OAH 68-0325-35511

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Alex Lewison,

Complainant,

vs.

David Hutchinson and Hutch for Sheriff,

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-entitled matter came on for an evidentiary hearing on September 20, 2018, before the following panel of Administrative Law Judges: Jeanne M. Cochran (Presiding Judge), James E. LaFave and Kimberly Middendorf (the Panel). The record closed at the conclusion of the hearing on September 20, 2018.

Erick Kaardal, Mohrman, Kaardal & Erickson, P.A., appeared on behalf of Alex Lewison (Complainant). Alan Weinblatt, Weinblatt & Gaylord, PLC, appeared on behalf of David Hutchinson and Hutch for Sheriff (Respondents).

STATEMENT OF THE ISSUES

1. Is Complainant's claim that Respondents violated Minn. Stat. § 211B.04 barred by the one year statute of limitations provided under Minn. Stat. § 211B.32, subd. 2 (2018)?

2. If the claim is not time barred, did Complainant demonstrate by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.04 by preparing or disseminating campaign material that lacked a disclaimer?

3. If Complainant demonstrated that Respondents violated Minn. Stat. § 211B.04, what penalty is appropriate?

SUMMARY OF CONCLUSIONS

Complainant's claim is timely and he did establish by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.04 by preparing and disseminating campaign material that lacked a disclaimer. The Panel concludes that a penalty of $200 is appropriate.

Based on the record and proceedings herein, the undersigned Panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. Respondent is a candidate for Hennepin County Sheriff in the November 6, 2018 general election. "Hutch for Sheriff" is the name of Respondent's campaign committee.

2. On March 7, 2017, Respondent Hutchinson paid a printing company (FastSigns) to print four campaign lawn signs.[1] Respondent Hutchinson considered the signs to be prototypes.[2] The signs stated: "Elect HUTCH for Hennepin County Sheriff."[3] The signs did not include a disclaimer.[4]

3. Respondent Hutchinson posted a picture of the sign on his HutchForSheriff Facebook page along with the comment: "New signs. I'm in the testing phase at this point these are prototype #1."[5]

4. On or about March 10, 2017, Respondent's father, Jerome Hutchinson, posted one of the four campaign signs on the front lawn of property owned by Troy Hutchinson.[6] The property is located at 3505 County Road 19 in Medina, Minnesota.[7] Troy Hutchinson is the brother of David Hutchinson.[8]

5. Jerome Hutchinson posted the campaign sign because his son (Respondent David Hutchinson) is running for Hennepin County Sheriff.[9]

6. Sometime later in 2017, David Lund, a friend and coworker of Respondent Hutchison, took one of the three remaining prototype signs and posted it on the front lawn of his home located at 5712 16th Avenue South, in Minneapolis. [10]

7. The other two signs of the four that Respondents ordered in March 2017 remained in Respondent Hutchinson's garage and were never disseminated.[11]

8. On December 18, 2017, Respondent Hutchinson filed his candidacy for the office of Hennepin County Sheriff.[12]

9. Between June 8, 2018 and September 14, 2018, Respondents ordered 1,050 campaign signs from a company called "Sign Rocket."[13] These signs state: "Hutch for Henn. Co. Sheriff" and include the following language at the bottom of each sign: "paid

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[1] Exhibit (Ex.) 101.
[2] Testimony (Test.) of David Hutchinson.
[3] Ex. 100.
[4] *Id*.
[5] Test. of D. Huthchinson; Ex. 4.
[6] Test. of Jerome Hutchinson; Ex. 10.
[7] Ex. 10.
[8] Test. of J. Hutchinson; Ex. 10.
[9] Test. of J. Hutchinson.
[10] Test. of D. Hutchinson; Ex. 8.
[11] Test. of D. Hutchinson.
[12] Ex. 3.
[13] Exs. 103-107.

for and prepared by the Hutch for Sheriff volunteer committee."[14] The disclaimer language does not include an address.[15]

