

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

**IN THE MATTER OF THE INVESTIGATION
OF MINNESOTA FAMILY COUNCIL**

**FINDINGS, CONCLUSIONS,
AND ORDER**

Background

In early July 2014, the Campaign Finance and Public Disclosure Board became aware of two communications that were being disseminated with the attribution "Prepared and paid for by Minnesota Family Council" (MFC) and the statement: "Learn more at www.mfc.org." The communications each related to Sheila Kihne, known to the Board to be a candidate in the Republican primary election for House District 48B. Copies of the communications are attached to and made a part of this document as exhibits A and B.

The communications identified Kihne as a "Trusted Conservative" and stated:

Sheila will:

Restore fiscal discipline to
the state budget

Defend our second
amendment

Strengthen Minnesota's
schools

Protect life and family
values

Board records indicated that Ms. Kihne was not a member of the Minnesota Legislature when the communications were disseminated. Thus, unless elected, she had no ability different than that of any private citizen to accomplish the things MFC said she would do.

The communications also included a prominent notice: "Primary Election Aug. 12th!" The communications further informed recipients that "Early voting begins on Friday, June 27th at Eden Prairie City Hall." The early voting notice included the address of the city hall and the hours that it was open. In one case the communication expressly advised readers to "Vote early starting June 27th at Eden Prairie City Hall."

Based on the content of the communications, the Board directed its Executive Director to initiate an investigation into whether the communications and any similar communications by MFC were subject to the disclosure requirements of Minnesota Statutes Chapter 10A, the Campaign Finance and Public Disclosure Act.

Board staff asked MFC for information regarding the communications and any other communications disseminated by MFC related to the Kihne election. In response, MFC provided copies of seven mail piece communications, one newspaper ad, and a number of broadcast television and online communications. Most of the communications were similar to the two initially considered by the Board.

In its response, MFC argued that "only communications that 'expressly advocate' for or against a candidate can be regulated." (Citing §10A.01, subs. 16a and 18, the definitions of "expressly

advocating" and "independent expenditure.") MFC asserted that because the communications did not contain express advocacy, they were not subject to Chapter 10A.

Analysis

MFC is an association that has as its major purpose something other than to influence the nomination or election of candidates in Minnesota. This conclusion was reached in the context of a Board investigation in 2012 and the Board has found no new facts that would change the characterization of the association. As a result, MFC is not a political committee. If it is to report at all, it will be through a political fund, which is the campaign finance disclosure mechanism used for non-major-purpose associations.

A political fund is:

an accumulation of dues or voluntary contributions by an association other than a political committee, principal campaign committee, or party unit, if the accumulation is collected or expended to influence the nomination or election of one or more candidates or to promote or defeat a ballot question. Minnesota statutes section 10A.01, subdivision 28.

The definition of a political fund makes it clear that once an association expends money to influence the nomination or election of candidates, that money constitutes the association's political fund, which exists as a matter of law without the association doing anything other than the spending.

An association is required to register its political fund after it has "made expenditures" of more than \$750 or made "independent expenditures" of more than \$1,500.¹ Minnesota statutes section 10A.14. An "expenditure" is

a purchase or payment of money or anything of value, or an advance of credit, made or incurred for the purpose of influencing the nomination or election of a candidate . . . Minnesota statutes section 10A.01, subdivision 9.

The phrase "to influence the nomination or election of one or more candidates" used in the definition of a political fund and the phrase "for the purpose of influencing the nomination or election of a candidate" used in the definition of expenditure are interchangeable and are construed by the Board to mean the same thing. Thus, if MFC spent money to influence the nomination of Sheila Kihne in the primary election, the accumulation of money used for that purpose constitutes MFC's political fund and the spending transactions constitute "expenditures."

The controlling question is whether the money MFC spent on the Kihne literature was spent "to influence" (or "for the purpose of influencing") the nomination of Ms. Kihne through the primary election process or for some other purpose.²

¹ A political fund is not an entity separate from the association that did the spending. Rather, it is an accounting mechanism used to track spending that is subject to disclosure. Registration is simply notifying the Board that the accounting mechanism exists and informing the Board of the name of the contact person for the association.

