

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Meg Forney,

Complainant,

vs.

Brad Bourn,

Respondent.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
EVIDENTIARY HEARING**

TO: Meg Forney, [Street Address Redacted], Minneapolis, MN 55416; and Brad Bourn, [Street Address Redacted], Minneapolis, MN 55408.

On Friday, November 6, 2009, Meg Forney filed a Campaign Complaint with the Office of Administrative Hearings alleging that Brad Bourn violated Minnesota Statutes §§ 211B.02 (false endorsement) and 211B.06 (false campaign material) in connection with his campaign for the Minneapolis Park and Recreation Board District 6 Commissioner seat. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a *prima facie* violation of Minn. Stat. § 211B.02 with respect to Respondent's statements on his campaign material that he had the endorsement of State Senator Scott Dibble and State House Representative Frank Hornstein. The other § 211B.02 allegation concerning Ted Wirth's endorsement and the § 211B.06 allegation are dismissed. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a prehearing conference and an evidentiary hearing, to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

Pursuant to Minn. Stat. § 211B.35, the evidentiary hearing must be held within 90 days of the date the complaint was filed.

You will be notified of the dates and times of both the prehearing conference and evidentiary hearing, and the three judges assigned to hear this matter, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law

Judges. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judges and the opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

Any party who needs an accommodation for a disability in order 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 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55101, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: November 10, 2009

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

MEMORANDUM

Complainant Meg Forney and Respondent Brad Bourn are both candidates for the Minneapolis Park and Recreation Board District 6 Commissioner seat. Because Minneapolis used Ranked Choice Voting for its local elections that took place on November 3, 2009, it is not certain as of today's date who won the election. However, the unofficial first round results indicate that Mr. Bourn received 4,016 votes and Ms. Forney received 3,038 votes.

Minn. Stat. § 211B.02 claims

The Complainant alleges in her complaint that Mr. Bourn violated Minn. Stat. § 211B.02 by falsely claiming in his campaign material that he had the endorsement of State Senator Scott Dibble and State House Representative Frank Hornstein. The Complainant has attached a copy of an email dated October 31, 2009, that was purportedly sent to Mr. Bourn from Senator Dibble and Representative Hornstein. In the email, Senator Dibble and Representative Hornstein thank Mr. Bourn for warning them about his campaign's error in listing them as having endorsed his candidacy. They also request that Mr. Bourn not list them as supporters of his candidacy in any future communications and they state that they remain neutral in this race.

The Complainant also alleges that Mr. Bourn falsely claimed endorsement by Ted Wirth. According to the Complainant, Mr. Wirth died well before the election and was of “questionable capacity” before his death. The Complainant suggests that Mr. Wirth did not have the capacity to give Mr. Bourn permission to publish his endorsement.

Minn. Stat. § 211B.02 prohibits candidates from stating in written campaign material that they have the support or endorsement of an individual without first getting written permission from the individual to do so.

For purposes of a *prima facie* determination, the Complainant must detail the factual basis to support a claim that the violation of law has occurred.¹ In reviewing the Complaint to determine whether it sets for a *prima facie* violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not “patently false” or “inherently incredible.”²

The Administrative Law Judge concludes that the complaint does allege sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.02 with respect to Respondent’s alleged false claims of endorsement by Senator Dibble and Representative Hornstein. This allegation will proceed to an evidentiary hearing.

The Administrative Law Judge finds that the Complainant has failed to allege sufficient facts to support a finding of *prima facie* violation with respect to Respondent’s claim of endorsement by Ted Wirth. It is not within this agency’s jurisdiction to determine the competency of an individual giving an endorsement. Without some evidence that Mr. Wirth did not in fact provide the Respondent written permission to state that he had Mr. Wirth’s endorsement, this claim cannot advance and must be dismissed.

Minn. Stat. § 211B.06 claim

The Complainant also alleges that the Respondent violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material. Specifically, the Complainant contends that Respondent’s reference in his campaign material to “my opponent” when he in fact had several opponents was confusing and designed to mislead voters. The Complainant attached a copy of Respondent’s campaign flyer in which the Respondent states the following:

I have always supported a positive, progressive vision for our parks. I want better park services for **all** people of Minneapolis. This seems only fair and reasonable, so I was surprised when my opponent decided inclusiveness is a bad thing:

¹ Minn. Stat. § 211B.32, subd. 3.

² See e.g., *Halverson v. Nelson*, OAH Docket NO. 4-6301-16282-CV; *Elzie v. Commissioner of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

“Brad is not a property owner . . . and [he] works in North Minneapolis and feels that they have it worse than us up there.”

While the Respondent does refer to “my opponent” in this campaign piece, he specifically attributes the above quote to candidate Steve Jecha and provides a link to Mr. Jecha’s campaign committee website.

Minnesota Statutes § 211B.06 is violated if a person: (1) intentionally participates in the preparation or dissemination of false campaign material with respect to the character or acts of a candidate; and (2) prepares or disseminates the material knowing that the item is false, or acting with reckless disregard as to whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact and not against unfavorable deductions or inferences based on fact.³ 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.⁴ 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.⁵

The Administrative Law Judge concludes that the Complainant in this matter has failed to allege sufficient facts to support a finding of *prima facie* violation of Minn. Stat. § 211B.06. Respondent’s references to “my opponent” is not a factually false statement particularly when he has attributed the quote at issue to a particular candidate. The Complainant also claimed that the Respondent referred to a singular opponent instead of plural opponents on his website. The Complainant failed to provide copies of Respondent’s website material to support this allegation. However, even if she had, a reference to a singular opponent instead of plural opponents would not be a factually false statement that could support a violation of § 211B.06. Accordingly, this allegation is dismissed.

The Complainant’s remaining allegation that the Respondent violated Minn. Stat. § 211B.02 with respect to statements he made that he had the endorsement of Senator Dibble and Representative Hornstein will proceed to an evidentiary hearing before a three-judge panel to be scheduled in the near future.

B.L.N.

³ *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).

⁴ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

⁵ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), *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);