

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Mark Frederickson,

Complainant,

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

vs.

Carla Nelson and Nelson Volunteer
Committee,

Respondents

The above-entitled matter came on for an evidentiary hearing on September 5, 2006, before a panel of three Administrative Law Judges: Richard C. Luis (Presiding Judge), Bruce H. Johnson, and Kathleen Sheehy. The hearing was conducted by telephone conference call. The hearing record was held open for submission of written argument and the record closed on Friday, September 7, 2006.

Ken Moen, Attorney at Law, 202 Riverside Building, 400 South Broadway, Rochester, MN 55904, appeared on behalf of Mark Frederickson (Complainant). Jeanne Danaher, Attorney at Law, 3255 Trading Post Trail, Afton, MN 55001 and Brian McDaniel, Attorney at Law, 13115 Gable Lane, Apple Valley, MN 55124, appeared on behalf of Carla Nelson and the Nelson Volunteer Committee (Respondents).

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

Did Respondents violate Minn. Stat. § 211B.06 by intentionally participating in the preparation or dissemination of false campaign material that Respondents knew was false or communicated to others with reckless disregard as to whether it was false?

The panel concludes that the Complainant failed to establish that Respondents violated Minn. Stat. § 211B.06, and therefore the Complaint against them is dismissed.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. Respondent Carla Nelson served one term (2002-2004) as State Representative for District 30A. She was defeated by Tina Liebling in the 2004 election and is challenging Ms. Liebling for the same seat in the upcoming election.

2. The physical boundaries of Minnesota Legislative District 30A are all within the City of Rochester, although the District does not include all of Rochester.

3. The Complainant is a Rochester resident who served one term on the Olmsted Soil and Water Conservation District and ran unsuccessfully for State Representative for District 30B in 2000.¹

4. In late May or early June of 2006, Respondent Nelson's web site included a picture of her above the following heading: "State Representative Carla Nelson." Below the heading was a press release that Respondent Nelson issued in December of 2005, announcing her candidacy. The press release stated in part as follows:

CARLA NELSON TO SEEK REELECTION TO MINNESOTA HOUSE
U of M-Rochester, genomics partnership, health care, and job creation will be top priorities

Former State Representative Carla Nelson today announced she will be a candidate for re-election to the District 30A seat in the Minnesota House of Representatives. Nelson made her announcement at the Rochester Community and Technical College flanked by Governor Tim Pawlenty and a bipartisan group of supporters.

"I am running for reelection as State Representative to provide Rochester with the voice it needs at the Capitol and to further advance university opportunities in Rochester as well as the genomics partnership, two projects begun in 2003 during my first term in the House," Nelson stated.²

5. During the July 2006 "Rochesterfest parade," supporters of Ms. Nelson wore T-shirts with the following message: "Re-elect Carla Nelson for State Representative."³

6. Beginning in August of 2006, Respondents placed lawn signs in the District 30A area that state: "Re-elect Carla Nelson Our State Representative"

¹ Testimony of Frederickson.

² Ex. 1; Testimony of Frederickson and Nelson.

³ Ex. 2.

and “Re-elect Carla Nelson For State Representative.”⁴ These signs were left over from Ms. Nelson’s unsuccessful bid for re-election in 2004.⁵

7. Respondent Nelson had some new lawn signs made in 2006 that said only “Carla Nelson for State Representative.” Nelson decided not to use the word “Re-elect” on the new signs because she did not want to be confused with the incumbent (Tina Liebling).⁶

8. The Complainant filed this complaint against the Respondents with the Office of Administrative Hearings on August 11, 2006. The Complaint alleges that Respondents’ use of the word “re-elect” rendered Nelson’s campaign material false in violation of Minn. Stat. § 211B.06.

9. Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

3. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.⁷

4. The Complainant has failed to demonstrate by clear and convincing evidence that Respondents violated Minn. Stat. § 211B.06.

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

⁴ Exs. 4 and 5.

⁵ Testimony of Nelson.

⁶ Testimony of Nelson.

⁷ Minn. Stat. § 211B.32, subd. 4.

ORDER

IT IS ORDERED:

That the Complaint in this matter is DISMISSED.

Dated: September 13, 2006

/s/ Richard C. Luis
RICHARD C. LUIS
Presiding Administrative Law Judge

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Complainant alleges that Respondents' use of the word "re-elect" on Carla Nelson's website, lawn signs, and T-shirts violated Minn. Stat. § 211B.06. The Complainant maintains that only incumbents may use the word "re-elect." Complainant alleges further that the Respondents either knew that use of the word "re-elect" rendered their campaign material false or they used the word with reckless disregard as to whether it was false.

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v.*

Sullivan.⁸ Based on this standard, the Complainant must show by clear and convincing evidence that the Respondents used the word “re-elect” knowing it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove that the Respondent “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.⁹

Reasonable people can disagree as to the propriety of using the word “re-elect” when the candidate has held the same office in the past but is not the incumbent.¹⁰ The panel accordingly concludes that the evidence is insufficient to prove by clear and convincing evidence that Respondents either knew that use of the word “re-elect” rendered Ms. Nelson’s campaign material false or that they likely knew it was probably false. Therefore, the Complaint in this matter is dismissed.

R.C.L., B.H.J., K.D.S.

⁸ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁹ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, No. A051125 (Minn. App. Apr. 26, 2006).

¹⁰ See *Maloney v. Anderson*, Order Dismissing Complaint, OAH Docket No. 3-0320-17444-CV (August 11, 2006); *Maloney v. Oman*, Order Dismissing Complaint, OAH Docket No. 4-6349-17443-CV (August 11, 2006); *Frederickson v. Nelson and Nelson Volunteer Committee*, OAH Docket No. 7-0320-17447-CV, Probable Cause Order (August 22, 2006).