OAH 8-0325-33077

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

City of Grant, by and through its City Clerk, Kim Points,

Complainant,

v.

John D. Smith and Karen Y. Smith,

Respondents.

ORDER ON MOTION TO DISMISS AND FOR COSTS (THIRD PREHEARING ORDER)

This matter came before Administrative Law Judge Eric L. Lipman on March 31, 2016, for an oral argument on the Respondents' motion to dismiss and for costs.

Nicholas J. Vivian and Amanda E. Prutzman, Eckberg Lammers, P.C., appeared on behalf of the City of Grant and the City Clerk, Kim Points (City). Richard D. Donohoo, Attorney at Law, appeared on behalf of Respondents John D. Smith and Karen Y. Smith (Respondents or the Smiths).

On December 16, 2015, the City of Grant filed a campaign complaint (Complaint) alleging that the Smiths violated Minn. Stat. § 211B.02 (2014). The complaint maintains that the Smiths misappropriated the City's municipal seal and masthead for use in campaign literature. Moreover, the Complaint asserts that the Smiths' circulation of campaign material with these symbols wrongfully implied that the City endorsed the positions that were advocated in the materials.

At the prehearing conference on January 6, 2016, and in written submissions after that date, the Smiths requested that the complaint be dismissed. The hearing record on the motions closed following the oral argument.

Based upon the submissions of the parties and the contents of the record,

IT IS HEREBY ORDERED:

1. The Respondents' Motions to Dismiss and for Costs are **DENIED**.

2. Pursuant to the terms of the Second Prehearing Order in this matter, by **4:30 p.m.** on **Thursday, May 5, 2016**, each party shall file with the Officer of Administrative Hearings and serve upon the opposing party copies of their witness lists and copies of the pre-

labeled exhibits that it proposes to offer into the hearing record. The City shall label its exhibits sequentially using numbers. The Smiths shall label their exhibits sequentially letters.

3. This matter shall proceed to an evidentiary hearing on **Thursday, May 12, 2016,** at the Saint Paul offices of the Office of Administrative Hearings. The hearing shall begin at **9:30 a.m**.

Dated: April 29, 2016

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Factual Background

On October 13, 2015, voters in the City of Grant cast ballots on whether to establish a Home Rule Charter (Question 1) and whether to discharge the City's Charter Commission (Question 2).[1]

The Complaint alleges that, without permission, the Smiths copied the City's municipal seal and masthead and placed these images on three pieces of campaign literature. The literature was circulated during the weeks that led up to the October 13, 2015 special election.[2] The literature included a small font disclaimer that stated that the pieces were "prepared and paid for by the Rally for Charter Committee, 10244-67th Ln N Grant MN." This address is the Smiths' home address.

On October 1, 2015, the Rally for the Charter Committee filed a campaign financial report with the City. Respondent John Smith signed the report certifying that it was an accurate accounting of the committee's contributions and disbursements.[3]

The Complaint maintains that Respondents' misappropriation of the City's seal and masthead was deliberate. Kim Points, the City Clerk, asserts that the City Attorney contacted the Smiths on October 5, 2015, and directed them to cease using the City's marks and symbols in this way. The Complaint alleges that, notwithstanding this directive, a second piece of campaign material including the seal and masthead was circulated by the Smiths on October 10, 2015.[4]

---

[1] COMPLAINT at Exhibit (Ex.) 1; *see generally,* Minn. Stat. § 410.10, subd. 1 (2014).

[2] COMPLAINT at 2.

[3] City's Response to Respondents' Motion to Dismiss, Affidavit of Kim Points, Ex. A.

[4] *Id*.

