

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Scott D. Wenzel,
Complainant,

vs.

ORDER OF DISMISSAL

Warren Harder, Painter & Allied Trades
District Council 82, and Jeffery Jewett,
Business Agent of the St. Paul Painters &
Allied Craftsmen, Local 61,

Respondents.

On October 17, 2007, a probable cause hearing under Minnesota Statutes § 211B.34 was held by telephone conference call before Administrative Law Judge Eric L. Lipman. During the conference call evidence and argument relating to the complaint filed by Scott Wenzel on October 10, 2007, was received. The probable cause record closed at the conclusion of the hearing.

Scott D. Wenzel (Complainant), 10779 Unity Lane North, Brooklyn Park, MN 55443, appeared on his own behalf without counsel. Warren Harder (Respondent), 1224 87th Avenue North, Brooklyn Park, MN 55444, appeared on his own behalf without counsel. Danielle LeClair, Attorney at Law, Miller O'Brien Cummins, One Financial Plaza, 120 South Sixth Street, Suite 2400, Minneapolis, MN 55402, appeared on behalf of Painter & Allied Trades District Council 82, and St. Paul Painters & Allied Craftsmen, Local 61 (Respondents).

Based upon the record and all of the proceedings in this matter, and for the reasons set forth in the Memorandum below, the Administrative Law Judge finds that there is not probable cause to believe that the Respondents violated Minnesota Statutes §§ 211A.12, 211B.15, subd. 2, or 211B.15, subd. 13, as alleged in the Complaint.

ORDER

IT IS ORDERED THAT:

The Complaint is DISMISSED.

Dated: October 22, 2007

/s/ Steve Mihalchick for
ERIC L. LIPMAN
Administrative Law Judge

Digitally Recorded – No Transcript Prepared.

NOTICE OF RECONSIDERATION RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, 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 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 Minnesota Statutes § 211B.35 within five business days after granting the petition.

MEMORANDUM

The Complaint concerns certain campaign donations given by Painter & Allied Trades District Council 82 ("District Council 82") and St. Paul Painters & Allied Craftsmen, Local 61 ("Local 61") in favor of Warren Harder. Mr. Harder is a candidate for election to the School Board of the Anoka-Hennepin School District for Board District 5. He is also an employee of District Council 82.¹ Mr. Wenzel is the incumbent School Board Member from District 5. Local 61 is one of ten member unions that belong to District Council 82.²

According to the Complaint, District Council 82 provided Harder with cellular telephone services and the software and hardware to operate his email account. The Complainant maintains that by contributing these items of value to Harder's school board campaign, Respondents violated Minnesota Statute § 211B.15, subd. 2. The Complaint further alleges candidate Harder unlawfully accepted the provision of the email and telephone services, in violation of Minnesota Statute §§ 211A.12 and 211B.15, subd. 13. The Administrative Law Judge will address each allegation below.

Probable Cause Analysis:

Following a probable cause hearing, the task of the Presiding Judge is to answer an important question: Given the facts in the record, is it fair and reasonable to require the respondent to go to hearing on the merits?³ A further hearing on the merits of the complaint is appropriate if there are sufficient facts in the record to believe that a violation of law that is alleged in the complaint has occurred.⁴ There are sufficient facts

¹ Ex. 3.

² Ex. 1.

³ See, *Hortman v. Republican Party of Minnesota*, OAH Docket No. 15-0320-17530-CV, at 2-3 (Probable Cause Order, October 2, 2006) (<http://www.oah.state.mn.us/aljBase/032017530.Prob.Cause.htm>).

⁴ See, Minnesota Statutes § 211B.34 (2) (2004); compare also, *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 674 (Minn. 2003) ("in 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)).

if the Presiding Judge is satisfied that the evidence in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a like civil case.⁵

Corporate Contributions by District Council 82 and Local 61

The Complaint alleges that District Council 82 and Local 61 violated Minn. Stat. § 211B.15, subd. 2, by providing Harder with an email account and cellular phone services.

