

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,

vs.

Michelle MacDonald,

Respondent.

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

The above-entitled matter brought under the Fair Campaign Practices Act came on for an evidentiary hearing on December 21, 2016, before the following panel of Administrative Law Judges: Jessica A. Palmer-Denig (Presiding Judge), Jeanne M. Cochran, and James E. LaFave (the Panel). The record closed at the conclusion of the hearing on December 21, 2016.

Barbara Linert and Steven Timmer (Complainants) appeared on their own behalf and without legal counsel. Erick Kaardal, Mohrman, Kaardal & Erickson, P.A., appeared on behalf of Michelle MacDonald (Respondent).

STATEMENT OF THE ISSUES

1. Did Complainants demonstrate by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 (2016) by stating that she had the endorsement of the “GOP’s Judicial Selection Committee 2016?”

2. If so, what penalty is appropriate?

SUMMARY OF CONCLUSIONS

Complainants established by a preponderance of the evidence that Respondent knowingly violated Minn. Stat. § 211B.02 by claiming she was endorsed by the “GOP’s Judicial Selection Committee 2016.” For this violation, the Panel concludes a \$500 civil penalty is appropriate.

Based on the record and proceedings herein, the undersigned Panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. Respondent was a candidate for the Minnesota Supreme Court in the November 8, 2016, general election.

2. Respondent was invited by the Republican Party of Minnesota's (RPM) judicial election committee to seek the party's endorsement prior to the RPM's state convention.¹ The RPM's state convention was held in Duluth, Minnesota on May 20-21, 2016.

3. The RPM's judicial election committee was a 22-member state convention committee consisting of two members from each of the state's ten Judicial Districts, appointed by their respective Judicial District chairs, and two members appointed by the chair of the RPM.²

4. RPM state convention committees are created to assist with carrying out the work of the RPM state convention.³ These committees are temporary, convention-specific committees.⁴ In addition to the judicial election committee, the RPM has the following other state convention committees: a platform committee, rules committee, credentials committee and nominating committee.⁵

5. The RPM's judicial election committee does not have the authority to confer an endorsement.⁶ It may only recommend to the state convention delegates that a particular candidate for the Minnesota Supreme Court or the Minnesota Court of Appeals be endorsed by the RPM.⁷

6. Respondent had been endorsed by the RPM two years earlier, in 2014, when she ran unsuccessfully as a candidate for the Minnesota Supreme Court.⁸

7. Approximately one week before the RPM's 2016 state convention, Respondent met with and was interviewed by the RPM's judicial election committee. No other judicial candidate was interviewed.⁹ Following that meeting, the judicial election committee voted 20 to 2 in favor of recommending to the party delegates that Respondent be endorsed by the RPM.¹⁰ The two committee members who voted against recommending endorsement for Respondent were Harry Niska and David Asp.¹¹ Both

¹ Testimony (Test.) of Michelle MacDonald.

² Test. of Timothy Kinley; Exhibit (Ex.) 2 at 9 (Art. VI, § 2) and 11 (Art. VI, § 6).

³ Ex. 2 at 9 (Art. VI, § 2).

⁴ Test. of T. Kinley.

⁵ Ex. 2 at 9 (Art. VI, § 2).

⁶ Test. of Harry Niska and Barbara Linert.

⁷ Test. of H. Niska, B. Linert and T. Kinley.

⁸ Test. of H. Niska.

⁹ *Id.*

¹⁰ Test. of H. Niska and M. MacDonald.

¹¹ *Id.*

Messrs. Niska and Asp were appointed to the committee by Keith Downey, chair of the RPM.¹²

8. The RPM's constitution in effect at the time of the RPM's 2016 state convention provided that, following the report of the RPM's judicial election committee, state convention delegates would vote on whether to consider endorsing candidates for the Minnesota Supreme Court and the Court of Appeals. If a majority of the delegates voted in favor of endorsing candidates, the delegates would then vote on whether to confer endorsement on specific candidates for the particular offices of the Minnesota Supreme Court and Minnesota Court of Appeals.¹³

9. At the RPM's state convention in 2016, Diane Anderson, the chair of the judicial election committee, offered the committee's majority report recommending that Respondent be endorsed by the RPM.¹⁴

10. Following the presentation of the judicial election committee's majority report, Mr. Niska offered a minority report recommending against endorsing Respondent.¹⁵

11. Ultimately the delegates voted against endorsing any candidates for the Minnesota Supreme Court or Minnesota Court of Appeals.¹⁶ As a result, Respondent was not endorsed by the RPM.

