

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

**PROBABLE CAUSE
DETERMINATION**

IN THE MATTER OF THE COMPLAINT OF THE MINNESOTA DFL REGARDING THE MATT BIRK FOR
LIEUTENANT GOVERNOR CAMPAIGN AND THE DR. SCOTT JENSEN FOR GOVERNOR COMMITTEE

On April 4, 2022, the Campaign Finance and Public Disclosure Board (the Board) received a complaint submitted by Charles Nauen on behalf of the Minnesota Democratic-Farmer-Labor Party regarding Matt Birk, a candidate for lieutenant governor (Birk campaign). Matt Birk is an announced candidate seeking the Republican Party of Minnesota (RPM) endorsement for lieutenant governor. Mr. Birk is running for that office with Dr. Scott Jensen, who has announced that he is a candidate seeking the RPM endorsement for governor. Dr. Jensen registered the Dr. Scott Jensen for Governor committee (Jensen Committee) with the Board in March of 2021. Mr. Birk has not registered a principal campaign committee with the Board.

Although the complaint does not make any specific allegations against the Jensen Committee, two of the allegations against the Birk campaign may, if determined to be true, also constitute violations by the Jensen Committee. Because the allegations in the complaint, and evidence provided with the complaint, reference the Jensen Committee, the Board chair concluded that the complaint was against both the Birk campaign and the Jensen Committee.

The complaint's initial allegation is that Mr. Birk failed to register a principal campaign committee with the Board within fourteen days of raising or spending more than \$750 on his campaign for lieutenant governor. In support of the allegation the complaint provides a screenshot of a web page¹ where political donations may be made to "Matt Birk for Lt. Gov". The web page also states "Give TODAY to help our team WIN!". The donation page disclaimer states "Paid for and provided by Dr. Scott Jensen for Governor". Additionally, the complaint provides information on five Facebook advertisements that announce that Mr. Birk is running for lieutenant governor on a ticket with Dr. Jensen's campaign for governor. The initial Facebook advertisement was released on March 10, 2022, and the combined cost of the Facebook advertisements is approximately \$4,000. The five Facebook advertisements each contain the statement "Paid for by Matt Birk for Lt. Governor".

The complaint further alleges that the Birk campaign either received prohibited contributions from the Jensen Committee, or alternatively, that the unregistered Birk campaign committee will need to reimburse the Jensen Committee for expenditures made on behalf of Mr. Birk's candidacy for lieutenant governor. In support of the allegation the complaint states that the website <https://mattbirk.com> is the website for the Birk campaign. The homepage of the website provides the disclaimer:

¹ secure.anedot.com/dr-scott-jensen-for-governor/birk-for-lg

Paid for and provided by the Dr. Scott Jensen for Governor Committee
Dr. Scott Jensen for Governor
P. O. Box 1348
Minnetonka, MN 55345

The complaint also alleges that if Mr. Birk has not formed a campaign committee for lieutenant governor, then the Facebook advertisements contain a false and misleading disclaimer in violation of Minnesota Statutes section 211B.04. In support of the allegation, the complaint again references the five Facebook advertisements that state “Paid for by Matt Birk for Lt. Governor”.

The complaint’s last allegation states that if Mr. Birk has not formed a campaign committee, then the contributions donated through the website donation page are probably being deposited in the Jensen Committee’s bank account. The complaint alleges that if contributions made via the website for the Birk campaign are being deposited in the Jensen Committee’s bank account, then the donations are being earmarked in violation of Minnesota Statutes section 10A.16. Earmarking is the practice of soliciting or accepting a contribution for a candidate with the understanding that the contribution will be forwarded to another candidate.

On April 14, 2022, the Board chair determined that the complaint stated prima facie violations of provisions in Chapter 10A, requiring the registration of a principal campaign committee by the Birk campaign; limiting contributions between active candidates for state office by both the Jensen Committee and the Birk campaign; and prohibiting earmarking of contributions by both the Jensen Committee and the Birk campaign. The Board chair also determined that the complaint stated a prima facie violation of the disclaimer requirements in Chapter 211B. The complaint and the prima facie determination were provided to the respondents on April 14, 2022.

