

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

**FINDINGS, CONCLUSIONS, AND
ORDER**

IN THE MATTER OF THE COMPLAINT OF MATT STEVENS REGARDING THE DUFF (ALAN) 4 HOUSE COMMITTEE, THE MN TEA PARTY ALLIANCE, AND THE NEW LEADERSHIP PAC:

On August 1, 2016, the Campaign Finance and Public Disclosure Board received a complaint submitted by Matt Stevens regarding the Duff (Alan) 4 House committee, the MN Tea Party Alliance, and the New Leadership PAC. The Duff 4 House committee is the principal campaign committee of Alan Duff in his bid for the seat in house district 31A. The other two respondents are general purpose political committees registered with the Board.

The complaint arises out of communications distributed by the two political committees that the committees identified as independent expenditures. The complaint alleges that relationships between the respondents preclude the subject communications from meeting the statutory requirements for independent expenditures. The complaint further alleges that because the expenditures were not independent, they were campaign contributions to the Duff committee that exceeded the contribution limits and were reported incorrectly by the candidate and the political committees. The complaint argues in the alternative that if the communications were independent expenditures, the MN Tea Party Alliance communication lacked the required independent expenditure disclaimer.

On August 9, 2016, the Board chair determined that the complaint alleged a prima facie violation of Chapter 10A. The matter was taken up by the Board on September 7, 2016, for the purpose of determining whether the allegations of the complaint established probable cause sufficient to warrant an investigation. The Board concluded that the complaint did not establish probable cause sufficient to require an investigation of the New Leadership PAC and dismissed the complaint with respect to that respondent.

With respect to the MN Tea Party Alliance, the Board concluded that the complaint was sufficient to establish probable cause as to whether any violations occurred and ordered an investigation.

Allegations of the complaint

In this case, the contribution limit, reporting, and disclaimer allegations all hinge on whether the subject communications were independent expenditures. Minnesota Statutes section 10A.01, subdivision 18, provides that to qualify as an independent expenditure, a communication must be made

without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.

The complaint and its exhibits allege facts which, if true, could establish that the MN Tea Party Alliance and the Duff committee used the same vendor to produce their election-related communications. Complainant asserts that this joint use of a single vendor defeated the independence of any expenditures made by the political committees. In part, complainant's legal assertion relies on the Board's analysis in Advisory Opinion 410, which will be further discussed below.

The complaint also alleges facts that, if true, could establish that a person named Jake Duesenberg served as a key Duff committee advisor at the same time that he served as the executive director of the MN Tea Party Alliance.

The complaint also alleges that Jake Duesenberg, through an association named Action 4 Liberty, published periodic podcasts and that these podcasts have, on multiple occasions, discussed how Duesenberg and the chair of the MN Tea Party Alliance, Jack Rogers, were working together to help the Duff campaign.

The complaint further alleges that the owner of the printing vendor, Don Niemi, is the treasurer of the MN Tea Party Alliance. The complainant asserts that the relationships between Duesenberg, Rogers, and Niemi, as well as the shared use of the printing vendor by the MN Tea Party Alliance and the Duff committee, preclude any communications produced by the vendor for the MN Tea Party Alliance from being considered independent of the Duff committee.

The responses

In their responses, the Duff committee and the MN Tea Party Alliance admit that they used the same printing vendor but deny cooperation in their communications. In testimony before the Board at the probable cause hearing, candidate Duff acknowledged that Mr. Duesenberg was a committee advisor and an agent of the committee with respect to development and dissemination of committee communications. Neither response addressed the roles that Duesenberg, Rogers, or Niemi played in the design and campaign strategy behind any of the communications.

The investigation

The investigation examined three sets of relationships, the result of which, complainant asserts, the independence of the MN Tea Party Alliance expenditure was defeated: (1) the use of a printing vendor shared between the MN Tea Party Alliance and the Duff committee; (2) the alleged dual roles of Duesenberg as agent of the Duff committee and executive director of the MN Tea Party Alliance; and (3) the political relationship between Duesenberg and Rogers as it related to the 2016 elections and to the Duff committee in particular.

