OAH 5-0320-38628

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Kari Mortensen,

Complainant,

vs.

Brad Tabke,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came on for an evidentiary hearing on October 7, 2022, before the following panel of Administrative Law Judges: Jim Mortenson (Presiding Judge), James E. LaFave, and Jessica A. Palmer-Denig (Panel). The hearing convened to consider a Fair Campaign Practices Complaint (Complaint) filed on August 31, 2022. The record closed at the conclusion of the hearing on October 7, 2022.

Nicholas R. Morgan, Mohrman, Kaardal & Erickson, P.A., appeared on behalf of Kari Mortensen (Complainant). Kevin J. Wetherille, Jaspers, Moriarty, and Wetherille, P.A., appeared on behalf of Brad Tabke (Respondent).

STATEMENT OF THE ISSUES

1. Did Respondent violate Minn. Stat. § 211B.03 (2022), by using the term "reelect" in campaign material when he is not the incumbent candidate?

2. If so, what penalty is appropriate?

SUMMARY OF CONCLUSIONS

Respondent did not violate Minn. Stat. § 211B.03. Therefore, the Complaint is dismissed.

Based on the record and proceedings herein, the undersigned Panel makes the following:

FINDINGS OF FACT

1. Respondent served one term as a member of the Minnesota House of Representatives representing District 55A.[1] Respondent was elected to the seat in 2018, but lost his reelection bid to Erik Mortensen in the 2020 general election.[2]

2. In 2022, Minnesota enacted new legislative district boundaries. The city of Shakopee is now wholly within Minnesota House District 54A.

3. Respondent is running again, this time as a candidate for the Minnesota House of Representatives District 54A seat in the general election to be held on November 8, 2022.[3]

4. Respondent's campaign committee is "Tabke for MN."[4] Respondent is a member of his campaign committee.[5]

5. Erik Mortensen is a Minnesota State Representative and currently represents Minnesota House District 55A.[6] He is also seeking election to the newly drawn Minnesota House District 54A seat in the November 8, 2022, general election and is one of Respondent's opponents in the race.[7]

6. Complainant is the spouse of Representative Mortensen.[8]

7. In August of 2022, Respondent and his campaign committee hired Moret Digital Consulting, LLC (Moret Digital) to create and manage online Google advertisements for Respondent's campaign.[9] Respondent and his campaign committee previously worked with Moret Digital to create Google advertisements for his 2018 and 2020 campaigns.[10]

8. Mark Moret is the owner and sole employee of Moret Digital.[11] Mr. Moret is also employed at Thomson Reuters and has experience working with Google advertising staff.[12]

9. Creating a Google advertising account is a time-consuming process. It requires several steps, including setting up the billing, formatting the advertisement, and choosing from a wide variety of audience targeting options.[13]

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[1] Testimony (Test.) of Brad Tabke.
[2] *Id*.
[3] *Id*.; Complaint (Aug. 31, 2022).
[4] Exhibit (Ex.) 3; Ex. 100 (Affidavit (Aff.) of Brad Tabke) at ¶ 4.
[5] Test. of B. Tabke.
[6] Test. of Kari Mortensen.
[7] *Id*.
[8] *Id*.
[9] Test. of B. Tabke.
[10] *Id*.: Test. of Mark Moret.
[11] Test. of M. Moret.
[12] *Id*.
[13] *Id*.: Test. of B. Tabke.

10. On August 16, 2022, Mr. Moret enabled a test advertisement to activate Respondent's campaign committee's Google advertising account.[14] Mr. Moret used a Google advertisement developed for Respondent's 2020 campaign, and he modified it slightly by changing the date of the general election to November 8, 2022.[15]

11. An image of the test advertisement appears below:[16]



12. The advertisement includes the word reelect twice and states that Respondent is running for House District 55A.[17] The advertisement includes a disclaimer that states it was paid for by Respondent's campaign committee.[18]

13. Mr. Moret enabled the test advertisement to hasten Google's review and approval of Respondent's campaign committee's advertising account.[19]

14. Mr. Moret did not show Respondent or any member of his campaign committee a proof of the modified advertisement prior to enabling it.[20] Mr. Moret advised Respondent and the campaign committee that he intended to run a test advertisement, but he did not ask Respondent or any member of his committee for approval of the test

