons could be used in an EA after seeking written consent from the persons concerned. It would not be necessary for the candidate to seek the consent of the owners' corporation or the school concerned since there is no specific mentioning of which school or owners' corporation. However, it would be desirable for the candidate to seek the organization's prior written approval as well if the EA is posted in the building or the school in which he is serving.

Titles of Incumbent DC members

18. There have been questions on whether candidates who are incumbent DC members could use the title of "DC Member" in their EAs.

19. Under section 28 of the District Councils Ordinance, Cap.547, to facilitate the holding of a DC election, a date will be determined with effect from which the operation of DCs is suspended until the commencement of the term of office of the members elected at that election. The same section also provides that the term of office of incumbent DC members will not be affected during the suspension period. On this basis, DC members are free to use the title of “DC Member” in their EAs. In future elections, HAD and EAC will convey this message clearly to all incumbent DC members.

Joint Election Advertisements

20. Paragraph 7.26 of the Guidelines on DC Election states that an EA advertising two or more candidates of different constituencies is allowed to be displayed on the designated spots in the respective constituencies allocated to the candidates concerned. The paragraph also states that the expenses incurred for the joint EAs will have to be borne by the candidates concerned in equal shares as their respective election expenses.

21. It has been suggested that for the LegCo elections, the amount of expenses incurred by the candidates of a joint EA should be calculated in proportion to their respective election expenses limits.

22. Through joint advertisement, the candidates have an equal opportunity to promote themselves at the election, and so each of the candidates would derive the same amount of benefit from the joint EA. Therefore, the EAC consider it appropriate for the candidates to share the expenses equally for the production and display of the EA. The proposal of calculating the expenses in proportion to the election expenses limits of their respective constituencies may not be fair as one candidate will in effect be subsidizing the other while they receive the same amount of benefit.

Support by Another Candidate

23. Members have asked whether expenditure incurred by an EA will need to be borne by candidate A if candidate A appears in the EA of candidate B to indicate support for candidate B.

24. If the appearance of candidate A in candidate B’s EA is solely to indicate support for candidate B but not to promote the election of candidate A, the EA should not be treated as a joint EA. The election expenses incurred should be counted as candidate B’s election expenses only, but not as candidate A’s. Candidate B has to obtain the prior written consent of support

from candidate A before using candidate A's names or photographs in his EAs. The EAC will make this clear in the Guidelines for LegCo election in 2004.

Depositing Copies of Election Advertisements

Difference between ECICO and EAC Regulation

25. There have been queries as to why the deadline for submission of copies of EAs to the Returning Officers ("RO") specified in the ECICO is different from that in the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation ("EAC (EP)(DC) Regulation").

26. Under section 34(4) of the ECICO, two copies of each printed EA must be furnished to the RO *not later than seven days after the EA is published*. In line with the requirement of the ECICO, during the DC election in 1999, candidates were required under the EAC (EP)(DC) Regulation to deposit two copies of the EAs and the necessary authorizations to the RO within seven days after the EA was displayed. However, it was found that some candidates displayed EAs in private premises or non-designated spots without the necessary authorizations, on the pretext that they would deposit the authorizations within seven days prescribed in regulation. However, the authorizations were never submitted and the EAs removed before the seventh day deadline. The EAs were then displayed in other private premises or non-designated spots, again without the necessary authorizations. Such practices, which were plainly abusing the legislative provisions, made it very difficult for ROs to control unauthorized EAs effectively.

27. To address the problem, amendments were introduced to the Guidelines and the EAC regulation for the 2000 LegCo election to the effect that copies of EAs and authorizations must be deposited *before display*. The revised arrangement proved to work well during the 2000 LegCo election. It enabled the ROs to exercise more effectively their statutory duties to control the display of EAs, and to deal with complaints on the display of EAs. Similar amendments were therefore made to the EAC (EP)(DC) Regulation for the 2003 DC election.

28. On the other hand, the deadline for submission of copies of printed EAs to the ROs specified in the ECICO remains unchanged as the purpose of the relevant provision in the ECICO is different from that of the EAC (EP)(DC) Regulation. The main aim is to facilitate the RO to consider whether the EAs comply with the requirements laid down in section 34 of the ECICO concerning particulars of the printer to be included in the EAs. It is considered reasonable

to require copies of EAs to be submitted within seven days after the EAs are published for this purpose. In practice, when a candidate submit two copies of an EA to the RO to meet the requirement under the EAC(EP)(DC) Regulation, he will also have fulfilled the requirement under the ECICO.

Number of Copies to be deposited and timing for submission

29. The EAC (EP)(DC) Regulation requires each candidate to furnish two copies of each EA to the RO before he displays an EA. Members have questioned about this requirement, and they are particularly concerned about the resource implications. As explained in paragraph 28 above, the requirement enables the ROs to control effectively the display of EAs and to deal with complaints. Further, the regulation requires the RO for each constituency to display the copies of EAs for public inspection. Such a statutory requirement is necessary for transparency purpose. In practice, in circumstances where candidates contesting different constituencies in the same district use identical copies of an EA, the RO of that district will exercise his discretion to accept a joint submission of two copies of the EA.

