

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Nick Foucault,

Complainant,

**PROBABLE CAUSE ORDER**

v.

FairVote Minnesota,

Respondent.

This matter came on for a probable cause hearing before Administrative Law Judge James E. LaFave on November 9, 2015. The hearing was convened to consider a campaign complaint filed under the Minnesota Fair Campaign Practices Act by Nick Foucault on November 2, 2015. The probable cause hearing was conducted by telephone conference call. The probable cause record closed upon the conclusion of the hearing on November 9, 2015.

Brian Rice, Rice, Michels & Walther LLP, appeared on behalf of Nick Foucault (Complainant). James Dorsey, Fredrikson & Byron, P.A., appeared on behalf of FairVote Minnesota (FVM or Respondent).

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 Respondent violated Minn. Stat. § 211A.02, subd. 2(4), (6) (2014) with respect to its campaign financial reporting regarding the city of Duluth's ranked-choice ballot question in the November 3, 2015, general election.

2. There is no probable cause to believe that Respondent violated Minn. Stat. § 211A.02, subd. 2(3), (5) (2014), with respect to its campaign financial reporting related to the city of Duluth's ranked-choice ballot question in the November 3, 2015, general election. Those claims are dismissed.

3. This matter will proceed to a prehearing conference for purposes of scheduling an evidentiary hearing before a panel of three Administrative Law Judges or otherwise resolving the matter.

Dated: November 16, 2015

s/James E. LaFave

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JAMES E. LAFAVE  
Administrative Law Judge

## MEMORANDUM

The Complainant alleges that FairVote Minnesota violated Minn. Stat. § 211A.02, subd. 2(3), (4), (5), (6), by failing to accurately and completely report its campaign contributions, cash on hand, and disbursements relating to its efforts promoting the ranked-choice voting ballot question in the city of Duluth's November 3, 2015, general election. The Complaint also alleges that FairVote Minnesota is a charitable organization and reported to the Minnesota Attorney General's Office that it had a 2014 year-end balance of \$101,606. The Complaint notes that despite this balance, FairVote Minnesota reported that it had no cash-on-hand on various campaign financial reports.

FairVote Minnesota is comprised of two separate corporate entities, FairVote Minnesota (FVM) and FairVote Minnesota Foundation (Foundation).<sup>1</sup> FVM is a tax-exempt 501(c)(4) Minnesota nonprofit corporation that advocates for election reform and "progressive voting systems," such as ranked-choice voting.<sup>2</sup> FVM filed campaign financial reports with the city of Duluth regarding its contributions and disbursements related to its efforts to promote the ranked-choice voting ballot question in Duluth in the November 2015 general election. FVM did not set up a separate campaign committee. Instead, it filed its reports as a corporate entity.<sup>3</sup>

The Foundation is a 501(c)(3) Minnesota nonprofit corporation that carries out educational outreach programs and acts as FVM's fiscal agent.<sup>4</sup> Approximately once a month, the Foundation processes all of FVM's individual transactions and then bills FVM for the total amount of its expenditures.<sup>5</sup> FVM pays the Foundation a lump sum payment each month for all of its disbursements.<sup>6</sup>

It was the Foundation that, as a charitable 501(c)(3) organization, reported a year-end balance of \$101,606 to the Minnesota Attorney General's Office, not FVM.

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<sup>1</sup> See <http://fairvotemn.org/>.

<sup>2</sup> See *id.*

<sup>3</sup> Testimony (Test.) of Anthony Solgard.

<sup>4</sup> *Id.*; and <http://fairvotemn.org/>.

<sup>5</sup> Test. of A. Solgard.

<sup>6</sup> *Id.*

Jeanne Massey is the Executive Director of FVM and the President of the Foundation.<sup>7</sup> Anthony Solgard is an accountant who was paid by FVM to prepare the campaign financial reports.<sup>8</sup> FVM maintains that it filed accurate and complete campaign finance reports.

## 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. 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.<sup>9</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>10</sup>

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 (if one to be made), a motion to dismiss for lack of probable cause should be denied.<sup>11</sup> A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.

## Minn. Stat. Ch. 211A (2014) Reporting Requirements

Under Minn. Stat. § 211A.02, subd. 1, candidates or committees who receive contributions or make disbursements of over \$750 in a calendar year must file financial reports with the appropriate "filing officer."<sup>12</sup> In addition to an initial financial report, a candidate or committee must also file a report 30 days after a general or special election.<sup>13</sup>

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<sup>7</sup> Test. of Jeanne Massey; See, Office of the Minnesota Secretary of State Business Filings at <https://mblsportal.sos.state.mn.us/Business/BusinessSearch?BusinessName=FairVote&IncludePriorNames=False&Status=Active&Type=BeginsWith>.