The material, allegedly circulated by the Smiths, urged an affirmative vote on Ballot Question 1 and a negative vote on Ballot Question 2.[5]

The Complaint asserts that the unauthorized use of the City's seal and masthead on literature which urged particular votes in the special election falsely implied the City's endorsement of those positions.[6] The City asserts that such a false implication violates Minn. Stat. § 211B.02.[7]

The Smiths' Motion to Dismiss

The Smiths urge dismissal of the Complaint. They make three key arguments in support of dismissal: (a) the underlying statute, Minn. Stat. § 211B.02, is unconstitutional; (b) use of the City's seal and masthead is insufficient to imply that the City endorsed the positions that were urged in the campaign material; and (c) the evidence is insufficient to establish that either John Smith or Karen Smith, prepared or disseminated the campaign material. Each of these claims is addressed, in turn, below.

An Administrative Law Judge may dismiss a Fair Campaign Practices case "where the case or any part thereof has become moot or for other reasons."[8] In considering motions to dismiss in the context of contested cases, the Office of Administrative Hearings has followed the standards developed in the state courts.[9]

When deciding such motions, the tribunal must take the facts that are alleged in the pleading as true and draw all inferences in favor of the non-moving party.[10] A motion to dismiss may be granted only in cases where the moving party demonstrates that the opposing party has no right to relief.[11]

To defeat a motion to dismiss, the non-moving party must show facts that, if true, are sufficient to state a plausible claim for relief. Thus, the question for the tribunal following a motion to dismiss is whether the pleadings state a legal basis to proceed to a hearing.[12] If relief cannot be granted, the matter must be dismissed.[13]

---

[5] COMPLAINT at Ex. 1.

[6] COMPLAINT at 2.

[7] *Id*.

[8] *See* Minn. R. 1400.5500 (K) (2015).

[9] Minn. R. 1400.6600 (2015) ("In ruling on motions where parts 1400.5100 to 1400.8400 are silent, the judge shall apply the Rules of Civil Procedure for the District Court of Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding").

[10] *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

[11] *Finn v. Alliance Bank,* 860 N.W.2d 638, 653 (Minn. 2015) (citing cases).

[12] *Northern State Power Co. v. Minnesota Metropolitan Council,* 667 N.W. 2d 501, 506 (Minn. Ct. App. 2003).

[13] *See In re Milk Indirect Purchaser Antitrust Litigation,* 588 N.W.2d 772, 774 (Minn. Ct. App. 1999).

The Constitutional Claim

The Smiths maintain that the City's complaint must be dismissed because the underlying statute, Minn. Stat. § 211B.02, is unconstitutional. The statute reads:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.[14]

Pointing to the recent decision of the United States Court of Appeals for the Eighth Circuit in *281 Care Committee v. Arneson*,[15] the Smiths contend that section 211B.02 is unconstitutionally overbroad and chills protected political speech. The Smiths maintain that counter-speech is a better, less restrictive means of achieving the government's asserted goal in truthful campaigns.

In *Arenson*, the appellate panel did not squarely address the constitutionality of section 211B.02, or prohibitions of false claims of endorsement. Instead, the panel struck down another section of the Fair Campaign Practices Act, section 211B.06. Section 211B.06 prohibited the dissemination of false claims about "the personal or political character or acts of a candidate, or with respect to the effect of a ballot question . . . ." The appellate panel concluded that this statute was infirm because it was not narrowly tailored to meet a compelling interest. As the panel summarized:

> [T]he county attorneys have failed to demonstrate that § 211B.06 is either narrowly tailored or necessary to preserve fair and honest elections and prevent a fraud on the electorate. The *mens rea* requirement established in the statute, and any other alleged narrowing safeguards that Appellees claim render this statute constitutional, have little effect in abating the advanced concern of the state. Citing Minnesota law, the county attorneys claim that the legislative intent of § 211B.06 is to prevent corrupt campaign practices that would "mislead the public and permit close elections . . . to be won by fraud." But as we have discussed, the practical application of § 211B.06 only opens the door to more fraud. The statute itself actually opens a Pandora's box to disingenuous politicking itself.
>
> While we would like to agree with the district court that because § 211B.06 employs "the force and impartiality of law," it "serves to check the unfair use of disparate advantage during a campaign," we do not have the luxury of indulging that scenario given the abridgement of core political speech at risk. With such abridgement left unregulated, not only is

---

[14] Minn. Stat. § 211B.02.

