

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Carolyn Jackson,

Complainant,

vs.

Keith Downey,

Respondent.

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

The above-entitled matter came on for an evidentiary hearing on November 19, 2008, before a panel of three Administrative Law Judges: Beverly Jones Heydinger (Presiding Judge), Steve M. Mihalchick and John A. Ellefson. The OAH hearing record closed on December 3, 2008, with the filing of the parties' written memoranda.

Christian Sande, Attorney at Law, 2116 Second Avenue South, Suite 300, Minneapolis, MN 55404-2606, appeared on behalf of Carolyn Jackson (Complainant).

Reid LeBeau II, Attorney at Law, Lockridge, Grindal, Nauen, P.L.L.P., 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401, appeared on behalf of Keith Downey (Respondent).

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 Respondent Keith Downey violate Minnesota Statute § 211B.06 with respect to two statements in campaign material he disseminated prior to the November 2008 election?

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

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

FINDINGS OF FACT

1. Keith Downey was the Republican-endorsed candidate for Minnesota House District 41A¹ in the November 2008 election. One of his opponents was incumbent State Representative Ron Erhardt who, after losing the Republican endorsement, ran as an Independent.² The Complainant, Carolyn Jackson, was the co-chair of Representative Erhardt's re-election campaign.

2. Prior to the election, Mr. Downey disseminated a letter to certain residents of House District 41A that attached a one-page flyer entitled "Candidate Comparison." A copy of the Candidate Comparison appears below:

"Keith Downey is exactly what we need in St. Paul to advance our state. He will make Edina and Minnesota proud."

Gov. Tim Pawlenty

"Elected office is all about getting things done, and so is Keith Downey. Join me in supporting Keith Downey for State Representative from Edina."

Sen. Norm Coleman

Candidate Comparison

Increase local option sales tax .25% for transit without a voter referendum. (HF2800, 2008)	No	Yes	Yes
Expand sales tax to include clothing. (Proposed) (HF2551, 2008)	No	Yes (Chief Author)	TBD
Raise taxes on natural gas and propane 25%. (HF2800, 2008)	No	Yes	Yes
Add sales tax to automobile leases. (HF2800, 2008)	No	Yes	Yes
Remove the cap on motor vehicle registration tab fees. (HF2800, 2008)	No	Yes	Yes
(HF2800: tax, Olson Amendment to HF3201: offset, 2008)			
Refuse PAC contributions and Union endorsements.	Yes	No	No
Increase the sales tax .38% via constitutional amendment for arts, culture, and outdoors. (HF2285, 2008)	No	Yes	Yes
Support the Positive Alternatives Act to provide material needs for women who otherwise would not choose to deliver their baby. (HF952, SF917, 2005)	Yes	No	No
Provide taxpayer funding of sex-selection abortions. (Holberg Amendment to HF1812, 2008)	No	Yes	Yes
Require internet pornography filters on computers in libraries. (Emmer Amendment to HF1973, 2008)	Yes	No	No
Limit property tax increases to the rate of inflation and population growth. (Buesgens Amendment to HF3201, 2008)	Yes	No	No
Shift \$101M in bonding bill to roads and bridges. (Emmer Amendment to HF380, 2008)	Yes	No	No

Note: Downey positions are candidate commitments and candidate-published information. Erhardt and DFL positions are actual votes, bill authorship, and published information.

¹ House District 41A is located in Hennepin County and covers roughly the northern two-thirds of the City of Edina.

² Representative Erhardt ran, and won during the years 1990 through 2006, as the Republican-endorsed candidate for the seat currently known as House District 41A.

3. Mr. Downey prepared both the letter and the Candidate Comparison.³ The Candidate Comparison lists 14 issues and purports to compare Mr. Downey's position on the issues to Mr. Erhardt's and those of the House DFL. At the bottom of the Candidate Comparison it states that Mr. Erhardt's positions are based on "actual votes, bill authorship, and published information."⁴

4. In creating the Candidate Comparison flyer, Mr. Downey researched the status of Minnesota House bills on-line and relied on Minnesota House Republican summaries of bills and amendments.⁵

5. During September and October of 2008, Mr. Downey disseminated the letter and Candidate Comparison flyer to approximately 5,000 households identified as likely Republican voters in House District 41A.⁶

6. Representative Erhardt did not disseminate any campaign material of his own or place any advertisements in local newspapers to counter or respond to the claims made in Mr. Downey's letter and Candidate Comparison flyer.⁷

Gas Tax statement

7. The sixth issue statement on the Candidate Comparison reads as follows: "Increase gas tax by up to 8.5 cents/gallon with no offsetting decrease in other taxes. (HF2800: tax, Olson Amendment to HF3201; offset 2008)."⁸ Mr. Downey is identified as opposing this statement, and Mr. Erhardt is identified as supporting it.