On April 22, 2022, the respondents’ attorney, Nicholas R. Morgan, submitted a response to the complaint and to a series of questions asked by Board staff. In response to a question on whether Mr. Birk had formed a separate principal campaign committee, Mr. Morgan states, “No, Mr. Birk did not form a separate principal campaign committee because he is running as a single entity under the Jensen for Governor Committee in compliance with Minnesota Statute § 10A.25 subdivision 3.”

Minnesota Statutes section 10A.25, subdivision 3, provides:

Governor and lieutenant governor a single candidate. For the purposes of this chapter, a candidate for governor and a candidate for lieutenant governor, running together, are considered a single candidate. Except as provided in subdivision 2, paragraph (b), all expenditures made by or all approved expenditures made on behalf of the candidate for lieutenant governor are

considered to be expenditures by or approved expenditures on behalf of the candidate for governor.

Mr. Morgan explains in his response that Dr. Jensen has signed the public subsidy agreement, which limits the total campaign expenditures his committee may make. Mr. Morgan's response further points out that the campaign spending limit is increased by five percent for a candidate seeking party endorsement for the office of lieutenant governor.² To take advantage of the increase Minnesota Rules part 4503.1300, subpart 2, requires the Jensen Committee to maintain a separate record of the expenditures made to secure the party endorsement of Mr. Birk for the office of lieutenant governor, as only those expenditure may be counted towards the five percent increase available for that purpose. The rule provides in part:

Subpart 1. Seeking endorsement as lieutenant governor. Raising and spending funds to seek endorsement as lieutenant governor may be done either through a separate principal campaign committee established by the lieutenant governor candidate or through a joint principal campaign committee of the governor and lieutenant governor candidates.

Subpart 2. Separate records for seeking endorsement. A principal campaign committee that makes expenditures and authorizes approved expenditures to seek endorsement for the office of lieutenant governor at the convention of a political party and intends those expenditures to be in addition to the expenditure limit established by Minnesota Statutes, section 10A.25, subdivision 2, shall maintain a separate record of those expenditures.

In response to the allegation that the mattbirk.com website was a prohibited donation between active principal campaign committees, Mr. Morgan provides that the website was paid for by the Jensen Committee, and that the payment was appropriate because Mr. Birk does not have, and was not required to form, a separate campaign committee. In conclusion Mr. Morgan states "If no additional registration was required, there were no improper in-kind donations."

In response to the allegation regarding the earmarking of contributions Mr. Morgan states, "All money raised by Mr. Birk was deposited into the Jensen for Governor bank account. All checks sent in for the Birk Lt. Governor endorsement were sent to the Jensen for Governor committee post office box, and any place where we informed voters their funds would go towards the Birk endorsement also included a Jensen disclaimer alerting them to the eventual recipient and spender of their contributions." Mr. Morgan further provides that

² Minnesota Statutes section 10A.25, subdivision 2 (b), states that "In addition to the amount in paragraph (a), clause (1), a candidate for endorsement for the office of lieutenant governor at the convention of a political party may make campaign expenditures and approved expenditures of five percent of that amount to seek endorsement." Five percent of the base campaign spending limit for the office of governor for the 2021 - 2022 election segment is \$211,635.

As noted above, Mr. Birk and the Jensen for Governor committee became a joint principal committee for a Governor and Lieutenant Governor campaign allowed under Minnesota Statute § 10A.25 subdivision 3. As a joint principal campaign committee, any funds solicited by Mr. Birk are appropriately deposited in the Jensen for Governor account.... As a joint principal committee, there is no possibility for earmarking because the Birk endorsement campaign is part of the Jensen for Governor Committee for expenditures and for soliciting contributions.

In reference to the allegation that the disclaimers on the Facebook advertisements, reading "Paid for by Matt Birk for Lt. Governor", are misleading and do not comply with Minnesota Statutes section 211B.04, Mr. Morgan provides several responses as to why the allegation is not true. Mr. Morgan states: "The Facebook advertisements noted in the complaint are not campaign material conducive to fulfilling the requirements of Minnesota Statute § 211B.04 subdivision 1(b). Facebook provides no area in the advertisement to actually put both the prepared and paid for language as well as the campaign address. Inserting the disclaimer into the advertisement would make it too small and a violation of the size requirements of § 211B.04 subdivision 5. Facebook advertisements fall under the exemption in § 211B.04 subdivision 3(c)(3)."

