OAH 65-0325-38667

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Sybil Dunlop,

Complainant,

v.

Brian Mortenson,

Respondent.

ORDER OF DISMISSAL

This matter came before Administrative Law Judge Ann C. O'Reilly for a probable cause hearing held by telephone on September 27, 2022. The hearing addressed a Fair Campaign Practices Act complaint (Complaint) filed by Sybil Dunlop (Complainant) under the Fair Campaign Practices Act. The hearing record closed at the conclusion of the hearing.

Complainant[1] and Respondent Brian Mortenson appeared on their own behalf and without legal counsel.

Based upon the record and proceedings in this matter, and for the reasons explained in the attached Memorandum, which is incorporated herein, the Administrative Law Judge makes the following:

ORDER

1. There is no probable cause to believe that Respondent violated Minn. Stat. § 211B.04 (2022), as alleged in the Complaint.

2. The Complaint is **DISMISSED**

Dated: September 30, 2022

ANN C. O'REILLY
Administrative Law Judge

[1] Complainant represents the John Fossum for Rice County Attorney Committee. Complaint (Sept. 20, 2022). John Fossum, the current Rice County Attorney, is running for re-election against Complainant. Testimony (Test.) of Sybil Dunlop (Test. of S. Dunlop). Mr. Fossum and Elizabeth Mortenson, Respondent's wife, were present at the hearing, though neither testified.

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minn. Stat. § 211B.34, subd. 3 (2022), provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two (2) business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minn. Stat. § 211B.35 (2022) within five (5) business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5 (2022), and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2022).

MEMORANDUM

I. Factual and Procedural Background

Respondent is a candidate seeking election to the office of Rice County Attorney in the general election to be held on November 8, 2022.[2] John Fossum is the current Rice County Attorney and Respondent's political opponent.[3] Complainant represents the John Fossum for Rice County Attorney Committee.[4]

The Complaint alleges that Respondent "is hosting and promoting" a campaign website (https://ricecountycitizens.com/home.htm) (Rice County Citizens) that lacks disclaimers in the form required by Minn. Stat. § 211B.04.[5] The Rice County Citizens website contains links to investigative reports regarding Mr. Fossum.[6] The Complainant alleges that the Rice County Citizens website provides misleading and incomplete information about Mr. Fossum, and is aimed at defeating his candidacy for Rice County Attorney.[7] As a basis for believing Respondent was responsible for the website, Complainant asserted that the Rice County Citizens website was registered on or around the same time as Respondent's official campaign website, July 17, 2022.[8]

The Complainant also asserts that "surrogates" of Respondent's campaign are posting links to the Rice County Citizens website on social media and distributing QR

[2] Complaint (Sept 20, 2022); Exhibit (Ex.) 1.
[3] *Id.*; Test. of S. Dunlop.
[4] Complaint.
[5] *Id.*; Ex. A.
[6] Ex. C.
[7] Complaint.
[8] *Id.*

codes for the website in Northfield.[9] According to the Complaint, the QR codes include a link to the website and the distributed QR codes also lack a disclaimer.[10]

The Complaint includes attached excerpts from the Rice County Citizens website and a photo of QR codes with the Rice County Citizens website link allegedly distributed at an August 13, 2022, parade.[11] In addition, Complainant provided screenshots of Facebook postings from alleged campaign "surrogates" of Respondent that included the link to the Rice County Citizens website.[12]

In her Complaint, Complainant attached a letter she sent to Respondent on August 29, 2022, asking him to remove the website or include a disclaimer, along with Respondent's September 8, 2022, letter in response.[13] In his response, Respondent asserted that Complainant's allegations were "entirely unfounded" and that his campaign website (votemortenson.com) (Vote Mortenson) contained the required disclaimers.[14] Respondent further stated that QR codes distributed at a parade were not from his campaign.[15]

By Order dated September 22, 2022, the Administrative Law Judge found that the Complaint established a prima facie violation of Minn. Stat. § 211B.04 and set this matter on for a probable cause hearing to be conducted by telephone on September 27, 2022.[16]

On September 26, 2022, Respondent filed a response to the Complaint in which he asserted he has no affiliation with the Rice County Citizens website.[17] In support of his claim, Respondent submitted affidavits from the following four individuals: Respondent; Respondent's wife, Elizabeth Mortenson; Teresa Kowalcyzk; and Susan Beaumaster.[18] Respondent asserted that he and his wife, Elizabeth, are the only decision-makers for his campaign.[19] He emphasized that his sole campaign website (votemortenson.com), which he paid for, registered, designed, and maintains, contains a proper disclaimer, as required by law.[20]

In their affidavits, Respondent and Mrs. Mortenson disavow any association with, or responsibility for, the Rice County Citizens website or its dissemination to the public through a QR code.[21] Respondent stated under oath that neither he nor his campaign

