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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0564**

Gary F. Menne,
Respondent,

vs.

Ted Phillips,
Relator,

Office of Administrative Hearings,
Respondent.

**Filed May 20, 2008
Reversed
Wright, Judge**

Office of Administrative Hearings
File No. 8-6312-17667-CV

Frederic W. Knaak, Greg T. Kryzer, Knaak & Kantrud, 3500 Willow Lake Boulevard,
Suite 800, Vadnais Heights, MN 55110 (for relator)

Gary F. Menne, 5311 264th Street, Wyoming, MN 55092 (pro se respondent)

Lori Swanson, Attorney General, Kenneth E. Raschke, Jr., Assistant Attorney General,
1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent Office
of Administrative Hearings)

Considered and decided by Stoneburner, Presiding Judge; Toussaint, Chief Judge;
and Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges an administrative determination that his campaign flyers threatened voters in violation of Minn. Stat. § 211B.07 (2006), arguing that the evidence does not support a finding that he violated the statute, which prohibits exerting undue influence on voters, and that the statute is facially unconstitutional. We reverse.

FACTS

The City of Wyoming held a general election on November 7, 2006. Four candidates were running for three positions. Sheldon Anderson, the incumbent mayoral candidate, was unopposed. There were also three candidates for two city-council seats: respondent Gary Menne, a first-time candidate for city council, and incumbents Joe Zerwas and relator Ted Phillips.

On the Saturday before the election, Phillips stuffed an anonymous flyer in the newspaper boxes of 90 residents displaying lawn signs in support of Menne. The bright orange cover page urged people to re-elect Anderson, Phillips, and Zerwas. The second page, which was the subject of Menne's complaint, reads as follows:

THE MANY FACTS ABOUT GARY MENNE

Fact #1 – Mr. Menne for three years has NOT paid his water/sewer bill with the City of Wyoming and now owes over \$2900.00 to US. Question? – Is this the type of person YOU want running OUR city? Someone that feels he is above the rest of US.

Fact #2 – Mr. Menne has his property newly list [sic] with Welsh Properties for sale. Question? – Doesn't this show he has NO commitment to the CITIZEN'S [sic] of Wyoming for which he is suppose [sic] to support?

Fact #3 – Attached you will see Mr. Menne's issue's [sic] when it comes to doing business as a person in Wyoming. He has many judgments against him, which will tell you that we ALL may have to pay the price for his poor decisions he makes while on council.

NOW you have a choice – Take down the sign in your yard and tell your neighbors that you NO longer support Mr. Menne for the facts listed above. The only way to avoid Mr. Menne getting into office is to vote for the incumbents – ANDERSON – PHILLIPS – ZERWAS. If you don't remove the sign and still believe in Mr. Menne then you must believe in cheating the rest of US in the city and that will not go unnoticed in the future. THANK YOU!

This flyer was appended with a list of judgments and UCC filings. Phillips did not have Anderson's or Zerwas's permission to use their names, and he distributed the flyer without their knowledge or approval. In fact, Anderson and Zerwas supported Menne and displayed signs to that effect on their respective lawns.

A number of Wyoming residents were upset by the flyer. Anderson and Zerwas received telephone calls from citizens asking why they had published the flyer and stating that they felt threatened by it. One elderly resident reported his fears to the police, although the responding officer advised him that "he was not in danger of retaliation of any kind [if he chose not to remove his sign] and that this was most likely a political game to get [him] to change [his] opinion."

Phillips denied that he intended to intimidate anyone with the flyer. Rather, he maintained that it was intended to provide individuals who obviously supported Menne

with information about him that “might not be generally available to the citizenry at large.” According to Phillips, the phrase “will not go unnoticed in the future” inartfully conveyed the message that “if Mr. Menne was elected in, that he would be held to . . . tasks to doing his job the right way.”

The flyer backfired. Instead of winning over Menne’s supporters, Phillips’s tactics only alienated them further. One voter who received the flyer, for example, testified that his reaction was “almost one of defiance.” Phillips lost the election.

On November 20, 2006, Menne filed a complaint with respondent Office of Administrative Hearings (OAH), alleging that Phillips had violated various provisions of the Minnesota Fair Campaign Practices Act, Minn. Stat. §§ 211B.01-211B.37 (2006). All claims were dismissed except for the violation of section 211B.07, which prohibits exerting undue influence on voters. After a contested evidentiary hearing, a panel of administrative law judges (ALJ panel) concluded that Phillips had violated section 211B.07 and ordered him to pay a civil penalty of \$600. This certiorari appeal followed.

D E C I S I O N

Phillips challenges the ALJ panel’s determination that he violated Minn. Stat. § 211B.07 (2006) by distributing the campaign flyers. When reviewing a final administrative decision on an unfair-campaign-practices complaint, we

may affirm the decision of the agency or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

(a) in violation of constitutional provisions; or

- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. §§ 14.69, 211B.36, subd. 5 (2006).¹

Under section 211B.07, “[a] person may not directly or indirectly use or threaten force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal, undue influence, or temporal or spiritual injury against an individual to compel the individual to vote for or against a candidate or ballot question.” In concluding that Phillips’s flyer threatened voters, the ALJ panel focused on language in the final paragraph:

NOW you have a choice – Take down the sign in your yard and tell your neighbors that you NO longer support Mr. Menne for the facts listed above. The only way to avoid Mr. Menne getting into office is to vote for the incumbents – ANDERSON – PHILLIPS – ZERWAS. *If you don’t remove the sign and still believe in Mr. Menne then you must believe in cheating the rest of US in the city and that will not go unnoticed in the future.* THANK YOU!

(Emphasis added.) Phillips argues that the ALJ panel’s conclusion that this language amounted to threatening voters is unsupported by substantial evidence in the record. We agree.

¹ Although we review this decision “as provided in sections 14.63 to 14.69,” administrative unfair-campaign-practices proceedings “are not a contested case within the meaning of chapter 14 and are not otherwise governed by chapter 14.” Minn. Stat. § 211B.36, subd. 5.

At most, the language at issue constitutes an ultimatum for Menne’s supporters to take down their signs “or else.” This begs the question, “or else *what?*” We are unable to discern what, if anything, Phillips was threatening to do to individuals whose refusal to remove their signs would “not go unnoticed in the future.” Vaguely ominous-sounding language, without more, does not amount to a violation of section 211B.07.² While Phillips’s actions are far from admirable political-campaign practices, they do not meet the standard for a sanction under the statute.

Reversed.

² Because we conclude that Phillips’s conduct falls beyond even the broad scope of section 211B.07’s language, it is unnecessary for us to consider Phillips’s facial challenges to the statute’s constitutionality.