

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

David Torres,
Complainant,

v.

**FINDING OF NO PROBABLE CAUSE,
ORDER OF DISMISSAL**

Representative Arlon Lindner,
Respondent.

On October 25, 2004, Complainant filed a complaint with the Office of Administrative Hearings alleging a violation of Minn. Stat. Chap. 211B.02 by Respondent. On October 26, 2004, the Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing was issued.

The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Beverly Jones Heydinger. The hearing was held by telephone on October 28, 2004, at approximately 9:30 a.m. The hearing was continued to approximately 10:30 a.m. to allow materials to be faxed between parties. The record remained open at the close of the hearing to allow copies of documents to be sent from the Respondent to the Complainant, and to provide the Complainant with the opportunity to cross-examine the witnesses about the documents. The Complainant received the documents, and waived his right to cross-examine the witnesses about them. The record of the probable cause hearing closed on October 28, 2004.

David Torres, 13395 Basswood Lane, Rogers, MN 55374, appeared on his own behalf. Darren Knight, Knight & Hayano, P.A. 18910 Hamel Road, Plymouth, MN 55446, appeared on behalf of Representative Arlon Lindner. In addition, Joyce Peppin and Gregg Peppin, 14535 Edgewood Road, Rogers, MN, Judy Lindsay, 4041 154th Ct. W., Rosemount, MN, and Mary Vath were also present by telephone.

During the telephone conference, the Complainant and Respondent gave sworn testimony. Joyce Peppin, Gregg Peppin and Judy Lindsay also testified, and the record was supplemented with eight exhibits, Exhibits 1 - 8.

Based upon the record and all of the proceedings in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. It is not disputed that the Respondent is running for the Legislature in District 32A as an Independent candidate and that Joyce Peppin is running for and has been endorsed by the Republican Party of Minnesota for the same legislative seat. It is also not disputed that the Respondent is the incumbent, that he has held the position for twelve years, and that, prior to this election, he ran and was elected as a Republican.

2. During the afternoon of October 21, 2004, the Complainant received a call at home from a woman who described herself as calling on behalf of the Lindner campaign. The telephone caller identification showed that the call was made from a telephone listed for Michael Marquardt. Judy Lindsay, campaign manager for Arlon Lindner, made calls that afternoon on behalf of the Respondent from Michael Marquardt's office, and recalls speaking with the Complainant.¹

3. The Complainant alleges that the caller encouraged him to vote for the Respondent, and Ms. Lindsay acknowledged that was the purpose of her call. The script for such calls is attached to Ms. Lindsay's affidavit.² The Complainant alleges that he asked the caller why Mr. Lindner did not receive the Republican endorsement, and that she replied that Democrats had attended the endorsing convention, the wrong person received endorsement, and that another Republican caucus was held later where Democrats were not allowed in, and that Respondent was endorsed. Complainant asserts that Ms. Lindsay's claim that Respondent was the "True Republican Nominee," and the implication that a Republican caucus had endorsed the Respondent, violated Minn. Stat. § 211B.02.

4. Ms. Lindsay denies that she told the Complainant that the Respondent was the "True Republican Nominee," or that the Respondent was endorsed by the Republican Party. For the purpose of determining probable cause, the Complainant's allegations, supported by his sworn statement, are taken as true.

5. The Complaint alleges that on or about October 23, 2004, Respondent sent a letter to approximately 10,000 identified Republican voters.³ The letter includes the statements "I am the True Republican and the True Conservative." The first line of the letter states: "This year, after 12 years of being the endorsed Republican, I am running as an Independent. I am an Independent Republican. It is the issues and values of our Republican platform that I believe in and represent; and that is more important to me than the party name." The letter further addresses Respondent's concerns with the liberalization of the Republican party, and states that his record

¹ Ex. 7 is an affidavit from Ms. Lindsay. At the hearing she testified that she was not aware when she signed it that the Complainant had alleged that the telephone call to him was received during the afternoon of October 21, 2004. She testified that she was the only one making calls from Mr. Marquardt's office that afternoon, and that she recalls her conversation with a person questioning her about the Republican endorsement. The Complainant believed that Ms. Lindsay could have been the caller, but he was not certain.

² Ex. 7.

³ Attachment D to the Complaint.

matches the Republican platform. The letter ends with a list of endorsements: “For over the past twelve years, I have also been endorsed by:....Republican Party '92-'03; Twin Cities Republican Association.” The Respondent does not deny sending the letter.

6. The Twin Cities Republican Association is a Political Action Committee established in 1991 that supports “candidates who most closely follow the historic principles of the Republican party and its stated platforms.”⁴ It endorses candidates that “best comply with its goals and principles,”⁵ and it has endorsed the Respondent.⁶

7. The Respondent does not have the endorsement of the Republican Party or any of its units.⁷

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction to consider this matter pursuant to Minn. Stat. § 211B.34.

2. The Fair Campaign Practices Law prohibits false claims of support. It states in applicable part:

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.⁸

3. The Complainant has failed to show that there is probable cause to believe that Respondent’s campaign directly or indirectly stated or implied that the Respondent had the endorsement of the Republican Party or one of its units when a campaign worker told Complainant that the Respondent was the “true Republican nominee,” and that another Republican caucus had endorsed the Respondent.

