



PROBABLE CAUSE MEMORANDUM

To: Miami-Dade County Commission on Ethics and Public Trust

From: Carol A. Jordan, Advocate

Re: Ethics Complaint C14--51 (Jorge Gonzalez v. Mario Garcia)

Date: May 2015

Recommendation:

A finding of No Probable Cause should be entered in this case as there is insufficient evidence to show that Respondent, Mario Garcia, violated the Mandatory Fair Campaign Practices ordinance (MFCP).

Background and investigation:

Prior to the November 2014 election, incumbent candidate for North Bay Village (NBV) Commissioner-at Large Jorge Gonzalez (Gonzalez), filed this complaint with the Miami-Dade County Commission on Ethics and Public Trust (COE). The complaint alleges that his opponent, Mario Garcia (Garcia), violated the MFCP ordinance when he approved a campaign flyer that contained material falsehoods.

Gonzalez alleges that the Campaign of Mario Garcia for North Bay Village Commissioner at Large (campaign) published and distributed campaign material (a flyer) to voters that contained the following eight separate intentional falsehoods:

1. Gonzalez has a history of bankruptcy and judgments of nearly \$1 million of unpaid debt;
2. Gonzalez dissolved the Village's Business Board and did not reinstate it;
3. Gonzalez raised voters' taxes by 35% but failed to pay his own;
4. At a Budget meeting, Gonzalez commented, "if people don't like paying taxes in North Bay Village, they can move";

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5. Gonzalez went on an all-expense paid trip to Turkey from lobbyists in May 2014, after being rebuked by the Commission on Ethics;
 6. Gonzalez voted to hide gifts he accepted from people seeking to do business with the Village;
 7. Gonzalez stood against performance measures at TIES as the school fell from an "A" to a "D" for fear grading bureaucrats would be "an insult" , but never worried about failing parents and children; and
 8. Gonzalez voted to cut youth services, including the Village's Police Athletic League.

Gonzalez vehemently denies all of the allegations detailed above. Gonzalez provided additional information that Gonzalez characterized as the "truth" behind Garcia's false statements and misrepresentations. Gonzalez, in a telephone interview with the COE investigator, provided additional information in an effort to substantiate his claim that the flyer statements are false. A summary of those claims are contained in the COE Report of Investigation.

While the complaint is silent as to any supposed "damages" suffered due to the alleged false statements, Gonzalez provided the following additional information as evidence that the flyer's false statements "exposed [him] to hatred, contempt or ridicule or caused [him] to be shunned or avoided or injured in his ... business or occupation":

1. A blog post from votersopinion.com entitled, "The Crybaby of North Bay Village", which ridicules Gonzalez for his filing of civil and ethics complaints in response to Garcia's flyer.
2. Gonzalez claims that he has been told by certain people that others have made fun of him or criticized him for what was printed in Garcia's flyer. Garcia claims the property manager of his condo stated that he overheard negative comments about Gonzalez based upon the flyer.
3. Gonzalez provided a hand-written statement of his 11 year old daughter on notebook paper, which claims someone criticized her dad based upon the flyer.
4. Gonzalez provided a November 16, 2014, news article, which appeared in the Miami Herald entitled, "Incumbents keep seats in North Bay Village" . The article reports that

on election day a voter outside the NBV voting location said that he voted for Garcia and not Gonzalez because Gonzalez “had too many legal issues”, referring to the bankruptcy involving debts that Gonzalez incurred.

5. Gonzalez claims that he has seen various comments posted on Facebook and a local blog criticizing and ridiculing him in connection with the statements made by Garcia in his flyer. Most appear to be blog posts and comments by NBV Reality Based Community blogger Kevin Vericker.

Respondent, Garcia, provided a written response to the COE, wherein he claims that the flyer statements were made based upon information available to him from sourced, documented materials which he thought to be true and in compliance with the Ordinance. Garcia further responds that the flyer in question contains statements regarding Gonzalez’ bankruptcy, court judgments, actions on the Commission, and actions in public. Garcia claims that all the statements were well-sourced and legitimate discussion points relevant to the campaign. Garcia then provides a chart and back-up documentation detailing the sources and corroborating documents backing up the eight flyer claims.

