

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Michael Knight,
Complainant,

v.

ORDER FINDING PROBABLE CAUSE

Andover Citizens Together ("ACT"), Rex
Greenwald, and Ken Orttel,
Respondents.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge Steve M. Mihalchick on November 22, 2004, at the Office of Administrative Hearings pursuant to Minn. Stat. § 211B.34 to consider a Complaint filed by Michael Knight on November 1, 2004.

Darren Knight, Knight & Hayano, P.A., 18910 Hamel Road, Plymouth, MN 55446, appeared on behalf of Complainant Michael Knight. John Ward, Chairman, Andover Citizens Together, 15266 Tulip St NW, Andover, MN 55304-3057, appeared on behalf of Respondent Andover Citizens Together (ACT). Rex Greenwald, 13951 Redwood St. NW, Andover, MN 55304, whom Complainant agreed to dismiss from the Complaint, did not appear. Ken Orttel, 2772 Northwest Bunker Lake Blvd., Andover, MN 55304, had been dismissed earlier from the Complaint, but appeared at the hearing as a witness for ACT.

Based on the record in this matter and for the reasons set out in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is probable cause to believe that ACT violated Minn. Stat. § 211B.06 by making several false statements in its mailer and on its Website published shortly before November 2, 2004, knowing the statements to be false or with reckless disregard of whether they were false.

2. There is also probable cause to believe that ACT violated the disclaimer requirements of Minn. Stat. § 211B.04 by failing to identify the candidates being supported in its mailer and on its Website published shortly before November 2, 2004.

3. The foregoing issues are referred to the Chief Administrative Law Judge for assignment of a three-judge panel to conduct an evidentiary hearing and penalty, if appropriate.

4. There is not probable cause to believe that ACT violated Minn. Stat. § 211A.02 by failing to file required documents. That allegation is dismissed.

5. Complainant's request to dismiss his claims against Rex Greenwald is granted. All allegations against Rex Greenwald are dismissed.

Dated: December 1, 2004

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE OF RECONSIDERATION RIGHTS

Complainant has the right to seek reconsideration of the dismissal of the Complaint regarding violation of the filing requirements of Minn. Stat. § 211A.02. Such reconsideration shall be by the Chief Administrative Law Judge on the record pursuant to Minn. Stat. § 211B.34, subd. 3. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this Order.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the issue will be heard as part of the evidentiary hearing being scheduled.

MEMORANDUM

Under Minn. Stat. § 211B.34, subd. 2, at this stage of the proceeding, a complainant must present substantial evidence, which may include reliable hearsay, sufficient to support a belief that there is probable cause to believe that the violations of law alleged in the complaint occurred. Probable cause is not specifically defined in the statute, but it is analogous to the probable cause standard in a criminal proceeding.^[1] Probable cause has commonly been defined to mean "a reasonable ground in fact and circumstance for a belief in the existence of certain circumstances."^[2] The facts alleged in a complaint and presented at the probable cause hearing are to be considered in the light most favorable to Complainant. A respondent may attempt to show that the facts relied upon to establish any required element of the violations do not exist or are "inherently incredible."^[3]

Complainant and Orttel are members of the City Council of the City of Andover. They were reelected to their positions November 2, 2004. Greenwald was one of

several other candidates for the two positions. Mike Gamache was reelected as Mayor, over Don Jacobson, a sitting Council member who was not up for reelection this year.^[4]

John Erar is the former City Manager of Andover. Erar filed a lawsuit in U.S. District Court in Minnesota alleging that the City and three of the City Council members, Complainant, Jacobson, and Julie Trude, illegally removed Erar from his position and committed other illegal acts. The City and three named Council members retained counsel and have filed an answer denying any illegal or wrongful acts and have moved for partial summary judgment. They have stated that Erar is a disgruntled former employee.^[5]

John Ward is an Andover resident and was concerned about the handling of the Erar matter and about Erar's lawsuit against the City. Ward formed ACT for the purpose of informing the citizens of Andover about the lawsuit. He and his wife are named as the officers of ACT in statements filed with the Andover City Clerk on October 13, 2004.^[6]

Ward and other persons associated with ACT whom he declined to identify,^[7] except to say the Orttel was not such a person, designed a mailer that was printed and sent to all the households in Andover. The mailer states that the citizens of the City are being sued because of the actions of the three Council members. It then describes some of the allegations in the lawsuit complaint and provides the address of ACT's Website. On its Website, ACT provides further detail on the allegations in the lawsuit complaint and makes statements based upon those allegations impugning the honesty and integrity of Complainant, Jacobson, and Trude. The Website also provided a copy of the lawsuit complaint. The content of the Website was prepared by Ward and other persons associated with ACT.

