

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Bob Fine,

Complainant,  
vs.

**ORDER DENYING MOTION  
FOR RECUSAL**

Jim Bernstein,

Respondent.

The above-entitled matter came before Chief Administrative Law Judge Raymond R. Krause on October 26, 2005, on the Respondent's Motion for Recusal.

On October 20, 2005, Administrative Law Judge Mihalchick issued an Order finding probable cause to believe that the Respondent violated Minn. Stat. § 211B.04 by placing a campaign advertisement in a newspaper without a disclaimer, and Minn. Stat. § 211B.06 by preparing and disseminating false campaign material. Judge Mihalchick also dismissed for lack of probable cause two of the Complainant's allegations of false campaign material. On October 25, 2005, the Chief Administrative Law Judge appointed Judge Mihalchick as presiding judge to conduct the evidentiary hearing with two other Administrative Law Judges serving on the panel. On October 26, 2005, the Respondent filed a motion seeking to have Judge Mihalchick removed from the three-judge panel.

Based on the record herein, and for the reasons stated in the following Memorandum, the Chief Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED:

1. That Respondent's Motion for Recusal is DENIED.
2. That this matter shall go forward as scheduled for an evidentiary hearing before Administrative Law Judges Steve Mihalchick, Bruce Johnson, and Barbara Neilson on October 31, 2005.

Dated: October 28, 2005

/s/ Raymond R. Krause  
RAYMOND R. KRAUSE  
Chief Administrative Law Judge

## MEMORANDUM

The Respondent makes three arguments in support of his Motion for Recusal. First, he contends the statutory scheme governing the administrative process for hearing election campaign complaints “strongly suggests” that the three-judge panel that conducts the evidentiary hearing be composed of judges other than the judge who made any previous prima facie or probable cause determinations.

Minn. Stat. § 211B.33, subd. 1, requires the chief administrative law judge to “randomly assign” an administrative law judge to review the complaint and make a determination whether it sets forth a prima facie violation. If “the administrative law judge” determines that the complaint sets forth a prima facie violation, “the administrative law judge” must conduct an expedited probable cause hearing when one is required or requested under Minn. Stat. § 211B.33, subd. 2.<sup>1</sup> The statutory language, contrary to Respondent’s argument, provides that the same administrative law judge should make both the prima facie and probable cause determinations. If probable cause is found, the chief administrative law judge must assign the complaint “to a panel of three administrative law judges for an evidentiary hearing.”<sup>2</sup> The panel must determine whether the alleged violation occurred. If it did not, the panel has the option to dismiss the complaint. If the violation is proved, the panel has the option to require other remedies or assess penalties.<sup>3</sup> The statutory scheme does not prohibit the judge initially assigned to make prima facie or probable cause determinations from sitting on the panel, and it permits the chief administrative law judge to assign judges to the panel based on their availability.

Second, the Respondent contends that it is a denial of due process to have a judge on the hearing panel who has already “disqualified himself from an objective determination of the issues on their merit” by making a probable cause determination. The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>4</sup> The purpose of a probable cause determination is to answer the question whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.<sup>5</sup> If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal, a motion to dismiss for lack of probable cause should be

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<sup>1</sup> Minn. Stat. § 211B.33, subd. 2(b) & (c). See also Minn. Stat. § 211B.34, subd. 1 (“the assigned administrative law judge” must hold a probable cause hearing).

<sup>2</sup> Minn. Stat. § 211B.35, subd. 1.

<sup>3</sup> Minn. Stat. § 211B.35, subd. 2.

<sup>4</sup> 239 N.W.2d 892 (Minn. 1976).

<sup>5</sup> *Id.*, 239 N.W.2d at 902.

denied.<sup>6</sup> A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. When a defendant offers either testimonial or non-testimonial evidence to controvert the facts appearing in the record, the motion to dismiss must be denied unless the evidence introduced by the defendant makes "inherently incredible" the facts which appear in the record and which are necessary to establish an essential element of the offense charged.<sup>7</sup>

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 the Respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards. A judge who makes a finding of probable cause does not become disqualified from making an objective determination on the merits.

Furthermore it is commonplace for judges to make preliminary determinations before deciding a case on the merits. For example, under Minn. Stat. § 147.092, Administrative Law Judges make probable cause determinations in cases in which certain types of misconduct are alleged by the Board of Medical Practice. District court judges routinely hear and decide motions for preliminary or injunctive relief before conducting a trial on the merits; and in criminal cases, particularly outside the metropolitan area, the same district court judge might issue an arrest or search warrant, hold a probable cause hearing, consider a plea agreement, conduct a trial, and sentence the defendant.

Third, the Respondent requests that Judge Mihalchick be removed from the panel to guard against any appearance of impropriety, citing rules permitting the removal of trial court judges from criminal and civil cases.<sup>8</sup> There is no provision of Minn. Stat. 211B.32 that would permit a Complainant or a Respondent to remove a trial court judge, and the rules of the Office of Administrative Hearings require an affirmative showing of prejudice or bias to disqualify an Administrative Law Judge.<sup>9</sup> The Respondent is not claiming that Judge Mihalchick is prejudiced or biased against him, he is merely arguing that it would appear improper for a judge who has made a probable cause determination to participate on the panel that will decide the case on the merits. There is nothing improper about it under the statute or the rules, nor does it have

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<sup>6</sup> *Id.* at 903. 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; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

<sup>7</sup> *State v. Florence*, 239 N.W.2d at 903.

<sup>8</sup> Minn. R. Crim. P. 26.03, subd. 13(4); Minn. R. Civ. P. 63.03.

<sup>9</sup> Minn. R. 1400.6400.

the appearance of impropriety. The fact that Judge Mihalchick will be the presiding judge means only that he will speak for the panel in conducting the hearing. The panel as a whole will make a determination on the merits based on the applicable evidentiary burdens and standards.

For all the above reasons, the Respondent's motion for recusal is denied.

R.R.K.