11-0320-16234-CV

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Alan Weinblatt,

Complainant,

vs.

ORDER FINDING PROBABLE CAUSE

Patrice Bataglia,

Respondent.

The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Barbara L. Neilson at 2:00 p.m. on October 28, 2004, to consider a complaint filed by Alan Weinblatt on October 25, 2004. The hearing was held by telephone. The telephone probable cause hearing continued at 10:15 a.m. on October 29, 2004.

The Complainant, Alan W. Weinblatt, Attorney at Law, Weinblatt & Gaylord, P.L.C., 111 East Kellogg Boulevard, Suite 300, St. Paul, Minnesota 55101, appeared on his own behalf. William F. Mohrman, Attorney at Law, Mohrman & Kaardal, P.A., 33 South Sixth Street, Suite 4100, Minneapolis, Minnesota 55402, appeared on behalf of the Respondent, Patrice Bataglia.

Based on the record in this matter and for the reasons set out in the attached Memorandum, the Administrative Law Judge concludes that there is probable cause to believe that the Respondent violated Minn. Stat. § 211B.06 by making a false statement in a piece of campaign material concerning Congresswoman Betty McCollum, who is running for re-election in the Fourth Congressional District. Therefore, the Administrative Law Judge issues the following:

ORDER

1. There is probable cause to believe that the Respondent violated Minn. Stat. § 211B.06 by including two false statements in a campaign flyer addressing her opponent's voting record; and

2. This matter is referred to the Chief Administrative Law Judge for assignment of a three-judge panel to conduct an evidentiary hearing.

Dated: November 1, 2004. /s/ Barbara L. Neilson

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BARBARA L. NEILSON

Administrative Law Judge

MEMORANDUM

The complaint filed in this matter alleges a violation of Minn. Stat. § 211B.06, subd. 1. That statute specifies:

> A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

The mailing that is the subject of the complaint is a piece of literature that was received by the Complainant at his home address in Mendota Heights on October 21, 2004, concerning Congresswoman Betty McCollum.[1] The mailing is a flyer that was mailed by the Respondent's staff as part of a bulk mailing to an unknown number of households in the Fourth Congressional District. The front of the flyer asks, **"Where does Betty McCollum stand on supporting our military and protecting our country? Take a look at her voting record..."** (Emphasis in original.) The inside of the flyer states in relevant part:

> **Even after 9-11 Betty McCollum has consistently opposed supporting our troops and protecting our country from terrorists...**
>
> **October 2002** **Voted against** authorizing the use of force in Iraq. (H.J. Res 114)
>
> **November 2002** **Voted against** creating the Department of Homeland Security. (H.R. 5710)
>
> **March 2003** **Voted against** commending the troops for liberating Iraq (H.R.561)
>
> **April 2003** **Voted against** approval of Emergency Wartime Supplemental Appropriations Act. (H.R. 172)
>
> **October 2003** **Voted against** the Emergency Supplemental Appropriations Act that would have given $87 Billion to support our troops in Afghanistan and Iraq. (H.R. 3289)

(Emphasis in original.)

The complaint challenges as untrue the two statements in the flyer pertaining to the March 2003 and April 2003 votes.[2] The Complainant asserts that the flyer not only

falsely represents Representative McCollum's actual votes in each instance, but also cites the wrong bill numbers and thus relies upon totally unrelated bills that have never been voted on in Congress. With respect to the March 2003 vote, the Complainant asserts that Representative McCollum did, in fact, vote on March 21, 2003, in favor of House Concurrent Resolution 104, "Expressing the support and appreciation of the Nation for the President and members of the Armed Forces who are participating in Operation Iraqi Freedom." The Complainant supplied a copy of H.Con. Res. 104 as well asinformation taken from the Library of Congress and Clerk of the House of Representatives' websitesshowing that Representative McCollum gave a speech on the floor of the House in support of the resolution, voted in favor of the resolution, and the resolution passed the House of Representatives on a vote of 414-12.[3] The Complainant further asserts that the citation in the flyer to H.R. 561 is inaccurate, since H.R. 561 was a bill to suspend temporarily the duty on certain manufacturing equipment. The Complainant supplied a copy of H.R. 561 and information from the Library of Congress' website showing that Congress has never voted on that bill.[4]

With respect to the April 2003 vote, the Complainant argues that Representative McCollum did, in fact, vote for H.R. 1559, the Emergency Wartime Supplemental Appropriations Act, on April 3, 2003. The Complainant supplied a copy of the bill as well as material from the Library of Congress' and the Clerk of the House of Representatives' websites showing that the bill passed the House on a vote of 414 to 12 and that Representative McCollum voted in favor of the bill.[5] The Complainant also submitted information from the Library of Congress' website in support of his allegation that the bill cited in the flyer (H.R. 172) was, in fact, a bill to amend the Social Security Act to provide that annuities paid by states to blind veterans shall be disregarded in determining supplemental security income benefits and that Congress has never voted on that bill.[6]

After this complaint was made, the Respondent contended on her website that Representative McCollum "voted to kill the Emergency Wartime Supplemental Appropriations bill in its tracks, before it could reach a final referendum" and cited House Resolution 172 in favor of this assertion. The Respondent also acknowledged on her website that a "printing error" showed that the vote occurred in March of 2003, but alleged that the vote actually occurred in March of 2004.[7]