[14] Test. of M. Moret.
[15] *Id*.
[16] Ex. 5.
[17] *Id*.
[18] *Id*.
[19] Test. of M. Moret; Test. of B. Tabke; Ex. 100 at ¶ 6.
[20] Test. of M. Moret; Test. of B. Tabke.

advertisement's content prior to enabling it.[21] Mr. Moret also did not tell Respondent or any member of Respondent's campaign committee that he had enabled the test advertisement.[22]

15. If someone viewing the test advertisement clicked on it, they would be directed to Respondent's campaign website at: www.tabkeformn.com.[23]

16. A person would see the test advertisement on Google only if the person did a specific search in Google that included the words "Brad" and "Tabke."[24]

17. Each view of an advertisement on Google from a single device is called an "impression."[25] Each click on the advertisement that directs a viewer to Respondent's campaign website is called an "interaction."[26] Google maintains data on the number of impressions and interactions an advertisement receives.[27]

18. On August 19, 2022, an acquaintance sent Complainant a text message with a screen shot of the advertisement.[28]

19. Complainant conducted her own search on Google and found the advertisement.[29] Complainant took a screen shot of the advertisement.[30]

20. Over the course of six days, Complainant searched for the advertisement several times on Google to see if it could still be found.[31] Each time Complainant viewed Respondent's Google advertisement, her "impression" was recorded.[32]

21. Complainant took screen shots of the Google advertisement on August 25, 26 and 30, 2022.[33]

22. Complainant filed the Complaint against Respondent on August 31, 2022.[34]

23. By Order dated September 2, 2022, the Presiding Administrative Law Judge found the Complaint alleged a prima facie violation of Minn. Stat. § 211B.03 and set the

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[21] Test. of M. Moret.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.; Ex. 100 at ¶ 9.
[26] Test. of M. Moret.
[27] *Id*.
[28] Test. of K. Mortensen.
[29] *Id*.
[30] *Id*.; Ex. 5.
[31] Test. of K. Mortensen.
[32] *Id*.; Test. of M. Moret; Exs. 109, 110, 130.
[33] Test. of K. Mortensen; *See* Exs. 1, 2, 5.
[34] Complaint (Aug. 31, 2022).

matter on for a probable cause hearing to be conducted by telephone on September 8, 2022.[35]

24. Respondent became aware of the Complaint when he received the Prima Facie Order via email on September 2, 2022.[36] Prior to that time, he was not aware of the content of the test advertisement.[37]

25. Immediately after reading the Prima Facie Order, Respondent called Mr. Moret.[38] When he was unable to reach Mr. Moret, Respondent accessed his campaign committee's Google advertising account and disabled the advertisement.[39]

26. Respondent's Google advertisement was viewable from August 16, 2022, until September 2, 2022.[40] During that period, there were 192 impressions or views of the advertisement and 63 interactions or clicks directing viewers to Respondent's website.[41] The interaction rate per impressions was approximately 32.8 percent, which is much higher than the two percent interaction average for Google advertisements.[42]

27. Respondent posted two Facebook posts and a Facebook live video acknowledging Google advertisement error on his campaign Facebook site.[43] Respondent explained that the advertisement incorrectly stated "reelect" when he is not the incumbent. Respondent stated that it was an honest mistake.[44]

28. None of Respondent's other campaign material, including signs, mailers, and websites include the word "reelect."[45]

29. By order dated September 14, 2022, the Presiding Administrative Law Judge found there was sufficient probable cause to believe Respondent violated Minn. Stat. § 211B.03, and that the matter should be assigned to a panel of administrative law judges for a final determination.[46]

30. By Order dated September 27, 2022, the Chief Administrative Law Judge assigned this matter to the Panel and set this matter on for an evidentiary hearing to be held on October 7, 2022.[47]

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[35] *See* Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing (Sept. 2, 2022). (Prima Facie Order).
[36] Although the Complaint and Notice letter were served on Complainant by email and US Mail on September 1, 2022, Complainant states that he only received the complaint notice by US Mail on September 3, 2022.
[37] Test. of B. Tabke.
[38] *Id*.
[39] *Id*.
[40] Test. of M. Moret; Ex. 130.
[41] Test. of M. Moret; Ex. 130.
[42] Test. of M. Moret; Ex. 130.
[43] Test. of B. Tabke.
[44] *Id*.
[45] *Id*.
[46] Order on Probable Cause (Sept. 14, 2022).
[47] *See* Notice of Panel Assignment and Order for Evidentiary Hearing (Sept. 27, 2022).