10. In early August of 2018, Complainant saw Respondents' campaign sign posted at Mr. Lund's property in south Minneapolis.[16] The sign remained posted on Mr. Lund's lawn for several days prior to and including August 14, 2018, the day of the primary election.[17]

11. Complainant filed this complaint on August 22, 2018.[18] Complainant alleged that Respondents violated Minn. Stat. § 211B.04 by preparing and disseminating campaign signs that lacked a disclaimer. Complainant also alleged that Respondents violated several other provisions of the Fair Campaign Practices and Finance Act in relation to his campaign for the office of Hennepin County Sheriff.[19]

12. By Order dated August 27, 2018 (Prima Facie Order), the Presiding Administrative Law Judge found the Complaint set forth prima facie violations of Minn. Stat. §§ 211B.04 and 211A.12.[20] The Judge set those claims on for a probable cause hearing and dismissed the other claims.[21]

13. Prior to the probable cause hearing, Complainant submitted a photograph of the "Hutch for Sheriff" sign posted on Troy Hutchinson's property.[22]

14. The signs posted on Mr. Lund's and Troy Hutchinson's properties were two of the prototype signs Respondents had printed in March of 2017.[23]

15. Following the probable cause hearing, Judge Cochran dismissed the Minn. Stat. § 211A.12 claim and set the remaining claim alleging a violation of Minn. Stat. § 211B.04 on for hearing before a panel of three administrative law judges.[24]

16. The matter came on for an evidentiary hearing before the assigned Panel on September 20, 2018, and the record closed that day at the conclusion of the hearing.

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

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[14] Ex. 102.
[15] *Id*.
[16] Test. of Alex Lewison.
[17] *Id*.
[18] *See* Complaint.
[19] *Id*.
[20] *See* Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing (Prima Facie Order) (Aug. 27, 2018).
[21] *Id*.
[22] Ex. 2.
[23] Test. of D. Hutchinson.
[24] *See* Order on Probable Cause (Sept. 7, 2018).

CONCLUSIONS OF LAW

1. The Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35 (2018).

2. Complainant bears the burden of proving the allegations in the complaint. The standard of proof of a violation of Minn. Stat. § 211B.04 is a preponderance of the evidence.[25]

3. Minn. Stat. § 211B.01, subd. 2 (2018), defines "campaign material" 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."

4. Respondents' campaign signs were disseminated for the purpose of influencing voting and are campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

5. Minn. Stat. § 211B.04 makes it unlawful for a person to participate in the preparation or dissemination of most types of campaign material that does not prominently disclose the person or committee causing the material to be prepared or disseminated.[26]

6. Pursuant to Minn. Stat. § 211B.04, subd. 1(b), the required form of disclaimer is: "Prepared and paid for by the ..... committee, ... (address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the ..... committee, ... (address), in support of ..... (insert name of candidate or ballot question)" for material prepared and paid for by a person or committee other than a principal campaign committee.

7. Complainant has established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.04, subd. 1(b) by participating in the preparation and dissemination of campaign material that lacked a disclaimer substantially in the form required.

8. The complaint is timely under Minn. Stat. § 211B.32, subd. 2. The two campaign signs at issue remained posted and "disseminated" as of August 2018.

9. Based on the above violation, it is appropriate to impose a civil penalty against Respondent in the amount of $200.

10. The attached Memorandum explains the reasons for these Conclusions of Law and is incorporated by reference.

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[25] Minn. Stat. § 211B.32, subd. 4 (2018).
[26] *See* Minn. Stat. § 211B.04, subd. 1(a) and (b).

Based upon the record herein, and for the reasons stated in the following Memorandum, the Panel makes the following:

ORDER

Having been found to have violated Minn. Stat. § 211B.04, Respondent David Hutchinson shall pay a civil penalty of $200 by November 15, 2018.[27]

Dated: September 25, 2018

JEANNE M. COCHRAN
Presiding Administrative Law Judge

JAMES E. LAFAVE
Administrative Law Judge

KIMBERLY MIDDENDORF
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5 (2018), this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2018).

