

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Doug Baker,

Complainant,

vs.

Ken Tschumper, Dennis DeKeyrel, and
Precision Plus, Inc.,

Respondents.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING**

TO: Above Parties on the Attached Service List:

On September 12, 2012, Doug Baker filed a Campaign Complaint with the Office of Administrative Hearings alleging that Ken Tschumper, Dennis DeKeyrel and Precision Plus, Inc. violated Minnesota Statutes §§ 211B.15, subd. 2; 211B.06 and 211B.04 of the Fair Campaign Practices Act in connection with Mr. Tschumper's 2012 campaign for the Minnesota House of Representatives District 28B seat. This matter was initially assigned to Administrative Law Judge Eric Lipman, and then reassigned to Administrative Law Judge Richard Luis.

After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth *prima facie* violations of Minn. Stat. §§ 211B.15 and 211B.04, but fails to set forth a prima facie violation of § 211B.06. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that a probable cause hearing regarding the alleged violations of Minn. Stat. §§ 211B.15 and 211B.04 shall be held by telephone before the undersigned Administrative Law Judge at **3:00 p.m.** on **Thursday, September 20, 2012.** The hearing will be held by call-in telephone conference. You must call: **1-888-742-5095** at that time. When the system asks for your numeric pass code, enter "**989-214-7284#**" on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minnesota Statutes § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at <http://mn.gov/oah> and www.revisor.leg.state.mn.us.

At the probable cause hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not

otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge Luis at Richard.luis@state.mn.us or faxed to 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minnesota Statutes § 211B.35. If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minnesota Statutes § 211B.34, subdivision 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: September 17, 2012

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

MEMORANDUM

Respondent Ken Tschumper is the DFL Party's endorsed candidate for the Minnesota House of Representatives District 28B seat.¹ Respondent Dennis DeKeyrel is the chairman of the Fillmore County DFL Party and the chief executive officer of Precision Plus, Inc., a registered Minnesota corporation.²

¹ House District 28B includes all of Fillmore and Houston Counties and the city of Lanesboro.

² Complaint Ex. C.

According to the Complaint, on or about August 1, 2012, radio station KFIL in Preston, Minnesota, sold a block of advertising time to “Ken Tschumper for the Minnesota House.”³ The radio advertising promoting Mr. Tschumper’s candidacy ran on KFIL radio from August 3, 2012, until August 23, 2012. The advertising time was purchased with a check from the account of Precision Plus, Inc., in the amount of \$224.00 and signed by Mr. Keyrel.⁴ The radio advertisements stated that they were paid for by Ken Tschumper’s campaign committee and did not state that they were paid for by Precision Plus and Mr. Keyrel.

The Complaint alleges that Respondents Keyrel and Precision Plus violated the Minn. Stat. § 211B.15, subd. 2, which prohibits corporations from making contributions of “thing[s] of monetary value” directly to candidates. The Complaint also asserts that Mr. Tschumper violated Minn. Stat. § 211B.06 and 211B.04 by falsely claiming that the radio ads were prepared and paid for by his campaign committee, “Tschumper for Minnesota House.”

Legal Standard

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.⁵ For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.⁶ A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.⁷

Minnesota Statutes § 211B.15 (prohibited corporate contributions)

Minn. Stat. § 211B.15, subd. 2, provides as follows:

A corporation may not make a contribution or offer or agree to make a contribution, directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate but does not include an independent expenditure authorized by subdivision 3.

³ Complaint Ex. A.

⁴ Complaint Ex. B.

⁵ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

⁶ *Id.*

⁷ *Id.*

Minn. Stat. § 211B.15, subd. 3, states that “independent expenditure” has the meaning given it in section 10A.01, subdivision 18. That section defines “independent expenditures” to mean:

an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An independent expenditure does not include the act of announcing a formal public endorsement of a candidate for public office, unless the act is simultaneously accompanied by an expenditure that would otherwise qualify as an independent expenditure under this subdivision.⁸

The Administrative Law Judge finds that the Complainant has alleged sufficient facts to support finding *prima facie* violations of Minn. Stat. § 211B.15, subd. 2. Based on the Complaint, it appears that Precision Plus, a Minnesota corporation, paid for Mr. Tschumper’s radio advertisements in cooperation or concert with Mr. Tschumper and/or his campaign committee.

Minn. Stat. § 211B.06 (false campaign material)

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material or paid political advertising with respect to the personal or political character or acts of a candidate. In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of campaign material or advertising that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.⁹ The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.¹⁰ Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the advertisement knowing that it was false or did so with reckless disregard for its truth or falsity.¹¹

The statute requires that the alleged false statement concern the “political character or acts of a candidate.” In this case, the Complainant contends that the

⁸ Minn. Stat. § 10A.01, subd. 18.

⁹ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

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

¹¹ *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 (Minn. App.) *review denied* (Minn. 2006).

disclaimer at the end of the paid political advertising promoting Mr. Tschumper's candidacy was a false statement. The Complaint maintains that Respondents falsely claimed the political advertisement was paid for by Mr. Tschumper's campaign committee when it was in fact paid for by Precision Plus, Inc. However, a claim that the advertisement was paid for by Mr. Tschumper's campaign committee, even if false, is not a statement reflecting on the character or acts of Mr. Tschumper and cannot form the basis of a claim under § 211B.06. The Administrative Law Judge finds that the Complainant has failed to allege sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.06 and this claim is dismissed.

Minnesota Statutes § 211B.04 (disclaimer requirement)

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, except for news items or editorial comments by the news media."¹² Campaign material is required, under Minn. Stat. § 211B.04,¹³ to include a disclaimer identifying the name and address of the person or committee that prepared and disseminated the material. In the case of broadcast media, the required form of disclaimer is: "Paid for by the _____ committee."¹⁴ Any person who prepares or disseminates campaign material that does not prominently include a disclaimer substantially in the form provided in § 211B.04 is in violation of the statute.

The Complaint alleges that the radio advertisements falsely identified Mr. Tschumper's committee as the organization responsible for paying for the campaign advertisements when in fact the advertisements were paid for by Respondents DeKeyrel and Precision Plus.

The Administrative Law Judge concludes that the Complaint does allege sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.04 as against the Respondents.

This matter will proceed to a probable cause hearing on the alleged violations of Minn. Stat. §§ 211B.15 and 211B.04 as indicated in this Order.

R.C.L.

¹² Minn. Stat. § 211B.01, subd. 2.

¹³ Minn. Stat. § 211B.04; Minn. Laws 2004 ch. 293, art. 3, §§ 1 & 2.

¹⁴ Minn. Stat. § 211B.04(c).