

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGSHouse Republican Campaign
Committee,

Complainant,

PROBABLE CAUSE
ORDER

vs.

Minnesota DFL State Committee,

Respondent.

The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Bruce Johnson on November 6, 2008, to consider a complaint filed by the House Republican Campaign Committee (HRCC) on October 31, 2008. The probable cause hearing was conducted by telephone conference call. The record was held open until November 26, 2008, to allow the parties to file memoranda and reply briefs. The record closed on November 26, 2008.

David Asp, Attorney at Law, Lockridge Grindal Nauen P.L.L.P., 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401, appeared on behalf of the HRCC. Alan Weinblatt, Attorney at Law, Weinblatt & Gaylord, PLC, 111 East Kellogg Boulevard, Suite 300, St. Paul, MN 55101, appeared on behalf of the Minnesota DFL State Committee.

Based on the record and all the proceedings in this matter, and for the reasons stated in the attached Memorandum, the Administrative Law Judge finds that there is probable cause to believe that the Minnesota DFL State Committee violated Minnesota Statute § 211B.06 (false campaign material).

ORDER**IT IS HEREBY ORDERED:**

1. That there is probable cause to believe that Respondent Minnesota DFL State Committee violated Minnesota Statute § 211B.06 with respect to a campaign flyer it created and disseminated relating to candidate Tim Kelly.

2. That 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.

Dated: December 2, 2008

/s/ Bruce H. JohnsonBRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

Tim Kelly was the Republican-endorsed candidate for the Minnesota House of Representatives seat in District 28A¹ in the November 2008 election. The DFL-endorsed incumbent candidate was Sandy Wollschlager. Mr. Kelly won the election by approximately 52 percent of the vote.²

The Complaint concerns a campaign flyer critical of Mr. Kelly that the Minnesota State DFL party prepared and disseminated on or about October 24, 2008. The flyer stated: "Tim Kelly won't stand up to the special interests. Kelly is under investigation for accepting an illegal campaign contribution from a corporation." The statements are written over a background depicting a quantity of U.S. bills in various denominations. The campaign flyer cites "State of Minnesota OAH Docket No. 3-0320-19986" in support of the statements.

The citation on the flyer refers to a campaign complaint filed by a Roger Sween against Mr. Kelly on October 17, 2008. Mr. Sween alleged in that complaint that Mr. Kelly had accepted two illegal corporate contributions in the form of unpaid advertisements that ran in local magazines. One of the alleged unpaid advertisements was a news article about Tim Kelly's family that Mr. Sween asserted was not news but actually a five-page advertisement published free of charge. The complaint was assigned to Administrative Law Judge Kathleen Sheehy. On October 20, 2008, Judge Sheehy issued an Order finding that the Complaint alleged a prima facie violation of Minn. Stat. § 211B.13, which prohibits candidates from knowingly accepting prohibited corporate contributions. On October 24, 2008, Judge Sheehy conducted a probable cause hearing on the complaint, and by Order dated October 28, 2008, Judge Sheehy dismissed the complaint in its entirety. Judge Sheehy concluded that the Complainant's evidence was insufficient to make even a threshold showing of wrongdoing and that the five-page news article was not a prohibited contribution as a matter of law.

Given this factual background, the Complainant maintains that the statement on the flyer at issue in this matter, that Kelly is "under investigation," is false because Mr. Kelly was never "under investigation." The Complainant argues that under no reasonable construction can the filing of a campaign complaint with the Office of Administrative Hearings and a prima facie determination constitute an "investigation" or inquiry into the facts. Moreover, the Complainant asserts that because the Minnesota DFL disseminated the flyer prior to the probable cause hearing, it knew the statement was false or communicated it with reckless disregard as to whether it was false.

The Respondent points out that Black's Law Dictionary defines "investigation" as "[t]he process of inquiring into or tracking down through inquiry",³ and Merriam-Webster dictionary defines "investigation" to mean "to

¹ House District 28A is located in Goodhue County and includes the cities of Red Wing, Wabasha and Lake City, plus surrounding townships.

² According to the Minnesota Secretary of State's website, Mr. Kelly received 51.89% of the vote and Ms. Wollschlager received 48.05% of the vote.

³ Black's Law Dictionary, Sixth Ed., at p. 825.

make systematic examination; *especially*: to conduct an official inquiry.”⁴ According to the Respondent, the fact that a complaint had been filed against Mr. Kelly and a prima facie determination made, meant that an inquiry was underway concerning Mr. Kelly’s alleged acceptance of an illegal corporate contribution. The Respondent asserts that, given the ordinary plain meaning of the word “investigation,” the Complainant has failed to show that the statement is false and has therefore failed to establish probable cause to believe a violation of Section 211B.06 has occurred.

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

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.⁵ The focus for the Presiding Judge is to answer the question whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.⁶ 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, were one to be made, a motion to dismiss for lack of probable cause should be denied.⁷ A judge’s function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.

The Complaint in this matter turns on the meaning of the phrase “under investigation.” More specifically, it raises the issue whether the act of filing a complaint and alleging a violation of fair campaign practices laws may be

⁴ Merriam-Webster Online Dictionary, 2008.

⁵ Minn. Stat. § 211B.34, subd. 2; see also Black’s Law Dictionary 1219 (7th ed. 1999) (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime.”)

⁶ Compare *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

⁷ *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 test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

interpreted as the commencement of an “investigation” into a candidate’s conduct.

After considering the arguments of the parties, the Administrative Law Judge finds that the Complainant has submitted sufficient evidence to support finding probable cause that the Respondent violated Minn. Stat. § 211B.06 with respect to this statement. The statement, “Kelly is under investigation for accepting an illegal campaign contribution from a corporation,” raises a question of fact as to whether an investigation or inquiry into the facts on which the complaint is based had begun at the time the flyer was prepared or disseminated such that it may be said that Kelly was “under investigation.” The Administrative Law Judge notes that there is no investigation or inquiry into the facts of a complaint at the *prima facie* stage of the campaign complaint process. Instead, when determining whether a campaign complaint sets forth a *prima facie* violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

Given this standard and the question of timing of the dissemination of the flyer, the statement that Kelly was “under investigation” might be considered factually false. It should be up to a panel of Administrative Law Judges to determine whether the statement is false and whether it was made with knowledge or reckless disregard of its falsity. Accordingly, this matter will be referred to the Chief Administrative Law Judge for assignment to a panel of three administrative law judges for an evidentiary hearing.

B.H.J.