OAH 3-0325-20939-CV

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Chuck Repke,
Complainant,
vs.

Saint Paul Better Ballot Campaign, a Project of FairVote Minnesota,
Respondent,
and

Daniel D. Dobson,
Complainant,
vs.

Saint Paul Better Ballot Campaign, a Project of FairVote Minnesota,
Respondent.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

The above-entitled matter came on for an evidentiary hearing on November 18, 2009, before a panel of three Administrative Law Judges: Kathleen D. Sheehy (Presiding Judge), Barbara L. Neilson, and Cheryl LeClair-Sommer. The hearing record closed on November 23, 2009, upon receipt of post-hearing briefs from the parties.

Chuck Repke and Daniel D. Dobson (Complainants) appeared on their own behalf without counsel.

Jay Benanav and Jane Prince, Attorneys at Law, Weinblatt & Gaylord PLC, appeared on behalf of Saint Paul Better Ballot Campaign, a Project of FairVote Minnesota (Respondent or BBC).

STATEMENT OF ISSUES

1. Did Respondent violate Minn. Stat. § 211B.02 by claiming in campaign material that the Minnesota DFL, the League of Women Voters–Minnesota (LWV-MN), and the League of Women Voters–St. Paul (LWV-SP) endorsed the IRV ballot question in St. Paul?

2. Did Respondent violate Minn. Stat. § 211B.02 by claiming in campaign material that President Barack Obama, Senator John McCain, Ralph Nader and Cynthia McKinney endorsed the ballot question in St. Paul, when the Respondent failed to obtain written permission from these individuals?

The panel concludes that the Complainants have established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02, and assesses a civil penalty of $5,000.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. Respondent Saint Paul Better Ballot Campaign is a committee organized to support instant runoff voting (IRV) in Saint Paul. The Better Ballot Campaign is a project of FairVote Minnesota, which is a lobbying organization formed under § 501(c)(4) of the Internal Revenue Code.[1]

2. FairVote Minnesota advocates for the use of alternative voting systems such as IRV. FairVote Minnesota successfully campaigned to put IRV on the ballot in Minneapolis, and IRV was adopted by voters there in 2006.

3. In 2008, the St. Paul City Council certified a petition to place IRV on the St. Paul ballot in the general election to take place on November 3, 2009. On June 24, 2009, the City Council approved the language of the ballot question, which read:

> Shall Chapter 7 of the City Charter be amended to require that the method for electing the Mayor and the City Council members be by Single Transferable Voting, sometimes known as Ranked Choice Voting or Instant Runoff Voting (IRV), which is a method without a separate primary election by which voters rank candidates for an office in order of preference on a single ballot: first, second, third, fourth, fifth, sixth, and so on; and votes are then counted in rounds until one candidate emerges with a majority of votes cast; and with ballot format and rules for counting votes adopted by ordinance?[2]

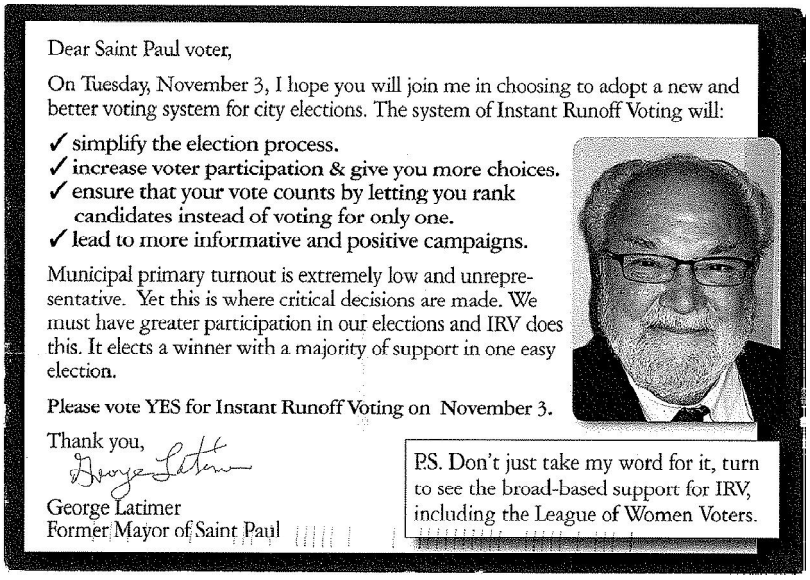
4. Complainant Chuck Repke is a resident of St. Paul who opposed IRV. He was a visible spokesperson and advocate for the "vote no" position on the IRV ballot question in the fall of 2009. In October 2009, Repke helped form No Bad Ballots, a committee organized to oppose IRV in St. Paul.[3]