Section 211B.15, subd. 2, prohibits corporations from making contributions to an individual to promote the individual's candidacy or election to political office within Minnesota. The statute defines "corporation" to mean: "(1) a corporation organized for profit that does business in this state; (2) a nonprofit corporation that carries out activities in this state; or (3) a limited liability company formed under chapter 322B, or under similar laws of another state, that does business in this state."⁶

The Complainant has failed to establish that either District Council 82 or Local 61 is a corporation as defined in the statute. First, there is not evidence that the either entity has taken a corporate form. Further, Mr. Wenzel did not marshal evidence to meet the Respondents' claim that both District Council 82 and Local 61 are unincorporated labor organizations under the National Labor Relations Act.⁷

Mr. Wenzel's argument is two-fold: Namely, that Minnesota's corporate contribution ban should be understood to apply to any organizational entity that undertakes not-for-profit activities, and further that the ban justly applies to District Council 82 and Local 61 because other labor organizations have chosen to organize as non-profit organizations.

Neither argument is availing. Had the Minnesota Legislature intended that the ban on contributions reach all associations that do not operate for profit, the text of Section 211B.15 would be far broader than it is today. Instead, the Legislature crafted a much narrower definition; one that does not include unincorporated associations. Similarly, the fact that other labor organizations have chosen the benefits of a corporate form,⁸ does not tend to establish the form chosen by either District Council 82 or Local 61, or that either organization has violated the ban on corporate political contributions.

⁵ 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; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975). Compare also, *State v. Florence*, 239 N.W.2d 892, 903 (Minn. 1976).

⁶ Minn. Stat. § 211B.15, subd. 1 (2006).

⁷ See, 29 U.S.C. §§ 142(3) and 152(5) (2006).

⁸ See Exs. F; G; H.

Because there is not sufficient evidence to believe that either organization is subject to the ban in Minn. Stat. § 211B.15, subd. 2, the allegations are dismissed.

Aiding and Abetting

The Complaint alleges Respondent Harder violated Minnesota Statute § 211B.15, subd. 13, by allowing District Council 82 and Local 61 to provide his campaign email account and cellular telephone services.

Section 211B.15, subd. 13 prohibits the “aiding, abetting or advising” of a violation of the prohibition against corporate contributions. As discussed above, the contributions made by District Council 82 and Local 61 were not prohibited corporate contributions under Minn. Stat. § 211B.15. Because the Complainant has failed to support his allegation that District Council 82 and Local 61 violated Minn. Stat. § 211B.15, subd. 2, he cannot support his claim that Respondent Harder aided and abetted the violation of this section. The record is insufficient to support finding probable cause that either prohibited corporate contributions were made or that Respondent Harder aided or abetted the making of such proscribed contributions. Therefore, the Complainant’s allegation that Respondent Harder violated Minn. Stat. § 211B.15, subd. 13 is dismissed.

Prohibited Contribution Claims

Finally, the Complaint alleges that Harder violated Minnesota Statute § 211A.12 by accepting the provision of cellular phone and email account services, in violation of the \$300 contribution set forth therein. Section 211A.12 provides in relevant part: “A candidate or a candidate’s committee may not accept aggregate contributions made or delivered by an individual or committee in excess of \$300 in an election year for the office sought and \$100 in other years.” Minnesota Statute § 211A.01, subd. 5, defines “contribution” to mean “anything of monetary value that is given or loaned to a candidate or committee for a political purpose.”

Mr. Wenzel has not established that there is sufficient evidence to believe that, individually or collectively, the value of the donated “in-kind” contributions from District Council 82 in favor of the Harder campaign, exceeds \$300. A few points deserve emphasis.

A. Prohibited Contribution Claim – Cellular Telephone Services

Harder announced as a candidate for the School Board on July 12, 2007.⁹ At that time, District Council 82 authorized him to receive campaign-related calls on a cellular phone that it had earlier issued to him for work purposes. This benefit was to be rendered to him as an in-kind contribution to his campaign. Harder is among eleven

⁹ Ex. 2.

employees of District Council 82 who use cellular telephones that are owned, and paid for, by the Union.¹⁰ The cost of the cellular service from July 12, 2007 through the November 6, 2007 General Election, totals approximately \$60.00.¹¹

Wenzel offered evidence to the effect that much higher prices reflect the true value of the donated services. He argues that someone who is not affiliated with the Union, or its volume pricing arrangements, would need to incur significantly higher costs in order to receive cellular telephone calls during the campaign.