The Complaint in this case alleges that several of the statements in the mailer and on the Website are false in that the lawsuit complaint does not contain the statements the mailer and Website allege it contains. For example, the mailer^[8] states that the lawsuit complaint includes an allegation that there were "Demands to shred public documents to cover up involvement." The Complaint in this case alleges that this statement is false. Ward testified that every statement in the mailer and on the Website was based upon reasonable interpretations of the allegations in the lawsuit complaint.

In Paragraphs 9 to 19 of the lawsuit complaint, there are allegations about a particular email message. In Paragraph 16, there is an allegation that Trude demanded that Erar destroy that email because it was private. Viewing the evidence in the light most favorable to Complainant, that is not a "demand to shred public documents to cover up involvement." While there are several factual issues to resolve on this particular allegation and the other allegedly false statements identified in the Complaint, there is sufficient evidence for probable cause to believe that ACT violated Minn. Stat. § 211B.06, subd. 1, by making false statements in its mailer and on its Website shortly before November 2, 2004, knowing the statements to be false or with reckless disregard of whether they were false.

Minn. Stat. § 211B.04 requires campaign material to prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the following form:

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.

The mailer and Website prominently included the name and address of ACT, but they did not state that they were prepared and paid for by ACT in support of a certain candidate or candidates in the form required by Minn. Stat. § 211B.04. The Website now contains a statement that it is not affiliated with any candidate and Ward testified that ACT did not support any particular candidates. However, viewing the evidence in the light most favorable to Complainant, the fact that the lawsuit alleges misdeeds by Complainant and Jacobson, who were candidates in this year's election, creates an implication that ACT was opposing them and supporting the election of Ortzel and Gamache. Thus, there is probable cause to believe that ACT violated the disclaimer requirements of Minn. Stat. § 211B.04.

The Complaint alleged that ACT failed to file a statement of committee as required by Minn. Stat. § 211A.05. It was determined in the Notice of Determination of Prima Facie Violations that the Complaint actually stated a prima facie violation by ACT of the reporting requirements of Minn. Stat. § 211A.02. However, at the probable cause hearing, Ward testified that ACT filed the required documents with the Andover City Clerk on October 13, 2004. Complainant presented no evidence to the contrary. Therefore, there is not probable cause to believe that ACT violated Minn. Stat. § 211A.02 by failing to file required documents. That allegation must be dismissed.

By letter of November 15, 2004, counsel for Complainant notified the Administrative Law Judge that Complainant wished to dismiss his claims against Rex Greenwald. Greenwald was notified that the request would be granted and that he need not appear at the hearing.

S.M.M.

^[1] "Upon the information presented, the Court shall determine whether there is probable cause to believe that an offense has been committed and that the person arrested committed the offense." Minn. R. Crim. Pro. 4.03, subd. 4.

^[2] Merriam Webster Dictionary of Law (1996).

^[3] See *State v. Florence*, 306 Minn. 442, 239 N.W.2d 892 (1976); *State v. Harris*, 265 Minn. 260, 121 N.W.2d 327 (1963).

^[4] Testimony of.

[\[5\]](#) Testimony of Michael Knight.

[\[6\]](#) Testimony of John Ward.

[\[7\]](#) The ALJ denied Complainant's request that Ward be required to identify other members of ACT and persons who helped design and prepare the mailer and Website. This denial was made because previous versions of Minn. Stat. §§ 211B.04 and 211B.06 have been held by the courts to infringe upon First Amendment rights of free speech and anonymous political comment. In light of those court decisions and because such information was not necessary for any determination in this matter, the request was denied.

[\[8\]](#) Complaint Ex. 1.