<sup>8</sup> Test. of A. Solgard.

<sup>9</sup> *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

<sup>10</sup> *Id.*; see also Black's Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime").

<sup>11</sup> *State v. Florence*, 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. Ct. App. 1994).

<sup>12</sup> Minn. Stat. § 211A.01, subd. 7, defines "filing officer" to mean the officer authorized by law to accept affidavits of candidacy or nominating petitions for an office or the officer authorized by law to place a ballot question on the ballot. In this case, the Duluth City Clerk is the filing officer.

<sup>13</sup> Minn. Stat. § 211A.02, subd. 1(b)(3).

A “committee” is defined, in relevant part, to mean “a corporation or association or persons acting together to influence the nomination, election, or defeat of a candidate or to promote or defeat a ballot question.”

A “disbursement” is defined as “money, property, office, position, or any other thing of value that passes or is directly or indirectly conveyed, given, promised, paid, expended, pledged, contributed, or lent.”<sup>14</sup>

A “contribution” is defined to mean “anything of monetary value that is given or loaned to a candidate or committee for a political purpose.”<sup>15</sup> “Contribution” does not include a service provided without compensation by an individual.<sup>16</sup>

Minnesota Statutes, section 211A.02, subdivision 2, requires campaign financial reports to include the following:

- (1) the name of the candidate or ballot question;
- (2) the printed name, address, telephone number, signature, and e-mail address, if available, of the person responsible for filing the report;
- (3) the total cash on hand designated to be used for political purposes;
- (4) the total amount of contributions and disbursements for the period from the last previous report to five days before the current report is due;
- (5) the amount, date, and purpose for each disbursement; and
- (6) the name, address, and employer, or occupation if self-employed, of any individual or committee that during the year has made one or more contributions that in the aggregate exceed \$100, and the amount and date of each contribution. . . .

## Analysis

The Complaint asserts that FVM violated the campaign finance reporting requirements of Minn. Stat. Ch. 211A in the following three ways:

- (1) by failing to disclose on its reports its cash-on-hand in violation of Minn. Stat. § 211A.02, subd. 2(3);
- (2) by failing to disclose on its reports the total amount of contributions it received and the name, address and employer of individuals or committees contributing more than \$100 in violation of Minn. Stat. § 211A.02, subd. 2(4) and (6); and

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<sup>14</sup> Minn. Stat. § 211A.01, subd. 6.

<sup>15</sup> *Id.*, subd. 5.

<sup>16</sup> *Id.*

(3) by failing to disclose on its reports the amount, date and purpose of each disbursement in violation of Minn. Stat. § 211A.02, subd. 2(5).

As a corporation acting to promote a ballot question, FVM meets the definition of a “committee” and was required to report its contributions and disbursements in accordance with Minn. Stat. § 211A.02.

FVM has filed six campaign financial reports with the Duluth City Clerk’s Office since April 16, 2015.

The first Campaign Financial Report was filed April 16, 2015, and governs the reporting period from January 1, 2015 through March 31, 2015. On this report, FVM indicated it had received no contributions and had no cash-on-hand. FVM also reported that it had made disbursements in the amount of \$4,450.69. FVM attached a separate sheet identifying the amount, date, and purpose of each disbursement. In addition, FVM noted on the front of the report that “all disbursements [were] made from corporate funds” and that “no contributions were received for this purpose.”<sup>17</sup>

On October 12, 2015, FVM filed a Campaign Financial Report for the reporting period of April 1, 2015 through August 31, 2015, that revised three prior reports for the same reporting period that FVM had filed in September of 2015. This report again noted that FVM had received no contributions during this period and had no cash-on-hand. The report also indicated that its total amount of disbursements was \$73,458.72. FVM attached separate sheets of paper identifying the amount, date and purpose of each disbursement. In addition, on the first page of the report, FVM stated the following: “All disbursements made from corporate funds. No contributions were received for this purpose.”<sup>18</sup>

On October 26, 2015, FVM filed a Campaign Financial Report for the reporting period beginning September 1, 2015 and ending October 15, 2015. This report stated that FVM had received contributions in the total amount of \$850. On a separate sheet of paper, FVM identified the name, address, and employer/occupation of the two contributors. FVM listed no other contributions and indicated it had no cash-on-hand for this reporting period. FVM also reported that it had made disbursements in the total amount of \$39,697.75. FVM attached separate sheets of paper identifying the amount, date, and purpose of each disbursement.<sup>19</sup> This report did not include a statement on the first page that all but \$850 of the disbursements were made from its corporate funds.