12. Following the 2016 state convention, the RPM amended its constitution to eliminate the judicial election committee.¹⁷ Judicial endorsements are now considered by the RPM's nominations committee.¹⁸

13. Sometime prior to October 18, 2016, Respondent submitted information to the *Star Tribune* newspaper for a candidate profile of herself that was posted in a "Voter Guide" section on the newspaper's website.¹⁹ In the "Endorsements" section of her candidate profile, Respondent claimed she was endorsed by:

- Christians United in Politics
- Republican Party of MN 2014
- GOP's Judicial Selection Committee 2016.²⁰

¹² Test. of M. MacDonald.

¹³ Test. of H. Niska; Ex. 2 at 4 (Art. V, § 3C) and 11 (Art. VI, § 6C).

¹⁴ Test. of H. Niska, M. MacDonald and T. Kinley.

¹⁵ Test. of H. Niska and M. MacDonald; Ex. 4.

¹⁶ Test. of H. Niska.

¹⁷ *Id.*

¹⁸ Ex. 3 at 4 (Art. V, § 3C) and 9 (Art. VI, § 3).

¹⁹ Test. of M. MacDonald; Ex. 1.

²⁰ Ex. 1.

14. The RPM does not have a “judicial selection committee.”²¹

15. Respondent’s candidate profile with the listed endorsements was initially posted on the *Star Tribune* website on or about October 18, 2016.²²

16. On or about October 21, 2016, Respondent became aware of comments on a social media site that criticized her claim of endorsement by the “GOP’s Judicial Selection Committee 2016.”²³

17. On October 21, 2016, Respondent went to the offices of the *Star Tribune* and requested that her claim of endorsement by the GOP Judicial Selection Committee be removed from her candidate profile.²⁴ The claimed endorsement was removed from Respondent’s candidate profile posted on the *Star Tribune* on-line Voter Guide or about October 21, 2016.²⁵

18. On October 25, 2016, Complainants filed their complaint under the Fair Campaign Practices Act with the Office of Administrative Hearings.

19. By Order dated October 27, 2016, the Presiding Administrative Law Judge found the complaint alleged a prima facie violation of Minn. Stat. § 211B.02, and set this matter on for a probable cause hearing.

20. By Order dated November 3, 2016, the Presiding Administrative Law Judge found probable cause to believe Respondent violated Minn. Stat. § 211B.02.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35 (2016).

2. Minnesota Statutes, section 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.

²¹ Test. of Steven Timmer and B. Linert.

²² Test. of M. MacDonald.

²³ *Id.*

²⁴ *Id.*

²⁵ Test. of S. Timmer.

3. The Complainants bear the burden of proving the allegations in the complaint. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.

4. Complainants have established by a preponderance of the evidence that Respondent knowingly violated Minn. Stat. § 211B.02 by falsely claiming to be endorsed by the “GOP’s Judicial Selection Committee 2016.”

5. Based on the above violation, it is appropriate to impose a civil penalty in the amount of \$500.


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


Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

Having been found to have violated Minn. Stat. § 211B.02, Respondent shall pay a civil penalty of \$500 by March 31, 2017.²⁶

Dated: December 27, 2016


JESSICA A. PALMER-DENIG
Presiding Administrative Law Judge


JEANNE M. COCHRAN
Administrative Law Judge


JAMES E. LAFAVE
Administrative Law Judge

²⁶ The check should be made payable to “Treasurer, State of Minnesota” and sent to the Office of Administrative Hearings, PO Box 64620, St. Paul MN 55164-0620.

