

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Pamela Wentink,

Complainant,

v.

Matt Udermann,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

This Fair Campaign Practices complaint (Complaint) is pending before the following panel of three Administrative Law Judges: Jessica A. Palmer-Denig (Presiding Judge); James E. LaFave, and Barbara J. Case (collectively, Panel).

Pursuant to the agreement of the parties, this matter was submitted to the Panel based on the record created at the probable cause hearing and the underlying documentary record, including the Complaint, the Prima Facie Determination, the Probable Cause Order, and written submissions from the parties. The hearing record closed on October 7, 2020.

STATEMENT OF THE ISSUES

1. Did Respondent violate Minn. Stat. § 211B.02 (2020) by claiming in written campaign material that he had the support of a majority of the members of the Independent School District 112 School Board (School Board), without obtaining written permission to do so from those individuals?
2. If Respondent violated Minn. Stat. § 211B.02, what penalty is appropriate?

SUMMARY OF CONCLUSIONS

Respondent violated Minn. Stat. § 211B.02 by claiming in written campaign material that he had the support of a majority of the members of the School Board without obtaining written permission of those individuals. For this violation, a civil penalty in the amount of \$600 is appropriate.

Based upon the record and proceedings, the undersigned Panel makes the following:

FINDINGS OF FACT

1. Respondent is a candidate for the Carver County Board of Commissioners, District 3 seat, in the general election to be held on November 3, 2020.

2. On August 19, 2020, Respondent used his personal Facebook account to post on a Facebook page called, “Chaska Education Association,” the following statement: “I enjoy the support of over half the School Board”¹ Respondent’s post was in response to a prior post on the same Facebook page, asking him to explain how he would support School District 112’s “equity objectives.”²

3. On September 2, 2020, on the same Chaska Education Association Facebook page, Complainant posted a response asking Respondent to “please disclose which 4 board members are supporting you,” noting that “Minnesota state statute requires you to have written permission to make that claim from the board members.”³

4. Respondent did not respond to Complainant’s post.

5. On or about September 3, 2020, the Facebook account belonging to Respondent’s campaign, under the name “youmattertomatt,” posted the following message to its own Facebook page:

Recently I responded to a voter on social media and said I enjoy half the support of the District 112 School Board (as I do with a number of civic organizations and groups, and is the case with earning 54% of primary votes across 5 candidates). My statement was and is accurate.

That said, I have been advised any support (formal or informal) for a candidate needs a signed statement. I’m told doing so would create unnecessary division, at a time when this community needs to unify and support our kids, teachers, staff, administration and school board. As such, I will not be pursuing formalized support or endorsement letters from any school board member.⁴

6. On September 3, 2020, Complainant emailed the seven School Board members to ask whom among them had given Respondent’s campaign permission to publicize their endorsements.⁵

7. Three School Board members responded – two by email and one by email and then by telephone – stating that they had not given written permission to Respondent.⁶

¹ Complaint (Sept. 8, 2020), Exhibit (Ex.) B.

² *Id.*

³ Complaint, Ex. C.

⁴ Complaint, Exs. A, H; Respondent’s Ex. F.

⁵ Complaint, Ex. D.

⁶ Complaint, Exs. E, F, G (emails from Jenny Stone, Ron Meyer and Lisa Anderson).

8. On September 3, 2020, School Board member Jenny Stone sent an email to Respondent asking him to immediately clarify for the record which School Board members had provided him with written endorsements.⁷ Alternatively, Ms. Stone requested that Respondent remove “any blanket endorsement statements.”⁸

9. On September 8, 2020, Complainant filed her Complaint alleging Respondent violated Minn. Stat. § 211B.02.⁹

10. By Order dated September 10, 2020, Presiding Administrative Law Judge Jessica A. Palmer-Denig determined the Complaint alleged a prima facie violation of Minn. Stat. 211B.02.¹⁰ Judge Palmer-Denig set this matter on for a probable cause hearing to be conducted by telephone on September 14, 2020.¹¹

