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April 25, 2013

Lori A. Bourbonais
Bureau of Elections, MI Dept. of State
Richard Austin Bldg., 1st Floor
430 W. Allegan
Lansing, MI 48916

Via Mail and email:
bourbonaisl@michigan.gov

Re: Traverse City Area Public Schools Complaint

Dear Ms. Bourbonais:

My client (Jason Gillman) and I have reviewed your April 18, 2013 letter summarizing your department's investigation and findings in the complaint he filed regarding express advocacy in an eight-page flyer mailed by TCAPS seeking voter support of their bond issue ballot request on the November 6, 2012 general election ballot.

We agree with your findings and recommended course of action, as set forth in the last two paragraphs of page 4. Specifically, TCAPS needs to provide your office with itemized costs incurred regarding that flyer. By Mr. Gillman's reading of the two page affidavit of Steven Cousins (which was submitted as a supportive document accompanying Mr. Dietzel letter of December 21, 2012 sent to your attention), it appears as though no legal review of the draft was made, before it was sent out to be printed and mailed.

Paragraph 6 & 7 specifically states...

"While I did not personally draft the pamphlet, I approved its contents. When I approved the pamphlet's content, I did not believe that its publication or distribution could be construed as a violation of the Campaign Finance Act."

Because no mention of any external review by anyone outside of TCAPS, (including but not limited to the Thrun law firm which was then and is now on retainer for its legal services to TCAPS), Mr. Gillman interprets the absence of such mention to mean that in fact TCAPS did not submit the flyer to be reviewed by counsel. If Mr. Gillman is right in this regards, then it is his position that Mr. Cousins and TCAPS specifically erred in not seeking such a timely and cost-effective pre-publication legal review, which would have headed off this whole problem.

Itemized costs that should be a part of your request to TCAPS would reveal any services rendered by counsel for review before publication and distribution. If no such evidence of qualified prior legal review on this flyer can be produced by TCAPS, then Mr. Gillman urges your offices to take that into account when determining what appropriate remedies and/or fines are to be levied against TCAPS.

It may be useful for you to know how a timely written legal opinion is utilized in some other fields of law. For example, intellectual property law discerns the absence of such to be useful evidence in a Court when levying fines and penalties in “the penalty stage” of patent infringement litigation. Specifically, after the court has determined infringement has taken place, then if an infringing party is shown to have been aware of the existence of the US patent at issue, and the infringing party decides to not seek an opinion letter from a registered patent attorney, then the Court (which has already determined the fact issue of infringement or non-infringement) will take into account the behavior of the infringing party in calculating damages. Specifically, US patent law differentiates between willful infringement, as evidenced by the infringing party's behavior, in either:

1. Choosing not to seek any opinion letter at all, or
Ignoring his legal counsel's opinion letter warning him of probable infringement, and then proceeding ahead regardless of the advice rendered in the opinion letter

The financial consequences of being found guilty of willful infringement are very substantial. The standard remedy is to triple the damages assessed by the Court, and to order as “relief” the payment of that trebled damage sum by the infringing party to the infringed – upon patent owner.

Mr. Gillman has not sought any monetary damages to be paid to himself, but is adamant that the taxpayer be protected from future abuses of this type. TCAPS needs to pay appropriate penalty for their violation of the campaign finance laws, and Mr. Gillman urges you to consider as one factor in assessing the penalty whether or not Mr. Cousins and TCAPS were exercising prudent and normal standards of governance, & specifically, if they chose not to seek pre-publication legal review by Thrun or other qualified law firm; a consideration that would shed light if it was indeed a willful violation.

Finally, Mr Gillman has one other concern, and offers a possible solution. The penalty as provided for in the statute allows a significant amount to be assessed up to the amount spent and including a misdemeanor sanction for parties involved in said violation. Because these complaints are made to protect the taxpayers, the remedy has often been a very small fine (\$100 as noted in a recent Capitol Confidential article) in the informal process so as not to punish the taxpayers twice. The unfortunate result of this, is a weak deterrent to public bodies and administrators which will 'test' the limits with little fear of appropriate reprisal.

The solution in this case would be to assess the full damages to the administrator responsible for the violation. In fact, superintendent Stephen Cousins might have made it easier to do so. In response to your office's determination, Mr Cousins sent out to parents a public letter of apology. It reads:

Dear TCAPS Parents,

In October, a complaint was filed against TCAPS alleging the district violated the Michigan Campaign Finance Act during our 2012 bond informational campaign. TCAPS has been cooperating with the Secretary of State during the course of their investigation.

As soon as we were made aware of the possibility that improper wording may have been used in our mailer, we immediately took steps to halt those communications and adjusted the language to avoid further confusion.

TCAPS has received the disposition from the Secretary of State today regarding the complaint. The Secretary of State disposition states the district mailer contained express advocacy and it further believes that the evidence supports its conclusion that there may be a reason to believe that a violation of section 57 of the Act occurred.

*As superintendent, I want to assure you that the district did not intend to violate the Act or mislead the public. **I take full responsibility for the issue.** On behalf of the district and the Board of Education, I apologize to Mr. Gillman, our parents, staff and community for any confusion the mailer may have caused. We value the trust our community places in TCAPS and we will work with the SOS to resolve this in a manner that will **prevent it from occurring again.***

Sincerely,

*Steve Cousins
Superintendent*

Two parts of this letter have been emphasized that could assist you in assessing the damages to the appropriate party. Last Nov. 6th's bond issue ballot question was defeated and it is public knowledge that TCAPS plans to run a 2013 bond issue campaign again. Mr. Gillman is requesting that the maximum penalty be levied upon the party which has already accepted responsibility, a decision that would ensure a dedicated compliance to the CFA in future elections. He would also be amenable to having his attorney fees being reimbursed for this matter as part of the assessed damages.

Thank you once again for your time and consideration on this matter

Sincerely,


David A. Bieganowski