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5 (2016), 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 (2016).

MEMORANDUM

Minnesota Statutes, section 211B.02 provides that a candidate may not knowingly make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of “a major political party or party unit or of an organization.”

Complainants maintain that Respondent’s claim of an endorsement by the “GOP’s Judicial Selection Committee 2016” was false and that it falsely implied endorsement of the RPM. Complainants point out that the RPM does not have a “Judicial Selection Committee.” It did have a “judicial election committee” under its then-operative constitution,²⁷ but this committee had no power to endorse candidates on its own.²⁸ It only had the authority to recommend candidates for party endorsement.²⁹ Complainants assert that the word “endorsement” has a specific meaning and requires specific procedures, including a vote in favor of endorsing a candidate by a majority of the delegates at the RPM convention.³⁰

Respondent asserts that the Office of Administrative Hearings lacks jurisdiction to consider the complaint because the RPM’s judicial election committee is not a “major political party, party unit or [] organization.” Therefore, Respondent contends that statements concerning the committee’s support or endorsement of her candidacy does not come within the purview of section 211B.02 and cannot form the basis of a violation. Respondent argues the complaint must be dismissed.

The term “organization” is a “simple word with a common usage,”³¹ and has been defined in case law as “two or more persons having a joint or common interest.”³² In *Niska v. Clayton*,³³ the Minnesota Court of Appeals held that section 211B.02 has “broad express reach to protect entities and even individuals from being falsely dubbed as supporters of any candidate.” The Panel concludes that this definition is broad enough

²⁷ Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

²⁸ Test. of H. Niska and B. Linert.

²⁹ *Id.*; Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

³⁰ Test. of H. Niska and B. Linert; Ex. 2 at 4 (Article V, § 3C) and 11 (Art. VI, § 6).

³¹ *Niska v. Clayton*, 2014 WL 902680 at *9 (Minn. Ct. App. 2014), *review denied* (Minn. June 25, 2014) (identifying, in a hypothetical, the International Falls Chamber of Commerce as an “organization.”).

³² See *Snider v. State, Dept. of Transp.*, 445 N.W.2d 578, 581 (Minn. Ct. App. 1989) (citing *Black’s Law Dictionary* (5th ed. 1979)).

³³ *Niska*, 2014 WL 902680 at *9.

to include the RPM's judicial election committee for purposes of section 211B.02.³⁴ Respondent's motion to dismiss for lack of jurisdiction is denied.

Respondent also argues that she did not imply that she was endorsed by the RPM in 2016. Instead, she maintains she accurately stated in her *Star Tribune* candidate profile that she was endorsed by the RPM in 2014 and by the GOP's Judicial Selection [sic] Committee in 2016. She insists that her use of the term "selection" instead of "election" was simply a typographical error and not an attempt on her part to indicate she was somehow "selected" by the RPM committee. Respondent contends further that because a majority of the judicial election committee did recommend that she be endorsed by the RPM, she could properly characterize the committee as having "endorsed" her. Respondent also notes that the RPM constitution recognizes that party units representing less than the entire electorate for a particular office may endorse a candidate for public office as an expression of sentiment.³⁵

Section 211B.02 provides that a person may not knowingly make a false claim stating or implying that a candidate has the "support or endorsement of a major political party or party unit or of an organization."³⁶ The Panel concludes that, in the context of section 211B.02, endorsement has a specific meaning requiring more than mere support. By its terms, the statute expressly differentiates between "support" and "endorsement." In interpreting this language, the Minnesota Supreme Court has recognized a distinction between the two words. In *Schmitt v. McLaughlin*, a candidate who was not endorsed by the DFL party used the initials "DFL" on advertisements and lawn signs.³⁷ The Court concluded that the "use of the initials 'DFL' would imply to the average voter that [the candidate] *had the endorsement or, at the very least, the support of the DFL party.*"³⁸ Interpreting the words "support" and "endorsement" to have different meanings is also consistent with the canon of statutory construction requiring that meaning be given if possible to each word in a statute.³⁹ Therefore, the Panel rejects Respondent's argument that the recommendation or support of the judicial election committee constituted an "endorsement."