5. Complainant Daniel Dobson is also a resident of St. Paul who opposed IRV.

6. In the week before the election, Respondent mailed and delivered three pieces of campaign literature that urged people to vote in favor of the ballot initiative.The first is a postcard on which George Latimer, Former Mayor of Saint Paul, outlined the reasons to support instant runoff voting and urged voters to: "Please vote

[1] Testimony of Jeanne Massey.
[2] *See* Ex. C-12.
[3] Testimonoy of Chuck Repke.

YES for Instant Runoff Voting on November 3." The corner on the front of the card reads: "P.S. Don't just take my word for it, turn to see the broad-based support for IRV, including the League of Women Voters."



Dear Saint Paul voter,

On Tuesday, November 3, I hope you will join me in choosing to adopt a new and better voting system for city elections. The system of Instant Runoff Voting will:

✓ simplify the election process.
✓ increase voter participation & give you more choices.
✓ ensure that your vote counts by letting you rank candidates instead of voting for only one.
✓ lead to more informative and positive campaigns.

Municipal primary turnout is extremely low and unrepresentative. Yet this is where critical decisions are made. We must have greater participation in our elections and IRV does this. It elects a winner with a majority of support in one easy election.

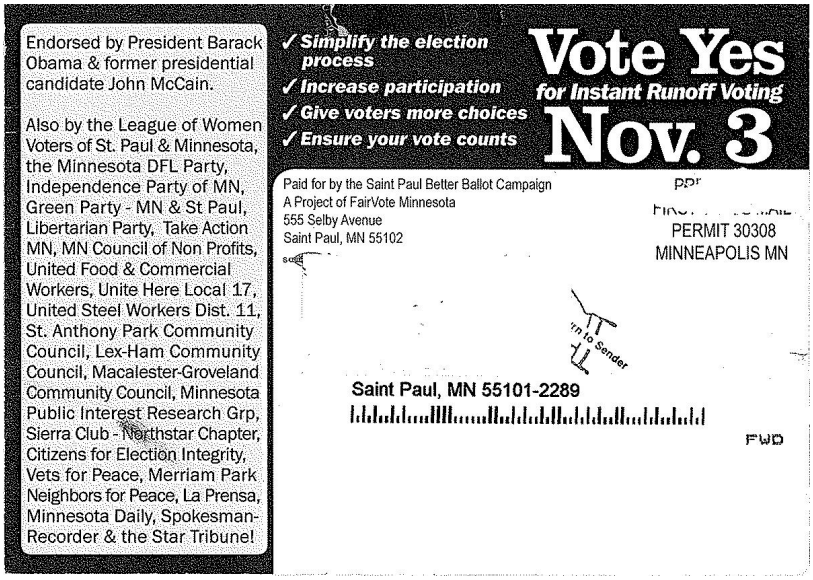
Please vote YES for Instant Runoff Voting on November 3.

Thank you,

George Latimer
Former Mayor of Saint Paul

P.S. Don't just take my word for it, turn to see the broad-based support for IRV, including the League of Women Voters.

The back of the card states in large letters, "Vote Yes for Instant Runoff Voting Nov. 3." To the left of that statement are the words "Endorsed by President Barack Obama & former presidential candidate John McCain. Also by the League of Women Voters of St. Paul & Minnesota, the Minnesota DFL Party," and a list of 19 other organizations. Respondent mailed approximately 10,000 of these postcards to voters in St. Paul on or about October 26, 2009.[4]



Endorsed by President Barack Obama & former presidential candidate John McCain.

Also by the League of Women Voters of St. Paul & Minnesota, the Minnesota DFL Party, Independence Party of MN, Green Party - MN & St Paul, Libertarian Party, Take Action MN, MN Council of Non Profits, United Food & Commercial Workers, Unite Here Local 17, United Steel Workers Dist. 11, St. Anthony Park Community Council, Lex-Ham Community Council, Macalester-Groveland Community Council, Minnesota Public Interest Research Grp, Sierra Club - Northstar Chapter, Citizens for Election Integrity, Vets for Peace, Merriam Park Neighbors for Peace, La Prensa, Minnesota Daily, Spokesman-Recorder & the Star Tribune!