As noted above, the Complainant maintains that FVM’s lists of disbursements under categories such as “consulting” or “salaries and wages” are not sufficiently specific to satisfy the reporting requirement of section 211A.02, subd. 2(5). The Complainant argues, for example, that FVM should have identified the names of individuals it paid for various services such as canvassing and advertising.

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<sup>17</sup> See <http://www.duluthmn.gov/media/398104/FairVoteMN10262015.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

FVM asserts that its campaign finance reports satisfy the reporting requirements of Minn. Stat. § 211A.02. FVM maintains that all of its disbursements were made from corporate funds, with the exception of the contributions it reported from two individuals. FVM also indicated that, initially, it intended to list contributions from its corporate funds in amounts equal to its disbursements, but that it was advised against that by the Duluth City Clerk. According to Ms. Massey and Mr. Solgard, the Duluth City Clerk stated that only contributions from “outside sources” were required to be reported and that FVM was not required to report the use of its own corporate funds as contributions. Ms. Massey and Mr. Solgard testified that the City Clerk instructed FVM to list “zero” for cash and cash-on-hand in the “Contributions Received” section of the reports, and to report only its disbursements.<sup>20</sup>

In a prior campaign financial reporting case, the OAH held that a school district was required to report as “contributions” general fund monies the district used in promoting a school bond referendum ballot question.<sup>21</sup> The panel explained that such an allocation should be disclosed as a contribution to provide citizens with a simple means of determining the source of the money made available to the district for promoting the ballot question.<sup>22</sup>

Likewise, in this case, FVM should have reported the total of the corporate contributions that funded its disbursements and the identity of the corporation(s) that provided the funds. The reports governing January 1, 2015 through August 31, 2015, state only that all disbursements were made from corporate funds. The filing does not render an accurate picture of events. Specifically, it is not clear from the statement whether the corporate funds are its own, the Foundation’s, or from other corporate entities.

Therefore, the Administrative Law Judge finds that the Complainant has established probable cause to believe FVM violated Minn. Stat. § 211A.02, subd. 2(4), (6), by failing to accurately report contributions it received and the source of the contributions for the period of January 1, 2015 through October 15, 2015. The Administrative Law Judge also notes that, as a 501(c)(3) entity, the Foundation is under strict limits as to the amounts of lobbying and electioneering it may do. Thus, greater clarity as to FMV’s and the Foundation’s activities fulfills an important compliance purpose.

With respect to the other claims, however, the Complainant has failed to establish probable cause to believe that FVM committed reporting violations. There is no evidence that FVM had cash-on-hand designated to be used for political purposes that it failed to report in violation of Minn. Stat. § 211A.02, subd. 2(3). Instead, the Complainant attributed the Foundation’s required year-end report to the Minnesota Attorney General’s Office to FMV and mistakenly believed FMV had cash-on-hand in the amount of \$101,606. However, it was the Foundation and not FMV that had a year-end balance of

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<sup>20</sup> Test. of A. Solgard; Test. of Jeanne Massey.

<sup>21</sup> See *Abrahamson v. St. Louis County Sch. Dist.*, Docket No. 60-0325-32071, FINDINGS OF FACT, CONCLUSIONS, AND ORDER at \*23 (May 18, 2015).

<sup>22</sup> *Id.*

\$101,606 in 2014. In addition, with respect to reporting its disbursements, FVM did identify on its reports the total amount of its disbursements, as well as the amount, date, and purpose of each disbursement as required by Minn. Stat. § 211A.02, subd. 2(5). Contrary to Complainant's claim, there is no requirement in section 211A.02, subdivision 2(5) that FVM identify the name of individuals it paid for campaign services. Therefore, these claims are dismissed.

## **Conclusion**

The Administrative Law Judge concludes that the Complainant has demonstrated probable cause to believe that FairVote Minnesota violated Minn. Stat. § 211A.02, subd. 2(4), (6) with respect to its campaign financial reporting regarding the ranked-choice voting ballot question in the city of Duluth's November 3, 2015, general election. The Complainant has failed to demonstrate probable cause to believe FairVote Minnesota violated Minn. Stat. § 211A.02, subd. 2(3), (5) and those claims are dismissed.

This matter will be set on for a prehearing conference. The topics of the conference will be: (a) appropriate resolution of the remaining contributions-related claims; (b) whether a directive to FVM to revise its earlier campaign finance report filings will resolve this matter; and (c) whether an evidentiary hearing is needed to resolve the claims in the complaint.

An Order scheduling the prehearing conference will issue shortly.

**J. E. L.**