

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Angela Berger,  
vs.  
Richard Novack

Complainant,  
  
Respondent.

**NOTICE OF DETERMINATION OF  
PRIMA FACIE VIOLATION  
AND  
NOTICE OF AND ORDER FOR  
PROBABLE CAUSE HEARING**

**TO: Angela Berger 4809 60<sup>th</sup> St., Edina, MN 55424; and Richard Novack, 5805 Interlachen Blvd., Edina, MN 55436**

On October 18, 2012, Angela Berger filed a Campaign Complaint with the Office of Administrative Hearings alleging that Richard Novack violated Minnesota Statutes § 211B.06 in connection with the campaign for the seat in the Minnesota House of Representatives from District 49A. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a *prima facie* violation of Minnesota Statutes § 211B.06.

**THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN** that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **11:00 a.m. on Wednesday, October 24, 2012**. The hearing will be held by call-in telephone conference. You must call: **1-888-742-5095** at that time. When the system asks for your numeric pass code, enter **"249 440 7275#"** on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minnesota Statutes § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at <http://mn.gov/oah> and [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

At the probable cause hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge LaFave at [James.LaFave@state.mn.us](mailto:James.LaFave@state.mn.us) or faxed to 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief

Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minnesota Statutes § 211B.35. If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minnesota Statutes § 211B.34, subdivision 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: October 22, 2012

s/James E. LaFave

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JAMES E. LAFAVE  
Administrative Law Judge

### MEMORANDUM

Complainant, Angela Berger, is a resident of Edina and asserts that on or about September 15, 2012, certain Edina residents received a mailing from Intelligent Choices Minnesota. The mailing discussed Bill Glahn and Ron Erhardt, the candidates for the seat in the Minnesota House of Representatives from District 49A. Intelligent Choices Minnesota is a 501(c)(4) organization formed by John Cashmore.<sup>1</sup> It is alleged that the Respondent, Richard Novack prepared the mailing.

The Complaint alleges that the mailing contained two false statements. (1) "Candidate Bill Glahn actually said that he will lie to the public in one of his online blogs." And (2), "Bill says elite people like himself should lie to the public to achieve goals." The mailing claimed it had "fully documented information" and referenced Mr. Glahn's blog "Hypocrisy is Good" as factual support for the statements in the mailing.<sup>2</sup>

The Complaint attached a copy of Mr. Glahn's blog "Hypocrisy is Good". The statements attributed to Mr. Glahn do not appear in the blog.

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<sup>1</sup> On October 2, 2012, Angela Berger filed a Campaign Complaint with the Office of Administrative Hearings alleging that John Cashmore violated Minnesota Statutes § 211B.06 in connection with the campaign for the seat in the Minnesota House of Representatives from District 49A. OAH Docket No. 3020-30021.

<sup>2</sup> Attachments to the Complaint, taken from the Intelligent Choices Minnesota (ICM) web site, state that Mr. Glahn's blog disappeared from the internet after he received his party's endorsement but that a member of ICM copies them before they disappeared.

Based upon these allegations, Ms. Berger alleges that Mr. Novack has violated Minnesota Statutes § 211B.06 (false political and campaign material) by preparing and disseminating false campaign material concerning the personal or political character or acts of candidate Bill Glahn.

## Standard of Review

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.<sup>3</sup> For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.<sup>4</sup> A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.<sup>5</sup>

## Minnesota Statutes § 211B.06 - False Campaign Material

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material with respect to the personal or political character or acts of a candidate. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts and not against unfavorable deductions or inferences based on fact, even if they “may be considered extreme and illogical.”<sup>6</sup> The statute does not prohibit inferences or implications, even if misleading. Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>7</sup> In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.<sup>8</sup>

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<sup>3</sup> *Barry v. St. Anthony-New Brighton Independent School District*, 781 N.W.2d 898, 902 (Minn. App. 2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981). See also *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

<sup>7</sup> *Abrahamson v. St. Louis County School District*, A10-2162, Slip op. at 18-19 (Minn. App. Aug. 1, 2011) (pet. for cert. pending); *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

<sup>8</sup> *Jadwin*, 390 N.W.2d at 441, citing *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).

To prove a violation at the hearing, the Complainant must show that the statement is substantively false and that the person or persons who prepared, disseminated or broadcasted the statement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.<sup>9</sup> Based on this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the statement or acted “with a high degree of awareness” of its probable falsity.<sup>10</sup>

Under this statute, campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”<sup>11</sup> As a threshold matter, the Complainant has made a *prima facie* demonstration that the Respondent’s mailing falls within the definition of “campaign material”. Despite the mailing’s purported disclaimer,<sup>12</sup> based upon its explicit language, it is evident that Mr. Novack prepared the mailing for distribution to Edina residents for the purpose of influencing voting in the upcoming November election. The remaining question is whether the mailing contains false statements regarding the personal or political character or acts of a candidate.

In her Complaint, Ms. Berger alleges that the mailing prepared by Mr. Novack contains two false statements.

- 1) “Candidate Bill Glahn actually said that he will lie to the public in one of his online blogs.”; and
- 2) “Bill says elite people like himself should lie to the public to achieve goals.”

The Administrative Law Judge concludes that the Complainant has alleged sufficient facts with respect to the alleged false statements to demonstrate a *prima facie* violation of Minnesota Statutes § 211B.06. The statements are factual, reflect upon Mr. Glahn’s personal and political character and are capable of being proven either true or false.

After reviewing the Complaint and its attachments, the Administrative Law Judge concludes that the Complaint sets forth a *prima facie* violation of Minnesota Statutes

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<sup>9</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>10</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied*, (Minn. 2006).

<sup>11</sup> Minn. Stat. § 211B.01 subd. 2. (2010).

<sup>12</sup> The mailing states at the bottom “Intelligent Choices Minnesota is a 501(c)(4) non-profit association. All information is intended to inform and is not an Independent Expenditure for, against, or on behalf of any candidate, party or ballot issue.”

§ 211B.06. These allegations will proceed to a probable cause hearing as scheduled by this Order.

**J. E. L.**