

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Melissa Hortman,

Complainant,
vs.

PROBABLE CAUSE
ORDER

Republican Party of Minnesota,

Respondent.

On September 28, 2006, a probable cause hearing under Minnesota Statutes § 211B.34 was held by telephone conference call before Administrative Law Judge Beverley Jones Heydinger to consider a complaint filed by Minnesota Representative Melissa Hortman on September 22, 2006. The record with respect to the probable cause hearing closed at the conclusion of the hearing on September 28, 2006.

Alan Weinblatt, Attorney at Law, Weinblatt & Gaylord, PLC, 111 East Kellogg Blvd, Suite 300, St. Paul, MN 55101, appeared on behalf of Representative Melissa Hortman (Complainant). Brian McDaniel, Attorney at Law, 13115 Gable Lane, Apple Valley, MN 55124, appeared on behalf of the Republican Party of Minnesota (Respondent). Ben Golnik, Executive Director of the Republican Party of Minnesota, also participated in the hearing.

Based on the record and all of the proceedings in this matter, and for the reasons set forth in the Memorandum below, the Administrative Law Judge finds that there is probable cause to believe that the Respondent violated Minnesota Statutes §§ 211B.06.

ORDER

IT IS ORDERED:

1. That there is probable cause to believe that Respondent violated Minnesota Statutes §§ 211B.06 as alleged in the Complaint.

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: October 2, 2006

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER

Tape recorded (one tape).

MEMORANDUM

Melissa Hortman is a member of the Minnesota State House of Representatives representing District 47B.¹ Ms. Hortman is running for re-election in the November 7, 2006, General Election. The Complaint alleges that on or about September 18, 2006, the Respondent distributed campaign literature² that contained the following statement:

Even though she promised to “*reduce homeowner property taxes*”³ Melissa Hortman failed to introduce even one bill to do so.⁴

The Complaint alleges that this statement is false because Representative Hortman was the Chief Author of House File 2310 (HF 2310), which increased referendum equalization aid and the referendum revenue cap. According to the Complaint, HF 2310 would have provided approximately \$18 million in property tax relief statewide, including \$3 million in property tax relief to the Anoka Hennepin school district (which is the school district that serves House District 47B). The Complaint further alleges that Respondent knew the statement at issue was false since its campaign literature cited the government website that lists all of the bills of which Representative Hortman was the Chief Author, including HF 2310. The Complainant notes, however, that the website address cited on the campaign literature was incorrect. According to the Complainant, persons attempting to go to this site find only an error screen informing them that they are “not authorized to view this page.”

The Respondent concedes that section two of HF 2310 would have lowered property taxes, but maintains that section one of the bill could have raised property taxes by increasing the maximum amount of referendum revenue a school district could seek from 18.6 percent to 28 percent. According to Respondent, the potential increase in property taxes through levy referendums permitted by section one of HF 2310 was greater than the property tax savings that would have resulted under section two of the bill.

Benjamin Golnik testified that the Republican Party of Minnesota used an outside vendor (Dax Bennett of Ryan Media) to design and draft the copy for the campaign flyer.⁵ According to Mr. Golnik, the vendor’s conclusion that HF 2310 would raise property taxes was based on the bill as it was introduced and data obtained from the Department of Education’s web site.⁶ Mr. Golnik testified that

¹ Minnesota House District 47B covers portions of Hennepin and Anoka Counties, and includes the cities of Brooklyn Park and Coon Rapids.

² Ex. 1.

³ Footnote 5 in Ex. 1 citing “Hortman 2004 campaign literature.” (Emphasis in original).

⁴ Footnote 6 in Ex. 1 stating “As Chief Author. See www.house.mn/members/47B.”

⁵ Ex. 1.

⁶ Exs. 5 and 6.

before approving the campaign flyer, he personally reviewed the bill and the Department of Education data.

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n 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 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.⁷ The focus for the Presiding Judge is to answer the question whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.⁸ If the Judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, were one to be made, a motion to dismiss for lack of probable cause should be denied.⁹ A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.

As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

In this case, the Complainant has submitted sufficient evidence that reasonably tends to show the existence of a violation of Minn. Stat. § 211B.06. Representative Hortman was the Chief Author of HF 2310. Whether this bill would have "reduced homeowner property taxes" requires factual determinations that must be left to a panel of administrative law judges to decide. Accordingly,

⁷ Minn. Stat. § 211B.34, subd. 2; see also Black's Law Dictionary 1219 (7th ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime.")

⁸ Compare *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

⁹ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

this matter will be referred to the Chief Administrative Law Judge for assignment to a panel of three administrative law judges for an evidentiary hearing.

At the evidentiary hearing, the Complainant has the burden of proving by clear and convincing evidence that the campaign material at issue is false, and that the Respondent knew it was false or communicated it to others with reckless disregard of whether it was false. That standard, stated in Minn. Stat. § 211B.06, subd. 1, has been interpreted recently by the Minnesota Court of Appeals in *Riley v. Jankowski*,¹⁰ which held that “reckless disregard,” as used in the statute, requires clear and convincing evidence that Respondent made the statement while subjectively believing that the statement was probably false.

B.J.H.

¹⁰ 713 N.W.2d 379 (Minn. Ct. App. 2006), *review denied* 2006 Minn. LEXIS 493 (Minn. July 19, 2006).