✓ Simplify the election process
✓ Increase participation
✓ Give voters more choices
✓ Ensure your vote counts

Vote Yes
for Instant Runoff Voting
Nov. 3

Paid for by the Saint Paul Better Ballot Campaign
A Project of FairVote Minnesota
555 Selby Avenue
Saint Paul, MN 55102

PRE
PERMIT 30308
MINNEAPOLIS MN

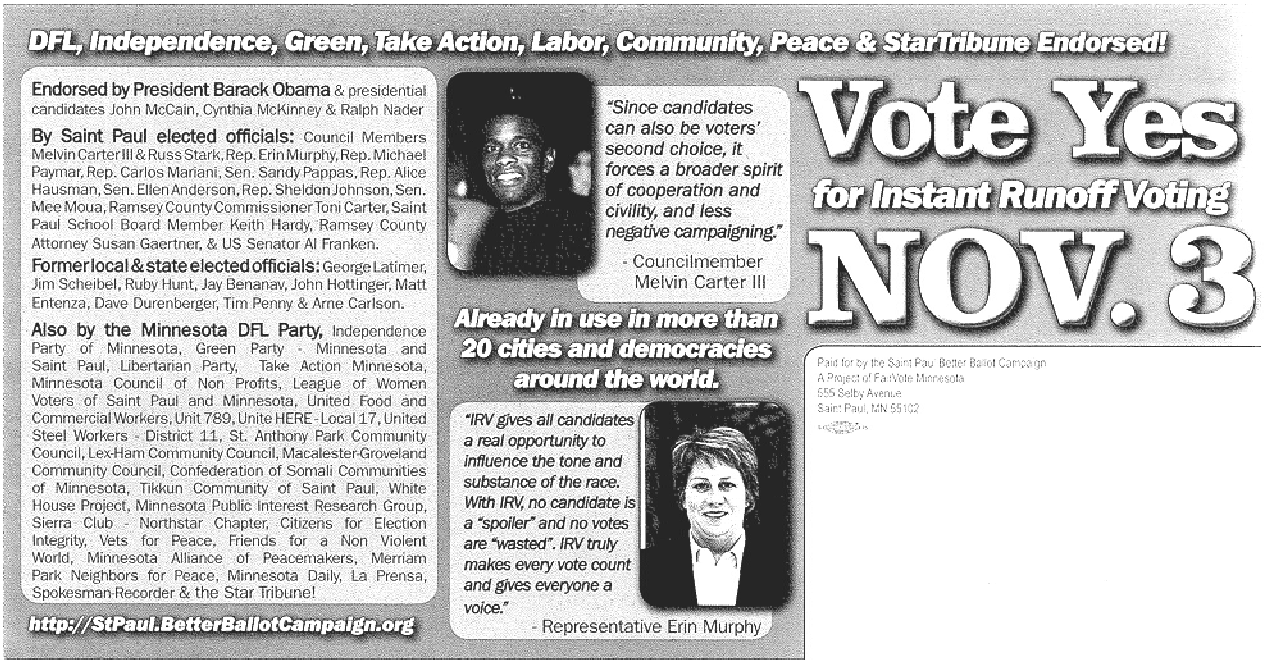
Return to Sender

Saint Paul, MN 55101-2289

FWD

[4] Ex. C-1; Testimony of J. Massey.

7. The second piece of literature, an orange flyer, states in large letters "Vote Yes for Instant Runoff Voting Nov. 3." At the top of the flyer, it states "DFL . . . Endorsed!" On the left side the card reads: "Endorsed by President Barack Obama & presidential candidates John McCain, Cynthia McKinney & Ralph Nader…[a]lso by the Minnesota DFL Party" and the "League of Women Voters of Saint Paul and Minnesota." Respondent mailed approximately 30,000 of these flyers to voters in St. Paul on or about October 28, 2009.[5]



8. On October 30, 2009, Complainant Repke filed a complaint with the Office of Administrative Hearings alleging that the Respondent had violated Minn. Stat. § 211B.02 based on the claimed endorsement of the League of Women Voters in the first postcard mailed by the Respondent. On November 2, 2009, Complainant Dobson filed a similar Complaint based on the claimed endorsements of the DFL party and some of the individuals listed in the second piece of campaign material. The Complaints were consolidated in an order dated November 2, 2009.