4. The Complainant has failed to show that there is probable cause to believe that the statements “I am the True Republican and the True Conservative,” or including the endorsement of the Twin Cities Republican Association in Attachment D either states or implies that the Respondent has the endorsement of the Republican Party or one of its units.

Based on the Findings of Fact and Conclusions of Law, and for the reasons set forth in the Memorandum, attached hereto and incorporated herein:

⁴ Ex. 5, Affidavit of Richard Iffert; Test. of Judy Lindsay.

⁵ *Id.*

⁶ Attachment F to the Complaint.

⁷ Test. of Arlon Lindner; Test. of Joyce Peppin.

⁸ Minn. Stat. § 211B.02.

ORDER

IT IS HEREBY ORDERED THAT:

1. There is no probable cause to believe that Respondent violated Minn. Stat. § 211B.02 as alleged in the Complaint;
2. The Complaint is DISMISSED.

Dated: October 29, 2004
Tape-recorded (one tape)

s/Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

NOTICE OF RECONSIDERATION RIGHTS

Minnesota Statute § 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 section 211B.35 within five business days after granting the petition.

MEMORANDUM

At the probable cause stage of the proceeding, the evidence must be placed in a light most favorable to the Complainant. The Complainant offered evidence that the Respondent's campaign worker represented that the Respondent was the "true Republican nominee." However, he admitted that he knew that the Respondent had not received the Republican Party endorsement and that he specifically asked the caller why the endorsement had been denied. In that context, even if the Complainant is correct that the campaign worker responded by describing the Respondent as the "true Republican nominee," the statement neither stated nor implied that the Respondent had the endorsement of the Republican Party. To the contrary, accepting Complainant's testimony that the campaign worker made the statement in the context of responding to the question about the failure to get endorsement, the statement could only be interpreted as ascribing Republican values or principles to the Respondent.

The statements that there was another Republican caucus held later, that Democrats were not allowed and that Mr. Lindner was endorsed, present a closer question. But these statements were made during a discussion of Respondent's failure

to receive the Republican Party endorsement and could not reasonably be construed as false.

Complainant also asserted that false or misleading representations were made in a letter that the Respondent sent out to 10,000 identified Republican voters, identifying the Respondent as the True Republican and True Conservative. The letter is included in the record as Attachment D to the Complaint. Respondent does not dispute that the letter was mailed on his behalf to identified Republican voters. The letter taken as a whole makes it clear that the Respondent is running as an Independent, that he is closely aligned with the issues and values of the Republican platform, and that those values are more important than a party name. Claiming that he is an Independent Republican does not imply Republican Party endorsement. At the end of the letter, Respondent lists his endorsement by the Republican Party from 1992 through 2003, and endorsement by the Twin Cities Republican Association. The letter makes no claim to endorsement in the November election by the Republican Party or any of its units.

There is the possibility that an individual could believe that the Twin Cities Republican Association is a “party unit.” The term “party unit” is not included in the definitions that apply to Chapter 211B.⁹ However, the Minnesota Supreme Court defined the term as it appeared in the predecessor statute to section § 211B.02, Minn. Stat. 210A.02 (repealed).¹⁰ The Court found that “party unit” was the required conventions, committees, and caucuses that are the organizational “units” of a political party.¹¹ The Respondent did not claim endorsement by any such unit, nor could the language of the letter reasonably imply one. Instead, the risk in this case is that an individual would not appreciate that the Twin Cities Republican Association has no formal tie to the Republican Party. That implication is caused by the organization’s choice of name, and not by the Respondent. The statute does not prohibit a candidate from listing an organization’s endorsement because the organization’s name might mislead voters into making a connection where there is none. There are many independent organizations acting on behalf of candidates, and they are free to choose their names. There is no allegation that the Respondent created the organization or sought its endorsement in order to mislead voters. There is no allegation that the Respondent did not have the endorsement of the Twin Cities Republican Association.

Ms. Peppin testified that she is extremely concerned about the Respondent’s representations that he is the True Republican because Republican credentials are crucial in District 32A where a high proportion of voters identify themselves as Republicans.¹² She correctly states that she is the only candidate for the House seat who can use the terms “Republican-endorsed.” However, as explained above, the campaign worker’s alleged statement that the Respondent was the “true Republican

⁹ See Minn. Stat. §§ 200.01 and 200.02.

¹⁰ “No person or candidate shall knowingly, either by himself or by any other person, while such candidate is seeking a nomination or election, make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of any political party, or unit thereof, or of any organization, when in fact the candidate does not have such support or endorsement.”

¹¹ *Graves v. Meland*, 264 N.W.2d 401, 404 (Minn. 1978).

¹² Exs. 1 and 2.

nominee” and was endorsed by a Republican caucus, even if true, must be considered in context. And the Respondent’s letter, Attachment D, does not include any such representation. The Respondent’s attempt to align himself with the policies and positions of the Republican Party is not prohibited, and there is no allegation that he is falsely implying such an allegiance.

B.J.H.