

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Republican Party of Minnesota,

Complainant,

vs.

**DISMISSAL
ORDER**

Thomas Horner, (Thomas) Horner
2010, and Decision Resources, Ltd.,

Respondents.

On June 24, 2010, this matter came on for a probable cause hearing under Minnesota Statutes § 211B.34, before Administrative Law Judge Manuel J. Cervantes. The probable cause hearing was conducted by telephone conference call. The record closed on June 28, 2010, with the parties' filing of legal memoranda.

Matthew Haapoja, Attorney at Law, Trimble & Associates, Ltd., represented the Republican Party of Minnesota. George Soule, Attorney at Law, Bowman and Brooke, LLP, represented Respondents Thomas Horner and Horner 2010. Travis Stottler, Attorney at Law, represented Respondent Decision Resources, Ltd.

Based on the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is not probable cause to believe that the Respondents violated Minnesota Statutes §§ 211B.13 and 211B.15 as alleged in the Complaint.

ORDER

IT IS ORDERED: That there is not probable cause to believe that Respondents violated Minnesota Statutes §§ 211B.13 and 211B.15 as alleged in the Complaint, and this matter is accordingly DISMISSED.

Dated: July 1, 2010

/s/ Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

Digitally recorded; no transcript prepared

NOTICE OF RECONSIDERATION AND APPEAL 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.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Respondent Thomas Horner is the Independence Party's endorsed candidate for governor in the November 2010 election. Respondent Horner 2010 is Thomas Horner's principal campaign committee. Respondent Decision Resources, Ltd., (DRL) is a Minnesota corporation that provides market research, survey and polling services. Dr. William Morris is the president of DRL. He formerly was the chair of the Republican Party of Minnesota, but he is supporting Mr. Horner's candidacy for governor.¹

The record established that between May 28 and June 2, 2010, DRL conducted a state-wide poll in which it surveyed 800 adults on their opinions regarding the gubernatorial race and other specific political issues.² The poll at issue was a general state-wide survey of Minnesota issues, and was not specific to any candidate.³ The poll was not commissioned or designed by any candidate and was not carried out in collaboration with any candidate or campaign committee. Instead, DRL conducted the poll "in-house." DRL has conducted other in-house polls in the past on a myriad of topics and has provided the results

¹ Complaint Ex. F.

² Complaint Ex. B.

³ Complaint Exs. B and G. (For example, the poll asked responders whether they had favorable or unfavorable impressions of many politicians including Governor Pawlenty, President Obama, and House Speaker Nancy Pelosi. It also asked questions about the influence of special interest groups on elected officials and a variety of social issues.)

to media outlets, including, but not limited to, the *St. Paul Pioneer Press* (*Pioneer Press*).⁴

On Sunday, June 6, 2010, Dr. Morris provided the polling results to Bill Salisbury, a reporter for the *Pioneer Press*, with the understanding that the poll results would be published shortly thereafter.⁵

On June 7, 2010, at approximately 2:09 p.m. CDT, Mr. Horner posted a message on the social networking site Twitter in which he stated: “Must be bad Emmer poll coming. GOP stepping up attacks. . . . Can we get a preview?”⁶

At some point in the afternoon of June 7, 2010, Dr. Morris provided the polling data to Mr. Horner and discussed the data with him and members of his campaign committee.⁷

On June 7, 2010, at approximately 9:48 p.m., the *Pioneer Press* posted an article on its website summarizing and dissecting the poll results. Among other findings, the article noted that the poll found Mr. Horner receiving 17-19 percent of the vote depending on which DFL candidate for governor won the State primary election. The article appeared in hard copy in the June 8th edition of the *Pioneer Press*.⁸ =

On June 8, 2010, at approximately 8:32 a.m., Mr. Horner posted another message from his Twitter account in which he stated that the poll indicated he was receiving support equally from Democrats and Republicans and that he was winning support of Independents with “more than a 41% lead.”⁹

On June 8, 2010, Horner’s Campaign Manager, Stephen Imholte, issued a statement that the Horner Committee learned that the poll was being conducted in early June and that it asked DRL when the data would be available. Mr. Imholte stated further that DRL told him that the data would be released exclusively to the *Pioneer Press* on June 6. According to Imholte, Dr. Morris provided the data to Horner’s committee only after it was released to the *Pioneer Press* and he confirmed that the same data was being provided to other candidates and campaigns upon request.¹⁰

According to Dr. Morris, on the morning of June 8, 2010, DRL provided the polling results to the following media outlets: Star Tribune, MinnPost, Politics in Minnesota, and the Associated Press. DRL also provided the results to the Minnesota Association of Professional Employees (MAPE) on behalf of Margaret

⁴ Affidavit of William Morris at ¶ 5.

⁵ Affidavit of Morris at ¶¶ 4 and 6.

⁶ The Complaint alleges that the Twitter posting occurred at 4:09 p.m. CDT, but the posting itself suggests that it occurred at 2:09 p.m. See, Ex. A.