Candidates are required to use language that specifically and accurately describes the affiliation between themselves and any entities listed in campaign material. For example, candidates may inform voters that they have a connection with a political party by using the terms "member of" or "affiliated with" when the candidate is not endorsed by that party.⁴⁰ However, candidates have been cautioned that they must use those words,

³⁴ See *City of Grant v. John and Karen Smith*, No. 8-0325-33077, NOTICE OF PRIMA FACIE DETERMINATION AND PREHEARING CONFERENCE at 4 (Minn. Office Admin. Hearings, Dec. 21, 2015) (concluding that a municipality may be considered an "organization" for purposes of section 211B.02).

³⁵ See Ex. 2 at 4 (Art. V, § 3(A)(6)).

³⁶ Minn. Stat. § 211B.02.

³⁷ 275 N.W.2d 587 (Minn. 1979).

³⁸ *Id.* at 591 (emphasis added).

³⁹ See Minn. Stat. § 645.16 (2016) ("Every law shall be construed, if possible, to give effect to all its provisions"); see also *Owens v. Federated Mut. Implement and Hardware Ins. Co.*, 328 N.W.2d 162, 164 (Minn. 1983) (stating that "no word, phrase or sentence should be deemed superfluous, void or insignificant.").

⁴⁰ *Matter of Ryan*, 303 N.W.2d 462, 466 (Minn. 1981).

or synonymous words, or they may run afoul of section 211B.02's requirements.⁴¹ The Minnesota Court of Appeals has also addressed the requirement for clarity, stating that "[a] person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party."⁴² The requirement that candidates use specific language is consistent with the Fair Campaign Practices Act's purpose "to promote informed voting so essential in a free society,"⁴³ and to prevent "false political speech [which] can be electorally toxic . . . and have serious adverse consequences for the public at large."⁴⁴

The Minnesota Supreme Court has indicated that whether a person has the endorsement or support of a political party is a matter that can be objectively determined.⁴⁵ Respondent acknowledges that she did not have the endorsement of the RPM in 2016. She also did not have the "endorsement" of the judicial election committee. The judicial election committee did not have the authority to confer an endorsement upon a candidate. Pursuant to the RPM constitution in effect at the time of the 2016 state convention, the judicial election committee could only recommend to the party delegates that a candidate be endorsed. Following the committee's recommendation, state convention delegates would vote on whether to consider endorsing candidates for the Minnesota Supreme Court and the Court of Appeals. If a majority of the delegates voted in favor of endorsing candidates, they would then vote on the endorsement of specific candidates for the particular offices of the Minnesota Supreme Court and Minnesota Court of Appeals.

Respondent underwent the RPM's endorsement process in 2014. She was aware that the judicial election committee could recommend her for endorsement, but that an endorsement required action by the delegates of the RPM according to the party's official process. Respondent knew she had not been "endorsed" by the judicial election committee. Therefore, the Panel finds that Respondent's claim of endorsement by the "GOP Judicial Selection Committee 2016" was knowingly false and violated Minn. Stat. § 211B.02. Respondent could have truthfully stated in her candidate profile that a majority of the RPM's judicial election committee supported her candidacy. Instead, her statement that the committee endorsed her, when it had no authority to "endorse," was a false claim of endorsement that Respondent knew to be false.

Having found Respondent falsely claimed she was endorsed by the GOP Judicial Selection Committee, the Panel need not decide whether her claim also falsely implied endorsement by the RPM.

⁴¹ *Id.*

⁴² *Niska*, 2014 WL 902680 at *6.

⁴³ *Daugherty v. Hilary*, 344 N.W.2d 826, 832 (Minn. 1984).

⁴⁴ *Niska*, 2014 WL 902680 at *7.

⁴⁵ *Schmitt*, 275 N.W.2d at 591.

The Panel concludes that Respondent's violation of section 211B.02 was ill-considered and that a civil penalty in the amount of \$500 is appropriate.⁴⁶

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

⁴⁶ See Penalty Matrix (<http://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).