In the course of the investigation, the Board requested and received documentary evidence from the parties including email correspondence, printing orders and invoices, and copies of printed communications. The Board also took the sworn testimony of Jake Duesenberg, Jack Rogers, and Don Niemi.

Analysis

The shared printing vendor

The MN Tea Party Alliance printed one piece of literature related to the Duff election. It was, in part, a negative communication against Duff's opponent but it also included express language urging readers to vote for Duff in the 2016 primary election. The Duff committee produced multiple campaign communications that were used throughout the campaign for various purposes. The respondents acknowledge that they both used Mr. Niemi's company, Veni Graphics, for the printing of their communication pieces.

Complainant argues that the MN Tea Party Alliance and the Duff committee "coordinated expenditures by hiring a shared vendor, Mr. Niemi, of Veni Graphics, Inc., to prepare and deliver campaign material on behalf of Mr. Duff." For its premise that a shared vendor defeats the independence of an otherwise independent expenditure, complainant relies on a portion of the Board's Advisory Opinion 410, which complainant quotes as follows:

If a consultant providing services on messaging and timing of independent expenditures for the IEPC also provides messaging and campaign services to a candidate, the independence of the IEPC's expenditures advocating the election of the candidate are not independent. The Board believes that it is not possible for a single individual to avoid coordination of effort between the two clients even if an attempt to do so is made. The Board has previously discussed the separation required in a consulting firm doing work for both an independent expenditure spender and a potentially affected candidate. See Advisory Opinions 338 and 400. It is not possible to maintain the required degree of separation when all of the work for both clients is handled by the same individual. An individual cannot maintain the required separation of effort.

Complainant's attempt to apply the reasoning of Advisory Opinion 410 to the present facts is misplaced. Advisory Opinion 410, according to its own terms, involved a "consultant" who would provide services "on messaging and timing" of campaign communications to both an independent expenditure spender and a candidate. The investigation of the present matter establishes that Niemi did not, either in his capacity as treasurer of the MN Tea Party Alliance or as owner of Veni Graphics, provide any consulting on messaging, timing of communications, means of distribution, or scope of mailings either for the Duff campaign or the MN Tea Party Alliance.

In Advisory Opinion 410, the relationship between the consultant and the clients could result in the consultant becoming the agent of both the independent expenditure spender and the candidate with respect to message and strategy. Such dual agency would make it impossible to separate the individual's work on behalf of a candidate committee from the work on behalf of the independent expenditure spender because the consultant would be developing plans, strategies, and communications for both at the same time.

In the present matter, both the sworn testimony and the documentary evidence establish that Veni Graphics served solely as a printing vendor. The single communication published by the MN Tea Party Alliance was designed in prototype form by Jack Rogers and put into printable

format without any significant change in its message by an external designer contracted by Veni Graphics. Jake Duesenberg designed all of the Duff committee communications and provided them to Veni Graphics in printable form. There is no evidence to support a finding that Don Niemi served as a “consultant” to either the Duff committee or to the MN Tea Party Alliance in any sense.

The Board concludes that the use of the same printing vendor by an independent expenditure spender and a candidate who is the subject of the spender’s communications does not, without more, constitute a relationship that will defeat the independence of the independent expenditure. That requisite “more” does not exist in the present matter.

The alleged dual roles of Jake Duesenberg as Duff committee agent and executive director of the MN Tea Party Alliance

Alan Duff acknowledged in testimony before the Board at the probable cause hearing that Jake Duesenberg was an agent for the Duff committee. As an agent, it would be possible for Duesenberg’s actions to constitute express or implied consent to an otherwise independent expenditure by an outside association or to constitute cooperation with such an organization in the making of expenditures. The Board’s investigation carefully examined whether any such actions occurred.

