OAH 60-0320-38767

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

The City of Saint Paul and its Police Department,

Complainant,

vs.

ORDER OF DISMISSAL FOR LACK OF PROBABLE CAUSE

Jim Schultz,

Respondent.

This matter came on for a probable cause hearing before Administrative Law Judge James E. LaFave on November 1 and 2, 2022. The matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by The City of Saint Paul (City) and the Saint Paul Police Department (Police Department) (together, Complainant) on October 24, 2022. The probable cause record closed on November 2, 2022.

Lyndsey Olson, Saint Paul City Attorney and Trina R. Chernos, Deputy Saint Paul City Attorney, represent the Complainant. Christopher W. Madel, Madel, P.A., represents Jim Schultz (Respondent).

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum, which is incorporated herein, the Administrative Law Judge makes the following:

ORDER

1. Probable cause does not exist to believe that Respondent violated Minn. Stat. § 211B.02 (2022).

2. The campaign complaint filed by Complainant is **DISMISSED**.

3. Respondent's request that the Complaint be deemed frivolous, and that he be awarded attorney's fees and costs, is **DENIED**.

Dated: November 9, 2022

JAMES E. LAFAVE
Administrative Law Judge

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minn. Stat. § 211B.34, subd. 3 (2022), provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minn. Stat. § 211B.35 (2022) within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5 (2022), and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2022).

MEMORANDUM

I. Background

Respondent is a candidate for Attorney General of Minnesota.[1] In connection with his candidacy, Respondent's campaign committee aired a video advertisement on social media for approximately six weeks.[2] During the advertisement, a narrator states that Respondent is "endorsed by Minnesota's police officers."[3] Simultaneously, the advertisement displays the phrase "Police Endorsed" in large font above Respondent's name and an image of Respondent standing next to a person in a police uniform.[4] The uniformed person is wearing a duty belt, with a gun visible, and a shoulder microphone.[5] The name "St. Paul" can be seen on the uniform's shoulder patch.[6] Next to the phrase "Police Endorsed," the advertisement features an image of the badge for the Minnesota Police and Peace Officers' Association (MPPOA). The MMPOA is an association that represents 98 percent of Minnesota police officers.[7]

Complainant argues that the uniform depicted in the advertisement closely "mimics" that of the Saint Paul Police Department. Complainant contends that the uniform coupled with the phrase "police endorsed" creates the appearance or implication that the Saint Paul Police Department endorses Respondent.[8]

On October 10, 2022, Complainant sent Respondent a "cease and desist" letter, notifying him that it believed the advertisement violated Minn. Stat. § 211B.02, and it

[1] Exhibit (Ex.) 23 at 2.
[2] Complaint at 2 (Oct. 24, 2022).
[3] Ex. 22 (video) at 0:08-09 / 0:15.
[4] *See* Ex. 4 at 12 (screen shot from advertisement); Ex. 22 (video) at 0:10 / 0:15; Ex. 2 at 3.
[5] *See* Ex. 4 at 12 (screen shot from advertisement); Ex. 22 (video) at 0:10 / 0:15; Ex. 2 at 3.
[6] *Id.*
[7] Testimony (Test.) of Brian Peters.
[8] Ex. 3 at 4.

demanded that he stop running the advertisement.[9] Respondent, through counsel, responded to the cease and desist letter on October 17, 2022.[10] Respondent asserted that the claims in the advertisement are true, that Respondent is police endorsed, that the uniform depicted in the advertisement is that of the St. Paul Police Federation, and that the uniform looks nothing like the current uniforms worn by officers with the Saint Paul's Police Department.[11]

The City filed this Complaint on October 24, 2022. Complainant alleges that Respondent violated Minn. Stat. § 211B.02 by falsely claiming or implying he has the support or endorsement of the Saint Paul Police Department.[12]

II. Legal Standard

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.[13] The administrative law judge must decide whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to address the claims in the complaint at a hearing on the merits.[14] If the administrative law judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a like civil case, the campaign violation complaint should be allowed to proceed.[15]

III. False Claim of Support (Minn. Stat. 211B.02)

Minn. Stat. § 211B.02 provides:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or

[9] Ex. 4.
[10] Ex. 5.
[11] *Id.*
[12] Ex. 2.
[13] *See Weinberger v. Maplewood Review*, 668 N.W.2d 667, 664 (Minn. 2003) ("[I]n civil cases probable cause constitutes a *bona fide* belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it") (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990)) (internal punctuation omitted); *see also State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976) (explaining operation of probable cause standard in criminal context).
[14] *See In re Hortman v. Republican Party of Minn.*, OAH No. 15-0320-17530, PROBABLE CAUSE ORDER at 3 (Minn. Office Admin. Hearings, Oct. 2, 2006).
[15] In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The court must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. *See, e.g.,* Minn. R. Civ. P. 50.01; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975).