Relevant ordinances:

2.11.1.1 Ethical campaign practices ordinance

(C) Mandatory Fair Campaign Practices

(1) Prohibitions. A candidate and his or her campaign staff to the Miami-Dade County Commission, Mayor of Miami-Dade County, Property Appraiser of Miami Dade County, Miami – Dade Fire and Rescue Service District Board, Miami-Dade County Community Councils or for any municipal elective within Miami-Dade County

(a) With actual malice make or cause to be made any untrue oral statement about another candidate or a member of his her family or staff which exposes said person to hatred, contempt or ridicule or causes said person to be shunned or avoided or injured in his or her business or occupation.

(b) With actual malice publish or cause to be published by writing, printing, picture, effigy, sign or otherwise than by mere speech any untrue statement about another candidate or a member of his or her family or staff which exposes said person to hatred, contempt, or ridicule or causes said person to be shunned or avoided, or injured in his or her business or occupation;

Review and Analysis:

To establish a violation of the MFCP proof of the following is required:

1. That Garcia made untrue oral statement(s) or published by writing, printing, picture, effigy, sign or otherwise than by mere speech
2. That the statement(s) were made with "actual malice" meaning that they were made with knowledge of their falsity or with reckless disregard for their truth or falsity
3. That the statement(s) were about another candidate or a member of the candidate's family or staff
4. *That the person about whom the untrue statements were made was exposed to hatred, contempt, or ridicule or was caused to be shunned or avoided, or was injured in his or her business or occupation. (Emphasis added)*

LEGAL ANALYSIS

A. Truthfulness.

If the statements made in the campaign flyer are true, then Gonzalez's complaint fails to establish probable cause. As much as Mr. Gonzalez doesn't like the comments in Garcia's flyer or feels that the comments don't state the "whole truth", the ordinance places no obligation on any candidate to publish information favorable to his or her opponent. The ordinance requires only that the disseminated information be truthful. The COE investigation of the eight flyer statements that are alleged as violations in Gonzalez's complaint have not been shown to be false. There is a kernel of truth in all the statements. While that truth is couched in language to show Gonzalez in the worst light possible, it does not change the fact that there is truth to the statements.

The investigation conducted by the COE found as follows regarding the eight alleged untruthful statements:

1. History of Bankruptcy and Judgments. Bankruptcy petition number 10-46850-AJC was filed related to a partnership co-owned by Gonzalez. Gonzalez admits that the partnership had obtained a loan, which was personally guaranteed by Gonzalez. Gonzalez defaulted on the loan and foreclosure proceedings were filed, naming Gonzalez as a defendant. A settlement agreement, which could be referred to as a judgment as it was approved by the court, was entered in that case binding the parties and ordering repayment of the loan.

The MFCP Ordinance places Garcia under no obligation to report to the public that the judgment was later satisfied. Further, the filing of a bankruptcy petition against a person

establishes "a history of bankruptcy". Therefore, because this is a truthful statement, it cannot support a finding of probable cause that the ordinance was violated.

2. Dissolution of the Business Board. Gonzalez was present and voted at the April 2014 commission meeting to dissolve the Business Board. The fact that Gonzalez alone could not dissolve the Business Board, and such dissolution could only be done through commission vote is irrelevant when Gonzalez was present at the commission meeting and voted for dissolution. The investigation found that the Business Board was dissolved by a vote of the entire Commission on 11/12/13 by a motion made by Vice Mayor Eddie Lim, seconded by Gonzalez, and adopted by a 5-0 roll call vote. Therefore, probable cause cannot be found that the ordinance was violated based upon this statement.
3. Raised Taxes / Failed to pay own. The flyer never described exactly what "tax" was raised. The flyer is silent on an exact time frame that "taxes were raised". Gonzalez assumes the flyer is referring to the millage rate generally and responds citing a decrease in millage rate between fiscal years 2013/14 and 2014/15. However, the flyer makes no such reference. Garcia responds that his sourced information for this claim is the 2013 Department of Revenue figures indicating a 22% tax rise in NBV coupled with NBV Commission Summary minutes from September 30, 2014 that specifies a 13.5% tax increase. It is the opinion of this writer that Gonzalez has failed to establish probable cause that the statement related to raising taxes is untrue.

