

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Lori Grivna,  vs.  Minnesota DFL Party,	Complainant,    Respondent.	<b>ORDER OF DISMISSAL</b>
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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 at 10:00 a.m. on October 28, 2008, to consider the complaint filed by Lori Grivna on October 20, 2008. The hearing was held by telephone conference call. The record closed on October 30, 2008, upon receipt of the Complainant's post-hearing submission.

Lori Grivna appeared on her own behalf. Alan W. Weinblatt, Attorney at Law, Weinblatt & Gaylord, PLC, appeared on behalf of Respondent Minnesota DFL Party.

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 no probable cause to believe that Respondent violated Minn. Stat. § 211B.06.

**ORDER**

**IT IS ORDERED:**

That there is no probable cause to believe that Respondent violated Minn. Stat. § 211B.06 as alleged in the Complaint, and therefore the Complaint is DISMISSED.

Dated: October 31, 2008

s/ Beverly Jones Heydinger  
BEVERLY JONES HEYDINGER  
Administrative Law Judge

Digitally recorded; no transcript prepared.

**NOTICE OF RECONSIDERATION RIGHTS**

**NOTICE OF RECONSIDERATION AND APPEAL RIGHTS**

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

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

### MEMORANDUM

Complainant Lori Grivna is the Republican-endorsed candidate for Minnesota House District 50B. Ms. Grivna alleges that the Minnesota DFL Party prepared and distributed false campaign material about her. Specifically, Ms. Grivna challenges a flyer the Minnesota DFL Party mailed to residents of District 50B. The flyer shows a picture of a padlocked gate, and states in part:

CLOSED:

The Lori Grivna Record on Our Schools

When Lori Grivna served on the Mounds View School Board, the Board increased property tax levies three straight years.<sup>1</sup>

But after spending our money on renovating Pike Lake and Snail Lake Elementary schools, Grivna voted to close them!<sup>2</sup>

Legislative leaders from her own party tried to take action to stop the closings<sup>3</sup>...but today, those schools are closed. The investment of our tax dollars can never be recovered.

The footnotes included in the flyer are highlighted in a box on the left-hand side of the flyer under the heading: "CHECK THE FACTS:"

The Complainant alleges that two of the statements in the flyer are false. First, she alleges that the statement, "But after spending our money on renovating Pike Lake and Snail Lake Elementary schools, Grivna voted to close them!" is false because the school buildings are not closed and are in fact being used for educational purposes. In addition, the accompanying photo depicts a padlock suggestive of a closed building. While the Complainant admits that as a member of the Mounds View School Board she voted to close the Pike Lake and Snail Lake Elementary school programs (consolidating programs from eight buildings to six to address the projected downturn in enrollment), she and other members of the Board did not vote to close the buildings. The Complainant states that students living in Snail Lake and Pike Lake were sent to other

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<sup>1</sup> ISD 621 School Board Minutes Dec. 2003-2005.

<sup>2</sup> ISD 621 School Board Minutes Dec. 22, 2004.

<sup>3</sup> "Bills Take New Tack on Closures," Star Tribune, 3/16/2005.

building sites in the district for traditional elementary programming, but there was never any intent by the School Board to close the buildings and the buildings are not closed.

The Complainant also argues that the statement, “The investment of our tax dollars can never be recovered,” is false. The Complainant maintains that the buildings were renovated to address structural needs, such as indoor air quality, safe entrances, and deferred maintenance. Complainant argues that because these public buildings are still occupied and being used to provide educational programming and house administrative operations, the investment of tax dollars to maintain and renovate these buildings is being recovered.

In an Order dated October 22, 2008, the ALJ found the Complainant had alleged a prima facie violation of Minn. Stat. § 211B.06 against Respondent. A probable cause hearing was held by telephone conference call on October 30, 2008.

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>4</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>5</sup> The purpose of a probable cause determination 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.<sup>6</sup>

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.

To be found to have violated section 211B.06, two requirements must be met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate’s conduct.<sup>7</sup> It does not reach criticism that is merely unfair or unjust. It does reach false statements of specific facts.<sup>8</sup> In addition, expressions of opinion, rhetoric, and figurative language are

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<sup>4</sup> Minn. Stat. § 211B.34, subd. 2.

<sup>5</sup> 239 N.W.2d 892 (Minn. 1976); see also Black’s Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime.”)

<sup>6</sup> *Id.* at 902.