8. House File 2800 increased the state gas tax to raise transportation funds for road and bridge repair and for public transit projects.⁹ Representative Erhardt voted in favor of House File 2800 for final passage.

9. Included in HF 2800 is a \$25 lower-income motor fuels tax credit. Under this provision, individuals meeting certain income requirements are allowed a \$25 credit against the tax imposed under the bill.¹⁰

10. According to the legislature's fiscal note for HF 2800, the gas tax will generate approximately \$150 million per year in revenue for the state of Minnesota.¹¹ A complete offsetting or "zeroing-out" of this tax would require a decrease of about \$150 million in other taxes. The \$25 lower-income motor fuels

³ Ex. J-1.

⁴ Ex. J-1.

⁵ Testimony of Downey.

⁶ Testimony of Downey.

⁷ Testimony of Jackson and Erhardt.

⁸ Ex. J-1. The reference to HF3201 was a typographical error. Mr. Downey intended to reference HF2800.

⁹ Ex. J-5.

¹⁰ Ex. J-5. (Section 2, Subdivision 34 of HF 2800).

¹¹ Ex. M

tax credit will not offset the approximately \$150 million in revenue raised annually by the gas tax increase.

11. On February 21, 2008, Representative Erhardt voted against an amendment to HF 2800 proposed by Representative Olson that would have implemented individual tax rate reductions to offset the gas tax increases in the bill.¹² Representative Erhardt also voted against an amendment to HF 2800 proposed by Representative Kohls that would have required that any funds made available to local government from the gas-tax increase be offset by a corresponding reduction in local property taxes.¹³ Neither of these amendments passed.

Positive Alternatives Act

12. The ninth statement on the Candidate Comparison sheet states: "Support the Positive Alternatives Act to provide material needs for women who otherwise would not choose to deliver their baby. (HF952, SF917, 2005)." Mr. Downey is identified as supporting the Positive Alternatives Act and Mr. Erhardt is identified as not supporting the Act.¹⁴

13. The Positive Alternatives Act was passed into law in 2005. In general, it provides grants related to "positive abortion alternatives."¹⁵ The Minnesota House version of the bill was HF 952. The companion bill in the Minnesota Senate was SF 917. In the end, SF 917 was substituted for HF 952 and was passed into law.

14. On April 18, 2005, Representative Erhardt voted against passing HF 952 out of the House Ways and Means Committee to the House floor for action by the entire House.¹⁶

15. On May 17, 2005, Representative Erhardt voted against SF 917 when it reached the House floor and was substituted for HF 952.¹⁷ The House passed the substituted bill, with amendments, and sent it back to the Senate.¹⁸

16. The Senate refused to concur with the House amendments and a conference committee was appointed to resolve the differences between the two versions of SF 917. When SF 917 returned to the House on May 23, 2005, as amended by conference, Representative Erhardt voted in favor of SF 917 for final passage.¹⁹

¹² Ex. K.

¹³ Ex. L.

¹⁴ Ex. J-1.

¹⁵ Exs. J-7 and I.

¹⁶ Ex. E.

¹⁷ Ex. I.

¹⁸ Ex. I.

¹⁹ Ex. J-7.

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. Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ...”²⁰ The Campaign Comparison prepared and disseminated by Respondent Downey is campaign material within the meaning of that statute.²¹

3. Minn. Stat. § 211B.06, subd. 1, provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast 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.

4. 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.²²

5. The Complainant has failed to demonstrate that the Respondent violated Minn. Stat. § 211B.06 because the evidence is insufficient to prove that the statements at issue are false and that the Respondent knew they were false or communicated them with a reckless disregard as to whether they were false.²³

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

²⁰ Minn. Stat. § 211B.01, subd. 2.

²¹ Ex. J-1.