The second part of this statement alleges that Gonzalez failed to pay his own taxes. Gonzalez fails to allege in his complaint that this statement is false. Despite this, Garcia provided information related to a corporation wherein Gonzalez is a principal that failed to pay corporate taxes. Based upon this, Gonzalez has failed to establish probable cause that this portion of the statement is untrue.

4. If people don't like paying taxes they can move. Gonzalez denies making the statement at the September 23, 2014 budget hearing, and supplied a recording of the hearing as proof. No such statement was made at that hearing. Garcia, however, claims in his response that the statement was made at a July 17 Budget workshop. Neither side has provided definitive

evidence proving whether or not the statement was made. This allegation boils down to a "he said/she said" situation, which does not meet the burden of probable cause.

5. Trip to Turkey / Rebuke by Ethics. Gonzalez admits to the trip to Turkey and that it was paid for, in large part, by the Turkish American Federation. This amounts to a gift and Gonzalez properly filed the required gift disclosure. Further, documents supplied by Garcia reveal that the Turkey trip occurred after Gonzalez was rebuked by the COE for accepting a gift of tickets and failing to file the required disclosure. Gonzalez's objection to the use of the word "lobbyist" is conclusory at best and not supported by facts. Gonzalez has failed to establish probable cause that the language in the flyer is false.
6. Vote to hide gifts he accepted. Gonzalez admits that he voted to increase the NBV gift reporting threshold to comport with the County threshold. Garcia cites to the fact that Gonzalez voted to raise the reporting threshold for gifts from \$25 to \$100 in the Sept 11, 2014 Commission meeting. A reasonable person could conclude that by casting a vote to enact a law wherein gifts valued at \$25 to \$100 will no longer require disclosure, is a vote to hide said gifts. This vote occurred after Gonzalez was rebuked by the COE in 2013 for the acceptance of tickets and his failure to file the proper disclosures. Gonzalez has failed to establish probable cause that this statement is false.
7. Stood against performance measures at TIES for fear of insulting bureaucrats. Gonzalez states in his complaint merely that he never made the statement. Garcia has supplied evidence that the statement was made at the NBV Sept 25, 2013 Final Budget Hearing in response to a request from Kevin Vericker that the IB program be tied to performance measures. Gonzalez has failed to establish probable cause the statement is untrue.
8. Voted to cut youth services, including PAL. Gonzalez cites as proof of this statement's falsity the minutes of the September 30, 2014, meeting wherein he voted to re-appropriate money previously allocated for a fireworks show to the PAL. Garcia, however, has supplied evidence that this vote was made after Gonzalez had already voted against funding PAL on Sept 25, 2013 and again on July 17, 2014. Gonzalez has failed to establish probable cause that this statement is false.

B. Actual Malice.

As demonstrated above, Gonzalez has failed to establish probable cause that the eight flyer statements are untrue. However, assuming *arguendo* that the eight flyer statements are false, the COE investigation has failed to find probable cause that the statements were made with “actual malice”. Garcia furnished the COE with the source documentation relied on by him in approving the eight flyer comments. Based upon a review of this source documentation by the COE, any reasonable person would believe that the flyer statements are true. Further, the sources relied upon by Garcia appear to be valid, unbiased sources such as: Miami-Dade Circuit court filings, information contained on Miami-Dade county websites, recordings and summary minutes from various NBV commission hearings, Federal Department of Revenue documents, County gift disclosure forms, and COE documents. Therefore, Gonzalez has failed to establish probable cause that the flyer statements, even assuming *arguendo* that they are untrue, were made with actual malice.