The exception in Minnesota Statutes section 211B.04, subdivision 3, paragraph (c), clause (3), referenced by Mr. Morgan provides that an online banner advertisement or similar electronic communication does not need to contain a disclaimer if the communication links to a webpage that contains the full disclaimer. With his response Mr. Morgan provided screenshots of the Matt Birk Facebook page that was linked to the advertisements provided in the complaint. The Matt Birk Facebook page states in the Intro section that "Dr Scott Jensen for Governor is responsible for this page" and provides the mailing address of the Jensen Committee. The Intro section also provides a link to the mattbirk.com website, which contains a disclaimer stating that the website was prepared and paid for by the Jensen Committee.

Mr. Morgan also states:

Even if the Campaign Finance Board decides that Facebook advertisements are campaign materials and require the full disclaimer, the disclaimer is not misleading because of the specific disbursement used for the advertisements. Since the Jensen for Governor Committee registered for the public subsidy, all campaign expenditures for the Birk endorsement campaign must be carefully monitored and noted on our report. Since this is a very specific type of expenditure, the Jensen for Governor Committee wanted people to know where the money for the advertisements was coming from. If people interacted with the advertisement they were brought to a social media page with a Jensen disclaimer, so there was never an attempt to mislead or deceive by the campaign. Since the advertisements provide specific details for the type of public subsidy expenditure, the Jensen for Governor Committee and Mr. Birk did not mislead voters, only provide them with specific information on the origination of the expenditure.

The Board considered this matter at its meeting on May 4, 2022. David Zoll, counsel for the complainant, appeared to address the Board. Mr. Morgan appeared before the Board on behalf of the Jensen Committee. The Board again considered the matter at its special meeting on May 9, 2022.

Analysis

When the Board chair makes a finding that a complaint raises a prima facie violation, the full Board then must determine whether probable cause exists to believe an alleged violation that warrants an investigation has occurred. Minnesota Statutes section, 10A.022, subdivision 3 (d). A probable cause determination is not a complete examination of the evidence on both sides of the issue. Rather, it is a determination of whether a complaint raises sufficient questions of fact which, if true, would result in the finding of a violation.

If the Board finds that probable cause exists, the Board is required to determine whether the alleged violation warrants a formal investigation, considering the type and magnitude of the alleged violation, the knowledge of the respondent, any benefit to be gained from a formal investigation, the availability of Board resources, and whether the violation has been remedied. Minn. R. 4525.0210, subp. 5. If the Board finds that probable cause exists but does not order a formal investigation, the Board is required to either dismiss the complaint or order a staff review. Minn. R. 4525.0210, subp. 6.

Registration

Generally, Minnesota Statutes section 10A.14 requires each state candidate to form and register a separate principal campaign committee for each office sought if the campaign exceeds \$750 in contributions, not counting the candidate's personal contribution to their own campaign. An exception is provided for candidates for lieutenant governor who are running on a ticket with a candidate for governor. A candidate for governor and a candidate for lieutenant governor running for election together may have a single, joint principal campaign committee that is registered by the candidate for governor as provided in Minnesota Statutes section 10A.25, subdivision 3, and Minnesota Rules part 4503.1300. All contributions received, expenditures made, and disclosure reports filed for both candidates are handled by this single committee.

Here, the response provides that a separate principal campaign committee for the Birk campaign is not needed because the Jensen Committee is the single joint committee for the ticket of Dr. Jensen for governor and Mr. Birk for lieutenant governor. The response also provides that all contributions received by the Birk campaign are deposited in the Jensen Committee account, that all expenditures for the Birk campaign are made through the Jensen Committee account, and that the disclosure of said contributions and expenditures are found on the reports filed by the Jensen Committee.

Having no basis to conclude that the Birk campaign is required to form or register a separate principal campaign committee, or that the Birk campaign has a separate bank account for contributions and expenditures, the Board finds that there is not probable cause to believe that the Birk campaign violated the committee registration requirement in Minnesota Statutes section 10A.14.