⁷ Affidavit of William Morris at ¶¶ 4 and 7.

⁸ Complaint Ex. B.

⁹ Complaint at 6; Complaint Ex. C.

¹⁰ Complaint at 8; Complaint Ex. G.

Anderson Kelliher's campaign committee.¹¹ The Complainant did not request the polling data.¹²

The Complainant argues that by giving the polling data to Mr. Horner and his committee, DRL violated Minn. Stat. § 211B.15, subd. 2, which prohibits corporations from making contributions of “thing[s] of monetary value” directly to candidates. The Complaint contends that polling data and results have a monetary value and that polling firms “typically charge tens of thousands of dollars for polls such as those conducted by DRL.”¹³ The Complaint alleges further that by soliciting and accepting the polling data from DRL without compensation, Respondents Thomas Horner and Horner 2010 knowingly solicited and received a prohibited corporate in-kind contribution in violation Minn. Stat. § 211B.13, subd. 2.

The Respondents maintain that once the polling data was distributed to the *Pioneer Press* it was made public and no longer had monetary value. Therefore, Respondents contend that providing the polling data to Mr. Horner or any other candidate cannot be considered a prohibited corporate contribution.

The Complainant asserts that there is no exception to the prohibited corporate contribution statute for things that have been “publically disclosed.” The Complainant maintains that the fact that the polling data was given to the *Pioneer Press* before it was disclosed to Mr. Horner should not absolve the Respondents of liability under Minn. Stat. §§ 211B.15 and 211B.13. However, even if public disclosure of the data is significant, the Complainant contends that the polling data was not in fact publicly available or meaningfully disclosed at the time it was given to Mr. Horner. The Complainant maintains that the summary of the poll results that was published in the *Pioneer Press* article did not render the complete polling data public and something without monetary value.

Legal Analysis

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.¹⁴ 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*.¹⁵ Probable cause exists if, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.¹⁶ If the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for

¹¹ Affidavit of Morris at ¶¶ 4 and 8.

¹² Testimony of Michael Brodkorb.

¹³ Complaint at 5.

¹⁴ Minn. Stat. § 211B.34, subd. 2.

¹⁵ 239 N.W.2d 892 (Minn. 1976); see also Black's Law Dictionary 1219 (7th ed. 1999) (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime.”)

¹⁶ *Id.*, 239 N.W.2d at 902.

a directed verdict or acquittal in a civil case, the matter should not be dismissed for lack of probable cause.

Minn. Stat. § 211B.15, subd. 2, provides as follows:

A corporation may not make a contribution or offer or agree to make a contribution, directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate but does not include an independent expenditure authorized by subdivision 3.

Minn. Stat. § 211B.13, subd. 2, prohibits a person from knowingly soliciting, accepting or receiving money or anything of monetary value that is a prohibited corporate disbursement under section 211B.15

The parties have found no Minnesota case law on the issue of whether, by providing polling data to a political candidate after that data has been released to a newspaper for publication, a corporation has made a prohibited corporate contribution under Minn. Stat. § 211B.15. Federal election law, however, is instructive.

Federal Election Commission (FEC) regulations governing allocation of political campaign expenses provides as follows with respect to the allocation of polling expenses:

The acceptance of any part of a poll's results which part, prior to receipt, has been made public without any request, authorization, prearrangement, or coordination by the candidate-recipient, **shall not be treated as a contribution in-kind** and expenditure under paragraph (b) of this section.¹⁷

In this case, it is undisputed that Mr. Horner and his committee received the poll results the day after DRL provided the results to the *Pioneer Press* for publication. While Complainant is correct that Section 211B.15 does not provide an exception for "publicly disclosed" items, whether something has been publically disclosed is an important factor in determining its monetary value.

¹⁷ 11 C.F.R. § 106.4(c) (emphasis added).

Accordingly, the question to be determined is whether the poll results were “made public” once DRL provided them to the newspaper on Sunday, June 6, 2010, and if they were, whether making the results public rendered the data something without “monetary value” that should not be treated as a corporate contribution. Contrary to the Complainant’s repeated statements in its brief, § 211B.15 does not prohibit corporations from giving “*anything* of value;” it prohibits corporations from contributing things of “*monetary* value.” Likewise, § 211B.13 prohibits candidates from knowingly soliciting or accepting “anything of *monetary* value.” Thus, the proper inquiry is what, if any, monetary value the polling data had once it was released to the *Pioneer Press*.

In an advisory opinion, the California Fair Political Practices Commission opined that a corporation would not be considered to have made a contribution to a candidate or committee if it provided the candidate or committee with survey results that had been made available to the public by “presenting the results at a public meeting of the city council or *by providing the results to a newspaper.*”¹⁸

While not authoritative, the FEC regulations and to a lesser extent the state election advisory opinion cited above provide guidance in resolving the issue presented in this case where no Minnesota law exists.¹⁹

The Administrative Law Judge concludes that once DRL released the poll results to the reporter at the *Pioneer Press*, it effectively made the results “public” and the data thereafter lacked “monetary value.” Because DRL provided the poll results to Mr. Horner and his committee (and to other media outlets and candidates) only after it provided the results to the newspaper, DRL did not make a prohibited corporate contribution under Minn. Stat. § 211B.15, subd. 2, and Mr. Horner and his committee did not receive a prohibited contribution under Minn. Stat. § 211B.13.