9. On November 3, 2009, the day of the election, the Respondent distributed a third flyer to voters in St. Paul. The card stated in large letters "Vote Yes for Instant Runoff Voting Today." Across the top, the card read: "Join the many elected officials and Saint Paul community leaders in supporting Instant Runoff Voting!" Underneath that statement the card read: "Supported by* Saint Paul elected officials," and it listed a number of officials. Underneath the paragraph listing the local officials there was an asterisk with the following statement: "*Support refers to the concept of Instant Runoff Voting, not necessarily this particular ballot question." The flyer does not mention the

[5] Ex. C-2; Test. of J. Massey.

DFL, League of Women Voters, President Obama, Senator McCain, Ralph Nader or Cynthia McKinney. Respondent printed approximately 5,000 of these flyers.[6]

10. The ballot question was narrowly approved in the general election. It passed with approximately 52% of the vote.[7]

11. Jeanne Massey is the executive director of FairVote Minnesota. Hers is a paid, full-time position. Ms. Massey has a master's degree in urban planning. Before becoming the executive director, she volunteered for FairVote Minnesota and worked on the successful campaign to adopt IRV in Minneapolis.[8]

12. The three flyers at issue were prepared by Jeanne Massey and BBC committee members Kathleen Murphy, Ellen Brown, and Dakota Johnson.[9]

13. The Better Ballot Campaign was advised by attorney Jay Benanav, former Saint Paul Mayor George Latimer, and former Minnesota Senate Majority Leader John Hottinger.[10]

Claimed Endorsement by the DFL

14. In the postcard and flyer distributed before the election, the Respondent stated that the ballot question was endorsed by the "DFL" and the "Minnesota DFL Party."[11]

15. The Minnesota DFL generally supports the use of IRV in state and local elections, as provided in its 2008-2010 Action Agenda and Legislative Priorities. The Minnesota DFL does not, however, endorse ballot questions in municipal elections. Any support for a ballot question, along with approval to appear on the DFL sample ballot, must be provided by the local DFL unit. Only persons residing within the electoral jurisdiction of the ballot question can vote to support a local ballot question.[12] The DFL treats the endorsement of a ballot question similarly to the endorsement of a candidate. To obtain an endorsement, a ballot question needs 60% of the vote of the competent endorsing body. Only the St. Paul DFL had the authority to take a position on the St. Paul ballot question.[13]

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[6] Ex. R-2; Test. of J. Massey.
[7] Ex. C-16.
[8] Test. of J. Massey.
[9] Test. of J. Massey.
[10] Test. of J. Massey.
[11] Ex. C-1; Ex. C-2.
[12] Test. of B. Melendez; Ex. C-15; Ex. R-14 at Art. 3, Section 4, subsection H.
[13] Testimony of Chuck Repke; Test. of B. Melendez; Ex. R-14 at Art. 3, Section 4, subsection H, and Art. 3, Section 15.

16. In 2007, the Respondent was successful in obtaining endorsement from the St. Paul DFL for an IRV ballot question, along with approval to place the "vote yes" position on the DFL sample ballot. Because of a pending legal challenge to IRV in Minneapolis, however, the City Council did not place IRV on the ballot in the election that year.[14]

17. In 2009, the Respondent again sought the endorsement of the St. Paul DFL for an IRV ballot question.

18. On March 21, 2009, the St. Paul DFL held its endorsing convention. The Respondent had a booth and a strong presence at the convention, where two votes were allowed on the question of whether the St. Paul DFL should endorse a "vote yes" position. Approximately 56% of the convention voted to endorse "vote yes" on the first vote; approximately 58% of the convention voted to endorse "vote yes" on the second vote. The "vote yes" position did not receive a 60% majority, and, as a consequence, the St. Paul DFL did not endorse a position on the IRV ballot question.[15]

19. Jeanne Massey, Kathleen Murphy, and Dakota Johnson attended the St. Paul DFL Convention on behalf of the Respondent. They were aware that the IRV ballot question failed to receive the St. Paul DFL endorsement. They were also aware that, as a consequence, the "vote yes" position would not appear on the DFL sample ballot distributed before the election.[16]

20. Brian Melendez, Chair of the Minnesota DFL, personally supports the concept of IRV. The Respondent obtained permission from Mr. Melendez to use his name and photograph on its website as a supporter of the IRV ballot measure.[17]