endorsement of an individual without first getting written permission from the individual to do so.[16]

The first sentence of section 211B.02 prohibits candidates from knowingly making a false claim stating or implying they have the support or endorsement of an organization. The City and its Police Department both qualify as an "organization" for purposes of Minn. Stat. § 211B.02.[17]

IV. Analysis

When interpreting a statute, one must "construe the statute's word and phrases according to their plain and ordinary meaning."[18] Despite the civil nature of campaign complaint proceedings, Minn. Stat. § 211B.02 is also a criminal statute, violation of which is a misdemeanor.[19] As a result, application of the rule of strict construction of penal statutes is required.[20]

On its face, Minn. Stat. § 211B.02 only prohibits candidates from making a "knowingly … false claim" of endorsement or support.[21] The statute "punishes speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization."[22] It does not punish inadvertent falsehoods.[23] Instead, specific intent is required to establish a violation, ensuring that the statute does not target broad categories of speech.[24]

In *City of Grant by and through Points v. Smith*,[25] the Minnesota Court of Appeals determined there was sufficient evidence of culpable knowledge to support finding a violation of section 211B.02. There, the respondent prepared campaign material, including a one-page flyer and a tri-fold brochure, that resembled the city's newsletter and bore the city's logo.[26] The material urged residents to support a ballot measure, even though the respondent was aware the city had not taken a position on the ballot questions, and the literature mirrored the sample ballot that had been produced by the city.[27] The respondent testified that he intentionally used the logo even though he

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[16] Minn. Stat. § 211B.02.

[17] *See City of Grant by and through Points v. Smith*, A16-1070, 2017 WL 957717, at *6 (Minn. Ct. App. Mar. 13, 2017) (interpreting section 211B.02 to include governmental agencies within the meaning of "organization"); *See also*, OAH No. 8-0325-33077, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Minn. Office of Admin. Hearings, June 3, 2016).

[18] *See* Minn. Stat. § 645.08(1) (2022) ("words and phrases are construed according to rules of grammar and according to their common and approved usage").

[19] *See* Minn. Stat. § 211B.19 (2022).

[20] *Id.*

[21] Minn. Stat. § 211B.02.

[22] *Niska v. Clayton*, No. A13-0622, 2014 WL 902680, at *8 (Minn. Ct. App. Mar. 10, 2014), *review denied* (Minn. June 25, 2014) (citing *In re Ryan*, 303 N.W.2d 462, 467 (Minn. 1981)).

[23] *Id*.

[24] *See Linert v. MacDonald*, 901 N.W.2d 664, 668-669 (Minn. Ct. App. 2017) (holding that the requirement that a violation be based on a "knowingly … false claim" ensured that the statute was not unconstitutionally overbroad).

[25] A16-1070, 2017 WL 957717, at *6 (Minn. Ct. App. Mar. 13, 2017).

[26] *Id*.

[27] *Id*.

wondered whether such use was out of bounds.[28] The court concluded that the evidence was sufficient to establish a knowingly false claim.[29]

Additionally, in *Woodbury Community Foundation v. 4MN, Inc.*,[30] this tribunal determined that the respondent knowingly falsely implied a local charitable foundation endorsed candidates, in violation of section 211B.02. The panel noted that the respondent registered an assumed name identical to the slogan of an initiative of the foundation, acquired a domain name similar that slogan, and created a website and other materials with a nearly identical name, logo, and font as that used by the foundation. The respondent then used those materials to communicate endorsements of political candidates.[31] The similarities between respondent's materials and those of the foundation supported finding that the respondent knowingly falsely implied candidates were endorsed by the foundation in order to capitalize on the foundation's goodwill in the community.[32]

To establish probable cause exists here, Complainant must offer sufficient facts to support the belief that Respondent knowingly used the image of a person, in a uniform similar to that of the Police Department, coupled with the phrase "police endorsed," to falsely claim or imply that Respondent had the support or endorsement of the Police Department.