Likewise, Mr. Horner’s June 7th posting on his Twitter account, “Can we get a preview?,” cannot be viewed as a solicitation for a prohibited corporate contribution in violation of Minn. Stat. § 211B.13, as argued by the Complainant. The request was posted generally on the web and not to anyone (or any corporation) in particular. In any event, the posting occurred after the release of the data to the newspaper, and it cannot be considered a solicitation of a prohibited contribution.

¹⁸ California Fair Political Practices Commission, *Winkler Advice Letter*, No. A-86-035 (Feb. 27, 1986), attached to Soule Aff. as Ex. 2, cited in CFPPC, *Bell Advice Letter* (Feb. 5, 2008), 2008 Cal. Fair-Pract. LEXIS 11, attached to Soule Aff. as Ex. 3.

¹⁹ The value of the published polling data is akin to the exception to the ban on lobbyist gifts to legislators found at Minn. Stat. § 10A.071, subd. 3(a)(6), for “informational material of unexceptional value. Cf. Advisory Opinion 317 (Campaign Finance & Public Disclosure Board, October 13, 1999) (informational booklet that is available without charge to the public has “unexceptional value” for purposes of Minn. Stat. § 10A.071 and is not a prohibited gift).

Even if the polling data became public only after the article was published on-line in the late evening of June 7, 2010, the Complainant has failed to put forth sufficient evidence that Mr. Horner's receipt of the polling data some hours prior to the article's publication has a monetary value that renders the data a prohibited corporate contribution. The Complainant argued at the hearing that receipt of the polling results some hours before the article was published may have provided Mr. Horner with "messaging" or strategic value; but this is speculative and does not amount to evidence of monetary value. It is undisputed that Mr. Horner did not release any information about the poll results until after the article appeared in the June 8th print version of the Pioneer Press. Moreover, as stated earlier, the record reflects that the poll was a general state-wide survey on a number of issues and was not specific to any candidate, including Horner.²⁰

In addition, the Complainant's claim that polls of this type typically cost tens of thousands of dollars and that Mr. Horner's receipt of the poll data should be valued at the amount it would cost his committee to procure the data in the marketplace is without merit. Unlike the Rybak poll, which Complainant offers for comparison, this poll was not commissioned or designed by Mr. Horner to gain specific data to assist his campaign. Rather, the undisputed evidence in the record is that Mr. Horner did not participate in the poll in any manner. His receipt of this polling data simply cannot be viewed or valued as equivalent to data generated by a poll that he commissioned or designed.²¹

The Complainant also argues for the first time that Dr. Morris's "brief discussion" with Mr. Horner and members of his committee on June 7, 2010, about the poll results²² amounts to a provision of "free [consulting] services" of corporate officers under Minn. Stat. § 211B.15, subd. 2, and should be deemed a prohibited corporate contribution. This allegation was not made in the original Complaint and was raised by the Complainant only after the probable cause hearing with the filing of Mr. Morris's Affidavit. The Complainant cites to the same FEC regulations governing allocation of polling expenses and notes that the regulations define the value of contributions relating to polling information to include a polling firm's "written analysis and verbal consultation."²³

The Complainant's argument that Dr. Morris's discussion with Mr. Horner about the polling results amounts to a separate prohibited contribution would have merit if the polling data itself had not been made public. In this case, however, it has been determined that the polling data was made public when it was released to the newspaper and that it thereafter lacked monetary value. The Complainant has put forward no authority to suggest that a discussion regarding publicly available data would have an independent monetary value when the data itself is not considered to be a contribution.

²⁰ Complaint Ex. B and G. Compare, Soule Affidavit Ex. 1 (survey on behalf of RT Rybak for Governor campaign).

²¹ Soule Affidavit Ex. 1.

²² Morris Affidavit at ¶ 7.

²³ 11 C.F.R § 106.4(e)(1).

The Administrative Law Judge concludes that the Complainant has failed to establish probable cause to believe DRL provided Mr. Horner and his campaign committee with a prohibited corporate contribution when it gave Mr. Horner and his committee polling data that it had already provided to the *Pioneer Press*. As of June 7, 2010, the date Mr. Horner received the data, the polling data was public and available upon request. In fact, it is undisputed that DRL provided the poll results to Margaret Anderson Kelliher's campaign as well as to the Star Tribune, Associated Press, and MinnPost on June 8, 2010. Because the polling data was public and free of charge to anyone upon request, it had no monetary value by the time it was provided to Mr. Horner and it cannot form the basis of a Minn. Stat. § 211B.13 or § 211B.15 complaint.

The Complaint is dismissed.

M.J.C.