²² Minn. Stat. § 211B.32, subd. 4.

²³ See *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App. 2006), *rev. denied* (Minn. July 19, 2006) (citing, *Chafoulias v. Peterson*, 668 N.W.2d 642, 654-65 (Minn. 2003) interpreting the “reckless disregard” standard to require that a defendant make a statement while subjectively believing that the statement is probably false.)

ORDER

IT IS ORDERED:

1. That the Complaint in this matter is DISMISSED.
2. That the Respondent's request for attorney's fees is DENIED.

Dated: December 8, 2008

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Presiding Administrative Law Judge

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

/s/ John A. Ellefson
JOHN A. ELLEFSON
Administrative Law Judge

MEMORANDUM

The Complainant maintains that the statements at issue in the Candidate Comparison flyer are false and that Respondent Downey knew they were false or disseminated them with a high degree of awareness as to their probable falsity.

Contentions of the Parties

There is no dispute that Representative Erhardt voted in favor of HF 2800 and that HF 2800 increased the state gas tax. The Complainant argues, however, that the statement that Representative Erhardt supports increasing the gas tax "with no offsetting decrease in other taxes" is false because there was an offsetting motor fuels tax credit for lower income taxpayers in HF 2800. Because the tax credit contained in this bill would necessarily result in a decrease in income tax for those persons qualifying for the credit, the Complainant maintains the Respondent's use of the absolute "no" in the phrase "with no offsetting

decrease in other taxes” renders the statement factually false. The Complainant contends that a tax credit is a type of offset and points to the 1979 edition of Black’s Law Dictionary in support of this argument.²⁴

The Respondent argues that the gas tax statement in his Candidate Comparison flyer is literally true. The Respondent asserts that the word “offset” is defined as “balancing” or “to serve as a counter balance for.”²⁵ According to the Respondent, a reasonable person would understand the word “offset” to mean a “canceling out” and maintains that the limited tax credit provided for in HF 2800 is not an *offsetting decrease* in other taxes. The Respondent points out that the 2004 edition of Black’s Law Dictionary defines “tax credit” as a reduction in the tax liability as computed²⁶ – not an offset. Thus, while the motor fuels tax credit for low income taxpayers does serve to reduce these taxpayers’ overall tax liability, affected taxpayers and others did not see a corresponding decrease in other taxes in an amount equal to the gas tax increase. Moreover, the Respondent asserts that the fact that Representative Erhardt voted against both the Olson and Kohls amendments, which would have specifically required offsetting the gas tax with decreases in other taxes, renders the statement substantially true if not literally true in every detail.

With respect to the second statement that Representative Erhardt did not support the Positives Alternatives Act, the Complainant argues that this statement is false because Representative Erhardt did vote in favor of the Act for final passage. The Complainant maintains that unlike the situation in *Anderson v. Faust*,²⁷ where a candidate claimed his opponent “voted against” a certain bill even though the opponent voted in favor of the final version of that bill, here, Mr. Downey stated that Representative Erhardt did not “support” the Act. According to the Complainant, the natural meaning of the word “support” would include voting in favor of final passage of the bill.

The Respondent counters that it is entirely reasonable for Mr. Downey to infer that Representative Erhardt did not support the Positive Alternatives Act based on his several preliminary votes against the bill. According to Mr. Downey, Representative Erhardt took every opportunity he had to try and kill the bill before the final vote. Given this conduct, the Respondent maintains it is reasonable to deduce that Representative Erhardt did not support the Act.

Applicable Standards

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation, dissemination, or broadcast of campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate

²⁴ Black’s Law Dictionary 1310 (5th ed. 1979) (defining tax credit as a “type of offset.”)

²⁵ Merriam Webster on-line dictionary (2008).

²⁶ Black’s Law Dictionary 396 (8th ed. 2004).