² There is no evidence that the MFC expenditures were made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of the candidate, the candidate's principal campaign committee, or the candidate's agent. Money spent with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of the candidate, the candidate's principal campaign committee, or the candidate's agent is presumed to be to influence the nomination or election of that

The Board first considered whether the communications constituted independent expenditures. An independent expenditure is an expenditure that is made completely independently from a candidate and that advocates for the election or defeat of the candidate using words or phrases of express advocacy. An independent expenditure is, by definition, an expenditure made for the purpose of influencing the nomination or election of a candidate. Minnesota statutes section 10A.01, subdivisions 18 and 16a.

Minnesota Statutes do not define what "words or phrases of express advocacy" are and the Board has not adopted administrative rules to clarify the statutory language. However, the U.S. Supreme Court in a brief footnote in the case of *Buckley v. Valeo*, 424 U.S. 1 (1976), suggested that words of express advocacy included words and phrases such as "vote for," "elect," "vote against." For the purposes of this investigation, the Board adopts the *Buckley* definition.

There is no evidence to suggest that the communications were not made completely independently of the candidate. Thus, the factor on which their characterization as independent expenditures depends is whether or not they expressly advocated for Ms. Kihne's nomination in the primary election. A copy of the MFC communication that has the strongest potential for being express advocacy is attached to and made a part of this document as exhibit C. The communication states on the front: "Sheila Kihne is fighting the liberal special interests." On the reverse the piece includes the following statements:

Liberals like Obama and Franken don't want Sheila.
Don't let them win. Plan ahead, and vote early.

VOTE EARLY IN PERSON

Eden Prairie City Center
8080 Mitchell Road, Eden Prairie Minnesota
Monday through Friday 8 a.m.- 4:30 pm [sic]

VOTE BY MAIL

Request your absentee ballot quickly and easily online.
www.sos.state.mn.us

Primary Election Aug. 12th!

Sheila Kihne
Trusted Conservative

A careful examination of this communication leads the Board to conclude that the piece is not an independent expenditure because MFC has avoided using specific words or phrases of express advocacy such as those described in the *Buckley* footnote. None of the other MFC communications comes closer to express advocacy than the example above. Thus, the MFC communications are not independent expenditures.

Having concluded that the MFC spending does not constitute approved expenditures or independent expenditures, the question on which this matter hinges is whether an expenditure that is made independently of the candidate, yet does not meet the narrow criteria defining an independent expenditure, can be for the purpose of influencing the candidate's nomination or

candidate and constitutes an approved expenditure. Since there is no evidence that the expenditures were approved expenditures, that topic is not discussed further in this document.

election and, thus, subject to disclosure. MFC asserts that it cannot, but Supreme Court First Amendment jurisprudence suggests that the answer is not so clear.

In *Buckley v. Valeo*, the Supreme Court determined that when applied to a non-major-purpose association acting completely independently of a candidate, the phrase "for the purpose of influencing" would be constitutional if it was construed narrowly to include only expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

In *MCCL v. Kelley*, 698 N.W.2d 424 (Minn. 2005), the Minnesota Supreme Court considered the definition of "to influence" elections in the context of political funds. The Minnesota Court stated that the *Buckley* decision requiring a narrowing construction of the phrase "for the purpose of influencing" was controlling with respect to interpretation of the phrase "to influence" in Chapter 10A.

Thus, after *Buckley* and *MCCL*, it was clear that money spent by a Minnesota non-major-purpose association independently of candidates could constitutionally be subject to disclosure only if the phrases "to influence" and "for the purpose of influencing" were narrowly construed. The construction suggested in *Buckley* and adopted in *MCCL* was to limit application of the disclosure requirement for non-major-purpose associations to only those expenditures that expressly advocated for the election or defeat of a candidate. Minnesota's independent expenditure statutes capture this concept.

However, analysis of First Amendment protections as applied to non-major-purpose associations did not stop with *Buckley* and *MCCL*. Subsequent U.S. Supreme Court decisions made it clear that the phrases "to influence" or "for the purpose of influencing" need not be construed as narrowly as suggested by the *Buckley* court in order to preserve their constitutionality when applied to non-major-purpose associations. Through two key cases further examining what communications by a non-major-purpose association may constitutionally be subject to disclosure, the Supreme Court has concluded that disclosure is also constitutional if the communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."³ This type of communication is referred to as the functional equivalent of express advocacy.