11. Prior to the probable cause hearing, Respondent submitted copies of emails and private social media messages he received from School Board members related to his campaign.¹²

12. Three of the emails were written by School Board members Jeff Ross, Lisa Anderson, and Ron Meyer.¹³ These emails express general support for some of Respondent’s education-related proposals, but each expressly disclaims that the School Board member is publicly endorsing or supporting any particular candidate.¹⁴ All three emails are dated after the date Respondent posted his claims regarding School Board member support.¹⁵

13. A private message or text dated August 19, 2020, from School Board member Amy Logue states: “You have my vote!”¹⁶ Apart from this expression of intent, Ms. Logue’s message does not include written permission for Respondent to publicly claim her endorsement or support of his candidacy.¹⁷

⁷ Complaint, Ex. E.

⁸ *Id.*

⁹ Complaint (Sept. 8, 2020).

¹⁰ Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing (Sept. 10, 2020).

¹¹ *Id.*

¹² Respondent’s Exs. A-D.

¹³ Respondent’s Exs. A, C, D.

¹⁴ See Respondent’s Ex. A (“While expressing support for those initiatives, I also expressed that it is important for me to not formally endorse any candidate. I am a non-partisan elected official focused on building up the community and directly endorsing or supporting a candidate would be against what I am trying to achieve in bringing the community together.”); Ex. C (“As we discussed I do not publicly support candidates outside of incumbents on the School Board candidate [sic] – I do wish you the best of luck in your election.”); Ex. D (“I would be happy to continue this conversation about why I support these proposals that Matt put forth or why I have decided not to endorse any candidates in this election if you would like . . .”).

¹⁵ Respondent’s Exs. A and C are dated September 13, 2020; Ex. D is dated September 3, 2020.

¹⁶ Respondent’s Ex. B.

¹⁷ *Id.*

14. On September 14, 2020, the Administrative Law Judge convened the probable cause hearing, at which both parties appeared.¹⁸

15. The parties agreed to submit the matter to the Panel for a decision on the Complaint based on the Complaint and the record created at the probable cause hearing, without any further evidentiary hearing.¹⁹

16. By Order dated September 17, 2020, the Presiding Administrative Law Judge found probable cause to believe that Respondent violated Minn. Stat. § 211B.02 as alleged.²⁰ The Chief Administrative Law Judge assigned this matter to the undersigned Panel by Order dated September 28, 2020.²¹

17. The record in this matter closed on October 7, 2020, the deadline for submitting written argument.²²

Based upon the foregoing Findings of Fact, the undersigned Panel makes the following:

CONCLUSIONS OF LAW

1. The Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35 (2020).

2. Complainant bears the burden of proof as to the allegations in the Complaint. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.²³

3. Minn. Stat. § 211B.02 states:

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 endorsement of an individual without first getting written permission from the individual to do so.²⁴

4. “Campaign material” is defined as any material “disseminated for the purpose of influencing voting at a primary or other election.”²⁵

5. Respondent’s posts on the Chaska Education Association Facebook page and on his campaign Facebook page, “youmattertomatt,” constitute “campaign material.”

¹⁸ Probable Cause Hearing Digital Recording (Sept. 14, 2020) (on file with Minn. Office Admin. Hearings).

¹⁹ *Id.*

²⁰ Order on Probable Cause (Sept. 17, 2020).

²¹ Notice of and Order for Panel Assignment and Scheduling Order (Sept. 28, 2020).

²² *Id.*

²³ Minn. Stat. § 211B.32, subd. 4 (2020).

²⁴ Minn. Stat. § 211B.02.

²⁵ Minn. Stat. § 211B.01, subd. 2 (2020).

The posts concern Respondent's policy positions related to local educational matters and were disseminated for the purpose of influencing voting in the general election.

6. Complainant has established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02, by claiming in written campaign material that he has the support of a majority of the members of the School Board without first obtaining written permission to do so.

