

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Barbara Linert and Steven Timmer,

Complainants,

**ORDER ON  
PROBABLE CAUSE**

v.

Michelle MacDonald,

Respondent.

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a probable cause hearing, held by telephone on November 1, 2016, to consider a complaint filed under the Fair Campaign Practices Act on October 25, 2016.

Barbara Linert and Steven Timmer (Complainants) appeared on their own behalf and without legal counsel. Michelle MacDonald (Respondent) appeared on her own behalf without legal counsel.

Based upon the complaint and the hearing record and for the reasons set forth in the Memorandum below:

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. There is probable cause to believe Respondent violated Minn. Stat. § 211B.02 (2016), as alleged in the complaint. This matter will be assigned to a panel of three administrative law judges for further consideration.

2. Should the parties decide that an evidentiary hearing is not necessary and that this matter may be submitted to an assigned panel of judges for a decision based on the file, the record created at the probable cause hearing, and final written argument, they should file a statement to that effect by **4:30 p.m. on Monday, November 7, 2016.**

3. If all parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing before an assigned panel of three administrative law judges in the near future.

Dated: November 3, 2016

  
JESSICA A. PALMER-DENIG  
Administrative Law Judge

## MEMORANDUM

### Factual and Procedural Background

Respondent is a candidate for the Minnesota Supreme Court in the November 8, 2016 election and is challenging incumbent Supreme Court Justice Natalie Hudson. The complaint alleges that Respondent violated Minn. Stat. § 211B.02 by falsely implying in campaign material that she has the endorsement of the Republican Party of Minnesota (RPM) in that judicial election race.

The complaint asserts that Respondent submitted information to the *Star Tribune* newspaper for a candidate profile of herself that was posted in a “Voter Guide” section on the newspaper’s website. In the “Endorsements” section of her candidate profile, Respondent claimed she was endorsed by:

- Christians United in Politics
- Republican Party of MN 2014
- GOP’s Judicial Selection Committee 2016

Respondent’s candidate profile with the listed endorsements was initially posted on the *Star Tribune* website on or about October 18, 2016. On October 21, 2016, Respondent requested that the *Star Tribune* remove the claim of endorsement by the “GOP’s Judicial Selection Committee 2016.” The endorsement was removed from Respondent’s profile on or about October 21, 2016.<sup>1</sup>

Complainants maintain that Respondent’s claim of an endorsement by the “GOP’s Judicial Selection Committee 2016” was a false claim of support. Complainants contend the RPM does not have a “Judicial Selection Committee.” It did have a “judicial election committee” under its then-operative constitution,<sup>2</sup> but this committee had no power to endorse candidates on its own.<sup>3</sup> It only had the authority to recommend candidates for

<sup>1</sup> Complaint, Attachment at 4; Testimony (Test.) of Michelle MacDonald.

<sup>2</sup> Complainants’ Exhibit (Ex.) 2 at Article V, Section 3C.

<sup>3</sup> Test. of Barbara Linert.

party endorsement.<sup>4</sup> Complainants further contend that the word “endorsement” has a specific meaning and requires a vote in favor of endorsing a candidate by the delegates at the RPM convention.<sup>5</sup>

Complainants assert that Respondent was not endorsed by the RPM in 2016, and that Respondent was aware that she did not have the party’s endorsement. Complainants argue that Respondent admitted in an August 31, 2016, letter to the *Star Tribune*’s editorial board that the state GOP “declin[ed] to endorse any judicial candidates at the convention.”<sup>6</sup> Therefore, Complainants allege that Respondent knowingly created a false implication that the RPM endorsed her in this year’s judicial election.

Respondent argues that the complaint in this case was not filed in good faith. She maintains that her reference to the “Judicial Selection Committee” was a typographical error and that this error is a common mistake.<sup>7</sup> Respondent denies that the reference was an attempt to imply that a fictitious party “selection” committee endorsed her. Respondent testified that a majority of the judicial election committee members recommended her for endorsement to the RPM, and Respondent contends that their support essentially constitutes an endorsement by that committee. Therefore, according to Respondent, her claim of endorsement by the “GOP Judicial Selection Committee 2016” is true and not a false implication of endorsement by the RPM.

