OAH 22-0325-38637

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Anthony Harris,

Complainant,

ORDER ON PROBABLE CAUSE

vs.

Joshua Nack,

Respondent.

This matter came before Administrative Law Judge Christa L. Moseng for a probable cause hearing held by telephone on September 26, 2022. The hearing addressed a campaign complaint (Complaint) filed under the Fair Campaign Practices Act. The hearing record closed at the conclusion of the proceeding.

Kendra Olson, Pemberton Law, appeared on behalf of Anthony Harris (Complainant). Jennifer Jacobs, Lockridge Grindal Nauen, P.L.L.P., appeared on behalf of Joshua Nack (Respondent).

Based upon the record and proceedings in this matter, and for the reasons explained in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

1. There is probable cause to believe Respondent violated Minn. Stat. § 211B.13 (2022) as alleged in the Complaint.

2. This matter will be referred to the Chief Administrative Law Judge for assignment to a panel of three administrative law judges, pursuant to Minn. Stat. § 211B.35 (2022).

Dated: September 29, 2022

CHRISTA L. MOSENG
Administrative Law Judge

MEMORANDUM

I. Factual and Procedural Background

Respondent is a candidate for Wilkin County Sheriff in the general election to be held on November 8, 2022.[1] Complainant filed the Complaint against Respondent on September 8, 2022. The Complaint alleges that Respondent violated Minn. Stat. § 211B.13, subd. 1, by soliciting entries, and conducting a drawing, for three gift cards during the Wilkin County Fair.

By Order dated September 13, 2022, the Administrative Law Judge found that the Complaint established a prima facie violation of Minn. Stat. § 211B.13 and set this matter on for a probable cause hearing to be conducted by telephone.[2]

During the probable cause hearing, Complainant asserted that he observed Respondent operate a booth at the Wilkin County Fair.[3] Complainant stated that Respondent's booth contained a box soliciting entries for a drawing for three gift cards; two valued at $25, and one with a value of $50.[4] Complainant stated that he heard Respondent solicit people to enter the drawing.[5]

Respondent admitted that he maintained the booth and the box to accept entries for a gift card drawing, that he conducted the drawing, and that he awarded three gift cards to people who entered the drawing.[6] He mailed one gift card each to three individuals, all of whom are residents of Wilkin County.[7] Respondent maintained that the drawing was intended to attract fairgoers to Respondent's booth to speak with him, and he denied that he intended to use the drawing to induce anyone to vote for him..

II. Legal Standard

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.[8] The Administrative Law Judge must decide whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to address the claims in the complaint at a hearing on the merits.[9] If the Administrative Law Judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude

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[1] Complaint (Sept. 8, 2022).
[2] Notice of Determination of Prima Facie Violation and Notice and Order for Probable Cause Hearing (September 13, 2022). The probable cause hearing was continued to September 26, 2022. *See* Order for Continuance (September 20, 2022).
[3] Testimony (Test.) of Anthony Harris.
[4] *Id*.; *See* Respondents' Exhibits (Ex.) 3A-3D.
[5] *Id*.
[6] Test. of Joshua Nack.
[7] *Id*.
[8] *See Weinberger v. Maplewood Review*, 668 N.W.2d 667, 664 (Minn. 2003) ("[I]n civil cases probable cause constitutes a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it") (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990)) (internal punctuation omitted); *see also State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976) (explaining operation of probable cause standard in criminal context).
[9] *See In re Hortman v. Republican Party of Minn.*, No. 15-0320-17530, PROBABLE CAUSE ORDER at 3 (Minn. Office Admin. Hearings, Oct. 2, 2006).

the granting of a motion for a directed verdict in a like civil case, the campaign violation complaint should be allowed to proceed.[10]

A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.[11] As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that a respondent has committed a violation.[12] The burden of proof is on the Complainant to show that there is probable cause to believe that the violation of law alleged in the complaint has occurred.[13]

III. Prohibition on Bribery and Solicitation (Minn. Stat. § 211B.13)

Minn. Stat. § 211B.13, subd. 1, provides:

> A person who willfully, directly or indirectly, advances, pays, gives, promises, or lends any money, food, liquor, clothing, entertainment, or other thing of monetary value, or who offers, promises, or endeavors to obtain any money, position, appointment, employment, or other valuable consideration, to or for a person, in order to induce a voter to refrain from voting, or to vote in a particular way, at an election, is guilty of a felony.

Minn. Stat. § 211B.13 is an anti-bribery statute. It prohibits giving something of monetary value or promising something of "valuable consideration" to a person in order to induce a voter to vote in a particular way at an election.[14] Despite the civil nature of these proceedings, Minn. Stat. § 211B.13 is also a criminal statute, violation of which is a felony. As a result, application of the rule of strict construction of penal statutes is required.[15]

IV. Analysis

To show probable cause of a violation of Minn. Stat. § 211B.13, the following elements must be established:

(1) a person who willfully, directly or indirectly,

   a. advances, pays, gives, promises, or lends any money, food, liquor, clothing, entertainment, or other thing of monetary value, or

   b. who offers, promises, or endeavors to obtain any money, position, appointment, employment, or other valuable consideration,

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[10] In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The court must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. *See, e.g.,* Minn. R. Civ. P. 50.01; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975).

