

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Yelena Kurdyumova,

Complainant,

vs.

Susan Pha,

Respondent

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

On November 4, 2016, Yelena Kurdyumova (Complainant) filed a complaint with the Office of Administrative Hearings alleging that the Susan Pha (Respondent) violated Minn. Stat. §§ 211B.06 and 211B.13 (2016) in connection with her campaign for election to the Brooklyn Park City Council.

Following a review of both the complaint and the documents submitted by the Complainant in support, the undersigned Administrative Law Judge has determined that the complaint sets forth a prima facie violation of Minn. Stat. § 211B.13. For the reasons detailed in the Memorandum below, the Complainant is permitted to proceed to a probable cause hearing on the section 211B.13 claim, but the alleged violation of Minn. Stat. § 211B.06 is dismissed.

**THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS GIVEN** that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **1:30 p.m. on Thursday, November 10, 2016**. The hearing will be held by call-in telephone conference. At the appointed time, the parties are directed to:

- (a) Telephone **1-888-742-5095**
- (b) Enter the Conference Code: **752-390-7175#**

The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34 (2016). 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](http://www.revisor.leg.state.mn.us).

At the probable cause hearing, all parties have the right to be represented by legal counsel or appear on their own behalf. In addition, the parties have the right to submit evidence, affidavits, documentation, and argument for consideration by the administrative law judge. By **4:30 p.m. on November 9, 2016**, the parties shall provide to the

administrative law judge all evidence bearing on the case, with copies of the same items to the opposing party.

Any document filed with the Office of Administrative Hearings, or any documents that a party wishes to make part of the hearing record, may be filed in one of the following ways: (1) by **e-Filing** through the Office of Administrative Hearings' e-Filing system; (2) by **mail**; (3) by **facsimile** (if less than 50 pages total); or (4) by **personal delivery**. (See 2015 Minn. Laws. Ch. 63, § 7; Minn. R. 1400.5550, subp. 5 (2015)).<sup>1</sup>

The e-Filing system is accessible at: <http://mn.gov/oah/forms-and-filing/efiling/>

The Office of Administrative Hearings' facsimile number is: (651) 539-0310.

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 Minn. Stat. § 211B.35 (2016).

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 Minn. Stat. § 211B.34, subd. 3.

Any party who needs an accommodation for a disability 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: November 7, 2016

  
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BARBARA J. CASE  
Administrative Law Judge

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<sup>1</sup> Please note mail is not a viable service or filing option for the probable cause hearing.

## MEMORANDUM

Susan Pha is seeking election to the Brooklyn Park City Council - West District. The complaint alleges that on July 31, 2016, Respondent held a voters' registration event at a Brooklyn Park condominium association building where she passed out campaign literature and provided food and entertainment in violation of Minn. Stat. § 211B.13. According to the complaint, Respondent posted flyers advertising the event throughout the condominium complex. The flyers stated: "Voter Registration. Free hot dogs & pop. Fun kid's activity."<sup>2</sup>

The complaint also alleges that on August 2, 2016, Respondent purchased and delivered several "jumbo-sized" pizzas to potential voters attending the Brooklyn Park National Night Out event. The complaint asserts that the value of the pizzas exceeded \$5. The complaint asserts that Respondent violated the prohibition against "bribery, treating and solicitation" at Minn. Stat. § 211B.13 at both the voter registration event and the National Night Out event.

The complaint also alleges that Respondent has disseminated false campaign material in violation of Minn. Stat. § 211B.06. Complainant asserts that Respondent has made several factually false statements on campaign material regarding her qualifications and experience.