[15] *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014), *cert. denied,* 135 S.Ct. 1550 (2015).

> § 211B.06 not narrowly tailored but likely does not rise to the level of explicating a "compelling" interest. The citizenry, not the government, should be the monitor of falseness in the political arena. Citizens can digest and question writings or broadcasts in favor or against ballot initiatives just as they are equally poised to weigh counterpoints.[16]

The City maintains that Section 211B.02 is constitutional because, unlike Section 211B.06 (2014), it is narrowly tailored to achieve a compelling governmental interest. The City argues that section 211B.06 has a broad scope – proscribing all false statements relating to the effect of a ballot initiative. By contrast, it continues, section 211B.02 prohibits only false claims of individual or organizational endorsement.

Additionally, the City asserts that in a recent unpublished opinion, the Minnesota Court of Appeals upheld section 211B.02 on these grounds. In *Niska v. Clayton*, the appellate panel concluded that preventing confusion within the electorate was a compelling state interest,[17] and that section 211B.02 was narrowly tailored to meet this interest. The panel wrote:

> [Section 211B.02] punishes speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization. It prohibits only those statements that can be read as endorsements. The statute therefore prohibits only claims of support and only when those claims are false. So construed, the statute does not prohibit or chill a "substantial amount" of protected speech.[18]

It is important to emphasize that neither an administrative law judge nor an Executive Branch agency has the authority to declare a statute unconstitutional on its face. Such a power is within the exclusive province of the judicial branch.[19]

With that said, however, parties with disputes that are referred to this tribunal sometimes have interests that are protected by the United States or Minnesota constitutions.[20] In such cases, due process of law may require giving effect to those

---

[16] *Arneson*, 766 F.3d at 795-96 (quoting *In re Contest of Gen. Election*, 264 N.W.2d 401, 406 (Minn. 1978) (Otis, J., dissenting)).

[17] *Niska v. Clayton*, A13-0622, 2014 WL 902680, at *7 (Minn. Ct. App.) (unpublished), *review denied* (2014), *cert. denied*, 135 S. Ct. 1399 (2015) (citations omitted).

[18] *Id*. at * 8.

[19] *See, e.g., In the Matter of Rochester Ambulance Service,* 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993) ("In this case, however, neither the ALJ nor the Commissioner had the power to declare Minn. Stat. § 144.802 unconstitutional. Thus, the issue could not have been addressed in the proceedings below.").

[20] *See* Minn. Stat. § 14.02, subd. 3 (2014) ("'Contested case' means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing"); Minn. Stat. § 14.57 (a) (2014) ("An agency shall initiate a contested case proceeding when one is required by law").

constitutional guarantees, as applied to the particular circumstances of those cases.[21] Moreover, any determination made by an Administrative Law Judge on these questions is subject to close review and oversight by the state courts.[22]

In this case, the Administrative Law Judge agrees that the overbreadth and under-inclusiveness of section 211B.06, identified in the *Arneson* case, does not extend to section 211B.02. The two statutes aim at different problems, proscribe differing amounts of speech and safeguard very different types of interests.

Section 211B.02 protects a more personal set of interests than section 211B.06. Section 211B.02 forbids the misappropriation of reputation, autonomy and identity for use by others in political campaigns. It guards against a particular type of injury to the person (whether natural or corporate) and these kinds of protections have been a part of our law for a long time.

