

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Brandon Rettke

Complainant,

v.

Xpress Mailing a/k/a People for a Voice,

Respondent.

**NOTICE OF DETERMINATION
OF PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING**

Brandon Rettke filed a Complaint in this matter on November 2, 2012. The Chief Administrative Law Judge assigned the matter to the undersigned Administrative Law Judge on November 2, 2012, and a copy of the complaint was sent by facsimile transmission and United States mail to the Respondent on November 2, 2012.

After reviewing the Complaint, the Administrative Law Judge finds that the Complaint sets forth claims that, if proven, would constitute a violation of the Fair Campaign Practices Act, specifically Minn. Stat. §§ 211A.02 and 211B.04. Mr. Rettke is entitled to a hearing on his claims.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **10:00 a.m.** on **Friday, November 9, 2012.** The hearing will be held by “meet me” telephone conference call. At the appointed hour, the parties are directed to:

- (a) Telephone 1-888-742-5095
- (b) Enter the Conference Code: 566-872-4759#

The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. By **2:00 p.m.** on **Thursday, November 8, 2012,** the parties shall provide to the Administrative Law Judge all evidence bearing on the case, with

copies to the opposing party. Documents may be faxed to Judge Eric L. Lipman at (651) 361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minn. Stat. § 211B.35.

If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minn. Stat. § 211B.34, subd. 3.

Any party who needs an accommodation for a disability to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: November 6, 2012

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of Chapter 211A or 211B.¹ For purposes of a *prima facie* determination, the tribunal must accept the facts that are alleged in the Complaint as true, without independent substantiation, provided that those facts are not patently false or inherently incredible.² A Complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of Chapter 211A or 211B.³

¹ *Barry and Spano v. St. Anthony-New Brighton Independent School District 282*, 781 N.W.2d 898, 902 (Minn. App. 2010).

² *Id.*

³ *Id.*

The Complaint asserts that the Xpress Mailing made more than \$2,000 worth of disbursements in 2012 to produce and disseminate the “People for a Voice” brochure. This brochure urged the election of candidates other than Jason Etten to the Roseville City Council. The Complaint also asserts that notwithstanding these expenditures, Xpress Mailing did not timely file the report required by Minn. Stat. § 211A.02 or include the disclaimer required by Minn. Stat. § 211B.04 on the brochure.

If true, these claims state violations of the Fair Campaign Practices Act. Additionally, the assertion that mailing a brochure to a “wide audience” in the City of Roseville would require more than \$2,000 in printing and postage costs is not patently false or inherently incredible.

The Administrative Law Judge finds that the Complainant has alleged a *prima facie* violation of Minn. Stat. § 211B.06 and this allegation will proceed to a probable cause hearing as scheduled by this Order.

The Administrative Law Judge is mindful, however, that this case may be one that involves protected anonymous speech – with Xpress Mailing merely acting as a mail vendor for others who do not wish to disclose their identities. As the U.S. Supreme Court noted in *McIntyre v. Ohio Elections Commission*,

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression - at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.⁴

For purposes of the *prima facie* review, however, the Administrative Law Judge has accepted as true Mr. Rettke’s assertion that the speech in the campaign brochure was that of Xpress Mailing. Whether others may be entitled to circulate a critique of Mr. Etten anonymously, by way of an expensive mass mailing, raises important questions; but ones which are to be put forward and resolved on another day.

E. L. L.

⁴ *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334, 357 (1995) (citations omitted). See also, *Riley v. Jankowski*, 713 N.W.2d 379, 404-05 (Minn. App) review denied (Minn. 2006); *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 219 F.Supp.2d 1052, 1068-69 (D. Minn. 2003).