### **Standard for Prima Facie Determinations**

To establish a prima facie violation of the Fair Campaign Practices Act, the complainant must allege sufficient facts to show that a violation of law has occurred.<sup>3</sup> The complaining party must submit evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of Minnesota Statutes, chapter 211A or 211B (2016).<sup>4</sup>

For purposes of a prima facie determination, the tribunal must accept the facts that are alleged in the complaint as true, without independent substantiation, provided that those facts are not patently false or inherently incredible.<sup>5</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>6</sup>

### **Bribery, Treating, and Solicitation**

Minnesota Statutes, section 211B.13 is an anti-bribery statute. It prohibits giving something of monetary value in order to induce a voter to vote in a particular way at an election. The statute provides, in relevant part:

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<sup>2</sup> Complaint Exhibit (Ex.) 1.

<sup>3</sup> Minn. Stat. § 211B.32, subd. 3.

<sup>4</sup> *Barry and Spano v. St. Anthony-New Brighton Independent School District 282*, 781 N.W.2d 898, 902 (Minn. Ct. App. 2010).

<sup>5</sup> *Id.*

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

A person who willfully, directly or indirectly, advances, pays, gives, promises, or lends any money, food, liquor, clothing, entertainment, or other thing of monetary value, or who offers, promises, or endeavors to obtain any money, position, appointment, employment, or other valuable consideration, to or for a person, in order to induce a voter to refrain from voting, or to vote in a particular way, at an election, is guilty of a felony. ... Refreshments of food or nonalcoholic beverages having a value up to \$5 consumed on the premises at a private gathering or public meeting are not prohibited under this section.<sup>7</sup>

The complaint has alleged sufficient facts to support finding a prima facie violation of Minn. Stat. § 211B.13 with respect to the purchase of hot dogs and pizzas at the two events. The Complainant has affirmatively alleged that the value of the food was worth more than \$5.<sup>8</sup> An assessment of the monetary worth of an item is made from the perspective of a voter receiving the item, not the person offering it.<sup>9</sup>

### **False Campaign Material**

Minnesota Statutes, section 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.

The complaint asserts that Respondent has made several factually false statements about her experience and qualifications in campaign material she has disseminated during her campaign.

Over the years, the Minnesota Supreme Court has upheld enforcement of section 211B.06 and interpreted it to be directed against false statements of fact and not against unfavorable deductions or inferences based on fact, even if those conclusions might be misleading or incomplete.<sup>10</sup>

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<sup>7</sup> Minn. Stat § 211B.13, subd. 1.

<sup>8</sup> *Cf. In re Heng v. Pha*, No. 5-0325-33871, ORDER OF DISMISSAL FOR LACK OF PROBABLE CAUSE (Minn. Office Admin. Hearings Oct. 11, 2016).

<sup>9</sup> *United States v. Garcia*, 719 F.2d 99, 201 (5<sup>th</sup> Cir. 1983) (under federal statute prohibiting payment for votes, an assessment of the monetary worth of an item should be made from the perspective of a voter receiving the item, not the person offering it).

<sup>10</sup> *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917).

In 2014, however, a panel of the U.S. Court of Appeals for the Eighth Circuit struck down section 211B.06 ruling that it violates the First Amendment of the U.S. Constitution and is not enforceable.<sup>11</sup> Moreover, the panel concluded that there is no way to narrowly construe the statute to avoid the constitutional violation. The court concluded generally that section 211B.06 is not narrowly tailored to achieve the state's asserted interest in preserving fair and honest elections and preventing a fraud on the electorate.<sup>12</sup>

Because a panel of the U.S. Court of Appeals for the Eighth Circuit has determined that Minn. Stat. § 211B.06 is unconstitutional and unenforceable, these allegations against Respondent must be dismissed.

## **Conclusion**

The Administrative Law Judge finds that the complaint alleges a prima facie violation of Minn. Stat. § 211B.13 and this claim will proceed to a probable cause hearing as indicated in the order. The alleged violations of section 211B.06 are dismissed.

**B. J. C.**

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<sup>11</sup> *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014), *cert. denied*, 135 S.Ct. 1550 (2015).

<sup>12</sup> *Id.* (The panel found the statute to be overbroad because nothing prohibits filing a complaint against wholly protected speech, and underinclusive because the statute exempts news items and is limited to paid political advertising or campaign material.).