

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Ken Martin, Chair, Minnesota Democratic-  
Farmer-Labor Party,

Complainant,

vs.

Republican Party of Minnesota,

Respondent.

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

On October 26, 2012, the Minnesota Democratic Farmer Labor (DFL) filed a Campaign Complaint with the Office of Administrative Hearings alleging that the Republican Party of Minnesota violated Minn. Stat. § 211B.06 by disseminating false campaign material regarding Kent Eken, the DFL's candidate for the Minnesota Senate for District 4.

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.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 violation of Minn. Stat. § 211B.06 shall be held by telephone conference before the undersigned Administrative Law Judge at **3:30 p.m. on Friday, November 2, 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 [www.oah.state.mn.us](http://www.oah.state.mn.us) and [www.revisor.leg.state.mn.us](http://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](mailto: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 violations of law alleged in the complaint have 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: October 31, 2012

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

### MEMORANDUM

The Complaint alleges that on or about October 20, 2012, the Republican Party of Minnesota prepared and disseminated campaign material that falsely claimed that Kent Eken, the DFL's candidate for Senate District 4, voted to raise the fee paid by senior citizens for nursing home care when he was in the House of Representatives.<sup>1</sup> The various pieces of campaign literature paid for by the Republican Party and attached to the Complaint state specifically that Kent Eken "voted to raise the 'granny tax' – the fee paid by senior citizens for nursing home care – by 17 percent."<sup>2</sup> The campaign material cites to House File 2614 of the 86<sup>th</sup> Legislative Session in support of this statement.

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<sup>1</sup> See Complaint Exhibits A-C.

<sup>2</sup> *Id.*

The Complaint states that when Mr. Eken was a member of the Minnesota House during the 86<sup>th</sup> Legislative Session, Senate File 2337, the companion to House File 2614, proposed increasing the nursing home surcharge from \$2,815 to \$3,400.<sup>3</sup> The House did not concur with Senate File 2337 and the bills were sent to a Conference Committee. The Complaint asserts that the provision increasing the nursing home surcharge was not in the Conference Committee Report that Mr. Eken voted on in the final passage of House File 2614.<sup>4</sup>

The Complaint argues that the Republican Party of Minnesota's statement on campaign material that Mr. Eken voted to raise the fee paid by senior citizens for nursing home care by voting for House File 2614 is false and that the Republican Party knew the statement was false at the time it communicated it or it made the statement with a reckless disregard of whether it was false. The Complaint also notes that the Republican Party has admitted the statement was false.<sup>5</sup> The Republican Party distributed a subsequent piece of campaign material that states: "We goofed. Kent Eken did not vote to raise the fee seniors pay for nursing home care. Instead, Eken voted to raise the cost we pay for hospital care and health insurance."<sup>6</sup>

### **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.<sup>7</sup> For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.<sup>8</sup> 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.<sup>9</sup>

### **Minnesota Statutes § 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.

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<sup>3</sup> The Complaint cites: <https://www.revisor.mn.gov/bin/bldbill.php?bill=S2337.2.html&session=ls86>. at (40.30-40.31).

<sup>4</sup> The Complaint cites: <http://www.house.leg.state.mn.us/cc/journals/2009-10/J0512103pt2.htm#12884>.

<sup>5</sup> Complaint Ex. D.

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

<sup>7</sup> *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.<sup>10</sup> The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.<sup>11</sup> Based on this standard, the Complainants have 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.<sup>12</sup>

The Administrative Law Judge finds that the Complaint has alleged sufficient facts to support a *prima facie* violation of Minn. Stat. § 211B.06. The statement at issue is presented as factual, it concerns the acts of the candidate, is designed to defeat a candidate’s election, and is capable of being proven true or false. Accordingly, this allegation will proceed to a probable cause hearing as ordered.

**R.C.L.**

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<sup>10</sup> *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).

<sup>11</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>12</sup> *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).