To argue that there was a close relationship between Duesenberg and the MN Tea Party Alliance, complainant relies on the assertion that that Duesenberg was listed as the executive director of the MN Tea Party Alliance on its website at least until late July 2016. The Board accepts the assertion that the website listing existed; however, the Board concludes that the listing of Duesenberg as executive director did not reflect his actual role with the committee after January 7, 2016. On that date, the MN Tea Party Alliance filed an amendment to its registration removing Jake Duesenberg as its treasurer and naming Don Niemi as the new treasurer. The amendment form was signed by Niemi and was submitted via email by outgoing treasurer Jake Duesenberg. Niemi filed the 2015 year-end report on January 30, 2016.

Though the filing of this amendment marked a significant change in Duesenberg’s role with the MN Tea Party Alliance, the change was not made clear on the MN Tea Party Alliance website until much later, leading to the complainant’s mistaken assumption that Duesenberg still played a significant role in the operation of the MN Tea Party Alliance.

The MN Tea Party Alliance is a political committee under Chapter 10A. It does not exist in a separate corporate form. As a result, the only officers the Board recognizes are its registered chair, who has been Jack Rogers at all relevant times, and its treasurer, who was Jake Duesenberg until January 7, 2016, and Don Niemi thereafter. Although the committee referred to Jack Rogers as its “president” and to Jake Duesenberg as its “executive director” on its website, these were internal labels conferring no legal status or obligation under Chapter 10A.

With regard to Duesenberg’s role, Jack Rogers testified that Jake Duesenberg carried the title executive director because “He did all the paperwork, you know, keeping it formal and correct, et. cetera.” With respect to maintaining the website (which continued to list Rogers as

“president” and Duesenberg as “executive director” until after the complaint was filed in this matter), Rogers testified that tasks like that were in the province of Duesenberg because he, Rogers, did not have expertise in that area.

In discussing the resignation of Jake Duesenberg as treasurer, Jack Rogers’s testimony was not precise, but he understood that there was a significant change. He stated that “Jake wanted to do some other things than – nothing in particular, but he wanted to be more formal and make it bigger, et. cetera, and I – you know, I kind of focused on what I got to do with it.” He testified that Jake had his hands full with these other activities and that they agreed that Jake would resign as “secretary” and that Don Niemi would take over Jake’s role.

Jake Duesenberg’s testimony, taken subsequent to that of Rogers, clarified the motivation behind the January 2016 change in relationships.

During the preceding years, another association named Action 4 Liberty existed both as a corporate entity and as a political committee, both of which became inactive. Because of changing names, the identities of Action 4 Liberty and the MN Tea Party Alliance were in a state of some confusion in the public perception prior to October 2015. Duesenberg’s goal was to sort out the identities so that there was a clear distinction between the MN Tea Party Alliance, a political committee, and Action 4 Liberty, a nonprofit corporation. This process was completed on November 3, 2015, at which time a corporation named “MN Tea Party Alliance” (not legally related to the registered political committee of the same name) changed its name to Action 4 Liberty. At that point, the identities and names of Action 4 Liberty, which was a 501(c)(4) nonprofit corporation, and the MN Tea Party Alliance, which was a general purpose registered political committee, were clearly separated. Duesenberg held the position of president of the Action 4 Liberty corporation.

Duesenberg testified that he did not want to continue to work on the MN Tea Party Alliance “project” anymore once he had the advocacy corporation to run. He stated, “[A]bout December of 2015 is when I handed over the treasury to Don Niemi and, you know, washed myself of any kind of decision-making or financial control of the MN Tea Party Alliance. So what my role is, is I’m the president of the nonprofit organization Action 4 Liberty.” Action 4 Liberty has no formal relationship to the MN Tea Party Alliance, though the associations may have members in common and their members likely agree on some of their political philosophies.

Duesenberg further explained that because he was not doing anything for the MN Tea Party Alliance, the website remained essentially unchanged. The evidence suggests that the fact that Duesenberg continued to be listed as the MN Tea Party Alliance executive director for a time after January 2016 is likely because of his retreat from that role rather than because he was still doing all the work he had previously undertaken to keep the committee operating.