The question thus recurs, is the value of the contribution measured from the vantage point of a competing candidate, such as Wenzel, purchasing these items in the marketplace, or from the point of view of the Union making the donation to Harder's campaign?

Where, as here, we have business records – produced through an arms-length transaction between the Union and the cellular telephone company – the better construction of the term “value”¹² is the sum which was actually transferred from the Union to Harder's campaign. The sum actually transferred from the Union was a rate based upon the added marginal costs of providing cellular telephone service to an eleventh employee, in a year when services were provided to this same worker (and others) for unrelated business purposes.

While the point of law is not free from doubt,¹³ Wenzel's argument would require us to prefer a hypothetical, judicially-developed calculation of value – namely, what a judge determines that an average person would pay for cellular telephone services under the circumstances – over the costs that were actually billed to the Union for the telephone service provided to Harder's campaign. There are considerable dangers in following that path; chief among them being the trap it sets for donors and candidates alike. If the value of an item is not measured by the actual billings in such cases, the value of in-kind donations might simultaneously appear to donors to be below the thresholds of Chapter 211A (where the costs *to the donors* are attributed to the campaign), and unlawfully contributed, because a judge later finds that other, hypothetical purchasers would have paid more. Such a reading of the statute is to be avoided. Because the law is neither a roulette wheel nor a weather vane, the best measure of what was “given” in this case is the tabulation of the independently-billed services.

¹⁰ Testimony of Terry Nelson.

¹¹ Exs. 3; 4; 5.

¹² *Compare*, Minn. Stat. §§ 211A.01, subd. 5 and 211A.12 (2006).

¹³ *Compare*, Advisory Opinion 339 (Campaign Finance and Public Disclosure Board, June 2, 2002) (<http://www.cfboard.state.mn.us/ao/AO339.pdf>).

B. Prohibited Contribution Claim – Value of the Telephone Bank

District Council 82 also allowed Harder to use its phones to make local calls to raise money for his campaign as an in-kind contribution on October 11, 2007. District Council 82 estimates that 50 cents in value was donated for each telephone, for a total in-kind contribution of \$3.00.¹⁴

While the estimate of value assessed to Harder's campaign appears overly generous, and is based upon nothing more than the Union's past practices,¹⁵ there is not a reason to believe that the use of six office telephones, on one evening, in making local calls, would itself, or in combination with other transfers, exceed the \$300 contribution limit.

C. Prohibited Contribution Claim – Internet Services

With respect to the provision of electronic mail services, the evidence in the record is to the effect that Harder inadvertently listed his work email address on his campaign website: www.warrenharder.org. The work electronic mail address is provided by District Council 82 and was not authorized to be used as part of the Harder campaign. The electronic mail address was listed on the Harder campaign website for a period of approximately ten days in September 2007, until Harder directed that it be changed. Since that time, the Harder campaign website has listed his campaign electronic mail address.¹⁶

Like before, Wenzel offered evidence suggesting that the full price of all of the computer equipment that is required for an electronic mail system to operate be attributed as a contribution to Harder's campaign. This overstates the amount of the transfer. The true, marginal cost of hosting an electronic mail address for a period of ten days is modest.¹⁷ In this case it would not, individually, or in combination with other transfers, puncture the \$300 contribution limit.

Because there is not sufficient evidence to believe that Respondent Harder accepted contributions from District Council 82 or Local 61 in excess of \$300, the allegations are dismissed.¹⁸

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¹⁴ Ex. 5.

¹⁵ Test. of T. Nelson.

¹⁶ Ex. 7.

¹⁷ Compare generally, Advisory Opinion 339, *supra*.

¹⁸ Any claims asserted against Jeffery Jewett in his individual capacity were previously dismissed by the Administrative Law Judge in the earlier *prima facie* determination of October 11, 2007.