

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

**PROBABLE CAUSE
DETERMINATION**

IN THE MATTER OF THE COMPLAINT OF THE REPUBLICAN PARTY OF MINNESOTA REGARDING THE MINNESOTA DFL PARTY AND THE MARK DAYTON FOR A BETTER MINNESOTA COMMITTEE:

Background: Complaint's Allegations

On October 31, 2014, the Republican Party of Minnesota (RPM) filed a complaint with the Minnesota Campaign Finance and Public Disclosure Board regarding the Minnesota DFL Party (DFL) and the Mark Dayton for a Better Minnesota committee (Committee).

The complaint alleges that the Committee published a video promoting Mark Dayton's candidacy on the YouTube video sharing internet site and that, subsequently, the DFL used a three second clip from the video in broadcast advertisements, which it classified as independent expenditures in support of Mark Dayton. The complaint maintains that the video clip used by the DFL either originated from the Committee's source footage or that the DFL captured the footage from a broadcast or internet source. The complaint notes that after the DFL's use of the clip, the Committee published another video promoting Mark Dayton's candidacy to youtube.com incorporating the same clip.

The complaint further alleges that use of the video clip by the DFL was with the consent of and/or in coordination with the Committee and that the Committee "either provided the DFL Party with the footage or at the very least consented to its use." The complaint states that even if the video clip existed in the public domain, the Committee at least implied its consent to the DFL's expenditure because the Committee maintained proprietary ownership over the video clip and never objected to the DFL's use of the video clip.

The complaint claims that this consent and/or coordination made subsequent campaign advertisements by the DFL that used the video clip approved expenditures, as opposed to independent expenditures, and that the amount of the approved expenditures, which are considered a contribution to the candidate's committee, is hundreds of thousands of dollars.

Subsequent Submissions to the Board

On November 14, 2014, Charlie Nauen, attorney for respondents, submitted a response at the prima facie determination stage of this matter. Through Mr. Nauen, the respondents stated that "there was no coordination between the DFL Party and the Mark Dayton for a Better Minnesota campaign committee." The response further stated that the Committee posted the video material to its website and on YouTube "without restriction as to its subsequent use." Respondents asserted that "the subsequent use of publicly-available materials cannot be the

basis for finding that an expenditure was not independent”, citing the Board’s findings regarding the Minnesota DFL State Central Committee on April 22, 2014.

Regarding the complaint’s claims that the Committee did not object to the DFL’s use of the video clip, Mr. Nauen stated that “not only is this position inconsistent with the Board’s prior Orders, it would require candidates to object to each and every independent expenditure so that it would not be deemed to have been impliedly approved.” Finally, respondents asserted that “Minnesota law does not require candidates to interfere with the activities of independent organizations in order to avoid campaign finance violations.”

On November 26, 2014, the Board Chair made a determination that the complaint stated a prima facie violation of Chapter 10A.

On December 15, 2014, the RPM submitted a response in support of the Board finding that probable cause exists to believe a violation has occurred. The RPM’s response recapped many of its arguments contained in the original complaint. On December 17, 2014, the DFL and the Committee re-submitted their prima facie response in support of the Board finding that probable cause does not exist. The DFL and the Committee’s legal counsel, Mr. Nauen, appeared at the Board’s meeting on behalf of both respondents.

Potential Violations

The complaint alleges that the DFL reported certain costs as independent expenditures that should have been reported as approved expenditures.

An approved expenditure is a contribution to that candidate, and the 2013-2014 election cycle contribution limit from political party units to a governor’s principal campaign committee is \$40,000. The complaint alleges that the DFL made approved expenditures in the amount of hundreds of thousands of dollars. If the complaint’s allegations are true, violations of the statutory contribution limits by both the DFL and the Committee will result.

Chapter 10A also requires independent expenditures to contain a statement in conspicuous type that the activity is an independent expenditure and is not approved by the candidate nor is the candidate responsible for it. If the expenditure was not made independently and was falsely claimed to be independent this requirement would have been violated as well.

Analysis

In both the complaint and its submission in support of the Board finding probable cause, the RPM attempts to support its claims by comparing the matter at hand to a prior matter in which the Board considered the independence of party unit expenditures. See, FINDINGS IN THE MATTER OF A COMPLAINT REGARDING THE TIM PAWLENTY FOR GOVERNOR CAMPAIGN AND THE REPUBLICAN PARTY OF MINNESOTA, October 10, 2012 (the “Pawlenty Matter”). In the Pawlenty Matter, the Board found that certain expenditures made by the RPM in support of the Pawlenty

committee and classified by the RPM as independent expenditures were not, in fact, made independently and, instead, constituted approved expenditures.

In its complaint, the RPM references the findings in the Pawlenty Matter, stating that:

A probable cause finding that a candidate consented to an expenditure by or coordinated with an entity other than the primary campaign committee does not require an expressed agreement for the expenditure. Rather, the Board reviews the facts surrounding the expenditure and the actions of the candidate and independent group required to complete the expenditure. The Board further reviews the subsequent actions of the candidate, including whether the candidate requested the independent entity to cease an expenditure when discovering the use of coordinated material.