The evidence supports a conclusion that after December 2015 Duesenberg had at best a very limited role in the MN Tea Party Alliance, possibly doing minor tasks to help Jack Rogers, such as eventually removing the officers page from the MN Tea Party Alliance website. Because he had no significant ongoing role in the operation of the MN Tea Party Alliance after December

2015, the allegations of the complaint that depend on a finding of Duesenberg's significant involvement in the MN Tea Party Alliance during 2016 cannot be sustained.

Even if Duesenberg did not have a significant ongoing role in the operations of the MN Tea Party Alliance, it is theoretically possible that there was *actual* express or implied consent or cooperation between Duesenberg and Rogers in the publication of the subject MN Tea Party Alliance independent expenditure. However, the investigation provided no evidence to support such a theoretical conclusion. Rogers produced the prototype draft of the independent expenditure communication and sent it on to the printer without the knowledge of Duesenberg and without any input from him. The printer simply carried out Rogers's instructions in printing the piece and delivering it to the mail house.

The political relationship between Jack Rogers and Jake Duesenberg.

There is no question that Jack Rogers and Jake Duesenberg shared at least some political philosophies, although Duesenberg characterized himself as a "libertarian" and characterized Rogers as a "conservative." During the relevant time period, the two regularly participated in a series of live podcasts under the name "Living Free Podcast," which were a production of the nonprofit corporation, Action 4 Liberty.

Complainant explains, accurately, that in some of the podcasts, Rogers and Duesenberg discussed Alan Duff and his campaign. In one podcast, Duff was a guest. In one podcast, Rogers notes how valuable Veni Graphics and Don Niemi have been to the campaigns.

Examined in some detail, the testimony clarifies that there were actually two primary election campaigns in which Rogers and Duesenberg were separately involved. Rogers was involved in the campaign of Cal Bahr, who was running against the incumbent in Rogers's district. Duesenberg, on the other hand, was a key volunteer in the Alan Duff committee in Duff's primary run against the incumbent in a different district. The evidence shows that there was little or no overlap between the efforts on behalf of the two campaigns, with each of the two individuals, Rogers and Duesenberg, wholly involved with the campaign on which he was working.

While the podcasts show that Rogers and Duesenberg supported each other's candidates and that they both talked favorably about Duff and negatively about his opponent, mere alignment of political interests is not sufficient to defeat the independence of an otherwise independent expenditure.

To convert an expenditure from an independent expenditure to an approved expenditure, some action or relationship relevant to the particular expenditure itself is required. An expenditure that fails the requirements for independence typically becomes an approved expenditure, which is defined in terms that are the converse of those used to define independent expenditures. An expenditure is an approved expenditure

if the expenditure 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 the candidate, the candidate's principal campaign committee, or the candidate's agent.

This definition depends on the existence of some particular characteristic of the expenditure itself. That is, with respect to the expenditure itself, there must be consent, cooperation, or one of the other factors listed in the definition. Sharing support for a candidate, or even talking about that shared support, does not defeat the independence of an independent expenditure when the subject of the possible expenditure is never discussed expressly or by implication (or under the facts of the present matter, never even suggested).

The independent expenditure disclaimer

Having concluded that the MN Tea Party Alliance expenditure was, in fact, an independent expenditure, the Board considers the allegation that the MN Tea Party Alliance violated the independent expenditure disclaimer requirement of Minnesota Statutes section 10A.17, subdivision 4. This subdivision requires an independent expenditure communication to include a specific form of statement indicating that the communication was made independently of the candidate. The MN Tea Party Alliance independent expenditure did not include this statement, resulting in a violation of the statutory requirement.

However, before a civil penalty may be imposed for an independent expenditure disclaimer violation, the Board must conclude that the violation was “knowingly” made. In the present context, that would require that at the time he authorized the communication, Jack Rogers knew that it constituted an independent expenditure and, nevertheless, omitted the disclaimer.