30. It was also suggested that candidates might update their EAs on election day, and concerns were expressed as to whether ROs would be available to receive copies of such new EAs on the day. Since the regulation requires that copies of EAs be furnished to the RO before display, ROs will receive copies of new EAs even on election day.

Free Postage for Election Advertisements

Sealing of Folders

31. Comments were received that different post offices have imposed different requirements on how EAs in folder form should be sealed. According to the advice of the Post Office, folders must be sealed properly to ensure that smaller letters will not be entrapped in the folders. The REO will remind the Post Office that different post offices should adopt the same requirement in future elections (i.e. for folders of A4 size with one fold, the three open sides should be sealed, and for folders of A4 size with two folds, only one open side needs to be sealed).

Submission of Election Mails to the Post Office

32. According to paragraph 7.70 of the Guidelines on DC Election, candidates are advised to make their postage-free EA postings seven working

days before the polling day at the concerned post office. Postings made after the above deadline may fail to reach the addressees before the polling day. Questions were asked as to whether Saturdays should be counted as working days.

33. Generally speaking, when working out deadlines set out in the Guidelines on DC Election, Saturdays should be counted as working days. Thus, for the 2003 DC election, the deadline for submission of election mails should be 14 November 2003. In the event, the Post Office extended the deadline by one day. This is an initiative made by the Post Office to enhance its service to candidates, having regard to its resources and workload situation during the election period.

Deadline for submission of Election Expenses Return

34. There have been questions on why different deadlines for submission of declaration of election expenses and donations apply to different candidates. Under section 37 of the ECICO, the return should be submitted not later than 30 days after the gazettal of the election result. As the election result was expected to be and was in fact gazetted on 29 November 2003, the return should be submitted not later than 29 December 2003, as specified in the Guidelines.

35. However, the deadline for candidates in uncontested constituencies is different. Under section 23 of the EAC (EP)(DC) Regulation, if only one candidate has been validly nominated for a particular constituency, the RO must publish a notice in the Gazette to declare the candidate as being duly elected within 14 days of the expiry of the nomination period. As the deadline for the gazettal of results in uncontested constituencies is earlier than that for contested constituencies, the deadline for submission of election expenses returns for candidates in uncontested constituencies will be earlier than that for contested constituencies.

“Consent of Support” and “Permission for Display of EAs at Private Premises”

36. There have been comments that the form for “Consent of Support” and the form for “Permission for Display/Distribution of EA or Electioneering Activities at Private Premises” do not provide enough space for candidates to fill in the required information. The two forms are provided to the candidates by the REO to facilitate their election campaigning activities. Candidates may redesign the forms to suit their need, although any self-designed forms must

contain the same contents as those in the forms provided by the REO. In future elections, the REO will remind the ROs that self-designed forms are acceptable.

Providing Electors and Others with Entertainment

37. According to section 12 of the ECICO, it is an offence if a person provides or pays for the provision of any entertainment for another person as an inducement to or a reward for that person not to vote at an election, or to vote for a particular candidate or not to vote for a particular candidate in an election.

38. Members have expressed the view that the Guidelines on DC Election are not clear on what constitutes “entertainment”, and that candidates should be given greater flexibility in conducting election activities.

39. What constitutes entertainment is not defined in the ECICO. The question will need to be considered on the facts of each case in the light of its own circumstances and eventually it is a matter for the court to determine. According to our understanding, there is no precedent case under section 12 of the ECICO which relates to “entertainment”.

Periods of Absence from Hong Kong

40. Members have expressed concern that the requirement for persons wishing to stand for an election to list out in the nomination form his period of absence from Hong Kong is cumbersome, particularly for persons who are frequent day-trip travelers.

41. Under section 20 of the DC Ordinance, a person eligible to be nominated as a candidate must, among other things, have ordinarily resided in Hong Kong for the three years immediately preceding the nomination. To facilitate ROs to consider the validity of nominations, a person wishing to stand for election is required to provide in the nomination form, details about period of absence from Hong Kong in the past three years. In the light of Members’ concern, the EAC will consider replacing the present requirement with a requirement for candidates to make a declaration of having ordinarily resided in Hong Kong for the three years immediately preceding the nomination. If necessary, ROs may require candidates to provide detailed information to substantiate the declaration.

Loss of Eligibility to Vote

42. Members have commented that some registered electors have been struck off from the register in the 2003 DC election for unknown reasons.

43. Under section 24(2) of the LegCo Ordinance, Cap. 542, a person is not entitled to be included as an elector if the Electoral Registration Officer (ERO) is satisfied on reasonable grounds that the person no longer resides at the residential address recorded against the person's name in that existing register. The cases referred to by Members could involve registered electors who have changed their residential addresses but have not informed ERO of their new addresses. However, the reason for each "struck off" case will have to be looked into individually. The REO would be prepared to look into each case further if more information is provided to them.

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