[27] The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, PO Box 64620, St. Paul MN 55164-0620. The docket number, 68-0325-35511, should be included on the check.

MEMORANDUM

The Fair Campaign Practices Act[28] defines campaign material 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."[29] Under Minn. Stat. § 211B.04, subd. 1(a) and (b), campaign material is required to include a disclaimer identifying the name and address of the person or committee that prepared or disseminated the material. The purpose of the disclaimer requirement is to "identify who or what committee prepared, disseminated and paid for the campaign material."[30]

I. Respondents Request for Dismissal of Complaint

A. First Amendment

Prior to the commencement of the evidentiary hearing, Respondents moved to dismiss this matter on the grounds that the disclaimer requirement is unconstitutional. Respondents assert that the Minnesota Court of Appeals in *Riley v. Jankowski,*[31] determined that Minn. Stat. § 211B.04 unconstitutionally restricts speech in violation of the First Amendment to the United States Constitution. Based on the holding in *Riley*, Respondents argue that Minn. Stat. § 211B.04 is unconstitutional and unenforceable, necessitating dismissal of this matter.

The Panel denied Respondents' motion to dismiss. Although the Minnesota Court of Appeals found the disclaimer requirements in section 211B.04 unconstitutional in *Riley v. Jankowski*,[32] the United States Supreme Court subsequently rejected both facial and as-applied challenges to similar federal disclaimer requirements in *Citizens United v. Federal Elections Commission*.[33] The Supreme Court held that such disclaimer provisions place no significant burden on First Amendment rights and help citizens make informed choices in the political marketplace.[34]

Following *Citizens United*, the Minnesota Legislature amended Minn. Stat. § 211B.04 effective June 1, 2010, to apply to all campaign material prepared and disseminated on or after that date.[35] The Legislature again amended the statute in 2015 and 2018 to add provisions governing independent expenditures.[36] Given this legislative

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[28] Minn. Stat. §§ 211B.01-.37 (2018).
[29] Minn. Stat. § 211B.01, subd. 2.
[30] *See Hansen v. Stone*, No. 4-6326-16911, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER at *4 (Minn. Office Admin. Hearings Oct. 28, 2005).
[31] 713 N.W. 2d 379, 401, (Minn. Ct. App. 2006), *review denied* (Minn. July 20, 2006).
[32] *Id*.
[33] 558 U.S. 310 (2010).
[34] *Id*. at 367-68 (2010) (rejecting an as-applied challenge). *See also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 196 (2003) (precluding facial challenges); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995) (holding an Ohio statute, as applied to the petitioner, conflicted with the First Amendment right to speak anonymously).
[35] *See* 2010 Minn. Laws ch. 397, § 15.
[36] *See* 2015 Minn. Laws ch. 73, § 22 and 2018 Minn. Laws ch. 119, § 33.

history, the Panel concludes the statute is constitutional and enforceable. Moreover, neither an administrative law judge nor an executive branch agency has authority to declare a statute unconstitutional on its face.[37] Such a power is within the exclusive province of the judicial branch.[38]

B. Timeliness of Complaint

Respondents also argue that the complaint is barred by Minn. Stat. § 211B.32, subd. 2, which provides:

> The complaint must be filed with the office within one year after the occurrence of the act or failure to act that is the subject of the complaint, except that if the act or failure to act involves fraud, concealment, or misrepresentation that could not be discovered during that one-year period, the complaint may be filed with the office within one year after the fraud, concealment, or misrepresentation was discovered.