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[9] *Id.*
[10] *Id.*
[11] Exs. C-D. The Rice County Citizens website states, "Attention Rice County Citizens. Rice County Attorney's Office Incident from February 2019" and includes links to documents entitled, "Police Report Summary" and "Full Police Report." Ex. C.
[12] Ex. E.
[13] Exs. A and B.
[14] Ex. B.
[15] *Id.*
[16] Notice of Determination of Prima Facie Violation and Notice and Order for Probable Cause Hearing (Sept. 22, 2022).
[17] Response to Complaint (Sept. 26, 2022).
[18] Exs. 1-2, 4-5.
[19] Exs. 1-2.
[20] Ex. 1.
[21] Exs. 1, 2.

has had any involvement in the creation, design, maintenance, materials, hosting, or promotion of the Rice County Citizens website or any QR codes distributed about that website.[22] He further attests that he did not ask anyone to distribute or post a link to the Rice County Citizens website on Facebook or while door knocking on behalf of his campaign.[23]

In her affidavit, Ms. Beaumaster accepts full responsibility for the creation, maintenance, and funding for the Rice County Citizens website, the creation and dissemination of the QR code, and the posting on the Facebook page cited by Complainant.[24] Notably, Ms. Beaumaster's husband is a former Rice County Attorney against whom Mr. Fossum ran and defeated in the 2014 election.[25]

A probable cause hearing was held on September 27, 2022, at which Complainant, Respondent, and Ms. Beaumaster testified under oath. Complainant asserted that the Rice County Citizens website aims to influence the Rice County Attorney election and lacks a disclaimer.[26] Complainant testified that she initially believed Respondent ran the website based on online supporters of Respondent attaching a link to the website on a Facebook post and other supporters distributing a QR code to the website at a recent parade.[27] Finally, Complainant argued that similar font and styles of Respondent and Ms. Beaumaster's affidavits evidence coordination between the parties.[28] Based upon these claims, Complainant maintained that Respondent was affiliated with the Rice County Citizens website.[29] Complainant submitted no additional evidence in support of her claims.

In response, Respondent testified that he and his wife contacted Ms. Beaumaster to ask if she would provide an affidavit concerning the Rice County Citizens website after he received Complainant's August 29, 2022, letter that identified Ms. Beaumaster as an individual who attended a parade where she was seen distributing the QR codes.[30] Respondent denied that his campaign had any cooperation or involvement with the Rice County Citizens website and emphasized that his campaign's Vote Mortenson website was registered in May 2022, two months prior to the Rice County Citizen website.[31] He specifically denied that either he or his campaign helped fund, create, provide content for, host, maintain, distribute or promote the Rice County Citizens website.[32] Respondent further provided documentary evidence that his campaign's website was registered months prior to the Rice County Citizens website.[33]

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[22] Ex. 1.
[23] *Id.*
[24] Ex. 5.
[25] Test. of Brian Mortenson.
[26] Test. of S. Dunlop.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Test. of B. Mortenson; Ex. A.
[31] Test. of B. Mortenson; Ex. 3.
[32] Test. of B. Mortenson.
[33] Ex. 3.

Respondent did admit that Ms. Beaumaster contacted him at one point to ask him if he knew anyone who could design a website and he provided her with the name of an individual who she later used to create the Rice County Citizens website.[34] However, Respondent denied that Ms. Beaumaster or her husband have any official relationship with his campaign.[35] In addition, Respondent denied his involvement with the distribution of QR codes or links to the Rice County Citizens website.[36]

II. 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.[37] 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.[38] If the Administrative Law Judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a like civil case, the campaign violation complaint should be allowed to proceed.[39]

A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.[40] 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 a respondent has committed a violation.[41]

III. Analysis

Under Minn. Stat. § 211B.04, subd. 1, it is unlawful to prepare or disseminate most types of campaign material without prominently disclosing the name and address of the person or committee causing the material to be prepared or disseminated.[42] The statute requires inclusion of a disclaimer providing the name and address of the committee that

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[34] Test. of B. Mortenson. Respondent did not name the individual. *Id.*

[35] *Id.*

[36] *Id.*

[37] *See Weinberger v. Maplewood Review*, 668 N.W.2d 667, 664 (Minn. 2003) ("[I]n civil cases probable cause constitutes a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it") (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990)) (internal punctuation omitted); *see also State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976) (explaining operation of probable cause standard in criminal context).

[38] *See In re Hortman v. Republican Party of Minn.*, No. 15-0320-17530, PROBABLE CAUSE ORDER at 3 (Minn. Office Admin. Hearings, Oct. 2, 2006).

[39] 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 court 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; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975).

[40] *State v. Florence*, 239 N.W.2d 892, 903 (Minn. 1976). *See also State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. Ct. App. 1996), *review denied* (Minn. Apr. 16, 1996).

[41] *Florence*, 239 N.W.2d at 903.

