

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Yvonne Selcer,

Complainant,

vs.

**ORDER OF DISMISSAL**

Republican Party of Minnesota,

Respondent.

This matter came before Administrative Law Judge Eric L. Lipman for a probable cause hearing on November 2, 2012.

Christopher A. Stafford, Fredrikson & Byron, P.A., appeared on behalf of the Complainant, Yvonne Selcer. Mathew H. Lemke, Winthrop & Weinstine, P.A., appeared on behalf of the Republican Party of Minnesota.

Yvonne Selcer is a candidate for election to the Minnesota House of Representatives from House District 48A.

On October 29, 2012, Ms. Selcer filed a Complaint with the Office of Administrative Hearings alleging that the Respondent, the Republican Party of Minnesota (RPM), violated Minn. Stat. § 211B.06. The Complaint alleges that the RPM sent to voters residing in House District 48A a campaign brochure that was false. The first of three brochures sent by the RPM to voters in District 48A asserts that Ms. Selcer “failed to pay her own 2012 property taxes on time.” Later, two other brochures repeated this same claim.<sup>1</sup>

By way of an Order dated October 31, 2012, the Administrative Law Judge determined that Ms. Selcer had set forth enough facts in her complaint to state that a violation of law had occurred. The probable cause hearing was held to determine whether there was a dispute requiring resolution at an evidentiary hearing.

Based upon the Complaint and the hearing record and for the reasons set forth in the Memorandum below:

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<sup>1</sup> See, Affidavit of Yvonne Selcer, Exhibits A, B and C (November 1, 2012) (“Selcer Affidavit”).

**IT IS ORDERED:**

1. Ms. Selcer's Complaint is **DISMISSED**.

Dated: November 5, 2012

s/Eric L. Lipman

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ERIC L. LIPMAN  
Administrative Law Judge

**NOTICE OF RECONSIDERATION AND APPEAL RIGHTS**

Minnesota Statutes § 211B.34, subdivision 3, 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 Minnesota Statutes § 211B.35 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, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

### Factual Background

Charles and Yvonne Selcer received a property tax statement from Hennepin County instructing them that the second-half of the annual real property tax assessment on their home in Minnetonka was due on October 15, 2012. The amount of the tax payment due and owing was \$4,303.75.<sup>2</sup>

The Hennepin County Treasurer's website instructs taxpayers who do not use its automated on-line system, but instead use one of the "conventional payment methods," that "mail-in payments" must be "postmarked on or before due date."<sup>3</sup>

The instruction on the Hennepin County Treasurer's website summarizes the rule set forth in Minn. Stat. § 276.017. The statute reads in part:

When a payment described in this section is required to be made to a county on or before the prescribed date, the payment is timely if received by the county on or before a prescribed date, or if mailed on or before that date. This section applies to the payment of current or delinquent real or personal property taxes, any other amount shown as payable on a property tax statement, and all related penalties, interest, or costs.

....

Mailing is timely under this section only if the payment was deposited in the mail in the United States on or before the due date, in an envelope or other appropriate wrapper, postage prepaid, and properly addressed.

Through a personal check dated October 14, 2012, Mr. Selcer made the tax payment. The Selcers remitted this check by way of first class mail, in a postage prepaid envelope, to the Hennepin County Treasurer.<sup>4</sup>

On October 16, 2012, the Hennepin County "Property Information Search" system – known as PINS – stated that of the \$8,607.50 annual property tax assessment on the Selcer home, the \$4,305.75 payment due on October 15 had not been received and was still part of the "total due." Additionally, the PINS system noted that an \$86.08 penalty was included as part of the "total due," for a combined amount owed of \$4,389.83.<sup>5</sup>

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<sup>2</sup> See, Selcer Affidavit, Ex. E.

<sup>3</sup> See, Selcer Affidavit, Ex. D.

<sup>4</sup> See, Selcer Affidavit, Ex. F; Affidavit of Christopher A. Stafford (November 1, 2012).

<sup>5</sup> See, RPM, Ex. 1.

