

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Brian Melendez,

Complainant,

PROBABLE CAUSE  
ORDER

vs.

Ember Reichgott Junge,

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, on July 20, 2006, to consider a complaint filed by Brian Melendez on July 17, 2006. The parties participated by telephone conference call.

Alan Weinblatt, Weinblatt & Gaylord PLC, 111 E. Kellogg Boulevard, Suite 300, St. Paul, MN 55101, appeared on behalf of Brian Melendez (Complainant). Marshall Tanick, Mansfield Tanick & Cohen, P.A., 1700 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402-4511, appeared on behalf of Ember Reichgott Junge (Respondent). Mr. Melendez and Ms. Reichgott Junge also participated in the conference call.

Based upon the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is probable cause to believe that Ms. Reichgott Junge violated Minnesota Statute § 211B.02 by using the initials "DFL" on her campaign billboards, web pages, and emails.

**ORDER**

**IT IS HEREBY ORDERED:**

1. That there is probable cause to believe that Ember Reichgott Junge violated Minnesota Statute § 211B.02 by using the initials "DFL" on her campaign billboards, web pages and emails.

2. That this matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges pursuant to Minnesota Statute § 211B.35.

Dated: July 21, 2006

/s/ Barbara L. Neilson  
BARBARA L. NEILSON  
Administrative Law Judge

## MEMORANDUM

Ember Reichgott Junge is a candidate running in the DFL primary for Minnesota's Fifth Congressional District. She is an attorney and former State senator. She ran successfully for State Senate five times between 1982 and 1996, and unsuccessfully for State Attorney General in 1998. In each of these races she was the DFL endorsed candidate. In her current campaign for the 5<sup>th</sup> Congressional District seat, Ms. Reichgott Junge does not have the endorsement of the DFL party. Instead, the DFL party endorsed Keith Ellison.

The Complaint in this matter was filed by the State Chair of the DFL party, Brian Melendez. The Complaint alleges that Ms. Reichgott Junge knowingly violated Minn. Stat. § 211B.02 by placing the initials "DFL" on her campaign billboards, email correspondence and website, thereby falsely implying that she has the endorsement of the DFL party, and by not ceasing the violation despite notice and demand.

Minn. Stat. § 211B.02 provides as follows:

### **211B.02 False Claim of Support.**

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.

Ms. Reichgott Junge has put up approximately eight billboards in the 5<sup>th</sup> Congressional District area promoting her candidacy. The initials "DFL" appear without any qualifier in the corner of each billboard. Ms. Reichgott Junge approved the design of the billboards and specifically requested that the initials "DFL" appear on the billboard. Ms. Reichgott Junge maintains that she did so in order to inform the voters that she is running in the DFL primary. In addition, the initials "DFL" appear after her name on her campaign emails and, until recently, appeared after the phrase "Ember for Congress" on her campaign website. Her website has since been modified to state "DFL Primary - 5<sup>th</sup> District" rather than "DFL" after the phrase "Ember for Congress."

By letter dated July 10, 2006, counsel for the Complainant notified Ms. Reichgott Junge of the State DFL Party's position that, as a non-endorsed candidate, her use of the initials "DFL" on campaign material violated Minn. Stat. § 211B.02 because it falsely implied that she had the DFL party's support or endorsement. Ms. Reichgott Junge testified at the probable cause hearing that she was shocked to receive Mr. Weinblatt's letter and was unaware that use of the initials "DFL" by a non-endorsed candidate was viewed as falsely implying endorsement of the party in violation of Minn. Stat. § 211B.02.

In *Schmitt v. McLaughlin*,<sup>1</sup> the Minnesota Supreme Court held that a candidate's use of the initials "DFL" falsely implied that the candidate had the endorsement of the DFL party in violation of Minnesota election law.<sup>2</sup> The court explained that, while candidates have a right to inform voters of their party affiliation "by the use of such words as 'member of' or 'affiliated with' in conjunction with the initials 'DFL,'" the use of the initials without such modifiers falsely implies to the average voter that the candidate is endorsed or at the very least has the support of the DFL party.<sup>3</sup>

Respondent argues that the use of the initials "DFL" on her campaign billboards and material does not state or imply party endorsement. Respondent maintains that the gravamen in the *Schmitt* case was that the "average" voter could be misled into thinking that the candidate had party endorsement. Here, Respondent has submitted as exhibits eight affidavits of prospective voters, each stating that they are familiar with Respondent's billboards and do not believe that her use of the initials "DFL" confuse or mislead them into thinking that Respondent is the DFL endorsed candidate. In addition, Respondent asserts that the likelihood of confusion is less in a partisan race, such as the upcoming primary, than in a non-partisan race, such as the one at issue in *Schmitt*. According to the Respondent, the initials "DFL" simply inform the voters that she is running in the DFL primary. In contrast, the Complainant asserts that the potential for voter confusion is even greater where a candidate implies that he or she has the party's endorsement in the context of a party's primary election.

Minn. Stat. § 211B.02 prohibits a candidate from knowingly making a false claim implying party support or endorsement. There is no exception provided in the statute for partisan races. In addition, the Minnesota Supreme Court has held in two other cases decided since the *Schmitt* case that use of the initials "DFL," without modifiers such as "member" or "affiliate," implies endorsement to the average voter.<sup>4</sup> In none of these decisions did the Minnesota Supreme Court find the partisan or non-partisan nature of the race to be a determinative factor.

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.<sup>5</sup> The material facts in this case are not in dispute. Ms. Junge does not have the DFL Party's endorsement, yet she has used the initials "DFL" on campaign material and has continued to do so despite being informed of the case law and the state DFL Party's position. Accordingly, there is probable cause to believe a violation of section 211B.02 has occurred. This matter will be

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<sup>1</sup> 275 N.W.2d 587, 591 (Minn. 1979) (discussing Minn. Stat. § 210A.02, predecessor to Minn. Stat. § 211B.02).

<sup>2</sup> *Accord, In the Matter of the Election of Ryan*, 303 N.W.2d 462 (Minn. 1981).

<sup>3</sup> 275 N.W.2d at 591.

<sup>4</sup> *In the Matter of the Election of Ryan*, 303 N.W.2d 462 (Minn. 1981); and *Dougherty v. Hilary*, 344 N.W.2d 826 (Minn. 1984). See also, *Stone v. Supporters of Carol Kummer for Park Board Commission*, OAH Docket No. 3-6326-16853-CV (Order dated October 13, 2005).

<sup>5</sup> Minn. Stat. § 211B.34, subd. 2.

referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges for an evidentiary hearing.

B.L.N.