7. It is appropriate to impose a civil penalty against Respondent in the amount of \$600.

8. The attached Memorandum explains the reasons for these Conclusions of Law and is incorporated by reference.


Based on the hearing record, and for the reasons stated in the following Memorandum, the Panel makes the following:

ORDER

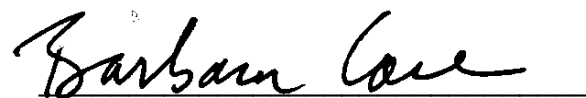
1. By **4:30 p.m. on Thursday, November 12, 2020**, Respondent shall pay a civil penalty of \$600, for violating Minn. Stat. § 211B.02.

2. The penalty shall be paid by check made to the order of: "Treasurer, State of Minnesota," and remitted to the Office of Administrative Hearings. The docket number, 71-0325-37070, should be included on the check.

Dated: October 12, 2020


JESSICA A. PALMER-DENIG
Presiding Administrative Law Judge


JAMES E. LAFAVE
Administrative Law Judge


BARBARA J. CASE
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5 (2020), this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2020).

MEMORANDUM

Minn. Stat. § 211B.02 provides as follows:

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 endorsement of an individual without first getting written permission from the individual to do so.²⁶

Respondent did not claim in his Facebook posts to have the support of the School Board as an organization. Instead, he claimed to have the support of a majority of the individual School Board members. To establish a violation of the second sentence of section 211B.02, Complainant must demonstrate that Respondent stated in written campaign material that he had the support of individual School Board members without first obtaining those members written permission to do so.

During the probable cause hearing, Respondent conceded that he claimed to have the support of four School Board members in his Facebook posts. Respondent explained that he meant that he had general support from the School Board members for his positions and proposed initiatives, not that he had received a formal public endorsement of his candidacy. Respondent also argued that the emails and messages he submitted as exhibits demonstrate the support of those School Board members.²⁷

Respondent's exhibits do not establish that four School Board members provided written permission for Respondent to claim their support or endorsement in campaign material. The three emails express general support for some of Respondent's proposals, but each expressly disclaims that the School Board member is publicly endorsing or supporting any particular candidate.²⁸ These communications are also dated after Respondent's claims were made in his campaign posts. And the private message or text dated August 19, 2020, from School Board member Amy Logue states only: "You have my vote!"²⁹ It does not constitute written permission for Respondent to publicly claim Ms. Logue's endorsement or support of his candidacy.

Complainant established Respondent claimed on his campaign Facebook account, "youmattertomatt," that he has the support of more than half of the members of

²⁶ Minn. Stat. § 211B.02.

²⁷ Probable Cause Hearing Digital Recording (Sept. 14, 2020) (on file with Minn. Office Admin. Hearings).

²⁸ See Respondent's Exs. A, C, D.

²⁹ Respondent's Ex. B; Probable Cause Hearing Digital Recording (Sept. 14, 2020) (on file with Minn. Office Admin. Hearings).

the School Board and that he made this claim without first obtaining written permission from those members to do so. The statute unequivocally provides that: “A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.”³⁰ Therefore, Complainant has demonstrated that Respondent violated Minn. Stat. § 211B.02.

In order to ensure consistency in the application of administrative penalties across types of violations of the Fair Campaign Practices Act, the Office of Administrative Hearings uses a “penalty matrix” to guide decision-making. The matrix categorizes violations based upon the willfulness of the misconduct and the impact of the violation upon voters.³¹ Because every case is unique, however, the Panel may depart from the presumptive penalty listed in the matrix.³²