An associate of the Republican Party of Minnesota accessed the PINS system at approximately 4:25 p.m. on October 16, 2012, and queried the system as to the status of the Selcer's property tax payment. The associate took a "screen shot" of the computer screen display that noted that an \$86.06 penalty had been added by the County to the "total due" from the Selcers.<sup>6</sup>

This "screen shot" was then routed to others who were developing campaign literature that was critical of Ms. Selcer. Two of the resulting brochures urged voters to cast ballots in favor of Ms. Selcer's opponent, the incumbent State Representative, Kirk Stensrud. A third brochure urged voters to "vote no on Yvonne Selcer."<sup>7</sup>

On October 17, 2012, the Hennepin County Treasurer's office received the property tax payment made by the Selcer's. The Treasurer's office later updated the PINS system to reflect receipt of the payment and removed the penalty assessment. After this adjustment, the PINS system showed a zero balance due by the Selcers.<sup>8</sup>

On October 27 and 30, voters in House District 48A received brochures from the RPM which claimed that Ms. Selcer had not remitted her property tax payments in a timely fashion.<sup>9</sup>

On October, 29, 2012, Ms. Selcer filed a Complaint with this Office under the Fair Campaign Practices Act.

## **Analysis**

### **A. Probable Cause Standards**

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. 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.<sup>10</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>11</sup>

If the Judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, were one to be

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<sup>6</sup> See, *id.*; *Digital Recording*, OAH Docket No. 320-30104.

<sup>7</sup> See, *Digital Recording*, OAH Docket No. 320-30104; Selcer Affidavit, Exs. A, B and C.

<sup>8</sup> See, Selcer Affidavit, Ex. E; Stafford Affidavit, at ¶ 3.

<sup>9</sup> See, Selcer Affidavit, ¶¶ 2 – 7.

<sup>10</sup> *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

<sup>11</sup> *Id.*; see also Black's Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime").

made, a motion to dismiss for lack of probable cause should be denied.<sup>12</sup> A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.

## B. Standards for Assessing False Literature Claims

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material. The prohibition has two elements: (1) A person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person developing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false.

As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. The statute does not proscribe criticism of candidates that is merely unfair or uncharitable.<sup>13</sup> Indeed, this statute is set against the backdrop of the First Amendment; which assures Americans in the public square sufficient "breathing space" to assemble data, construct arguments and present conclusions to their fellow citizens.<sup>14</sup> The statute does not punish poor reasoning, but instead relies upon voters to discern the merits of arguments made in campaign brochures.

With respect to the second element of the statute – namely, the RPM's awareness surrounding the Selcer's tax payments – the test is subjective: OAH inquires into whether the Respondent "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.<sup>15</sup>

Section 211B.06 closely tracks the standard for actual malice.<sup>16</sup> Actual malice can be shown if the statement was fabricated by the respondent, was the product of the

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<sup>12</sup> *State v. Florence*, at 903. 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 judge 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; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

<sup>13</sup> *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

<sup>14</sup> See, *Boos v. Barry*, 485 U.S. 312, 322 (1988), ("[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment"); compare also, *State v. Machholz*, 574 N.W.2d 415, 422 (Minn. 1998) ("Commenting on matters of public concern is a classic form of speech that lies at the heart of the First Amendment, and speech in public arenas is at its most protected on public sidewalks, a prototypical example of a traditional public forum") (citing *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997)).

<sup>15</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.) review denied (Minn. 2006).

<sup>16</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (defining "actual malice" as acting "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not");

respondent's imagination or was based on an unverified source.<sup>17</sup> As the U.S. Supreme Court explained in *St. Amant v. Thompson*:

Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications, as well as true ones....

Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.<sup>18</sup>

In this case, the assertion that Ms. Selcer did not timely remit her property tax payment is not solely the product of the brochure drafter's imagination, based on a wholly unverified source or so inherently improbable that only a reckless man would have put this claim into circulation. Hennepin County does list the tax penalties that it assesses on the PINS system and some well-meaning taxpayers miss the deadline for remitting property tax payments.