Respondent is endorsed by the MPPOA. Respondent was also endorsed by 41 Minnesota sheriffs, the National Trooper Coalition, the Ramsey County Deputies' Federation and The Minnesota Sheriffs' Association District 5.[33] Therefore, Respondent argues that his claim to be "police endorsed" is true. Respondent further asserts that the uniform depicted in the advertisement was not a Police Department uniform. Instead, it is the uniform used by the Saint Paul Police Federation, the color of which is "French blue," while the current Police Department uniform is navy, or dark blue.[34]

Upon close inspection, the Administrative Law Judge finds that the record does not support finding probable cause exists to believe Respondent violated section 211B.02. Complainant's concern about the appearance of the police uniform in a political advertisement is not unreasonable. The statement that Respondent is "police endorsed," however, is true and the statement occurs in the advertisement next to the MPPOA badge. MPPOA has endorsed Respondent. Further, the uniform worn by the individual featured in the advertisement along with Respondent is that of the St. Paul Police Federation, not the Police Department. A review of the video advertisement shows that the word "Federation" appears on the shoulder patch of the uniform.

Complainant argues Respondent "knowingly" chose to use a person in uniform with police equipment, and that in so doing, he "knowingly" implied that the police, in

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[28] *Id*.
[29] *Id*.
[30] OAH No. 71-0325-35698, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Minn. Office Admin. Hearings, Dec. 11, 2018).
[31] *Id*. at 10.
[32] *Id*.
[33] Ex. 23 at 2.
[34] *Id.*

their official law enforcement capacity, were endorsing Respondent. Complainant also contends that because a viewer could see "St. Paul" on the sleeve of the officer, the advertisement falsely implied the Police Department endorsed Respondent. Complainant asserts that the Police Department is falsely depicted in the advertisement.[35] Complainant notes that neither the City, nor its Police Department, may endorse a candidate for office,[36] and that to properly do their job, the police must be viewed as impartial.[37]

There is no dispute that the City and its Police Department have not endorsed Respondent.[38] Even so, there is nothing in the advertisement that states or implies that Respondent is endorsed or supported by the Police Department. Instead, the record suggests that Respondent's use of a person in a police uniform alongside the caption "police endorsed" was an attempt to inform the public Respondent has been endorsed by police, a claim that is true. The use of the MPPOA badge next to the phrase "police endorsed," would lead a viewer to believe that the MPPOA endorsed Respondent, and not the Police Department.

At the prima facie stage of a campaign complaint matter, this tribunal accepts the facts alleged in the complaint as true, without independent substantiation, provided that those facts are not patently false or inherently incredible and draws reasonable inferences in the light most favorable to the complainant.[39] For a probable cause determination, the record is viewed more stringently, and a complainant must offer additional support for the claim that a violation of law occurred. Here, Complainant did not meet its burden to show probable cause exists to believe Respondent knowingly falsely implied he was endorsed by the Police Department. Therefore, the complaint must be, and is, **DISMISSED**.

V. Request for Fees and Costs

Respondent argues that the Complaint should be deemed frivolous, and that the Administrative Law Judge should award him attorneys' fees and costs. The Fair Campaign Practices Act expressly allows an award of reasonable attorney fees and the costs of adjudication at the Office of Administrative Hearings as a sanction if the judge or panel determines a complaint is frivolous.[40] A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good-faith argument for a modification or reversal of existing law.[41]

Complainant filed the Complaint based on its concern that individuals viewing the advertisement would assume that the person seen talking to Respondent in the advertisement was a Saint Paul Police Officer and as such, that the Police Department

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[35] *Id.*
[36] Ex. 3 at 4.
[37] *Id.*
[38] Probable Cause Hearing Digital Recording (Nov. 2, 2022) (on file with the Minn. Office of Admin. Hearings).
[39] *Barry v. St. Anthony-New Brighton Indep. Sch. Dist. 282*, 781 N.W.2d 898, 902 (Minn. Ct. App. 2010); *Abrahamson v. St. Louis Cty. Sch. Dist.*, 819 N.W.2d 129, 136 (Minn. 2012).
[40] Minn. Stat. § 211B.36, subd. 3 (2022).
[41] *Maddox v. Dep't. of Human Services*, 400 N.W.2d 136, 139 (Minn. Ct. App. 1987).

supported Respondent.[42] The Administrative Law Judge found the Complaint established a prima facie violation of section 211B.02.[43]

The City did not meet its burden to show probable cause exists and that further proceedings in this case are warranted. But dismissal of the Complaint at this stage does not mean the Complaint was so lacking in reasonable basis that it could be considered frivolous. Instead, the case was a close call, and it appears that Complainant proceeded according to a good faith belief about the substance of its claims. Therefore, Respondent's request that the Complaint be deemed frivolous, and fees and costs awarded, is **DENIED**.

J. E. L.

[42] Probable Cause Hearing Digital Recording (Nov. 2, 2022) (on file with the Minn. Office of Admin. Hearings).
[43] Notice of Determination of Prima Facie Violation and Notice and Order for Probable Cause Hearing (Oct. 27, 2022).