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DISTRICT COURT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

In the Matter of the Contest of the General Election held on November 4, 2008, for the purpose of electing a United States Senator from the State of Minnesota,

File No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Memorandum of Law by Cox and the City of Duluth Supporting Their Motion to Quash the Subpoena of Jeffrey Cox.

Contestants,

v.

Al Franken,

Contestee.

INTRODUCTION

Jeffrey Cox, City Clerk for the City of Duluth as been served with a subpoena by Al Franken to testify in this matter. Mr. Cox has requested that Franken provide reasonable compensation to him as authorized by Rule 45.03(d), Minn.R.Civ.P. Because Franken has not agreed to provide reasonable compensation to Cox, he and his employer the city of Duluth assert this motion to quash pursuant to Rule 45.02(c), Minn.R.Civ.P. Because of the inadequate notice in advance of the requested time for testimony, it is impossible for Cox and the City to comply with the notice requirements of Rule 115.10, Gen.R.Prac. Therefore, they request that the Court, in the interests of justice, relax the notice requirements pursuant to Rule 115.07, Gen.R.Prac.

FACTUAL STATEMENT

On February 23, 2009 and after the 4:30 business closing of City Offices, Cox received e-mail notification that Franken was seeking to subpoena him to testify in the above matter. *Aff. Lutterman*. In response, on February 24th, the Office of the City Attorney provided Franken with information regarding the reasonable compensation requested by Cox as authorized by Rule 45.03 (d), Minn.R.Civ.P. and requested \$1,151.50. *Aff. Lutterman, Ex. 1*. In determining the value of Cox's time, the City calculated an hourly rate of \$60.00 per hour based upon the value of his annual salary and benefits. The mileage and meal rates are based upon the current City travel reimbursement policy. Pursuant to this policy the City must reimburse Cox for travel expenses incurred that result from his employment with the City. It is standard practice in the City to allow the employee to choose whether to use a vacation day or consider the day work related because the vacation accrual status varies from employee to employee. If the employee remains on duty, the witness check is tendered to the City and the employee is reimbursed for direct out of pocket expenses and mileage. This practice provides compensation to the employee and reimburses the City for the value of the lost employee time. Mr. Cox is considered an FLSA exempt employee and is paid a salary rather than compensated on an hourly basis. *Aff. Lutterman*

In response, Cox was served with a subpoena and tendered a check in the amount of \$105.00. This amount does not reasonably compensate Cox for the cost of traveling a minimum of 300 miles round trip, a minimum of six hours of travel time, the loss of at least

a day of work, the cost of meals while traveling, the cost to park, the potential cost of hotel accommodations, and the value of his time away from his family. *Id.*

As of the time this memorandum was served, Cox and Franken have not reached an agreement on additional compensation. *Id.*

ARGUMENT

The Rules Mandate That Franken Compensate Cox For The Cost Of His Appearance.

Rule 45.03(d), Minn.R.Civ.P. provides the rule for the compensation of non-party witnesses. In relevant part it mandates that one “who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.” *Rule 45.03 (d), Minn.R.Civ.P.*

The rules of procedure further mandate that the party seeking the testimony “shall make arrangements for reasonable compensation as required by Rule 45.03(d) prior to the time of commanded production or the taking of such testimony.” *Rule 45.02(d), Minn.R.Civ.P.*

The obligation to provide compensation to non-party witnesses is mandatory. “The rule ‘leaves no room **** to exercise any discretion in deciding whether or not to award costs.” Wick Building Systems, Inc. v Employers Insurance of Wausau, 546 N.W. 2d 306,

308 (Minn.App. 1996) quoting Bowman v Bowman, 493 N.W. 2d 141, 144 (Minn.App.1992).

It is anticipated that Franken may rely upon Howard v City of St. Louis Park, 466 N.W. 2d 759 (Minn.App. 1991) to support his position that the standard statutory witness fee and mileage reimbursement is all that is required. The Howard decision is not apposite and cannot be reasonably relied upon. Howard involved an implied consent proceeding and a dispute as to whether the petitioner was required to compensate the arresting police officers for their appearance at a discovery deposition. The Court, in determining that no compensation was required, relied upon the fact that the implied consent proceeding was a unique creation of statute; that the Commissioner of Public Safety was a party; and that the police officers were "critical agents of the Commissioner and served the Commissioner in initiating the revocation." Id., at 761. The court recognized that the officers were agents of a party to the proceedings and therefore could not be classified as nonparty witnesses. Id. The Court also held that the city that employed the officers were entitled to compensation for the costs associated with producing records in response to the subpoena *duces tecum*. Id. at 762.

Here, the city of Duluth and its employees are not a party to the action, Cox is not a critical agent of a party to the action, and the City's employees are not agents necessary to commence a proceeding on behalf of a party to the action. In other words, the City and its

employees don't have a "dog in the fight". According, neither the City nor Cox should be expected to subsidize Franken's litigation expenses.

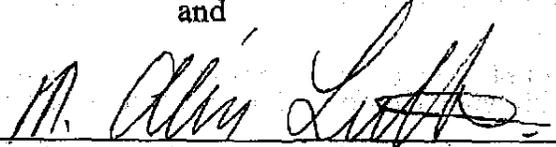
The amounts requested are reasonable and represent the actual value of Cox's time and the costs of travel. The rule is clear that Franken is required to pay these expenses and the Court is not granted the discretion to waive the rule.

CONCLUSION

Municipalities all over the state are facing a budget crisis. The city of Duluth is not exception. The City runs a leanly staffed organization that is struggling to provide to its citizens the services they have a right to expect. It should not be asked to bear the expense of providing its employees for these proceedings because it has no interest in these proceedings and is not a party. The subpoena should be quashed, or in the alternative, Franken should be ordered to pay in advance the estimated costs for Cox's appearance.

Dated this 26th day of February, 2009.

GUNNAR B. JOHNSON, City Attorney
and


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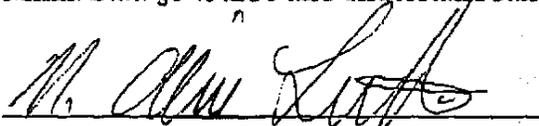
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ACKNOWLEDGMENT

The City of Duluth and Jeffrey Cox, by its legal counsel, acknowledge the provisions of Minn. Stat. §549.211 and understand sanctions can be imposed for a violation of this statute.



M. ALISON LUTTERMAN

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