31. The record in this matter closed at the conclusion of the evidentiary hearing on October 7, 2022.

32. Any portion of the Memorandum below that constitutes a Finding of Fact is incorporated as such herein.

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 (2022).

2. Complainant bears the burden to prove a violation of Minn. Stat. § 211B.03 by a preponderance of the evidence.[48]

3. Minn. Stat. § 211B.03, prohibits a person or candidate, in the event of redistricting, from using the term "reelect" in a campaign for elective office "unless the candidate is the incumbent of that office and the office represents any part of the new district."[49]

4. Because Respondent is not the incumbent candidate of any part of the newly redrawn Minnesota House of Representatives District 54A seat, he is prohibited from using the term "reelect" in his campaign.

5. Respondent did not use the term reelect in violation of Minn. Stat. § 211B.03.

6. There being no violation found, the Complaint is dismissed.

7. 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 makes the following:

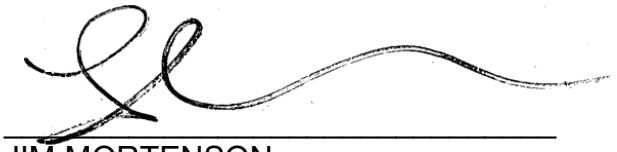
[48] Minn. Stat. § 211B.32, subd. 4 (2022).
[49] Minn. Stat. § 211B.03.

ORDER

IT IS ORDERED:

That the Complaint filed by Kari Mortensen against Brad Tabke is **DISMISSED**.

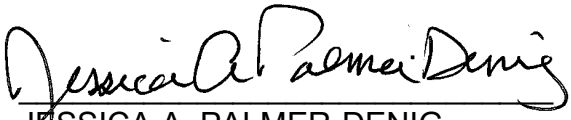
Dated: October 12, 2022



JIM MORTENSON
Presiding Administrative Law Judge



JAMES E. LAFAVE
Administrative Law Judge



JESSICA A. PALMER-DENIG
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5 (2022), 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 (2022).

MEMORANDUM

Respondent is not the incumbent in the race for the newly drawn Minnesota House District 54 seat and may not use the word “reelect” on campaign material.[50]

The record establishes that a vendor working for Respondent’s campaign committee enabled a test advertisement on Google that included the word “reelect.” The vendor did so to hasten the review and approval of Respondent’s Google advertising account. Respondent and his campaign committee were not aware of, did not approve,

[50] Minn. Stat. § 211B.03.

and did participate in developing the content of or using the test advertisement. Mr. Moret testified credibly that he alone made the decision to enable the Google advertisement. He used an advertisement from Respondent's 2020 campaign to activate Respondent's campaign committee's Google account. He made revisions to the older advertisement as he developed a new one. Respondent was not aware that an advertisement using the term reelect was available to the public until he received an order from this tribunal.

To demonstrate a violation of section 211B.03, Complainant must put forward sufficient evidence that Respondent used the word reelect in his campaign – not just that the word reelect was used. The record must show that Respondent participated in, approved of, or otherwise permitted the dissemination of the campaign advertisement as part of his campaigning. No such evidence exists in this case. Rather, a vendor used this term as part of the development of a particular kind of ad: a Google ad. As soon as Respondent discovered the forbidden language was in the public sphere, he terminated the advertisement and issued a public apology.

This case is distinguishable from a recent decision issued by another panel of administrative law judges regarding the same Minnesota House District 54A race. In that case, *Krause v. Loonan*,[51] the panel of judges found that the candidate had personally disseminated campaign literature door to door that included the word "reelect" when he was not the incumbent in the race.[52] Likewise in *Budding v. Bly*,[53] the candidate personally disseminated lawn signs with the word "reelect" in a race where he was not the incumbent. By contrast, in this case, Respondent did not participate in the dissemination of the test advertisement and was unaware that the term reelect appeared in it.

The Panel finds Complainant has not met her burden of establishing Respondent violated Minn. Stat. § 211B.03 by using the term reelect in his campaign. The Complaint filed by Kari Mortensen against Brad Tabke is **DISMISSED**.

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

[51] OAH No. 22-0320-38463, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, (Minn. Office of Admin. Hearings Aug. 3, 2022).
[52] *Id*.
[53] OAH No. 60-0320-3005, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, (Minn. Office of Admin. Hearings Oct. 24, 2012).