OAH 23-0325-40372

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

John Kysylyczyn,

Complainant,

vs.

City of Mounds View, Zach Lindstrom, and Nyle Zikmund

Respondents.

ORDER OF DISMISSAL FOR LACK OF PROBABLE CAUSE

This matter came before Administrative Law Judge Suzanne Todnem for a probable cause hearing on October 22, 2024. The hearing addressed a Fair Campaign Practices Complaint (Complaint) filed by John Kysylyczyn (Complainant) under the Fair Campaign Practices Act (Act).[1] The hearing record closed at the conclusion of the hearing.

Thomas J. Knecht, Madel PA, appeared on behalf of Complainant. Robert A. Alsop, Kennedy & Graven, Chartered, appeared on behalf of the City of Mounds View (City), Zach Lindstrom, and Nyle Zikmund (collectively, Respondents).

Based upon the record and proceedings in this matter, and for the reasons set forth 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 Respondents violated Minn. Stat. § 211A.02 as alleged in the Complaint.

2. There is no probable cause to believe that Respondents violated Minn. Stat. § 211B.04 as alleged in the Complaint.

3. The Complaint is **DISMISSED**.

Dated: October 25, 2024

SUZANNE TODNEM
Administrative Law Judge

[1] Minn. Stat. §§ 211A.01-.14, 211B.01-.37 (2024).

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minn. Stat. § 211B.34, subd. 3 (2024), 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 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, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2024).

MEMORANDUM

I. Factual and Procedural Background

The City has an open market system for solid waste collection (Open Collection).[2] An open collection system means residents directly contract with licensed trash haulers.[3] In March 2023, the City's City Council (City Council) initiated steps to begin research and planning to establish an organized trash collection system.[4] The City Council passed a resolution on August 14, 2023, outlining the organized collection steps the City had taken and initiated the required negotiation period with existing licensed residential collectors.[5] The City Council ended negotiations with licensed residential collectors in March 2024.[6] The City and existing licensed residential collectors were unable to agree on an acceptable contract.[7] On April 9, 2024, voters approved a charter amendment in a special election that requires voter approval for any move to an organized residential solid waste collection service (Organized Collection).[8] As a result, whether to move to Organized Collection is a ballot question for the November 5, 2024, general election.[9] The ballot question is:

> Should the City establish a system for organized residential solid waste collection in which residential dwellings will have trash, recycling, and other solid waste collected by a City-designated hauler in a

[2] Complaint (Compl.) at 2 (Oct. 15, 2024).
[3] *Id*. at Exhibit (Ex.) 2. *See* https://www.moundsviewmn.org/news_detail_T6_R177.php.
[4] *Id*. at 3 and Ex. 3.
[5] Respondent's [sic] Response to Fair Campaign Practices Complaint (Response) (Oct. 21, 2024) at Resolution No. 9794; Minn. Stat. § 115A.94, subd. 4d.
[6] Compl. at 4 and Ex. 3.
[7] *Id*. at Ex. 3.
[8] *Id*.
[9] *Id*. at 2 and Ex. 3.

> City-designated collection district? The organized collection system would replace the current competitive market collection system. A "Yes" vote is a vote to allow organized collection. A "No" vote is a vote against organized collection.[10]

On or about September 13, 2024, Respondents added a video on the City website entitled "Organized Waste Collection Video" (Video).[11] The Video provides information including the concerns and questions raised by residents that initiated Organized Collection discussions, the goals of Organized Collection, the Organized Collection process, resident participation in the Organized Collection process, anticipated outcomes of an Organized Collection system, frequency of trash pickup, services offered if Organized Collection is approved, and pricing.[12]

In 2024, Respondents published a website entitled "Mounds View's New Proposed System for Collecting Trash & Recycling" (Website).[13] The Website consists of a home page and five tabs: The Process, FAQ, How to Vote, New Contract Pricing, and Connect.[14] The Website provides information about the ballot question at issue here. Specifically, the Website provides much of the same information as the Video, including three methods to vote on the ballot question.[15] It also provides information about the anticipated outcomes of Organized Collection to the City's residents.[16]

Complainant asserts that on September 24, 2024, he visited the Website and found no disclaimer as required under Minn. Stat. § 211A.04.[17] As of September 30, 2024, the Website contains the following: "Prepared and paid for by the City of Mounds View. 2401 Mounds View Boulevard, Mounds View, MN 55112."[18] Respondent Nyle Zikmund states the Website has always included the disclaimer "Prepared and paid for by the City of Mounds View."[19]