In response, the Respondent argues that Minn. Stat. §§ 211B.06 and 211B.32-211B.36 are unconstitutional because they deprive the Respondent of rights guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. In particular, the Respondent contends that the statute is unconstitutional on its face because the state lacks a compelling interest in criminalizing false statements made by a candidate concerning his or her opponent and the statute is not narrowly tailored. The Respondent also asserts that the statute is unconstitutional as applied to the Respondent based upon allegations that the complaint, which was filed by an attorney who frequently represents the DFL Party, was filed solely to interfere with the Respondent's ability to campaign during the week before the election. Finally, the Respondent argues that the statutory process deprives her of due process based upon

allegations that the process moves forward in too expeditious a fashion and the Respondent should have been permitted to expand the probable cause hearing to encompass testimony from subpoenaed witnesses.[8]

During her examination at the probable cause hearing, the Respondent testified that she takes responsibility for the statements made in the flyer. She testified that she saw the flyer before it went out, looked at the wording, and consulted a voting file she maintains regarding Representative McCollum's votes to confirm the accuracy of the flyer. The Respondent indicated that she did not have documents describing Representative McCollum's final vote on the Emergency Wartime Supplemental Appropriations Act in the file she consulted, but acknowledged during the hearing that Representative McCollum had, in fact, voted "yes" on the bill. However, she asserted that Representative McCollum voted against bringing the Emergency Wartime Supplemental Appropriations Act to the floor for a vote and alleged that Representative McCollum thereby attempted to "kill" the bill before it reached the floor. She acknowledged that the reference to H.R. 172 in the flyer was a misprint and the reference should have been to H. Res. 172. The Respondent also testified that a misprint was made in the flyer regarding the March 2003 vote in terms of the date and the bill number. She stated that the flyer should have indicated that, in March of 2004, Representative McCollum voted against H. Res. 561 commending the troops for liberating Iraq. The Respondent did not produce any records showing that Representative McCollum voted in the fashion set forth in the flyer on the bills to which the flyer refers. The parties supplied conflicting documentation and testimony regarding whether Representative McCollum in fact voted against bringing the Emergency Wartime Supplemental Appropriations Act to the floor for a vote.[9]

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.[10] The Administrative Law Judge concludes that the Complainant has presented sufficient credible evidence supporting his view that the two statements at issue contain information that is false in that Representative McCollum did not vote in the manner alleged on the bills and dates that are referenced to justify this matter proceeding to a full evidentiary hearing before a three-judge panel. Even if Representative McCollum voted against bringing the Emergency Wartime Supplemental Appropriations Act to the floor for a vote (a fact that is disputed by the parties), it is undisputed that she later voted for that Act. Moreover, even if she voted against H. Res. 557 in March of 2004, it is undisputed that she voted for H. Con. Res. 104 in March of 2003. Accordingly, the Administrative Law Judge concludes that there is probable cause to believe the two statements identified above are false statements with respect to the political character or acts of a candidate that are designed or tend to injure or defeat a candidate for election to a public office, that were intentionally prepared by a person who knew they were false or communicated to others with reckless disregard of whether they were false, in violation of Minn. Stat. § 211B.06, subd. 1.

As a general rule, an Administrative Law Judge lacks authority to declare a statute unconstitutional on its face because that power is vested in the judicial branch.

Because evidence relating to constitutional arguments may, however, be offered for purposes of creating a record, the Respondent was permitted to preserve her constitutional arguments during the probable cause hearing.[11] To the extent that Administrative Law Judges have authority to determine a constitutional question regarding the application of a statute to particular facts, it is appropriate for the three-judge panel to address this issue.

B.L.N.

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[1] Ex. 1.

[2] During the probable cause hearing, the Complainant also sought to challenge as untrue the statement in the flyer alleging that Congresswoman McCollum "has consistently opposed supporting our troops and protecting our country from terrorists." Because the only statements alleged to be false in the original complaint pertained to the March 2003 and April 2003 votes, the Administrative Law Judge ruled that it would not be proper to expand the scope of the proceeding to include this additional allegation. For similar reasons, the Administrative Law Judge also did not receive into evidence or consider additional allegations of falsity relating to other campaign literature that the Complainant alleged he had received from the Respondent after he filed the complaint concerning the flyer at issue in this matter.

[3] Exs. 3-5, 8.

[4] Exs. 6-7.

[5] Exs. 9-11.

[6] Ex. 12.

[7] Ex. 2.

[8] Given the nature of the statutory scheme, the purpose of the probable cause hearing, and the availability of a full evidentiary hearing before a three-judge panel in the event that probable cause was found, the Administrative Law Judge denied the request made by the Respondent during the October 28 telephone hearing to expand the probable cause hearing to encompass testimony from subpoenaed witnesses.

[9] *Compare* testimony of P. Bataglia and A. Weinblatt and Exs. 13 and 19. (Materials supplied by the Respondent by facsimile transmission on October 29, 2004, have been marked and received as Exhibit 19.)

[10] Minn. Stat. § 211B.34, subd. 2.

[11] *Neeland v. Clearwater Memorial Hosp.,* 257 N.W.2d 366, 368 (Minn. 1977); *Starkweather v. Blair,* 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); G. Beck, *Minnesota Administrative Procedure* § 11.5 (2d ed. 1998).