

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Brad Bourn,

Complainant,

vs.

Margaret Forney,

Respondent.

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

**TO: Morgan Smith, Attorney at Law, Smith & Raver, LLP, 1313 5<sup>th</sup> Street SE, Minneapolis, 55416; Margaret Forney, 3201 Zenith Avenue South, Minneapolis, MN 55416.**

On December 14, 2009, Brad Bourn filed a Campaign Complaint with the Office of Administrative Hearings alleging that Margaret Forney violated Minnesota Statutes §§ 211B.02 (false endorsement) and 211B.06 (false campaign material) in connection with her 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 Complainant has put forth sufficient facts to support finding *prima facie* violations of Minn. Stat. § 211B.02 with respect to some of the claims, but that the Complaint fails to allege sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.06. 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.

The Complainant has requested that this matter be consolidated for hearing with a complaint previously filed by Ms. Forney against Mr. Bourn (OAH Docket No. 11-0325-20954-CV). You will be notified shortly whether or not the request for consolidation has been granted and informed of the dates and times of both the prehearing conference and evidentiary hearing, and the three judges assigned to hear this matter. 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](http://www.oah.state.mn.us) and [www.revisor.leg.state.mn.us](http://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: December 16, 2009

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

### **MEMORANDUM**

Complainant Brad Bourn and Respondent Meg Forney were both candidates for the Minneapolis Park and Recreation Board District 6 Commissioner seat in the November 3, 2009 election. Mr. Bourn won the election. He received approximately 48 percent of the vote and Ms. Forney received approximately 36 percent of the vote.<sup>1</sup>

#### **Minn. Stat. § 211B.02 claims**

The Complainant alleges in his complaint that Ms. Forney violated Minn. Stat. § 211B.02 by listing on her 2009 campaign website endorsements and letters of support from individuals and organizations that she obtained in 2005 when she ran unsuccessfully for a seat on the Minneapolis Park Board. According to the complaint, some of the endorsements listed on Ms. Forney's website included endorsements that

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<sup>1</sup> Minnesota Secretary of State's website election reporting system.

Mr. Bourn had in fact earned for the November 2009 election. The Complainant has attached copies of pages printed from Ms. Forney's website as it appeared in July 2009. One page is captioned: "Letters to the Editor in support of Meg Forney" and under the caption is a list of individuals that includes State Senator Scott Dibble, Representative Frank Hornstein, Representative Ron Erhardt, and others. In a sidebar on the same page is a list of "Meg's Endorsements," that includes the Star Tribune, DFL Feminist Caucus, Stonewall DFL and Minnesota Women's Political Caucus.<sup>2</sup>

According to the Complaint, on July 12, 2009, the chair of the Minneapolis DFL Party, Dan McConnell, requested that Ms. Forney remove the inaccurate information from her website. On July 15, 2009, Ms. Forney updated her website to include the date of the endorsements.<sup>3</sup>

The Complainant maintains that by knowingly listing endorsements on her campaign website without having obtained the individuals' written permission and by falsely implying she had the support of these individuals and organizations, Ms. Forney violated Minn. Stat. §§ 211B.02 and 211B.06.

The Complaint also alleges that, during a September 24, 2009, candidates' interview with the Star Tribune Editorial Board, Ms. Forney falsely stated in her closing remarks that she had the endorsement of Mayor R.T. Rybak, State Senator Scott Dibble and the Minneapolis Professional Employees Association (MPEA). The MPEA eventually endorsed both Ms. Forney and Mr. Bourn on September 25, 2009. The Complainant alleges that these claims of endorsement were false and that, by making these statements, Ms. Forney violated Minn. Stat. § 211B.02.

### **Standard of Review**

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.<sup>4</sup> In reviewing the Complaint to determine whether it states 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."<sup>5</sup>

### **Minn. Stat. § 211B.02 claims**

Minn. Stat. § 211B.02 provides as follows:

#### **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

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<sup>2</sup> Complaint Ex. 1C.

<sup>3</sup> Complaint Ex. 1E.

<sup>4</sup> Minn. Stat. § 211B.32, subd. 3.

<sup>5</sup> 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).

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.

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 and support listed on Ms. Forney's campaign website in July 2009. This allegation will proceed to an evidentiary hearing.

With respect to Ms. Forney's closing remarks made during the candidates' interviews with the Star Tribune Editorial Board, the Administrative Law Judge finds that Ms. Forney's alleged statement to the board that she had the support or endorsement of Mayor Rybak and Senator Dibble cannot form the basis of a Minn. Stat. § 211B.02 claim. The portion of § 211B.02 relating to false claims of endorsement by individuals only prohibits candidates from stating in *written campaign material* that they have the support or endorsement of an individual without first getting written permission to do so. Oral statements by a candidate that they have the support or endorsement of certain individuals therefore are not within the purview of Minn. Stat. § 211B.02. Consequently, this allegation is dismissed.

However, § 211B.02 more broadly prohibits false claims of endorsement by *organizations*, such as the MPEA. Minn. Stat. § 211B.02 specifies that candidates may not falsely state or imply that they have the endorsement of an organization without limiting this prohibition to written campaign material. Accordingly, the allegation concerning Ms. Forney's alleged statement to the Star Tribune Editorial Board that she had the endorsement of the MPEA will proceed to hearing.

### **Minn. Stat. § 211B.06 claim**

The Complainant alleges that by placing the list of 2005 endorsements on her campaign website in July 2009, Ms. Forney also violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material.

Minnesota Statutes § 211B.06 prohibits a person from intentionally preparing or disseminating false campaign material with respect to the character or acts of a candidate that the person knows is false or communicates to others with reckless disregard of whether it is false. The Minnesota Supreme Court has observed that this statute is "directed against the evil of making false statements of fact."<sup>6</sup> The statute does not prohibit inferences or implications, even if misleading.

The Administrative Law Judge concludes that the list of names that appeared on Ms. Forney's website under the captions "Letters to the Editor in support of Meg Forney" and "Meg's Endorsements" do not amount to false statements of fact concerning Ms. Forney's character or acts. The lists of names, without more, are not factually false.

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<sup>6</sup> *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

Presumably these people and organizations did endorse Ms. Forney in 2005. Although the lists give the false implication of current endorsement, implications do not come within the purview of Section 211B.06. Likewise, while it was misleading of Ms. Forney not to clarify that the endorsements were obtained during her 2005 campaign, her failure to do so did not render the lists of supporters factually false statements. At most the Complainant has identified misleading implications of current support, not misstatements of fact. The Administrative Law Judge concludes that this allegation is not sufficient to state a *prima facie* violation of Minn. Stat. § 211B.06, and it is therefore dismissed. The substance of the allegation, however, as explained above, will proceed as an alleged § 211B.02 violation.

The Complainant's allegations that the Respondent violated Minn. Stat. § 211B.02 with respect to endorsements listed on her website and the statement made at the Star Tribune Editorial Board regarding the MPEA endorsement will proceed to an evidentiary hearing before a three-judge panel to be scheduled in the near future.

**B.L.N.**