

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Dan Haglin,

Complainant,

v.

**PROBABLE CAUSE
ORDER**

Robert Cunniff and Cunniff for State
House Committee,

Respondents.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge (ALJ) Jeanne M. Cochran on October 25, 2012. This matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by Dan Haglin on October 18, 2012. The probable cause hearing was conducted by telephone conference call. The probable cause record closed at the conclusion of the hearing on October 25, 2012.

R. Reid LeBeau II, Attorney at Law, appeared on behalf of Complainant, Dan Haglin. David Zoll, Attorney at Law, appeared on behalf of Respondents Robert Cunniff and the Cunniff for State House Committee.

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

ORDER

IT IS HEREBY ORDERED THAT:

1. There is probable cause to believe that Respondents Robert Cunniff and the Cunniff for State House Committee violated Minn. Stat. § 211B.04 of the Fair Campaign Practices Act in connection with Mr. Cunniff's 2012 campaign for the Minnesota House of Representatives District 8B seat.
2. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minnesota Statute § 211B.35.
3. Should the Parties decide that this matter may be submitted to the assigned Panel of Judges based on this Order and the record created at the Probable Cause

hearing, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **4:30 p.m.** on **November 1, 2012**. Notice by email to Jeanne.Cochran@state.mn.us will be accepted if followed by a paper filing. If the Parties agree to waive the evidentiary hearing, the parties will have until **4:30 p.m.** on **November 1, 2012** to submit a written filing setting forth legal arguments and addressing the issue of any penalty. If the Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: October 30, 2012

s/Jeanne M. Cochran
JEANNE M. COCHRAN
Administrative Law Judge

MEMORANDUM

Factual Background

Respondent Robert Cunniff is a candidate for the Minnesota House of Representatives for District 8B.¹ Dan Skogen is a candidate for the Minnesota Senate for District 8.²

At the request of Mr. Skogen, Respondent Robert Cunniff recorded a radio advertisement.³ In the advertisement, Mr. Cunniff states:

While I'm working hard to earn your vote, I want to ask that you also support Dan Skogen for Senate, over the last 8 months I've had a chance to get to know Dan, his compassion, his desire to serve, his common sense approach to solving problems. Dan Skogen is one of us and I believe in him and his ability to move the State of Minnesota forward, November 6th make sure you vote for a better tomorrow – vote for Bob Cunniff for House and Dan Skogen for Senate.⁴

At the end of the advertisement, there is a disclaimer which states that the advertisement was paid for by Mr. Skogen's campaign committee.⁵ The contracts with the radio station also indicate that the advertisement was paid for by the Skogen campaign committee.⁶

¹ Minnesota House District 8B includes northeast Douglas and eastern Otter Tail counties.

² Testimony of Robert Cunniff

³ *Id.*

⁴ Complaint, Ex. A

⁵ *Id.*

⁶ See Exhibits B, C, D.

The advertisement ran on two radio stations in Alexandria, 94.3 FM and 100.7 FM. The advertisement was played 39 times, starting in early October.⁷

At the probable cause hearing, Mr. Cunniff represented that he first learned that the advertisement might violate state law on October 18, 2012, when he received an email from Mr. LeBeau regarding the advertisement.⁸ Mr. Cunniff stated that after he read the email, he immediately called Mr. Skogen and asked him to have the advertisement pulled from the air. According to Mr. Cunniff, Mr. Skogen contacted the radio station and the radio station pulled the advertisement that day.⁹

Mr. Cunniff further stated that he also directed his campaign committee treasurer to write a check to the Skogen campaign to pay for half of the cost of the advertisements. The check was written after October 18, 2012, and prior to October 22, 2012.¹⁰

Legal Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.¹¹ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.¹² A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. 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 the Respondent has committed a violation.

Analysis

Minnesota Statutes § 211B.04 requires campaign material to prominently include the name and address of the person or committee causing the material to be prepared or disseminated.¹³ The disclaimer is required to provide the name and address of the candidate's committee that prepared and paid for the signs and must read substantially

⁷ Testimony of Robert Cunniff; see also, Complaint at 2.

⁸ Testimony of Robert Cunniff.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

¹² *Id.* at 903. 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 judge 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; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

¹³ Campaign material is defined to mean "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media." Minn. Stat. § 211B.01, subd. 2.

as follows: “Prepared and paid for by the _____ committee _____ (address).”¹⁴ With respect to broadcast media, the disclaimer is required to state “Paid for by the _____ committee.”¹⁵ Any person who prepares or disseminates campaign material that does not prominently include a disclaimer substantially in the form provided in § 211B.04 is in violation of the statute.

The advertisement, recorded by Mr. Cunniff, asks voters to vote for both Robert Cunniff for House and Dan Skogen for Senate. This advertisement is campaign material subject to the disclaimer requirements of Minn. Stat. § 211B.04. The record shows, however, that the disclaimer for the advertisement states only that it was paid for by candidate Skogen’s committee. The disclaimer makes no mention of Mr. Cunniff or his campaign committee. Because the advertisement was prepared by Mr. Cunniff and advocates for both candidates, the Complainant argues that there is a reasonable basis to believe that Respondents violated the disclaimer requirements of Section 211B.04.

Respondents, Mr. Cunniff and his campaign committee, argue that probable cause should not be found. They make two arguments. First, they argue that probable cause should not be found because Mr. Cunniff did not intend to violate the law. The language of Section 211B.04, however, does not require a showing of intent to find a violation.¹⁶

Second, they argue that Mr. Cunniff took immediate action to have the advertisement discontinued once he learned that the advertisement might violate Section 211B.04 and that the advertisement had little or no impact on voters. Section 211B.04, however, does not contain an exception for persons who promptly remedy a violation. Nor does it contain an exception for violations that have a minimal impact on voters. The actions taken by Mr. Cunniff after learning of a potential violation and the likely impact on voters do not go to whether a violation occurred. Rather, these are factors to be considered in any penalty phase.

The Administrative Law Judge concludes that based on the record presented, the Complainant has demonstrated probable cause to believe that the Respondent violated Minn. Stat. § 211B.04. It is therefore reasonable to require the Respondent to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. § 211B.04, and in the event a violation is found what penalty may be appropriate.

J. M. C.

¹⁴ Minn. Stat. § 211B.04 (2012).

¹⁵ *Id.*

¹⁶ *Id.*