21. After the postcard and flyer were mailed, several persons objected to the claimed endorsement by the DFL. In response to questions posed by Jeanne Massey and Kathleen Murphy, Mr. Melendez notified them on October 31, 2009, that the claimed endorsement by the DFL was false:

> While the Party's platform generally supports the adoption of instant-runoff voting, that support does not mean that the Party "endorses" any particular ballot question. In fact, the Party specifically declined to endorse the St. Paul ballot question. To say that "the DFL Party endorses the St. Paul ballot question" is definitely false. To say that "the DFL Party endorses IRV" is technically incorrect and probably misleading, although not totally false….As long as you say that "[t]he DFL 2008-2010 Action Agenda and Legislative Priorities clearly state support by the DFL for 'adopt(ing)

[14] Test. of J. Massey.
[15] Ex. C-5; Ex. C-6; Ex. C-7; Ex. C-8; Test. of J. Massey.
[16] Test. of J. Massey; Ex. C-8.
[17] Test. of J. Massey; Testimony of Brian Melendez; Ex. C-20; Ex. R-34.

> Instant Runoff Voting for state and local elections,'" then you are on solid ground. But if the statement is paraphrased or truncated in any way that states or implies endorsement of this particular ballot question, then the claim becomes misleading or false.[18]

Claimed Endorsement by the League of Women Voters

22. In the postcard and flyer, Respondent stated that the St. Paul ballot initiative was "endorsed by the League of Women Voters of Saint Paul and Minnesota."[19]

23. In 2004 and 2005, the LWV-MN conducted a study on alternative voting systems. Of the five voting systems studied, the League voted to support two – plurality voting and instant runoff voting.[20]

24. Based on the study, on February 19, 2005, the LWV-MN adopted the following position regarding IRV:

> LWVMN supports the option to use Instant Runoff Voting to elect State and Local Officials in single seat elections. LWVMN also supports the continued use of the plurality voting system in our elections. The LWVMN Board reserves the right to decide the appropriateness of legislation proposing to replace the plurality voting system with the Instant Runoff System at the state level. LWVMN supports the right of local governments and municipalities to choose Instant Runoff Voting for their own local elections. Voters need to understand how votes in an election are tabulated and how a candidate actually wins an election. If a change in elections systems occurs, LWVMN supports adequate voter education. LWVMN does not support Approval, Borda Count, or Condorcet as alternative voting systems.[21]

25. The LWV-MN generally supports IRV as a voting system. On its website, under the heading "Program at a Glance," LWV-MN has listed approximately forty program statements, which are similar to action items, pertaining to such subjects as government, criminal justice, education and social policy. Under the topic "Government," LWV-MN states: "Election Processes: Support improvements in election laws. Support improvements in laws regulating campaign practices. Allow Instant Runoff Voting. Support timely redistricting based on population."[22]

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[18] Ex. C-15.
[19] Ex. C-1; Ex. C-2.
[20] Testimony of Marsha Oliver; Ex. R-9; Ex. R-10.
[21] Ex. R-7.
[22] Ex. R-8.

26. The LWV-SP, as a local unit of the State League, cannot hold a position contrary to the LWV-MN.[23]

27. On May 14, 2007, the LWV-SP endorsed Respondent's petition to amend the St. Paul City Charter to allow for instant runoff voting. The LWV-SP did not endorse the ballot question; it simply voted to support Respondent's efforts to present the question to voters in St. Paul.[24]

28. On June 13, 2007, Sigrid Johnson, Co-President of the LWV-SP, sent email correspondence to Beth Mercer-Taylor, a BBC volunteer. Johnson indicated that the LWV-SP generally supported instant runoff voting. The email stated: "At our Annual Meeting in May we voted to concur with the State LWV position and are in favor of IRV."[25]

29. On September 13, 2007, Roberta Megard, member of the LWV-SP, sent email correspondence to Ms. Mercer-Taylor. The email stated:

> The membership of LWVSP voted to support IRV at its annual meeting in May. You would have to get approval from the Exec. Committee through Sig and Phyllis in order to get sponsorship from the League. However, this should be pro forma only. Give me a call or e-mail and I would be happy to talk about other issues for the campaign.[26]

30. The communications and email correspondence that occurred in 2007 between Respondent and the LWV-SP pertained only to Respondent's efforts to place instant runoff voting on the ballot to let voters decide which election system should be used in local elections. The LWV-SP supported these efforts to place instant runoff voting on the ballot, but neither the LWV-MN nor the LWV-SP took a position that the then-existing plurality voting system in St. Paul should be replaced by IRV.[27]