<sup>7</sup> *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

<sup>8</sup> *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.<sup>9</sup>

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.<sup>10</sup> Based upon this standard, the Complainant has the burden at the hearing to prove by clear and convincing evidence that the Respondents either published the statements knowing the statements were false, or that they “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.<sup>11</sup> In addition, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>12</sup>

The Administrative Law Judge concludes, after considering all of the evidence in the record and the arguments of the parties, that the Complainant has failed to present sufficient facts to support finding probable cause that Respondent violated Minn. Stat. § 211B.06. Complainant served on the Mounds View School Board from 1999-2006. On December 22, 2004, after approximately 50 community meetings in which the District’s repurposing plan was discussed, the Board voted to close the Pike Lake Elementary School and the Snail Lake Elementary School at the conclusion of the 2004-2005 school year.<sup>13</sup> The closings consolidated the District’s eight elementary programs into six because of decreasing enrollment projections.<sup>14</sup> Ms. Grivna voted in favor of the school closings.<sup>15</sup> Shortly thereafter, two legislative bills were proposed, one of which would have forced the District to keep the schools open.<sup>16</sup> The Pike Lake and Snail Lake Elementary Schools were renovated in 2005.<sup>17</sup> The renovations consisted mostly of deferred maintenance and ventilation and air quality improvements.<sup>18</sup> The Pike Lake and Snail Lake Elementary Schools are closed.<sup>19</sup> Currently, the Pike Lake Education Center houses the District’s Community Education programs.<sup>20</sup> The Snail Lake Education Center houses the Oak Grove Middle School, community programs and District administration.<sup>21</sup>

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<sup>9</sup> *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

<sup>10</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>11</sup> *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see also Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

<sup>12</sup> *Jadwin*, 390 N.W.2d at 441.

<sup>13</sup> Ex. 1; Test. of L. Grivna; Complaint; Ex. F.

<sup>14</sup> Test. of L. Grivna; Complaint.

<sup>15</sup> Test. of L. Grivna; Ex. G.

<sup>16</sup> Ex. 2.

<sup>17</sup> Test. of L. Grivna.

<sup>18</sup> Test. of L. Grivna, Ex. D, attached to Complaint.

<sup>19</sup> Test. of L. Grivna.

<sup>20</sup> Ex. C, attached to Complaint.

<sup>21</sup> Ex. B.

Given the evidence in record, it cannot be said that any of the statements included in the flyer are factually false. Ms. Grivna acknowledged during the probable cause hearing that the Pike Lake and Snail Lake Elementary School buildings were renovated and she voted to close the school programs. The statement “But after spending money on renovating Pike Lake and Snail Lake Elementary Schools, Grivna voted to close them!” is ambiguous and misleading and could imply that the buildings are closed; not the school programs. That implication is strengthened by the two pictures of a padlocked gate. Still, the false implication does not make the literal statements factually false.<sup>22</sup> As such, the statements do not come within the purview of section 211B.06. Moreover, there is no requirement that campaign material be thorough or complete. Minnesota’s appellate courts have repeatedly held that the statute is not broad enough to prohibit incomplete and unfair campaign statements, even those that are clearly misleading.<sup>23</sup>

The statement, “The investment of our tax dollars can never be recovered,” is not actionable under section 211B.06 because it is a statement of opinion or political rhetoric. Ms. Grivna has offered no objective evidence that the statement is false; that the tax dollars have actually been returned or will be returned to the tax payers. Instead, her claim is based upon her opinion that the tax dollars are being “recovered” because the buildings are being used for a public purpose. Expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.<sup>24</sup> Here, the statement reflects the DFL’s contrary opinion that the tax dollars previously invested will not be recovered. The brochure does not explain what the term “recovered” would mean as applied to the expenditure of bond funds, but the incompleteness or unfairness of the implication does not make the statement any less an opinion. Since the statement is not a representation of fact, it does not come within the purview of section 211B.06.

**B. J. H.**

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<sup>22</sup> See *Hortman v. Republican Party of Minnesota*, OAH Docket No. 15-0320-17530-CV (Oct. 16, 2006), p. 8 (“Minn. Stat. § 211B.06 is directed against false statements of fact and not false implications”).

<sup>23</sup> See, *Bundlie*, 276 N.W.2d at 71.

<sup>24</sup> *Jadwin*, 390 N.W.2d at 441, citing *Old Dominion Branch*, 418 U.S. at 284-86; *Greenbelt Coop. Publishing Assoc.*, 398 U.S. at 13-14. See also *Milkovich*, 497 U.S. at 16-17; *Diesen*, 455 N.W.2d at 451; *Hunter*, 545 N.W.2d at 706.