The literature piece related to a proposed increase on automobile license fees. The evidence shows that Jack Rogers had made opposition to this increase a cause of the MN Tea Party Alliance. In his testimony, when asked about the subject communication, which the examiner had referred to as “a campaign ad” supporting Duff and opposing his opponent, Mr. Rogers testified that this characterization of the ad was incorrect:

Because it's the end piece of a campaign going back to prior to the state convention when we objected to the increase in budget and spending and we produced a piece we took to the state convention and it was a follow-up on that.

Although the subject communication clearly meets the definition of an independent expenditure and was later reported by the MN Tea Party Alliance's treasurer as such, the Board concludes that at the time the communication was made, Jack Rogers did not have the requisite understanding of its legal status to “knowingly” violate the independent expenditure disclaimer requirement.

Conclusion

When the facts of a matter are unclear, but are sufficient to raise the real possibility of a violation, the Board will investigate. The purpose of an investigation is to clarify the facts. As a result of that clarification, a respondent may be found to have violated Minnesota statutes or

may be exonerated of one or more alleged violation. In the present matter, the latter result is reached. While the allegations of the complaint were sufficient to raise a legal question, they are not borne out by the actual facts and, as a result, the complaint must be dismissed.

Findings or fact:

1. Jake Duesenberg was treasurer of the MN Tea Party Alliance political committee until January 7, 2016. During the time he was treasurer, he was also considered to be the “executive director” of the political committee; an internal title not recognized in Minnesota statutes.
2. After he resigned as treasurer of the MN Tea Party Alliance, Duesenberg became more involved in the nonprofit corporation Action 4 Liberty and later in the primary election campaign of Alan Duff. At the same time, he essentially discontinued his involvement with the MN Tea Party Alliance.
3. Prior to the 2016 primary election, the MN Tea Party Alliance made an expenditure for a communication that criticized Alan Duff’s opponent and called on voters to vote for Duff in the upcoming primary.
4. The MN Tea Party Alliance communication was designed by political committee chair Jack Rogers and printed to his specification by Veni Graphics.
5. Jake Duesenberg, who served as an advisor and agent of the Duff committee, was not aware that Rogers was going to do an expenditure related to the Duff election. He had no involvement in any aspect of the development and publication of the communication.
6. Don Niemi served as a printing vendor to both the MN Tea Party Alliance and the Duff Committee. However, he did not provide consulting on campaign messaging or strategy to either committee and was not the agent of the Duff committee for any purpose that could defeat the independence of an independent expenditure. He simply accepted print jobs from each customer and printed them to order.
7. While Jake Duesenberg and Jack Rogers shared some political views, including the opinion that Alan Duff should be selected in the 2016 primary election, they had no relationship and no communication that would destroy the independence of the subject MN Tea Party Alliance expenditure.
8. The subject communication did not include the statutorily-required independent expenditure disclaimer.
9. Jack Rogers, who was responsible for publication of the communication, understood it to be a continuation of the MN Tea Party Alliance’s campaign against proposed license fee increases.

Based on the foregoing findings of fact, the Board makes the following:

Conclusions of law

1. The expenditure by the MN Tea Party Alliance that is the subject of this matter met the requirements of Minnesota Statutes Chapter 10A to constitute an independent expenditure.
2. The relationships between the individuals and associations subject to this investigation did not defeat the independence of the expenditure.
3. The subject communication did not include the required independent expenditure disclaimer, in violation of Minnesota Statutes section 10A.17, subdivision 4. However, the violation was not knowingly made and, as a result, no civil penalty is provided by statute.

Based on the foregoing findings of fact and conclusions of law, the Board issues the following:

Order

The Board investigation of this matter is concluded and hereby made a part of the public records of the Board pursuant to Minnesota Statutes section 10A.022, subdivision 5.

s/ Daniel N. Rosen
Daniel N. Rosen, Chair
Campaign Finance and Public Disclosure Board

Date: January 31, 2017