C. Statement regarding another candidate.

The COE investigation finds that the eight flyer statements were made about the candidate, and no other person.

D. Damages.

Gonzalez presents no evidence that he *was exposed to hatred, contempt, or ridicule or was caused to be shunned or avoided, or was injured in his or her business or occupation*. Other than acknowledging that he became aware of negative hearsay comments that Gonzalez assumed stemmed from the flyer, Gonzalez offers no proof that the fourth element of an MFCP violation was satisfied.

The blog post from votersopinion.com entitled, “The Crybaby of North Bay Village”, which ridicules Gonzalez for his filing of civil and ethics complaints in response to Garcia’s flyer, fails to establish the fourth element of an MFCP. Gonzalez acknowledged to the COE investigator that the blog post does not ridicule him based upon the actual information contained in Garcia’s flyer. Rather, it accuses Gonzalez of being a “crybaby” and ridicules him for the filing complaints themselves. This is not competent evidence that the fourth element of an MFCP violation was satisfied.

Gonzalez's assumptions and conclusions that the cause of a few voters negatively commenting about him was specifically due to Garcia's flyer are misplaced. The information in the flyers was in the public domain and available from other sources before the flyer was disseminated. Other than his mere assumptions, Gonzalez proffers no evidence that any person's poor opinion of Gonzalez was formed directly due to the flyer, versus any of the other available sources. Further, he fails to allege with any specificity the identity of these supposed voters.

The only specific evidence submitted by Gonzalez in his quest to prove that the fourth element of the MFCP was violated are: (1) a letter from his child and (2) copies of blogpost and facebook comments of NBV Reality Based Community Blogger Kevin Vericker. This evidence fails to establish the type of damages or loss contemplated by the fourth element of the MFCP.

Gonzalez provided the statement of his daughter alleging that she overheard comments about her dad which made her feel bad. As a matter of law, this letter is not competent evidence to establish the fourth element. There is no showing that the 11-year-old child understands the difference between fact and opinion, or understands the oath required to give competent testimony. Further, the delicate sensibilities of an 11-year-old child regarding negative comments made against his or her beloved father is not the standard upon which violation of the MFCP ordinance is measured. Gonzalez's reliance on this "evidence" is sadly misplaced.

Gonzalez furnished various comments posted on Facebook and a local blog, criticizing and ridiculing him. Most of these comments were made by NBV Reality Based community blogger Kevin Vericker. A close reading of the provided posts and comments, however, fails to establish the fourth element of the MVCP. It is clear from a reading of the posts that Mr. Vericker consistently criticizes Gonzalez on a whole host of issues, which have nothing to do with the eight flyer statements. In large part, the posts criticize Gonzalez for his own statements and explanations made in response to the flyer. Similar to the Crybaby article mentioned above, the comments and blogposts also criticize Gonzalez for his actions of filing civil complaints of wrongdoing based upon the flyer, not the actual content of the flyer itself. Lastly, Gonzalez fails to allege that the proximate cause of Vericker's criticisms is the Garcia flyer vs. any prior knowledge Mr. Vericker may have had of the facts underlying the statements from various other public sources. None of this information supplied by Gonzalez establishes probable cause that the fourth element of the MFCP has been violated.

Lastly, it should be noted that Gonzalez was ultimately successful in defeating Garcia and was re-elected as Commissioner-at-large by a majority of voters. The electorate did not avoid him. Gonzalez has made no allegation that his business or occupation was harmed by Garcia's flyer.

CONCLUSION

Gonzalez has failed to establish probable cause that the eight flyer statements are untrue. Gonzalez has failed to establish that the flyer statements were made with actual malice. Lastly, Gonzalez has failed to establish probable cause that he suffered the damage contemplated by the fourth element of the MFCP. For these reasons, a finding of No Probable Cause should be entered in this matter.