

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Douglas W. Erickson,

Complainant,

vs.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION**

David Fazio and Education Minnesota
Local 1406,

Respondents.

TO: Parties

On February 24, 2010, Douglas Erickson filed a Campaign Complaint with the Office of Administrative Hearings alleging that David Fazio and Education Minnesota Local 1406 violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material relating to Independent School District 2142's bond referendum election that occurred on December 8, 2009. 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.06 as against Education Minnesota Local 1406. However, the Complaint fails to allege a *prima facie* violation of Minn. Stat. § 211B.06 as against David Fazio and that allegation is 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 telephone 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: February 26, 2010

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

This Campaign Complaint concerns the December 8, 2009, special election on the St. Louis County School District's (ISD 2142) \$78 million bond referendum ballot question. The Complaint alleges that on or about December 3, 2009, representatives of the teachers' union (Education Minnesota Local 1403) prepared and disseminated false campaign material relating to the bond referendum election. Specifically, the Complainant alleges that an advertisement prepared and paid for by Education Minnesota Local 1406 that ran in the *Cook News Herald* on December 3, 2009, falsely stated that a vote in favor of the referendum was a vote in favor of lowering taxes.

The advertisement encouraged voters to vote in favor of the bond referendum and stated, in part, as follows:

SAVE OUR SCHOOLS!

Vote YES for lower taxes!

Vote YES for our schools!

Vote YES for our community!

Vote yes for the passing of the referendum

On December 8, 2009

A disclaimer at the bottom of the advertisement states that the ad was “paid for by EdMN Local 1406” and “designed by Rosa Goerd, Cherry School.”

The Complainant argues that, contrary to the statement in the advertisement, passage of the school bond referendum would increase residents’ property taxes, not lower them. In support of his claim, the Complainant attached to the Complaint a copy of the sample ballot prepared by the School District for the bond referendum question, which contained a notice in bold-face type stating: “By voting “Yes” on this ballot question, you are voting for a property tax increase.” The Complainant also attached a copy of the last page of an article discussing the bond referendum that ran in the *Cook News Herald* on December 3, 2009. The article states that if the bond referendum passed, taxpayers would pay about \$166 [more each year] per \$100,000 in taxable home value. The Complainant also points out that the School District explained in its own newsletters that passage of the referendum would result in an increase in taxes for residents. For all of these reasons, the Complainant contends that the statement “vote yes for lower taxes” is demonstrably false and that Respondents knew it was false. By preparing and disseminating the advertisement as written, the Complainant asserts the Respondents violated Minn. Stat. § 211B.06.

Minnesota Statutes § 211B.06, subd. 1, prohibits intentional participation:

... [i]n 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.

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.¹ 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.² 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.³

¹ *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).

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

³ *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);

To prove a violation at the hearing, the Complainant must show that the statement is substantively false and that the person or persons who prepared, disseminated or broadcasted the advertisement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.⁴ Based on this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.⁵

To allege a *prima facie* violation, the Complainant must allege sufficient facts to show that a violation of law has occurred.⁶ “Prima facie” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”⁷ “Prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”⁸ In determining whether a campaign complaint sets forth 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.

The Administrative Law Judge finds that the Complainant has alleged sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.06 as against Education Minnesota Local 1406. The teachers’ union is identified on the advertisement as having paid for the advertisement. The Complainant, however, has failed to allege a sufficient factual basis to support finding a *prima facie* violation of Minn. Stat. § 211B.06 on the part of David Fazio. The Complainant failed to identify the named individual Respondent and failed to detail what role he played in this matter. Because the Complaint fails to allege any facts to support an allegation that Mr. Fazio participated in the preparation or dissemination of the advertisement knowing it was false or with reckless disregard of its falsity, the Complaint as against him is dismissed.

The allegation against Education Minnesota Local 1406 will proceed to a prehearing conference and evidentiary hearing to be scheduled in the near future.

B.J.H.

⁴ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁵ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied* (Minn. 2006).

⁶ Minn. Stat. § 211B.32, subd. 3.

⁷ *Black’s Law Dictionary* 1228 (8th ed. 2004).

⁸ *Id.* at 598.