Respondents assert that the campaign lawn signs were prepared and posted in March of 2017, more than a year before the complaint was filed. In support of their claim, Respondents cite to the March 2017 Facebook posting of the image of the "prototype" campaign signs[39] and the affidavits of David Lund and Troy Hutchinson.[40] Troy Hutchinson asserts in his affidavit that the lawn sign on his property was posted in March of 2017.[41] David Lund's affidavit indicates only that the sign in his lawn was posted "in 2017."[42]

Respondents maintain that any participation Respondents may have had in preparing or disseminating the signs occurred in March 2017, more than a year before the complaint was filed. They assert, therefore, that the complaint is untimely and must be dismissed. In support of their position, Respondents cite to *Abrahamson v. St. Louis County School District*.[43] In that case, the court held that a claim alleging false campaign material was time barred when it was based on statement contained in a school district flyer that was disseminated more than a year before the complaint was filed.[44]

The Panel finds Respondents' argument that the dissemination of the signs was a discrete act that was completed in March of 2017 to be unpersuasive. Unlike the flyer that was mailed to school district residents in *Abrahamson*, the campaign signs at issue here

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[37] G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998); *see, e.g., Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *Petterssen v. Comm'r of Emp't Serv*., 306 Minn. 542, 543, 236 N.W.2d 168, 169 (Minn. 1975); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In re Rochester Ambulance Service,* 500 N.W.2d 495 (Minn. Ct. App. 1993).
[38] *See Niska v. Clayton*, A13-0622, 2014 WL 902680 at *6 (Minn. Ct. App.) (unpublished), *review denied* (2014), *cert. denied*, 135 S. Ct. 1399 (2015) (citations omitted).
[39] Ex. 4.
[40] Exs. 8 and 10.
[41] Ex. 10 at ¶ 4.
[42] Ex. 8.
[43] 819 N.W.2d 129, 138-39 (Minn. 2012).
[44] *Id*.

remained posted and visible for months, up to and including August of 2018. The Panel finds that so long as the campaign signs remain posted, the message encouraging people to "Elect Hutch" continues to be disseminated. The dissemination of the campaign signs without disclaimers is, therefore, a continuing violation. Respondents' failure to remove or correct the signs, is the act that is the subject of the complaint. And that act or failure to act continued from March 2017 until at least August of 2018.

The Panel finds support for its position in *Northern State Power Co v. Franklin*.[45] In that case, the Minnesota Supreme Court applied the doctrine of "continuing violation" when construing the timeliness of a trespass action that involved the construction of a structure on certain property.[46] In that case, the court held that there is a continuing wrong so long as the offending structure remains, and that the statute of limitations does not run from the initial trespass.[47] The Panel finds that, in this matter, the disclaimer violation continues so long as the non-compliant campaign signs are posted. As a result, the complaint in this matter was timely filed and is not time-barred.

C. Exemption and Intent

Respondents also argues that the signs fall within the exemption to the disclaimer requirement provided under Minn. Stat. § 211B.04, subd. 3(a) for items that are "clearly being distributed by the candidate." This provision states that the disclaimer requirement "does not apply to fund-raising tickets, business cards, personal letters, or similar items that are clearly being distributed by the candidate." Respondents assert that the Elect Hutch signs were clearly being distributed by the candidate and thus did not require a disclaimer.

The Panel is not persuaded by Respondent's argument that the exemption provided for items "clearly distributed by the candidate" applies to campaign signs. Unlike personal letters or business cards, campaign signs may be prepared and distributed by any number of individuals or groups engaged in influencing voting. Moreover, there is nothing specific about these particular signs posted in different locations in Hennepin County that would render them "clearly distributed by the candidate."

Finally, Respondents argue that Respondent Hutchinson prepared the prototype signs to simply test the design and that he did not intend the signs to be disseminated to influence voting. Noting that a violation of Minn. Stat. § 211B.04 carries with it potential criminal penalties, Respondents argue that the lack of intent to disseminate the signs in order to influence voting is fatal and warrants dismissal of the claim.

