

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

John Swon,

Complainant,
vs.

DISMISSAL
ORDER

Minnesota DFL Party,

Respondent.

This matter came on for a probable cause hearing under Minnesota Statutes § 211B.34, before Administrative Law Judge Steve M. Mihalchick on October 31, 2008, to consider a complaint filed by John Swon on October 27, 2008. The probable cause hearing was continued to November 3, 2008, and again to November 6, 2008. The probable cause hearing was conducted by telephone and the record closed on November 6, 2008.

John Swon appeared on his own behalf. Alan W. Weinblatt, Weinblatt & Gaylord, PLC, appeared for Respondent Minnesota DFL Party.

Based on the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is not probable cause to believe that the Respondent violated Minn. Stat. § 211B.06.

ORDER

IT HEREBY ORDERED THAT:

- 1) There is not probable cause to believe that Respondent violated Minnesota Statute § 211B.06 as alleged in the Complaint and this matter is accordingly DISMISSED.
- 2) Respondent's Motion for Fees is DENIED.

Dated: November 7, 2008

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

Recorded; no transcript prepared

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 is the campaign chair for Jan Schneider, the Republican candidate for House District 41B in the November 4, 2008, election. Complainant alleges that Respondent Minnesota DFL Party violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material concerning Jan Schneider. Complainant maintains that Respondent disseminated two pieces of literature which contain false statements.

The first piece states that “Schneider supports expanding ‘voucher-like’ tax credits to send students to private schools – just the wrong answer for our public schools.” The piece of literature cites “Minnesota Sun Newspapers, 11/10/2005” as the source of the statement. Complainant does not dispute the substance of the statement and he admits that Schneider supports vouchers. Complainant asserts that the citation to the Minnesota Sun Newspaper is incorrect. Specifically he alleges that the story which the flyer cites as from the November 10, 2005, edition of the Minnesota Sun Newspaper ran in the August 8, 2002, edition and therefore the citation to the November 10, 2005, issue is incorrect. Complainant claims that someone on the Schneider campaign staff called the Minnesota Sun Newspaper and was told the name “Jan Schneider” appeared in no article that ran on November 10, 2005.

Respondent produced an article from the Minnesota Sun Newspaper, entitled “District 41 Republican Hopefuls Woo Primary Voters.”¹ The article describes the Republican candidates who were running in the 2002 primary in House District 41B. The article describes Schneider as supporting “tax credits for parents who send their children to private schools.” The article produced by Respondent contains two dates. One date, November 10, 2005, appears under the byline. The second date, August 8, 2008, is included in a hyperlink at the top right corner of the article. Complainant asserts that the campaign flyer therefore contains false information.

The second piece of literature states that “Schneider wants to reduce requirements that insurance companies provide Minnesotans with basic coverage for critical needs like cancer screenings, maternity care and mental health care.” The piece cites a League of Women Voters Debate, which occurred on September 27, 2008 (“LWV Debate, 9/27/08”), as the source of the statement. Complainant asserts that candidate Schneider never made any such claim during the debate.

Respondent has introduced a transcript of the September 27, 2008, debate.² In the debate, Schneider, in response to a question on how to control the cost of health care, says:

I would work to reduce the mandates. We have the most mandates of any state in the union; we have 67 and the average is 37 or 34 across the country. Tell me why a freshman college male student should be taking maternity coverage, hair piece coverage. I think we need to introduce cafeteria-style plans that are mandate-lite.

Respondent has also provided a copy of the health insurance mandates in each state, as prepared by the Council for Affordable Health Insurance.³ According to the report, cancer screenings, maternity care and mental health care are three of Minnesota’s mandates. The Complainant asserts the campaign flyer contains false information because it misconstrues her statement made during the debate.

Legal Analysis

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.⁴ 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*.⁵ The purpose of a probable cause determination is to answer the question whether, given the

¹ Ex. 3.

² Ex. 1.

³ Ex. 2.

⁴ Minn. Stat. § 211B.34, subd. 2.