31. On October 21, 2009, the LWV-MN sponsored a debate on IRV at Hamline University in St. Paul. The LWV-MN position on IRV, as adopted in February 2005, was read at the forum prior to the start of the debate. Ellen Brown, on behalf of the Respondent, and Chuck Repke, on behalf of the No Bad Ballots Committee, debated the pros and cons of adopting IRV at the forum.[28]

32. On October 28, 2009, after receiving the first postcard on which Respondent claimed the endorsement of the LWV-SP, Sigrid Johnson, Co-President of

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[23] Testimony of Sigrid Johnson.
[24] Ex. R-5; Test. of S. Johnson.
[25] Ex. R-11.
[26] Ex. R-12.
[27] Test. of S. Johnson.
[28] Test. of C. Repke; Ex. C-11; Ex. C-12.

the LWV-SP, and Marion Watson, League member, wrote a letter to the editor of the Pioneer Press requesting that Respondent correct the error.[29]

Claimed Endorsements of President Obama, Senator McCain, Ralph Nader and Cynthia McKinney

33. In the postcard, Respondent stated that the Saint Paul ballot initiative was "endorsed by President Barack Obama and former presidential candidate John McCain." In the flyer, Respondent stated that the initiative was "endorsed by President Barack Obama and presidential candidates John McCain, Cynthia McKinney, and Ralph Nader."[30]

34. In 2002, President Obama, while a state legislator in Illinois, sponsored legislation to support the voters' right to choose instant runoff voting in municipal elections.[31]

35. Respondent did not obtain written permission to use the names of President Obama, Senator McCain, Ralph Nader, or Cynthia McKinney in its campaign material. It based its claimed endorsements on public statements these individuals apparently made in the past supporting IRV in other contexts. These individuals made no statements supporting the use of IRV in St. Paul or supporting the St. Paul ballot question. Respondent did not speak personally with any of these individuals or verify that they currently support IRV or were aware of the ballot measure to allow IRV in St. Paul.[32]

36. Respondent obtained written permission from most if not all of the local officials and community leaders whose support it claimed on its website.[33]

37. Respondent's website was designed to allow individuals to provide electronic written permission to use their names as a public endorsement of "advanced voting methods like instant runoff voting."[34]

[29] Test. of S. Johnson; Ex. C-22.
[30] Ex. C-1; Ex. C-2.
[31] Ex. R-23.
[32] Test. of J. Massey.
[33] Test. of J. Massey; Ex. C-3
[34] Test. of J. Massey; Ex. C-3.

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.02 provides:

> **211B.02 False Claim of Support.**
>
> 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.

3. The burden of proving the allegations in the complaint is on the Complainants. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.[35]

4. The Complainants have demonstrated by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 by falsely claiming that the IRV ballot question was endorsed by the Minnesota DFL and the League of Women Voters of Saint Paul and Minnesota.

5. The Complainants have demonstrated by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 by claiming that the IRV ballot question was endorsed by President Obama, Senator McCain, Ralph Nader and Cynthia McKinney without obtaining their written permission.

6. The Respondent shall pay a fine of $5,000 for these violations.

7. The attached Memorandum explains the reasons for these conclusions and is incorporated by reference.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

[35] Minn. Stat. § 211B.32, subd. 4.

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. § 211B.02, Respondent Saint Paul Better Ballot Campaign shall pay a civil penalty of $5,000 by January 1, 2010.[36]

Dated: November 30, 2009

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Presiding Administrative Law Judge

s/Cheryl LeClair-Sommer
CHERYL LECLAIR-SOMMER
Administrative Law Judge

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

Reported: Digitally recorded, no transcript prepared.

NOTICE

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

MEMORANDUM

There are two issues in this case. The first is whether the St. Paul BBC knowingly and falsely claimed that the ballot question was endorsed by organizations including the Minnesota DFL, the Minnesota League of Women Voters, and the St. Paul League of Women Voters. The second is whether the St. Paul BBC claimed

[36] The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, P.O. Box 64620, St. Paul MN 55164-0620.

endorsement by several individuals—President Obama, Sen. John McCain, Ralph Nader, and Cynthia McKinney—without obtaining their written permission.