On October 15, 2024, Complainant filed the Complaint alleging Respondents failed to file required financial reports for expenditures of the Video and Website under Minn. Stat. § 211A.02.[20] The Complaint also alleged that the Video and Website lacked disclaimers required under Minn. Stat. § 211B.04.[21] The Complaint had five exhibits attached.[22]

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[10] *Id*. at 2.
[11] *Id*. at 5. and Ex. 2.
[12] *Id*. at 5 and Ex. 2.
[13] *Id*. at 6-8. *See* https://www.mvtrashservicesplan.org/. The parties disagree as to when the website was established. Complainant asserts the website was created in September 2024 while Respondents assert it was in the spring of 2024. The timing is not relevant to the alleged violations.
[14] *Id*. at Ex. 3.
[15] *Id*.
[16] *See* https://www.mvtrashservicesplan.org/.
[17] Compl. at 10 and Ex. 5.
[18] *Id*. at Ex. 4. *See* https://www.mvtrashservicesplan.org/.
[19] Decl. Nyle Zikmund ¶ 3.
[20] Compl.
[21] *Id*.
[22] *Id*. at Exs. 1-5.

On October 18, 2024, the Administrative Law Judge found that the Complaint established prima facie violations of Minn. Stat. §§ 211A.02 and 211B.04 regarding the Video and Website.[23]

On October 21, 2024, Respondents submitted a Response to Fair Campaign Practices Complaint (Response) with Attachments.[24] On October 21, 2024, Complainant resubmitted the Complaint with a sixth exhibit[25] and submitted Exhibits 7, 8, and 9 on October 22, 2024.[26] A probable cause hearing was conducted by telephone on October 22, 2024.[27]

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.[28] 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.[29] 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.[30]

A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.[31] 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.[32]

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[23] Notice of Determination of Prima Facie Violation and Notice and Order for Probable Cause Hearing (Oct. 18, 2024).
[24] Response, generally.
[25] Resubmitted Complaint (Resubmitted Compl.) (Oct. 21, 2024).
[26] Complaint Exs. 7-9 (Oct. 22, 2024).
[27] Probable Cause Hearing Digital Recording (Oct. 22, 2024) (on file with the Minn. Office Admin. Hearings).
[28] *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).
[29] *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).
[30] 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).
[31] *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).
[32] *Florence*, 239 N.W.2d at 903.

III. Analysis

Complainant alleges that Respondents are a "committee" under the statutory definition in the Act and therefore required to file a financial report pursuant to Minn. Stat. § 211A.02 and include disclaimers on campaign material.[33] Respondents assert that the City is not a "committee" because it did not engage in promoting the ballot question; therefore, the Act does not apply. Respondents assert the Video and Website explain the issues in the ballot question and provide information.[34]

A committee is defined as "a corporation or association or persons acting together to . . . promote or defeat a ballot question."[35] A public corporation, including a municipality, may be a "committee" under Minn. Stat. §§ 211A.01-.14, 211B.014 .37, if its actions promote or defeat a ballot question.[36]

A. Informational Materials Do Not Promote a Ballot Question

Whether Respondents are promoting a "Yes" vote on the ballot question as Complainant alleges requires examination of whether Respondents have crossed the line from explanation to promotion. Promotion of a ballot question "includes any efforts that 'urge the adoption of or advocate' for the ballot question."[37] Statements that expressly advocate for a ballot question and statements that implicitly advocate for a ballot question can "promote" a ballot question.[38] To determine if a statement is implicit advocacy, the standard is whether it is the functional equivalent of express advocacy subject to no reasonable interpretation other than as an appeal to vote for or against a specific proposition.[39] Statements must be viewed as a whole when determining if they are the functional equivalent of express advocacy.[40] Statements cross the line between informing and promoting if they mislead, overly dramatize the situation or exaggerate the consequences of passage or defeat of the ballot question.[41]

The language in the Video and on the Website provide information about the process the City is required to and has followed when proposing a change to Organized Collection, the anticipated outcomes of Organized Collection based on studies and reports, how residents can vote, costs under Organized Collection, and whom to contact for more information. The Video and Website use positive terms to describe Organized Collection ("more efficient," "protects customers") and describe the concerns with Open Collection ("a steady flow of large trucks are crisscrossing neighborhoods, creating noise and air pollution and wearing down city streets"). Complainant contends the statements about noise levels; air pollution; wear and tear on city streets; inconsistent