⁵ 239 N.W.2d 892 (Minn. 1976); 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.”)

facts disclosed in the record, it is fair and reasonable to require the respondent to go to hearing on the merits.⁶

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 the “actual malice” standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.⁷ 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.⁸ 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.⁹

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.¹⁰

In *Kennedy v. Voss*, the incumbent initially voted in favor of the county budget funding a variety of programs, and later voted against it because he disagreed with one particular appropriation. His opponent circulated literature stating that the incumbent had voted against a variety of programs funded in the budget. The Supreme Court concluded that the inferences to be drawn from the true fact of the incumbent’s vote, as to whether he supported particular programs, did not fall within the purview of the statute. In the Court’s view, the

⁶ *State v. Florence*, 239 N.W.2d at 902.

⁷ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

⁸ 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).

⁹ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

¹⁰ *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).

public is adequately protected from any extreme or illogical inferences drawn from those facts by the campaign process itself.¹¹

Statement One

With respect to Complainant's first allegation, that the campaign flyer includes an incorrect citation to the November 10, 2005, issue of the Minnesota Sun, the ALJ concludes that he has failed to state a claim under Minn. Stat. § 211B.06. This section requires that the alleged false material refer to the personal or political character or acts of the candidate. An incorrect citation does not refer to Schneider's character or acts.

Moreover, in *Grotjohn v. McCollar*, the Minnesota Supreme Court squarely rejected the claim that a misrepresentation of source constituted a violation of the campaign practices statute.¹² In that case, a candidate represented that he possessed the juvenile record of his opponent and that according to the record, his opponent had committed burglary at the age of thirteen. In fact, the candidate was not in possession of the actual juvenile record, but only a typewritten summary thereof. His opponent admitted that he was guilty of burglary as the candidate stated. The trial court found the candidate in violation of the campaign practices statute because his statement that he possessed the record was false. The Minnesota Supreme Court reversed, finding no violation of Minn. Stat. § 211.08 (the predecessor statute to Minn. Stat. § 211B.06). The court pointed out that the opponent admitted he had committed burglary, and that "the corrupt practices statute is directed against false statements of fact. It does not forbid criticism of a candidate, even though unfair and unjust, if based upon facts which are not false."¹³ The court concluded, "A false representation regarding the source of...information is not a violation of our election laws so long as the information regarding his opponent is true."

Applying *Grotjohn* to the instant case, Complainant's allegation that the campaign flyer contains a citation to the wrong edition of the Minnesota Sun Newspaper fails. Complainant admitted that Schneider supports school vouchers and he made clear during the probable cause hearing that he was not alleging that the statement included in the flyer that "Schneider supports expanding 'voucher-like' tax credits to send students to private schools" is false. Even if the citation to the November 10, 2005, issue of the newspaper is incorrect, it would not be a violation of Minn. Stat. § 211B.06. Schneider's position on vouchers, as stated in the flyer, is correct, and a false representation of the source of that information is not a violation of the statute under *Grotjohn*.

Statement Two

Complainant's second allegation that the campaign flyer contained false information concerning Schneider's position on health insurance also fails. The flyer stated that "Schneider wants to reduce requirements that insurance

¹¹ *Kennedy*, 304 N.W.2d at 300.

¹² 191 N.W.2d 396 (Minn. 1971).

¹³ 191 N.W.2d at 397-98, citing *Bank v. Egan*, 60 N.W.2d 257, 259 (1953).

companies provide Minnesotans with basic coverage for critical needs like cancer screenings, maternity care and mental health care.” According to the transcript of the League of Women Voters debate, Schneider stated that she wanted to reduce the number of health coverage mandates. The flyer states that Schneider wants to reduce mandates “like cancer screenings, maternity care and mental health care.” Schneider has admitted she wants to reduce mandates. Cancer screenings, maternity care and mental health care are three of Minnesota’s insurance mandates. Although the three listed mandates were probably chosen for their sensational value, the statement is not factually false. The statement that Schneider would reduce certain mandates is an unfavorable deduction based on Schneider’s statement and is therefore outside the purview of Minn. Stat. § 211B.06 under *Kennedy*. Under the rationale of *Kennedy*, her remedy was to give voters the information to judge for themselves the inferences that can properly be drawn from her statements. Accordingly, this matter must be dismissed.

Motion for Fees

At the probable cause hearing, Respondent requested that fees be assessed against the Complainant. Respondent’s motion for fees is denied. The statement about the health insurance mandates was grossly distorted and the statement about the school vouchers was outdated. Though the statements are not false under Minn. Stat. § 211B.06, the Complaint was not frivolous.

S. M. M.