With regard to the claim of false endorsement by the organizations, the Respondent's evidence focused on the extent to which these organizations have indicated support for IRV. It is not disputed that the Minnesota DFL generally supports the use of IRV in state and local elections and that this position is included in the DFL Action Agenda. Nor is it disputed that the League of Women Voters (both the Minnesota League and the St. Paul affiliate) has found IRV to be an acceptable voting system, along with plurality voting. The issue here is whether the St. Paul BBC properly used these general statements of support for IRV in claiming in its literature that the DFL and the League of Women Voters "endorsed" the ballot question in St. Paul.

The Respondent argues that there is no legal or factual distinction between "support" for IRV and "endorsement" of a ballot question. It contends that the two words are interchangeable and that it is free to call the general statements of support by these organizations an "endorsement" of the ballot question.[37]

As a legal matter, the statute at hand provides that a person 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."[38] The statute by its terms expressly differentiates between "support" and "endorsement." In interpreting this language, the Minnesota Supreme Court has recognized that there is a distinction between the words "support" and "endorsement." In *Schmitt v. McLaughlin*, a candidate who was not endorsed by the DFL party used the initials "DFL" on advertisements and lawn signs.[39] The Court concluded that the "use of the initials 'DFL' would imply to the average voter that [the candidate] *had the endorsement or, at the very least, the support of* the DFL party."[40] This interpretation is consistent with the canon of statutory construction requiring that meaning be given if possible to each word in a statute.[41] Moreover, the Court indicated that the determination whether a person has the endorsement or support of a political party is a matter that can be objectively determined.[42]

As a factual matter, the record reflects that the organizations themselves have specific procedures for persons wishing to obtain statements of support or

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[37] The Respondent provided testimony to this effect and cites to *Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976), for the proposition that these words are synonymous. In *Buckley*, the United States Supreme Court held, among other things, that the independent expenditure provisions of the Federal Election Campaign Act were unconstitutional. The cited footnote explains that communications expressly advocating the election or defeat of a candidate for public office were subject to this limitation. The panel does not believe *Buckley* sheds any light on the issues raised in this case.
[38] Minn. Stat. § 211B.02.
[39] 275 N.W.2d 587 (Minn. 1979).
[40] *Id*., 275 N.W.2d at 591 (emphasis added).
[41] Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions"); Minn. Stat. § 645.17(2) (it is presumed that "the legislature intends the entire statute to be effective and certain").
[42] 275 N.W.2d at 591.

endorsement. The DFL party permits endorsements of candidates only by a 60% affirmative vote of delegates present and voting, but no convention representing a geographical area less than the area competent to elect the public official may endorse a candidate.[43] The DFL's position on ballot questions is similar. The process for taking a formal DFL Party position on any ballot question and, if desired, placing the question on the official DFL Sample Ballot, requires a 60% affirmative vote, and the body with authority to take an official stand on that question is the party unit having the smallest jurisdiction that includes the entire electoral district that will vote on the ballot question.[44] In this case, that means that only the St. Paul DFL had the authority to take a position on the St. Paul ballot question. The League of Women Voters has an official position statement, developed in 2005 and unchanged since then, that supports both the use of IRV in state and local single-seat elections, and the continued use of a plurality voting system.[45] Neither the Minnesota League of Women Voters nor the St. Paul League of Women Voters has specifically endorsed the use of IRV in lieu of plurality voting in any election.

The Respondent argues that it could properly characterize the general statements of support by these organizations as an "endorsement," because based on *Kennedy v. Voss*,[46] even "extreme and illogical inferences" based upon accurate statements of fact are not actionable as false statements in campaign literature. That case involved an allegedly false statement regarding a candidate's voting record, and the violation alleged was of Minn. Stat. § 210A.04, subd.1, a predecessor of Minn. Stat. § 211B.06. Claims asserted under § 211B.06 are subject to a different and higher standard of proof. As noted by the Minnesota Supreme Court, the support or endorsement of an organization, when challenged under § 211B.02, is a matter that can be objectively determined. In addition, claims of ignorance about the permissible limits of claiming endorsements, particularly with regard to the implication of endorsement by the DFL party, are viewed with some skepticism.[47]

The record is clear in this case that the Respondents were well aware of the official positions of these organizations. The Respondent successfully obtained the endorsement of the St. Paul DFL party in 2007; however, the presentation of the ballot question to voters was delayed due to the litigation over IRV in Minneapolis. When that matter was resolved,[48] the Respondent again sought the endorsement of the St. Paul DFL; this time, however, it failed to obtain the requisite number of votes. This was the second major campaign spearheaded by Ms. Massey, who previously directed the successful ballot initiative in Minneapolis. She was personally involved in the BBC's unsuccessful effort to obtain the endorsement in St. Paul, and her testimony that she