The Panel rejects Respondents' assertion that Complainant is required to prove the subjective intent of the person or persons who disseminated the material in order to establish a violation of Minn. Stat. § 211B.04. Such an interpretation would require a higher standard of proof than that contained in § 211B.04. The standard of proof for a

[45] 122 N.W.2d 26 (Minn. 1963).
[46] *Id*.
[47] 122 N.W.2d at 30.

violation of Minn. Stat. § 211B.04 is a preponderance of the evidence.[48] Proof of an intentional or knowing violation of § 211B.04 is not required.[49] Rather, the Panel concludes that it is appropriate to infer intent using an objective standard based on the totality of the circumstances, including the text of the material and the manner in which it was displayed.[50]

II. Analysis

The two campaign signs that are the subject of this complaint state: "Elect Hutch for Hennepin County Sheriff." They were prepared by Respondents in March of 2017 and failed to include a disclaimer identifying who or what committee prepared and paid for them. Respondent David Hutchinson provided the signs to his father, Jerome Hutchinson, and his friend, David Lund. Jerome Hutchinson testified that he posted the sign on Troy Hutchinson's property because his son David was running for office.[51] The signs remained posted on the properties of Troy Hutchinson and David Lund until at least just prior to the August 14, 2018 primary election.[52] Sometime after the complaint in this matter was filed, Respondent David Hutchinson asked his father and David Lund to remove the signs.[53]

The record is sufficient to support finding the signs are campaign material, that they were prepared and disseminated by Respondents, and that they were required to have a disclaimer substantially in the form provided in Minn. Stat. § 211B.04, subd. 1.

III. Conclusion

The complaint was timely filed and Complainant has established that Respondents violated Minn. Stat. § 211B.04, subd. 1 by preparing and disseminating campaign signs that lacked the required disclaimer.

In order to ensure consistency in the application of administrative penalties across types of violations of the Fair Campaign Practices Act, the Office of Administrative Hearings uses a "penalty matrix" to guide decision-making. The matrix categorizes violations based upon the willfulness of the misconduct and the impact of the violation

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[48] See Minn. Stat. § 211B.32, subd. 4.
[49] *Compare* Minn. Stat. §§ 211B.05 and .06 (prohibiting intentional conduct).
[50] *See, State v. Marsyla*, 269 N.W.2d 2, 5 (Minn. 1978); *State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). *See also, Minnesota Democratic-Farmer-Labor Party v. Minnesota Senate Republican Caucus,* No. 11-0320-22622-CV FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Minn. Office Admin. Hearings Aug. 31, 2012); *Gadsden v. Kifffmeyer*, No. 3-0320-21690-CV, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Minn. Office Admin. Hearings Nov. 1, 2010).
[51] Test. of J. Hutchinson.
[52] During the hearing, Complainants argued for the first time that Respondents also violated Minn. Stat. § 211B.04, subd. 1 with respect to the 1,050 other campaign signs. These signs have a disclaimer that identifies who prepared and paid for the sign, but the disclaimer fails to include an address as required by Minn. Stat. § 211B.04, subd. 1(b). Because this allegation was not included in the initial complaint, the Panel will not address it in this Order other than to encourage Respondents to bring these signs into compliance with the requirements of section 211B.04.
[53] Test. of J. Hutchinson.

upon voters.[54] Because every case is unique, however, the panel may depart from the presumptive penalty listed in the matrix.[55]

The Panel is persuaded that Respondents' violation is properly characterized as inadvertent, with minimal impact on voters. There is no allegation that the signs contained false information or that the signs were disseminated for the purpose of misleading voters. The Panel concludes that a $200 penalty is appropriate in this case. The Panel also directs Respondents to bring all of their campaign signs into compliance with the requirements of Minn. Stat. § 211B.04 by affixing stickers that includes the name and address of the committee causing the material to be prepared and disseminated.[56]

J. M. C., J. E. L., K. M.

[54] *See* Penalty Matrix (https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp); *Fine v. Bernstein*, 726 N.W.2d 137, 149-50 (Minn. Ct. App.), *review denied* (Minn. 2007).
[55] *Id*.
[56] *See* Minn. Stat. § 211B.04, subd. 1(b).