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[33] Compl. at 8-10; Minn. Stat. §§ 211A.02 and 211B.04.
[34] Response at 2.
[35] Minn. Stat. §§ 211A.01, subd. 4, and 211B.01, subd. 4.
[36] *Abrahamson v. St. Louis County School Dist.*, 819 N.W.2d 129, 136 (Minn. 2012). *See also Danculovic v. Zimmerman,* 238 N.W. 695, 696 (Minn. 1931) (defining a municipal corporation to include a city).
[37] *Minn. Voters Alliance, et al., Anoka-Hennepin School Dist.*, 868 N.W.2d 703, 708-09 (Minn. Ct. App. 2015) (quoting *Abrahamson*, 819 N.W. 2d at 136).
[38] *Id*. at 709.
[39] *Id*.
[40] *Id*. at 710.
[41] Id. at 712.

pricing; extra charges; and how complaints about the hauler are handled between Open Collection and Organized Collection is advocacy.[42] In the fall of 2023 through early 2024, the City asked residents to submit their trash bills to aid the City in contract negotiations for potential Organized Collection.[43] Respondents provided, and the Website cites to, the research and reports issued by the Minnesota Department of Transportation and Minnesota Pollution Control Agency. The City relied on these and other reports and the statements are based on the information contained in them.[44]

The statements about noise levels; air pollution; wear and tear on city streets; inconsistent pricing; extra charges; and how complaints with haulers would be handled in the Video and on the Website are based on reports and information from residents Respondents received during the process required under Minn. Stat. § 115A.94.[45] The record does not include evidence to refute the reports and information provided by Respondents.

B. A Lack of Opposition Statements Does Not Promote a Ballot Question

The Video and Website address the positive consequences of approving the ballot question and the negative consequences of not approving the ballot question. A lack of "opposition statements" does not render material promotional.[46] When taken as a whole, the Video and Website provide supported factual statements, remind voters the decision is theirs and provides information on how to vote but not what to vote.[47] Even though the Video and Website leave little doubt that the City favors passage of the ballot question, they do not cross the line between informing and promoting because they do not mislead, overly dramatize the situation or exaggerate the consequences of the current Open Collection situation.[48]

The facts available do not establish a reasonable belief that Respondents are a committee required to file a financial report or include disclaimers under the Act. The statements are informational and not promotional; Respondents are not a "committee" under the Act.

IV. Conclusion

At the prima facie stage of a campaign complaint matter, the tribunal accepts the facts alleged in the complaint as true, without independent substantiation, provided that those facts are not patently false or inherently incredible, and draws reasonable

[42] Compl., *generally*.
[43] *Id*. at Ex. 3.
[44] *Id*.; Response at March 6, 2023, Staff Report.
[45] Response at Decl. of N. Zikmund; March 6, 2023, Staff Report; Resolution No. 9794; Minnesota Department of Transportation Report: Assessing the Effects of Heavy Vehicles on Local Roadways; and Minnesota Pollution Control Agency Report: Analysis of Waste Collection Service Arrangements.
[46] *Minn. Voters Alliance, et al*., 868 N.W.2d at 711-712.
[47] Compl. at Exs. 2 and 3; *see id*. at 712.
[48] *See Minn. Voters Alliance, et al*., 868 N.W.2d at 712.

inferences in the light most favorable to the complainant.[49] The record is viewed more stringently when the matter proceeds to a probable cause determination, and a respondent is able to provide additional information to rebut claims made by the complainant.

The evidence submitted by Respondents to rebut Complainant's claims was credible, documented, and unrefuted. Based upon this evidence, there is no probable cause to support a finding that Respondents violated Minn. Stat. §§ 211A.02 or 211B.04, as alleged in the Complaint. Therefore, the Complaint is **DISMISSED**

S. T.

[49] *Barry v. St. Anthony-New Brighton Indep. Sch. Dist. 282*, 781 N.W.2d 898, 902 (Minn. Ct. App. 2010); *Abrahamson v. St. Louis Cty. Sch. Dist.*, 819 N.W.2d 129, 136 (Minn. 2012).