During the probable cause hearing, the parties stipulated that the RPM constitution in effect at the time of the RPM’s 2016 state convention provided that delegates would vote on whether to consider endorsing candidates for Minnesota Supreme Court and Minnesota Court of Appeals following “the report of the judicial election committee.”<sup>8</sup> Ultimately, the delegates at the RPM state convention in 2016 voted not to consider endorsing any judicial candidates.<sup>9</sup>

## Legal Standard

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.<sup>10</sup> The administrative law judge must decide whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to address the claims in the complaint at a hearing on the merits.<sup>11</sup> If the administrative law judge is

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<sup>4</sup> *Id.*; Complainants’ Ex. 2.

<sup>5</sup> Test. of B. Linert; Complainants’ Ex. 2 at Article V, Section 3C.

<sup>6</sup> Respondent’s Ex. 8.

<sup>7</sup> Respondent’s Ex. 1.

<sup>8</sup> Complainants’ Ex. 2 at Article V, Section 3C.

<sup>9</sup> Test. of B. Linert and M. MacDonald; Respondent’s Ex. 8.

<sup>10</sup> See *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 664 (Minn. 2003) (“[I]n civil cases probable cause constitutes a *bona fide* belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it”) (quoting *New England Land Co. v. DeMarkey*, 569 A.2d 1098, 1103 (Conn. 1990)) (internal punctuation omitted); see also *State v. Florence*, 239 N.W.2d 892, 903-04 (Minn. 1976) (explaining operation of probable cause standard in criminal context).

<sup>11</sup> See *In re Hortman v. Republican Party of Minn.*, No. 15-0320-17530, PROBABLE CAUSE ORDER at 3 (Minn. Office Admin. Hearings, Oct. 2, 2006).

satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict in a like civil case, a campaign violation complaint should proceed.<sup>12</sup>

## Analysis

Minnesota Statutes, section 211B.02 provides that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party.

In *Niska v. Clayton*,<sup>13</sup> the Minnesota Court of Appeals upheld a decision by a panel of this tribunal finding that a person violated Minn. Stat. § 211B.02 by using the term “Republican Party of Minnesota” on multiple documents and on his website to promote candidates who lacked the party’s endorsement. The court stated that “[a] person who promotes a candidate by including the initials or the name of a major party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party.”<sup>14</sup>

Similarly, in *Schmitt v. McLaughlin*,<sup>15</sup> the Minnesota Supreme Court held that an unendorsed candidate’s use of the initials “DFL” violated the statute because it implied to the average voter that the candidate had the endorsement, or at the very least the support, of the Democratic-Farmer-Labor Party. The court explained that, while candidates have a right to inform voters of their party affiliation “by the use of such words as ‘member of’ or ‘affiliated with’ in conjunction with the initials ‘DFL,’” the use of the initials “DFL” without such modifiers creates a false implication of support.<sup>16</sup>

The Administrative Law Judge concludes that probable cause exists to believe Respondent violated Minn. Stat. § 211B.02 by claiming the endorsement of the “GOP’s Judicial Selection Committee 2016.” It is therefore reasonable to require Respondent to proceed to a hearing on the merits and to allow a panel of three administrative law judges to determine whether Respondent violated Minn. Stat. § 211B.02, and if so, to decide the appropriate penalty for such a violation.

The parties are directed to inform the undersigned Administrative Law Judge as to whether they wish to proceed to an evidentiary hearing or submit this matter to the assigned panel based on the complaint, filings, and record created at the probable cause hearing. Should the parties forgo the evidentiary hearing, they will be given the

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<sup>12</sup> In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The court must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party’s favor. See, e.g., Minn. R. Civ. P. 50.01; *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980); *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975).

<sup>13</sup> *Niska v. Clayton*, 2014 WL 902680 (Minn. Ct. App. 2014), review denied (Minn. June 25, 2014).

<sup>14</sup> *Id.* at \*6.

<sup>15</sup> 275 N.W.2d 587, 591 (Minn. 1979); see also *In re Ryan*, 303 N.W.2d 462, 465-66 (Minn. 1981) (holding that placing the terms “DFL” and “LABOR ENDORSED” on campaign materials violated the statute).

<sup>16</sup> 275 N.W.2d at 591.

opportunity to submit written argument as to what penalty, if any, is appropriate should the panel conclude Respondent violated Minn. Stat. § 211B.02.

**J. P. D.**