Indeed, speech-related restrictions are only recognized when they fall within this narrow band of long-standing exceptions to the First Amendment. As Justice Kennedy observed in *United States v. Alvarez*:

> [C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.' Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; **defamation**; speech integral to criminal conduct; so-called "fighting words;" child pornography; **fraud**; true threats; and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.[23]

Likewise important, laws prohibiting fraud, perjury or defamation, were in existence when the First Amendment was adopted, and the constitutionality of these limited restrictions are widely-accepted.[24] Similarly, proscriptions that forbid the intentional infliction of emotional distress by means of a false statement, enjoy this same

---

[21] *See generally, Manufactured Housing Inst. v. Pettersen,* 347 N.W.2d 238, 241 (Minn. 1984) ("[I]n a pre-enforcement constitutional challenge, the challenge is to the constitutionality of the rule on its face; in a contested enforcement action, the challenge is more to the constitutionality of the rule as applied"); *Pine County v. State Dep't. of Natural Resources*, 280 N.W.2d 625, 629 (Minn. 1979) ("If ... the challenge relates only to the constitutionality of the ordinance, as applied, the aggrieved party must first exhaust available remedies before we will consider the constitutional claims ripe for our review").

[22] *See id.;* Minn. Stat. § 211B.36, subd. 5 (2014).

[23] *United States v. Alvarez*, -- U.S. --, 132 S. Ct. 2537, 2544 (2012) (emphasis added and citations omitted).

[24] *See, e.g., Donaldson v. Read Magazine, Inc.,* 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *United States v. Dunnigan*, 507 U.S. 87, 97 (1993) ("the constitutionality of perjury statutes is unquestioned"); *Beauharnais v. Illinois,* 343 U.S. 250, 256 (1952) (the "prevention and punishment" of libel "have never been thought to raise any Constitutional problem").

acceptance, notwithstanding the fact that the underlying tort was not recognized until decades after adoption of the First Amendment.[25] In each of these categories, a narrowly-drawn restriction on speech is permitted in order to protect against significant injury to highly personalized interests.[26]

In this case, the City has a substantial interest in maintaining strict neutrality during referenda campaigns and avoiding the appearance that it is supporting particular results from the balloting. There can be significant consequences to a municipality, including financial reporting and litigation, if it uses public resources in support of one side of a ballot question.[27]

Section 211B.02 protects all of those who wish to remain neutral, or silent, from being conscripted against their will into political campaigns. The Administrative Law Judge concludes that Minn. Stat. § 211B.06 is narrowly-tailored to meet a compelling state interest. The statute's restrictions on political speech are constitutional as applied in this circumstance and the decision in *Arneson* does not point to a different conclusion.

The Implication Claim

The Smiths argue that the use of the City's seal and masthead is not enough to imply that the City supported the positions espoused in the materials. They maintain that in *Meinzer v. Jasicki*,[28] an administrative law judge concluded that use of the Brooklyn Park Fire Department's logo on a candidate's brochure, without more, was not enough to imply that the candidate had the endorsement of the fire department. The Smiths argue that, like *Meinzer*, the use of the City's seal and masthead did not imply an endorsement of any particular result in the special election balloting.

In *Meinzer*, the respondent, Mr. Jasicki, was a Brooklyn Park firefighter seeking election to the Brooklyn Park city council.[29] Jasicki disseminated campaign material that identified himself as a 14-year veteran of the Brooklyn Park Fire Department and included an image of the fire department's logo.[30]

For its part, the City contends that the holding in *Meinzer* is sound but inapplicable in this case. It maintains that the facts of this case, and the use it claims the Smiths made of the City's masthead and logo, outdistance the events in *Meinzer*.

---

[25] *See Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56 (1988); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts,* § 12, at 60, and n. 47. (5th ed.1984)

[26] *See Alvarez*, 132 S. Ct. at 2544.

[27] *See Trehus v. City of Lino Lakes*, OAH Docket 48-0325-31026, 2014 WL 2156987 (2014); *see also, Abrahamson v. St. Louis County Sch. Dist*., 819 N.W.2d 129, 135 (Minn. 2012).

[28] *Meinzer v. Jasicki*, OAH Docket No. 15-6326-17587 (October 20, 2006).

[29] *Id*. at *2.

[30] *Id*.