Improper In-Kind Contributions

As noted previously, Minnesota Statutes 10A.25, subdivision 3, provides that a candidate for governor and a candidate for lieutenant governor, running together, are considered a single candidate for the purposes of Chapter 10A. Expenditures made to secure the endorsement for the lieutenant governor candidate may be counted separately to take advantage of an increase in the campaign spending limit, but all expenditures for the lieutenant governor candidate are made by the principal campaign committee of the candidate for governor.

The complainant's allegation is that the Jensen Committee made an approved expenditure (a type of in-kind contribution) on behalf of the Birk campaign when it paid for the mattbirk.com website. The premise of the allegation is that there was, or should be, a Birk for Lt. Governor committee separate from the Jensen Committee. A contribution from a state candidate's principal campaign committee to another state candidate's principal campaign committee is limited by Minnesota Statutes section 10A.27, subdivision 9. This statute provides in part that a contribution between candidate committees must not be made or accepted unless the donating committee provides a statement that the committee will terminate within twelve months of the date of the contribution.

The response from Mr. Morgan provides that the principal campaign committee of the Birk campaign is the Jensen Committee. The Jensen Committee paid for the mattbirk.com website and reports that cost on the committee's 1st quarter report of receipts and expenditures. Therefore, the cost of the website was an expenditure by the Jensen Committee for the committee's own lieutenant governor candidate, and not an approved expenditure for any other committee or candidate. The Board finds that there is not probable cause to believe that the Jensen Committee or the Birk campaign violated the provisions on contributions between state candidates found in Minnesota Statutes section 10A.27, subdivision 9.

Earmarking of Contributions

The prohibition on earmarking contributions is found in Minnesota Statutes section 10A.16, which provides:

An individual, political committee, political fund, principal campaign committee, or party unit may not solicit or accept a contribution from any source with the express or implied condition that the contribution or any part of it be directed to a particular candidate other than the initial recipient. An individual, political committee, political fund, principal campaign committee, or party unit that knowingly accepts any earmarked contribution is subject to a civil penalty

imposed by the board of up to \$3,000. Knowingly accepting any earmarked contribution is a gross misdemeanor.

The complainant's allegation is that contributions made via the mattbirk.com website were given to the Birk campaign, but actually deposited in the Jensen Committee's account, which resulted in the contribution being directed to a candidate other than the initial recipient. The complainant views this as a violation of the prohibition on earmarking.

The response from Mr. Morgan acknowledges that in fact contributions made via the website, or otherwise provided to the Birk campaign, are deposited in the Jensen Committee's account. As provided in Minnesota Statutes section 10A.25, subdivision 3, and Minnesota Rules part 4503.1300, funds raised by a candidate for lieutenant governor running on a ticket with a candidate for governor must be deposited in the account of the joint committee. The candidates for governor and lieutenant governor are considered a single candidate for the purpose of contribution limits and must report all contributions as a single principal campaign committee. Here, the contributions received by the Birk campaign are being appropriately deposited in the Jensen Committee's account, and reported by the Jensen Committee as contributions received. Therefore, the contributions are not being directed to a candidate other than the initial recipient. The Board finds that there is not probable cause to believe that the Jensen Committee or the Birk campaign violated the provisions of Minnesota Statutes section 10A.16.

Disclaimers

Minnesota Statutes section 211B.04 generally requires anyone preparing campaign material to include a disclaimer on the material substantially in the form specified in subdivision 1, paragraph (b):

(b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the committee, (address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the committee, (address)" for material prepared and paid for by a person or committee other than a principal campaign committee. The address must be either the committee's mailing address or the committee's website, if the website includes the committee's mailing address. If the material is produced and disseminated without cost, the words "paid for" may be omitted from the disclaimer.

Additionally, the statute provides that certain material does not need a disclaimer because it would be impracticable to apply, or provides an alternative to placing the disclaimer directly on the campaign material in certain situations. Relevant to this discussion is the provision in Minnesota Statutes section 211B.04, subdivision 3, paragraph (c), clause (3), which provides that a disclaimer is not needed for "online banner ads and similar electronic communications that link directly to an online page that includes the disclaimer."