²⁷ OAH File No. 3-0320-19995-CV (October 31, 2008).

the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.²⁸ Based upon this standard, the Complainant has the burden at the hearing to prove by clear and convincing evidence that the Respondent either published the statements knowing the statements were false, or that he “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.²⁹ 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.³⁰

To be found to have violated section 211B.06, therefore, 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.³¹

Legal Analysis

The panel concludes that the first sentence at issue concerning the gas tax is not a false statement of fact. The panel is persuaded that the ordinary meaning of the word “offset” is to serve as a counterbalance or to compensate for something else. In financial terms, “offset” typically means accounting entries that cancel each other out. With these definitions in mind, HF 2800 does increase the gas tax by up to 8.5 cents a gallon without including an *offsetting* decrease in other taxes. The lower-income gas tax credit contained in HF 2800 is a limited credit against the tax imposed by the bill and not an offsetting decrease in other taxes. Even if the panel were to find the phrase “offsetting decrease” sufficiently ambiguous so as to render the statement not literally true in every detail, the statement is true in substance, particularly given the fact that Representative Erhardt voted against specific amendments to HF 2800, which would have required offsetting decreases in other taxes. For all of these reasons the panel finds the Complainant failed to show by clear and convincing evidence that the statement is false. Moreover, the Complainant failed to put forward any evidence to suggest that Respondent disseminated the statement knowing the

²⁸ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

²⁹ 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).

³⁰ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

³¹ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *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).

statement was false or with a high degree of awareness of its probable falsity. Instead, the Respondent testified the he chose his words in this statement carefully to convey the message that Representative Erhardt did not vote for a decrease in other taxes while voting to raise the gas tax.

With respect to the second sentence, the panel finds the Minnesota Supreme Court's decision in *Kennedy v. Voss*³² to be controlling. In that case, an incumbent county commissioner complained that his opponent disseminated literature that unfairly characterized his support for programs serving the elderly. The incumbent initially voted in favor of the county budget, which funded a variety of programs including those serving the elderly. Later he voted against entire budget because he disagreed with one particular appropriation. After that vote, his opponent circulated literature asserting that the incumbent "is not a supporter of programs for the elderly."³³ The incumbent maintained that there were other votes, not cited in the challenger's literature, which made the incumbent's support of the referenced programs clear. The Minnesota Supreme Court held that inferences based on the true fact of the incumbent's "no" vote, as to whether he supported particular programs, did not come within the purview of the statute.³⁴ The Court concluded that the public is adequately protected from extreme or illogical inferences drawn from facts by the campaign process itself.³⁵

In this case, the panel finds the Complainant's argument that a reasonable reader would interpret the word "support" to mean a vote in favor of the final bill to be unavailing. Like *Kennedy*, the Respondent in this matter is permitted to infer from Representative Erhardt's procedural votes against the Positive Alternatives Act that Representative Erhardt did not *support* the Act. Section 211B.06 is directed against factually false statements; not unfavorable deductions or inferences derived from a candidate's conduct.³⁶ Minnesota's appellate courts have repeatedly held that the statute is not broad enough to prohibit incomplete and unfair campaign statements, even those statements that are clearly misleading.³⁷ The statement at issue in this matter may be misleading and the Candidate Comparison disseminated by Mr. Downey may have been incomplete in not detailing Representative Erhardt's every vote, but the material was not factually false.

Moreover, Representative Erhardt had the opportunity to respond directly to Mr. Downey's flyer and to communicate his positions to the voters prior to the November election, but for whatever reason he chose not to do so. Mr. Downey disseminated the flyer in two mailings; one in September and one in October. It was for the voters of House District 41A to decide whether the Respondent's

³² 304 N.W.2d 299 (Minn. 1981).

³³ *Id.* at 300 (emphasis added).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Bundlie v. Christensen*, 276 N.W.2d at 71 (statements which "told only one side of the story," or were merely "unfair" or "unjust," without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

characterization of Representative Erhardt's positions was fair. Because the statements are not false, the Complainant has failed to establish by clear and convincing evidence that the Respondent violated Minn. Stat. § 211B.06. The Complaint is therefore dismissed.

The Respondent has brought a motion for attorneys' fees. Pursuant to Minn. Stat. § 211B.36, subd. 3, the assigned panel may order a Complainant to pay the Respondent's reasonable attorney's fees and costs of the Office of Administrative Hearings if the panel determines the complaint was frivolous. A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law.³⁸ The complaint in this matter was not frivolous, and the fact that the Complainant was not able to meet her burden of proving the case by clear and convincing evidence does not render the complaint frivolous. Therefore, Respondent's request for attorney's fees is denied.

B.J.H., S.M.M., J.A.E.

³⁸ *Maddox v. Department of Human Services*, 400 N.W.2d 136, 139 (Minn. App. 1987).