Ms. Selcer does not allege that Republican Party officials had actual knowledge that the Hennepin County Treasurer's office received the property tax payment made by the Selcer's on October 17, 2012. Instead, she argues that these officials acted recklessly by not acknowledging that the payment would be "timely" if mailed by October 15, 2012.

To the extent that Ms. Selcer argues that the RPM acted unreasonably by not accounting for tax payments that are sent by first class mail, this argument runs headlong into the rule announced by the Minnesota Supreme Court in *Kennedy v. Voss*.<sup>19</sup> In that case, an incumbent County Commissioner complained that his opponent disseminated literature which unfairly characterized his support for programs serving the elderly. The challenger, citing the incumbent Commissioner's vote against the entire County Budget, which included funding for programs serving the elderly as well as other appropriations, asserted that the incumbent "is not a supporter of programs for the

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*Fitzgerald v. Minn. Chiropractic Ass'n, Inc.*, 294 N.W.2d 269, 270 (Minn. 1980) (defining "actual malice" as "either actual knowledge of the falsity of the publication or reckless disregard of whether it is false or not").

<sup>17</sup> *Chafoulias v. Peterson*, 668 N.W.2d 642, 654-55 (Minn. 2003) ("[A] 'highly slanted perspective' . . . is not enough by itself to establish actual malice"); *accord, Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 1004 (D. Minn. 1998).

<sup>18</sup> *See, St. Amant v. Thompson*, 390 U.S. at 732.

<sup>19</sup> *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

elderly.”<sup>20</sup> The incumbent maintained that there were other votes, not cited in the challenger’s literature, which made the incumbent’s support of the programs clear.

While the Justices of the Minnesota Supreme Court might not have shared the challenger’s assessment of the incumbent’s voting record, or agreed with his reasoning, the Court held that the challenger was legally entitled to share his conclusion with the wider electorate. As Chief Justice Sheridan summarized:

In this case, [the challenger] used a fact, respondent’s “no” vote on the county budget vote, to infer that respondent did not support any of the individual items in that budget. Although the inferences made by the [challenger] may be considered extreme and illogical, they do not come within the purview of the statute. The public is adequately protected from such extreme inferences by the campaign process itself. For example, in this case, the [incumbent Commissioner] distributed two flyer’s rebutting the [challenger’s] remarks. The voters of Dakota County had every opportunity to judge for themselves what inferences could be properly drawn from the record of the candidates.<sup>21</sup>

In this case, even if it was “extreme and illogical” for the RPM to base conclusions on data that was posted a day after the property taxes were due – and not account for either the possibility that there was an error in the County website or that the County would later receive a payment that was postmarked before the deadline – *Kennedy v. Voss* instructs that the Republicans are entitled to share their reasoning and conclusion with voters. Minn. Stat. § 211B.06 does not require the RPM to be certain before speaking or to give Ms. Selcer the benefit of the doubt.

The cure for the very real shortcomings in the RPM brochures is more campaign speech by Ms. Selcer and her supporters.<sup>22</sup>

Because the First Amendment protects speakers who make inferences from specific facts, and there is no statutory requirement “that campaign material be thorough or complete,”<sup>23</sup> Ms. Selcer has failed to establish probable cause that the RPM violated Minn. Stat. § 211B.06. The appropriate result is dismissal of the Complaint.

**E. L. L.**

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<sup>20</sup> *Id.* at 300.

<sup>21</sup> *Id.*

<sup>22</sup> See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which “told only one side of the story,” or were “unfair” or “unjust,” without being demonstrably false, were not prohibited by the Fair Campaign Practices Act, and subject to cure by an incumbent who “was able to discuss and publicize his rebuttal to the charges made”).

<sup>23</sup> *Emmer v. Brazelton*, OAH Docket No. 3-0320-20049-CV(2008) ([http://mn.gov/oah/multimedia/pdf/032020049\\_dismissal\\_ord.pdf](http://mn.gov/oah/multimedia/pdf/032020049_dismissal_ord.pdf)).