The RPM further states that “factors in the Board’s decision [in the Pawlenty Matter] included the actions required by the candidate in making the footage and the fact that neither the candidate nor his committee protested to the party or to the production company when the Republican Party began airing the footage, which was created by the Pawlenty campaign.”

The RPM’s emphasis on the lack of action by the Pawlenty committee after the expenditures were made is misplaced. In the Pawlenty Matter, the Board concluded that certain expenditures made by the RPM on behalf of candidate Tim Pawlenty were not, in fact, made independently. The basis for the Board’s conclusion was the fact that an agent of the Pawlenty committee cooperated with the RPM in producing the independent expenditures and consented to the RPM’s use of footage and creative ideas developed by or on behalf of the Pawlenty committee.

The independence of an expenditure may be defeated if a candidate, the candidate’s principal campaign committee, or an agent of the candidate or the committee expressly or impliedly consents, authorizes, cooperates with, acts in concert with the entity making the independent expenditure, or requests or suggests that the entity make the independent expenditure. Minn. Stat. § 10A.01, subd. 18. In the Pawlenty Matter, the Pawlenty committee’s agent’s cooperation and consent defeated the independence of the subject expenditure.

The Pawlenty Matter, therefore, is unlike the matter at hand. The present complaint provides no evidence that the Committee or an agent of the Committee consented to or cooperated with the DFL in the making of the subject independent expenditure and the nature and history of the publication of the clip do not provide a sufficient basis on which to find probable cause that a relationship between the Committee and the DFL existed that would defeat the independence of the expenditure.

In the Pawlenty Matter, the Board observed that the committee had not taken any recourse against its agent after the agent was found to have exceeded his authority and profited from his actions. While the Board also noted in its findings of fact that the Pawlenty Committee had not asked the RPM to cease running its advertisements in support of Pawlenty, this was not the basis for the Board’s conclusions concerning probable cause. To the extent that the findings in

the Pawlenty Matter may be read to suggest that there is some affirmative duty on a candidate to intervene to stop the publication of a communication that was independent at the time it was initiated, that premise is rejected.

The Board has recognized in the past that candidates publish high-resolution photographs on their campaign websites that are sometimes later used by independent expenditure committees. The Board has not raised the issue of the independence of these expenditures in the past. See Findings, Order, and Memorandum in the Matter of the Investigation of Expenditures Made by the Minnesota DFL State Central Committee, April 22, 2014.

The three second clip that is the subject of this matter is not so substantially different from a photograph that the Board is inclined to treat its use differently. However, the Board's decision in this matter is strictly limited to the facts before it and should not be read to extend beyond them.

Findings:

1. On November 26, 2014, the Board Chair made a determination that the complaint under consideration stated a prima facie violation of Chapter 10A.
2. The Mark Dayton for a Better Minnesota committee published a video to youtube.com titled "On the Campaign Trail" on July 18, 2014. From approximately 0:33 – 0:38 in the video, Mark Dayton is seen speaking to two young women while sitting on concrete steps. A playground can be seen in the background. For the purposes of this determination this clip will be referred to as the "Subject Clip."
3. The Minnesota DFL Party published a video to youtube.com titled "We Know" on September 15, 2014. From approximately 0:25 – 0:28 in the video, a portion of the Subject Clip is shown. The video contains a disclaimer indicating that the video is an independent expenditure made by the DFL.
4. The Committee published a video to youtube.com titled "Rising" on October 28, 2014. From approximately 0:20 – 0:22 in the video, a portion of the Subject Clip is shown.
5. No facts have been presented by the RPM that support a claim that there was actual cooperation between the Committee and the DFL. The DFL and the Committee deny that there was cooperation or coordination in regard to use of the video clip. The DFL's use of the publicly available clip, without more, does not defeat the independence of the subject expenditures.
6. The facts surrounding the publication and use of the Subject Clip, by themselves, do not provide evidence that suggests the type of candidate involvement in the DFL expenditure that would lead to an investigation.

Conclusions:

1. No evidence has been presented that suggests the Committee provided the DFL with the Subject Clip beyond posting its own video to youtube.com.
2. No evidence has been presented that suggests the DFL's independent expenditure was approved by the Committee or an agent of the Committee or was not, in fact, made independently.

3. A candidate's committee is not required to object to another entity's use of material that is in the public domain in order to preserve the independence of an otherwise independent use of publicly-available materials.
4. Probable cause does not exist to believe that the Minnesota DFL Party or the Mark Dayton for a Better Minnesota committee violated Chapter 10A, specifically the sections related to approved expenditures and independent expenditures.

Order:

The complaint in the above matter is dismissed.

/s/ George A. Beck

1/6/2015

Dated: _____

George A. Beck, Chair
Campaign Finance and Public Disclosure Board