Complainant argues that Respondent’s actions were a deliberate attempt to misinform voters, rather than an inadvertent error. Complainant points out that Respondent had opportunities to correct his statement prior to the filing of her Complaint. On September 2, 2020, Complainant asked Respondent to identify the School Board members who were supporting him, referring him to section 211B.02’s written permission requirements.³³ Likewise, on September 3, 2020, School Board member Jenny Stone asked Respondent in an email to clarify the public record by immediately identifying which School Board members endorsed him.³⁴ Respondent did not respond directly to either request. Instead, Respondent doubled down on his claim, stating on his campaign Facebook page on September 3, 2020, that his statement regarding School Board members’ support “was and is accurate.”³⁵

Complainant contends that the impact of Respondent’s claims on voters is substantial and his failure to correct the record has resulted in an unfair advantage for Respondent’s campaign. Complainant urges the Panel to assess a penalty within the \$2,500–5,000 range for what she asserts is a willful and deliberate violation on Respondent’s part.

Respondent emphasizes that he is a first-time candidate navigating the complexities of running for office. He maintains that he intended his claim of support to mean only that School Board members supported the blueprint he laid out for what he will do if elected county commissioner. Respondent admits that, in hindsight, he could have been clearer in his posts. He asserts that it was never his intent to pursue formal endorsements and that once he was advised that written permission was required for even “informal support,” he did his best to clarify his claim on his campaign Facebook page. Respondent states that he would have “likely deleted or modified the post in

³⁰ Minn. Stat. § 211B.02.

³¹ See Penalty Matrix (<https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp>); *Fine v. Bernstein*, 726 N.W.2d 137, 149-50 (Minn. Ct. App.), *review denied* (Minn. 2007).

³² *Id.*

³³ Complaint, Ex. C.

³⁴ Complaint, Ex. E.

³⁵ Complaint, Exs. A, H; Respondent’s Ex. F.

question to avoid confusion or misunderstanding,” but contends he was advised that as a candidate, he could not take this action.

Based upon the record,³⁶ the Panel concludes that Respondent’s failure to obtain written permission prior to claiming his candidacy had the support of a majority of the School Board members was negligent and ill-considered. A candidate claiming the support or endorsement of another person does so to bolster the candidate’s campaign by showing the public that the campaign has a certain level of support or influence. Although Respondent did not name the specific School Board members that he claimed were supporting him, the School Board is a small identifiable group of seven individuals. Those individuals have an interest in not being pressed into service in support of a campaign without their permission.³⁷

Notwithstanding that, the Panel declines to find that Respondent’s conduct was as deliberately misleading as Complainant claims. Unlike the candidate in *Forney v. Bourn*,³⁸ for example, who knowingly falsely claimed to have the endorsement of a DFL-endorsed state senator and representative on campaign literature targeted to thousands of voters, Respondent’s post was more general and it was less widely disseminated. There is no evidence in the record to support finding that Respondent’s claims had more than a minimal impact on voters or that Respondent gained an unfair advantage from his claim.³⁹ Moreover, given that Respondent made his claim months before the general election, there was sufficient time to meaningfully counter Respondent’s claims.

Therefore, the Panel concludes that a civil penalty in the amount of \$600 in this matter is appropriate for Respondent’s violation. Respondent shall pay the penalty in the matter set forth in the Order above.

J. P. D., J. E. L., B. J. C.

³⁶ The parties agreed to submit this matter to the Panel on the record with final written submissions addressing the penalty that would be appropriate in the event the Panel found Respondent violated section 211B.02, as alleged. With their closing arguments, however, both parties relied on factual assertions or additional proposed evidentiary materials that are outside the record established as of the probable cause hearing. The Panel has not considered facts outside of the record or new allegations in reaching a decision in this case.

³⁷ *City of Grant v. Smith*, OAH 8-0325-33077, 2016 WL 3029796, at *5 (Minn. Off. Admin. Hrgs. 2016) *aff’d City of Grant by & through Points v. Smith*, A16-1070, 2017 WL 957717, at *8 (Minn. Ct. App.).

³⁸ OAH No. 11-0325-209454, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Minn. Office Admin. Hearings, March 19, 2010).

³⁹ See Penalty Matrix (<https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp>).