[42] Minn. Stat. § 211B.04, subd. 1(a).

prepared and paid for the material, and the disclaimer must read substantially as follows: "Prepared and paid for by the _____ committee _____ (address)."[43] The address must be either the committee's mailing address or the committee's website, if the website includes the committee's mailing address.[44] For campaign websites and social media pages, the requirements of Minn. Stat. § 211B.04 are satisfied for the entire site when the disclaimer appears once on the home page of the site.[45]

"Campaign material" is defined, in relevant part, as any literature, publication, or material disseminated for the purpose of influencing voting.[46] The purpose of the disclaimer requirement is to "identify who or what committee prepared, disseminated and paid for the campaign material."[47]

It is undisputed that the Rice County Citizens website amounts to "campaign material" published and disseminated for the purpose of influencing the election between Mr. Fossum and Mr. Mortenson. It is also undisputed that the website does not contain the disclosure required by law to identify who is responsible for publishing and paying for the website.

What is disputed in this case is who prepared and disseminated the website.

Complainant asserts that Respondent or his campaign must have been involved in the creation and dissemination of the website because: (1) Respondent is Mr. Fossum's opponent; (2) the website was registered on July 17, 2022, shortly after Respondent registered his own campaign website; (3) individuals were seen handing out a QR code for the website at a parade who appeared to be supporters of Respondent; (4) Ms. Beaumaster responded to a Facebook post by including a link to the website; and (5) the four affidavits submitted by Respondent in this case, including Ms. Beaumaster's affidavit, include similar style and font, indicating a connection between Ms. Beaumaster and Respondent.

None of the assertions made by Complainant, however, are supported by evidence that Respondent or his campaign had any involvement in the disputed website. In fact, the evidence in this case is overwhelming that neither Respondent nor his campaign created, maintain, disseminated information about, funded, or published the website.

First, the fact that Respondent is Mr. Fossum's political opponent is not proof that Respondent was involved with a website that paints Mr. Fossum in a negative light. Respondent is not the only individual with motive to publish campaign material opposing Mr. Fossum's re-election. Indeed, Ms. Beaumaster's husband was defeated in his bid for re-election for Rice County Attorney by Mr. Fossum in 2014. Therefore, it is

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[43] *Id*. at subd. 1(b).
[44] *Id*.
[45] *See* Minn. Stat. § 211B.04, subd. 4.
[46] *See* Minn. Stat. § 211B.01, subd. 2 (2022).
[47] *Hansen v. Stone*, OAH No. 4-6326-16911, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER at 4 (Minn. Off. Admin. Hearings Oct. 28, 2005).

understandable why Ms. Beaumaster might want Mr. Fossum defeated in this election and why she would create and host the Rice County Citizens website.

Second, Respondent has provided documentary evidence that his campaign's official website domain was registered in May 2022, not in July 2022, when Complainant contends that the subject website was registered. Thus, there does not appear to be any temporal connection between the two website registrations.

Third, the fact that individuals appearing to be Respondent's supporters were distributing QR codes at a parade and responded to a Facebook post by including a link to the Rice County Citizens website, does not mean that these individuals were working for Respondent or his campaign. Ms. Beaumaster is not a member of Respondent's campaign committee. While Ms. Beaumaster may be a supporter of Respondent or of the defeat of Mr. Fossum, there is no evidence that she worked with Respondent or his committee in creating or funding the website. Indeed, in her sworn affidavit Ms. Beaumaster takes full responsibility for the website and disavows any association with Respondent or his campaign committee in the formation of the website or its dissemination.

While Respondent admits that Ms. Beaumaster contacted him to get a name of a website designer (a referral that Respondent gave), Respondent's in-court testimony and sworn affidavits establish that he had no involvement in the creation, hosting, dissemination, or funding of the website. As a licensed attorney and officer of the court, Respondent's testimony holds significant weight. He and his wife (the only campaign committee members) unequivocally deny any responsibility for the website. Therefore, Respondent has firmly rebutted Complainant's unsupported assertions that he is associated with the website.

Finally, the fact that Respondent submitted four affidavits that included similar font and style (including Ms. Beaumaster's affidavit), is not evidence of collusion. Indeed, Respondent freely admits that he prepared the affidavits and that Ms. Beaumaster read and signed her own affidavit taking full responsibility for the website and its dissemination.

In short, Complainant has not submitted any evidence to rebut the evidence provided by Respondent. The burden of establishing probable cause or a reasonable belief that Respondent violated the Fair Campaign Practices Act is on Complainant. Complainant did not put forward sufficient facts or evidence to support finding Respondent prepared or disseminated campaign material in violation of Minn. Stat. § 211B.04. Accordingly, the Complaint must be dismissed.

IV. Conclusion

Complainant failed to demonstrate probable cause to believe Respondent violated Minn. Stat. § 211B.04 as alleged. The Complaint is, therefore, **DISMISSED**.

A. C. O.