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[43] Ex. R-14 at Art. 3, Section 4, subsection H.
[44] *Id*. Section 15.
[45] Ex. R-7.
[46] 304 N.W.2d 299 (Minn. 1981).
[47] *See In the Matter of Ryan*, 303 N.W.2d 462, 468 (Minn. 1981); *In the Matter of Daugherty v. Hilary*, 344 N.W.2d 826, 832 (Minn. 1984).
[48] *See Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (rejecting a number of constitutional challenges to IRV, as adopted by ordinance in Minneapolis).

was unaware that she could not claim endorsement by the "DFL" or the "Minnesota DFL" is not credible.

Likewise, the Respondent was well aware of the position of the League of Women Voters; it worked with League representatives to put the "Vote Yes" question on the ballot in 2007, and it participated in a forum shortly before the recent election in which the League's official position was read before the commencement of a debate between the Respondent and Complainant Chuck Repke. The argument that the Respondent believed it could claim "endorsement" of the ballot question by the League, based on either a partial reading of the League's position, or on personal expressions of support by individual League members or officers, is lacking in credibility.

With regard to the claimed endorsements by individuals, the Respondent admits that it made no effort to obtain written permission from President Obama, Sen. McCain (the endorsed Republican candidate for president in the last election), Ralph Nader (an independent, endorsed Reform Party, and endorsed Green Party candidate for president in the past), or Cynthia McKinney (an endorsed Green Party candidate for president in the last election). The Respondent contends that it would be "absurd" to require that national political leaders, who have taken public positions on specific issues, must provide written permission to use their names in support of local ballot initiatives addressing those issues. In addition, Ms. Massey testified that she was unaware that it was necessary to obtain written permission before using the names of individuals in its literature.

The statute unequivocally provides that "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."[49] There is no exception for national political leaders. As with support claimed from organizations, it should be an easy matter to objectively determine whether an individual has provided permission to use that individual's name in support of a candidate or ballot question. The Respondent could truthfully have said in its literature, without obtaining written permission, that as a state legislator in 2002, President Obama introduced legislation that would have permitted municipalities to adopt instant runoff voting for the positions of mayor, city clerk, and city treasurer.[50] It could truthfully have said, without obtaining written permission, that Sen. McCain, in 2002, supported an IRV ballot question in Alaska; or that Ralph Nader said in a debate in 2008 that IRV was something that should be examined. But these are far different messages than saying, without written permission, that the St. Paul ballot question was "endorsed" by President Obama, Sen. McCain, and the others.

The Respondent's testimony that it was not aware that written permission was required from individuals is contradicted by its acknowledgment that it in fact obtained written permission from most if not all of the state and local elected officials, former state and local officials, and other business and community leaders whose names were

[49] Minn. Stat. § 211B.02.
[50] Ex. R-23.

used in the mailings. It specifically obtained written permission from Brian Melendez, the chair of the Minnesota DFL, to say that he personally supported the ballot question. In addition, the Respondent's web site was designed to incorporate a mechanism by which individuals could provide electronic written permission to use their names as a public endorsement of "advanced voting methods like Instant Runoff Voting."[51] To the extent that the Respondent is relying on testimony that it was not aware of the requirement to obtain written permission from individuals, the panel finds that this testimony is not credible.

Accordingly, the panel has concluded that the Respondent made knowingly false claims that the Minnesota DFL and the League of Women Voters "endorsed" the St. Paul ballot question and that it failed to obtain written permission from the national political figures before using their names as supporters of the ballot question, in violation of Minn. Stat. § 211B.02. The panel has concluded that these violations, which were reflected in approximately 40,000 pieces of campaign literature, were multiple and deliberate. They were made despite the clarity of the statutory prohibitions, and the Respondent remains completely unapologetic. The timing of these mailings made it difficult for opponents to respond before the election and created an unfair advantage. These false claims of support or endorsement likely influenced some voters, but the impact on the election cannot be quantified on this record. Under all the circumstances, the panel believes a fine in the amount of $5,000 is the appropriate penalty.

K.D.S., B.L.N., C.L.S.

[51] Ex. C-3.