[11] *State v. Florence*, 239 N.W.2d 892, 903 (Minn. 1976). *See also State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. Ct. App. 1996), *review denied* (Minn. Apr. 16, 1996).

[12] *Florence*, 239 N.W.2d at 903.

[13] *See* Minn. Stat. § 211B.32, subd. 4 (2022) (establishing burden of proof of any violation of chapter 211B).

[14] *See In the Matter of the Contest of General Election*, 264 N.W.2d 401, 403 (Minn. 1978) (describing the standard for two different campaign-related statutes).

[15] *Id*.

(2) to or for a person,

(3) in order to induce a voter to refrain from voting, or to vote in a particular way, at an election.

Determining whether the facts alleged meet this standard requires interpretation of Minn. Stat. § 211B.13. The goal of all statutory interpretation is "ascertain and effectuate the intention of the legislature." The legislature intended Minn. Stat. § 211B.13 "to prohibit the buying of votes" in order to uphold the integrity of the electoral process. The legislature underscored the serious nature of this conduct by making a violation of this standard a felony. "Great care" must be taken to avoid interpreting criminal statutes as imposing strict liability, rather than one requiring a criminal intent (or *mens rea*), where doing so would criminalize a broad range of what would otherwise be innocent conduct.

Courts construe a statute as a whole and interpret a statute's language to give effect to all of its provisions.[16] Both the act of giving and the underlying purpose of the gift require a showing of specific intent.[17] This interpretation is also in accord with the legislature's guidance for interpreting criminal statutes, which directly addresses the use of the phrases "with intent to" or "with intent that."[18] Those phrases mean that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.[19] Although the statute here uses the phrase "in order to," it is reasonable to read that phrase analogously. Accordingly, Minn. Stat. § 211B.13 requires proof that the person providing the thing of value *had a purpose to cause* someone to refrain from voting or to vote in a particular way, or *believed that the act would cause* one of those outcomes.

Respondent's act of soliciting entries for a drawing for prizes with monetary value in the course of campaigning does not, in and of itself, violate Minn. Stat. § 211B.13. Respondent did not promise any individual entrant in the drawing that they would receive anything of value. The mere possibility of winning the drawing had no substantial value to any individual entrant. However, awarding three gift cards as prizes from such a drawing constitutes willfully giving money or a thing of monetary value to a person. There is no dispute that Respondent awarded these gift cards.

Respondent argues did not intend to induce a voter to refrain from voting, or to vote in a particular way. He contends that Complainant cannot establish a necessary element of a violation of Minn. Stat. § 211B.13. The Administrative Law Judge considers Respondent's argument in light of the entire record. Respondent's purpose in holding the drawing was to bring fairgoers to his booth, so that he could talk to them.[20] Respondent attended the fair and sought to talk to fairgoers in connection with his campaign for office.[21] After the fair ended, Respondent mailed gift cards to three people who had entered the drawing,[22] all three of whom reside in Wilkin County.[23]

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[16] *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015).
[17] *See* Minn. Stat. § 645.17(2) (2022) (providing that "the legislature intends the entire statute to be effective and certain.").
[18] *See* Minn. Stat. § 609.02, subd. 9(4) (2022) (defining those terms as they are used in Minnesota Statutes Chapter 609).
[19] *Id.*
[20] Test. of J. Nack.
[21] *Id*.
[22] *Id*.
[23] *Id*.

The record does not establish whether any of the gift card recipients are eligible to vote.[24] Eligibility to vote was not a requirement for entering the drawing, and the record reflects that people who were ineligible to vote in Wilkin County entered the drawing.[25] Nevertheless, Respondent campaigned at the fair because he believed was likely to encounter, and have the opportunity to persuade, potential voters. Overall, the possible pool of entrants was likely to contain many Wilkin County voters.

It should be noted that what is required by Minn. Stat. § 211B.34 is a preliminary determination: whether it is reasonable to require an evidentiary hearing to determine whether Respondent violated the law. At this stage and on this record, a reasonable factfinder could determine that Respondent held the gift card drawing with the motive to influence the gift card recipients to vote for him. A reasonable factfinder could, therefore determine, that it is more likely than not that Respondent willfully gave a thing of value to a person with the purpose of causing a voter to vote for him. As a result, there is sufficient evidence to require an evidentiary hearing.

The Judge reminds the parties that a probable cause review does not involve a determination of the relative credibility of conflicting testimony. At the hearing, Complainant will have the burden to establish the necessary elements of a violation of Minn. Stat. § 211B.13, by a preponderance of the evidence. Doing so will require competent evidence sufficient to overcome Respondent's denial that he acted with the necessary intent.

V. Conclusion

There is probable cause to believe that Respondent violated Minn. Stat. § 211B.13 by willfully giving a thing of value in order to induce a voter to refrain from voting, or to vote in a particular way, at an election. It is fair and reasonable to require Respondent to address the claim at a hearing on the merits. The alleged violation will proceed to a panel of three administrative law judges for a final determination.

The Chief Administrative Law Judge will assign this matter to a panel within two weeks.

C. L. M.

[24] *Id*.
[25] Test. of J. Nack.