The complaint is based on five Facebook advertisements, all of which contain the statement "Paid for by Matt Birk for Lt. Governor". The response from Mr. Morgan acknowledges that the

advertisements were paid for by the Jensen Committee. The response provides that the full prepared and paid for disclaimer would not fit onto a Facebook advertisement, or that the size of the disclaimer would be so small that it would violate the 8-point font size requirement found Minnesota Statutes section 211B.04, subdivision 5. Mr. Morgan then states that the exception for electronic communications that link directly to an online page that includes the disclaimer applies to the Facebook advertisements. Mr. Morgan also states that “Paid for by Matt Birk for Lt. Governor” is a statement to alert the public that the advertisement is part of the expenditures made in support of the endorsement of Matt Birk, and count against the increased campaign spending limit used for that purpose. In summary Mr. Morgan states:

“The Jensen for Governor Committee was committed to noting not just to the Campaign Finance Board, but to the general public, which expenditures would be part of Mr. Birk’s endorsement campaign. Therefore, any confusion comes from the Jensen for Governor Committee’s abundance of caution and desire to inform the public.”

There does not seem to be disagreement that the Facebook advertisements are campaign material that require a disclaimer. Minnesota Statutes section 211B.04, subdivision 5, specifically excludes websites and social media pages from the 8-point font requirement, and in other investigations the Board has examined Facebook advertisements that contained the full disclaimer. As Mr. Morgan states, the disclaimer may also be provided for online banner advertisements and similar electronic communications via a link to an online page that does provide the full disclaimer. In this case the link takes the viewer to the Matt Birk Facebook page, which includes an Intro section. That section states that “Dr Scott Jensen for Governor is responsible for this page” and includes the mailing address used by the Jensen Committee. The Board declines to find that this information is a disclaimer substantially in the form provided in Minnesota Statutes section 211B.04. Within the Facebook page there is also a link to the mattbirk.com website that does contain the full disclaimer for the Jensen Committee, however because the mattbirk.com website is not a direct link from the Facebook advertisements it does not satisfy the exception provided in Minnesota Statutes section 211B.04, subdivision 3, paragraph (c), clause (3).

Moreover, in the Board’s view the primary problem with the Facebook advertisements is that they do contain a disclaimer, “Paid for by Matt Birk for Lt. Governor”, which is misleading and not accurate. The advertisements were paid for by the Jensen Committee, which is not obvious to the public from the advertisement. The Board accepts that the Jensen Committee was trying to identify expenditures made for the endorsement of Matt Birk when it applied “Paid for by Matt Birk for Lt. Governor” to the advertisements, but does not accept that the advertisements identify the committee that prepared and paid for the advertisements as required by Minnesota Statutes section 211B.04. Based on the complaint and the response provided by the Jensen Committee, there is probable cause to believe that a violation of the disclaimer requirement occurred.

Given the completeness of the record of the events that led to the disclaimer on the Facebook advertisements in question, and the information in the record on the cost and approximate

distribution of the advertisements, the Board concludes that a formal investigation is not warranted or needed to resolve this matter.

Order:

1. The allegation that Matt Birk violated the registration requirements in Minnesota Statutes section 10A.14, subdivision 1, is dismissed without prejudice because there is not probable cause to believe that this violation occurred.
2. The allegation that the Dr. Scott Jensen for Governor committee and the campaign of Matt Birk for lieutenant governor violated the contribution provisions of Minnesota Statutes section 10A.27, subdivision 9, is dismissed without prejudice because there is not probable cause to believe that this violation occurred.
3. The allegation that the Dr. Scott Jensen for Governor committee and the campaign of Matt Birk for lieutenant governor violated the earmarking prohibition in Minnesota Statutes section 10A.16, is dismissed without prejudice because there is not probable cause to believe that this violation occurred.
4. Although probable cause exists to believe that the Dr. Scott Jensen for Governor Committee prepared and disseminated campaign material lacking a disclaimer substantially in the form required by Minnesota Statutes section 211B.04, a formal investigation is not warranted. The Board's executive director is directed to initialize a staff review regarding the allegations in the complaint regarding the disclaimer provisions in Minnesota Statutes section 211B.04 pursuant to Minnesota Rules 4525.0320 for the purpose of concluding the investigation by a conciliation agreement with the Dr. Scott Jensen for Governor committee. If the investigation cannot be resolved by conciliation agreement, the executive director is directed to prepare findings to resolve the matter.



Faris Rashid, Chair
Campaign Finance and Public Disclosure Board

Date: May 9, 2022