Prior to 2014 both the definition of "expenditure" and of "independent expenditure", when applied to a non-major-purpose association, required the purpose of influencing an election. Thus, both could include communications that were either express advocacy or the functional equivalent of express advocacy.⁴ In 2014, however, Chapter 10A was amended to restrict the definition of independent expenditure to those communications that used words or phrases of express advocacy, precluding the use of the functional equivalent test to conclude that an expenditure made independently of a candidate was an "independent expenditure". However, the definition of "expenditure" itself was not changed.

The 2014 amendment results in a distinction between two communications, both made independently of the candidate. The first, which advocates for the election of the candidate using words or phrases of express advocacy, is an independent expenditure, which will trigger the disclosure requirements of Chapter 10A. The second, a communication that does not use words or phrases of express advocacy, but is susceptible of no reasonable interpretation other than as an

³ See *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Wisconsin Right To Life (WRTL II)*, 551 U.S. 449 (2007) (Quoted). See also, *Citizens United v. FEC*, 558 U.S. 310 (2010), reaffirming the principle.

⁴ The Board has previously noted that the definition of expenditure could be defined based on either the magic words or the functional equivalent of express advocacy, but it has not adopted that principle for Minnesota. See Advisory Opinion 428.

appeal to vote for or against a specific candidate, could also constitutionally be subject to disclosure requirements under the functional equivalent approach of *WRTL II*.

The Board has expressed in various contexts that its interpretation of Chapter 10A as a body of law is intended to provide the highest level of disclosure permitted by its language and constitutional principles. Consistent with that interpretation, the Board concludes that it would be permissible, both from a statutory interpretation and a constitutional law standpoint, to conclude that the definition of expenditure in §10A.01, subd. 9, and in the political fund registration requirement of §10A.14, subd. 1, apply to a non-major-purpose association, acting independently of a candidate, that makes a communication that is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

The constitutional law now seems clear that the statutes subjecting non-major-purpose associations to disclosure requirements when they make expenditures "to influence" and "for the purpose of influencing" elections are constitutional as long as those phrases are construed to limit the disclosure requirement to expenditures that constitute express advocacy or its functional equivalent. However, the Board has been cautious in considering how this established constitutional concept should be recognized in Minnesota.

In Advisory Opinion 428 the Board declined to recognize the concept because of ongoing litigation at the federal level and because it considered the administrative rulemaking process to be better suited for statutory interpretations of general applicability. Although the federal litigation has ended, removing the legal questions surrounding the functional equivalent concept, the Board still concludes that administrative rulemaking is the preferred approach for statutory construction. As a result, the Board declines to conclude that the money spent by MFC for the communications that are the subject of this matter are "expenditures" under Chapter 10A.⁵

Findings of Fact

1. The MFC published a number of communications naming candidate Sheila Kihne during the 2014 primary election.
2. The communications were made completely independently of candidate Kihne.
3. The communications did not include words or phrases of express advocacy as interpreted by the Board for the purposes of this investigation.
4. Some of the communications, including those that are included as exhibits A, B, and C to this document, are susceptible of no reasonable interpretation other than as an appeal to vote for candidate Kihne in the primary election.

Conclusions of Law

1. The expenditures for the MFC communications were not independent expenditures or approved expenditures.

⁵ The Board notes that the adjudication process is an appropriate posture for the construction of statutes. The fact that the Board does not use this matter to adopt the functional equivalent approach to defining "to influence" should not be taken to suggest that it has relinquished its authority to do so in the context of a future investigation or through administrative rulemaking.

2. Under the current interpretation of Minnesota statutes, an expenditure by MFC will not be considered to be for the purpose of influencing the nomination or election of a candidate unless the resulting communication uses words or phrases of express advocacy.
3. The current interpretation of Minnesota statutes, which takes a more restrictive approach to defining "to influence" and "for the purpose of influencing" is not constitutionally mandated but will not be modified by the Board in this matter.
4. Based on the current interpretation of statute, the MFC communications are not subject to disclosure and MFC is not in violation of Chapter 10A.

Order

This matter is dismissed.

/s/ George A. Beck

1/6/2015

George A. Beck, Chair

Date