The City argues that the three pieces of campaign material were designed to appear as if they were disseminated by the City. Each piece has the image of the City's seal in the top left corner and two pieces have the words "City of Grant, Minnesota" in a large font at the top of the item. Moreover, the City argues that the Smiths continued to use the City's seal and masthead after they were directed by the City to cease using its images in the campaign material.[31]

The Administrative Law Judge concludes that the facts alleged in this matter are different, and more serious, than the claims made in *Meinzer v. Jasicki*. Unlike the firefighter displaying his workplace logo on a campaign flyer, the serial and prominent use of the City's seal and masthead could falsely imply that the City had generated the material and was circulating particular positions on the ballot questions.

The Administrative Law Judge finds the cases of *Daugherty v. Hilary*[32] and *Niska v. Clayton* instructive.

In *Daugherty*, the Minnesota Supreme Court held that Sandra Hilary's distribution of campaign material which reproduced the presentation of the Democrat-Farmer-Labor Party's sample ballot, and recommended a vote for her as Aldermen, falsely implied that her election was endorsed by the DFL party.[33] As in this case, the literature included an official masthead, in a large font at the top, and a disclaimer identifying the true authorship of the item, in a much smaller font at the bottom. As Justice Peterson noted:

> [T]he similarity of the Hilary sample ballot to the DFL sample ballot, together with the use of the word 'official' followed by the phrase 'Vote for these DFL'ers,' implied DFL party endorsement. There is no credible reason Hilary can suggest for the particular design of her ballot, except to imply DFL party support or endorsement…. [T]he very vice of the Hilary sample ballot, that 'official' was a consciously chosen word that would attract the voter's attention because of its association with the traditional DFL sample ballot.[34]

Similarly, in *Niska v. Clayton*, a panel of the Minnesota Court of Appeals upheld the finding that a relator's use of the term "Republican Party of Minnesota" on multiple documents, while promoting candidates who lacked the party's endorsement, falsely implied that the Republican Party of Minnesota had endorsed those candidates.[35]

The Administrative Law Judge finds that when the facts in the City's complaint are considered true, and all inferences drawn its favor, the City has stated a proper claim that the Smiths knowingly made a false claim of endorsement.

---

[31] COMPLAINT at 2; Ex. 2.

[32] *Daugherty v. Hilary*, 344 N.W.2d 826 (Minn. 1984).

[33] *Daugherty,* 344 N.W.2d at 830-31.

[34] *Id.,* at 831-32.

[35] *Niska, supra,* at *6.

The Development and Dissemination Claim

The Smiths assert that the City has failed to show that they are the real parties in interest. They argue that the fact that their home address is listed on the campaign material as the address for the "Rally for Charter Committee" is not enough to establish that either of the Smiths prepared or disseminated the pieces at issue.

The City asserts that it has put forward sufficient evidence that the campaign material was disseminated by the Smiths, based upon the address included on the materials and Mr. Smith's filing of related campaign finance reports. Moreover, the City notes that, as an affirmative defense, the burden is on the Smiths to prove they are not real parties in interest.[36]

The Administrative Law Judge agrees. When all of the facts in the City's complaint are considered true, and all inferences drawn its favor, the City has stated a proper claim under Minn. Stat. § 211B.02.

The Smiths' Motion for Costs

The Smiths assert that the City's complaint is frivolous and request the imposition of costs. The Smiths maintain that in light of the decisions in *Arneson* and *Meinzer,* the Complaint is not sufficiently grounded in the law. Additionally, the Smiths criticize the City for waiting more than two months after the special election before filing a Fair Campaign Practices complaint.

The Administrative Law Judge concludes that neither claim is well taken. As noted above, the Complaint sufficiently supports an alleged violation of section 211B.02. Moreover, under Minn. Stat. § 211B.32, subd. 2 (2014), the City had an entire calendar year before filing a complaint with the Office of Administrative Hearings. Accordingly, the Smiths' motion for costs is denied.

E. L. L.

[36] *See BankCherokee v. Insignia Development*, LLC, 779 N.W.2d 896, 902 (Minn. Ct. App. 2010); Minn. R. 1400.7300, subp. 5 (2015) (A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence).