

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Citizens for a New Montrose,
Complainant,
vs.
Charles Nelson,
Respondent.

**ORDER FINDING
NO PRIMA FACIE VIOLATION AND
DISMISSING COMPLAINT**

TO: Parties.

On October 12, 2012, Citizens for a New Montrose filed a Campaign Complaint under the Fair Campaign Practices Act alleging that Charles Nelson violated Minnesota Statutes § 211B.06 by preparing false campaign material related to his candidacy for Mayor of Montrose.

The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge on October 12, 2012, pursuant to Minn. Stat. § 211B.33. A copy of the Complaint and its attachments were sent by United States mail to the Respondent on October 15, 2012.

After reviewing the Complaint and the attached documents, and for the reasons set out in the attached Memorandum, the Administrative Law Judge finds that the Complaint fails to set forth a *prima facie* violation of the Fair Campaign Practices Act.

ORDER

IT IS ORDERED:

That the Complaint filed by Citizens for a New Montrose against Charles Nelson is **DISMISSED**.

Dated: October 17, 2012

s/Jeanne M. Cochran
JEANNE M. COCHRAN
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this Order is the final decision in this matter. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The Complainant, Citizens for a New Montrose, is a non-profit organization organized for the purpose of “promoting transparent and ethical city government in Montrose.”¹ The Respondent, Charles Nelson, is a candidate for Mayor of Montrose in the upcoming November 2012 election. Mr. Nelson is not the incumbent.

According to the Complaint, Mr. Nelson has prepared and posted campaign lawn signs in the city that state: “Return Mayor Charlie Nelson.”² The Complaint asserts that these signs falsely imply that Mr. Nelson is the incumbent candidate. The Complainant maintains that the misleading campaign signs must be corrected and Mr. Nelson be required to withdraw his candidacy.

Standard of Review

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.³ For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.⁴ 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.⁵

Minnesota Statutes § 211B.06 - False Campaign Material

Minn. Stat. § 211B.06 provides in relevant part:

A person is guilty of a gross misdemeanor who intentionally participates in 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.

¹ Attachment to Complaint.

² Complaint Ex. A.

³ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

⁴ *Id.*

⁵ *Id.*

In order to be found to have violated Minn. Stat. § 211B.06, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false. Campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”⁶

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of specific fact.⁷ It does not prohibit inferences or implications, even if misleading, extreme or illogical.⁸ Moreover, 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 Finally, 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.¹⁰

To prove a violation at the hearing, the Complainant must show that the statement is substantively false and that the person who prepared, disseminated or broadcast the statement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.¹¹ Based on this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.¹²

The statement at issue in this matter, “Return Mayor Charlie Nelson,” is not factually false. It is at most misleading in that the word “return” may imply that Mr. Nelson is the incumbent candidate. Minnesota’s appellate courts have held, however, that mere implications, even those that are clearly misleading, are insufficient to form the basis of a § 211B.06 claim.¹³ Absent some evidence that a particular statement is

⁶ Minn. Stat. § 211B.01, subd. 2.

⁷ *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).

⁸ *Kennedy v. Voss*, 304 N.W.2d at 300 (inferences that may be considered extreme and illogical do not come within the purview of the statute.) See also, *Bundlie*, 276 N.W.2d at 71 (statements that are merely “unfair” or “unjust,” without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

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

¹⁰ *Id.*, 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);

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

¹² *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.), *rev. denied* (Minn. 2006).

¹³ See, *Bundlie v. Christensen*, 276 N.W.2d at 71.

demonstrably factually false and was disseminated with a high degree of awareness of its probable falsity, the claim fails to allege a *prima facie* violation of Minn. Stat. § 211B.06 and must be dismissed.

The Administrative Law Judge also notes that she is without jurisdiction to require a respondent to withdraw his or her candidacy as was requested by the Complainant in this matter. In the event a panel of administrative law judges finds that a respondent violated a provision of Chapter 211B, the panel's authority is limited to issuing a reprimand, assessing a civil penalty of up to \$5,000, and/or referring the matter to the appropriate county attorney for possible criminal prosecution.¹⁴ While the provisions of chapter 211B provide for criminal penalties, the campaign complaint process is an administrative proceeding. A criminal conviction for violating a provision under chapter 211B may only be pursued by the appropriate county attorney, and an adjudication of guilty may only be made by a district court.

For the reasons stated above, the Complaint is dismissed in its entirety.

J.M.C.

¹⁴ Minn. Stat. 211B.35, subd. 2.