

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Elizabeth Sletten,		NOTICE OF DETERMINATION OF PRIMA FACIE VIOLATION AND NOTICE OF AND ORDER FOR PROBABLE CAUSE HEARING
vs.	Complainant,	
Marvin Koppen,		
	Respondent.	

TO: Parties

On June 13, 2011, Elizabeth Sletten filed a Campaign Complaint with the Office of Administrative Hearings alleging that Marvin Koppen violated Minnesota Statutes §§ 211B.02, 211B.06, 211B.07, 211B.17, 211B.32 and 211B.33 in connection with his campaign for Maplewood City Council. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a *prima facie* violation of Minnesota Statutes § 211 B.02.

THEREFORE, IT IS 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 **11:00 a.m. on Thursday, June 16, 2011**. The hearing will be held by call-in telephone conference. You must call: **1-888-742-5095** at that time. When the system asks for your numeric pass code, enter "**9892147284**" on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minnesota Statutes § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is 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 Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge Luis at Richard.Luis@state.mn.us or faxed to 651-361-7936.

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 Minnesota Statutes § 211B.35. 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 Minnesota Statutes § 211B.34, subdivision 3.

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 P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: June 14, 2011

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

MEMORANDUM

Complainant Elizabeth Sletten is a candidate in the August 9, 2011 primary election for Maplewood City Council. The Respondent, Marvin Koppen, is a current member of the Maplewood City Council and is seeking reelection. Mr. Koppen ran unsuccessfully for Mayor of Maplewood in 2009.

The Complaint alleges that Mr. Koppen has stated falsely in campaign material posted on his campaign website that he is running for both City Council and Mayor of Maplewood in the August 2011 primary. Specifically, two pages of the Respondent's campaign website include an image or graphic of a sign that states: "Elect Mary Koppen for Mayor of Maplewood. Labor Endorsed." In addition, on the page entitled "Volunteer for Marv," it states "help Marv get elected Mayor of Maplewood." The Respondent's campaign website also states that the Respondent has been endorsed by the Maplewood DFL and "Councilmember Julie Wasiluk," among others. Ms. Sletten points out that the Maplewood DFL has not yet held its endorsing convention and that Julie Wasiluk is a former, not a current, member of the Maplewood City Council. By posting this material, Ms. Sletten alleges that Mr. Koppen has violated Minn. Stat. § 211B.02 (false claim of endorsement), 211B.06 (false campaign material), 211B.07 (undue influence), 211B.17 (forfeiture of nomination or office), 211B.32 (complaints), and 211B.33 (prima facie review).

Standard of Review

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.¹ For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.² 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.³

Minnesota Statutes § 211 B.02 False Claim of Support.

Minnesota Statutes 211 B.02 provides, as follows:

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.

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 claim of endorsement by the Maplewood DFL. The statute prohibits a candidate from implying that he has the endorsement of a major political party or party unit. Although it appears that Mr. Koppen may have simply posted old material from his prior campaign for Mayor on his current campaign website for City Council, the listing of endorsements implies that he is currently endorsed by the Maplewood DFL. The Complainant has submitted information that indicates that the Maplewood DFL has not yet held its endorsing convention. This allegation will proceed to an evidentiary hearing. The statement "Labor Endorsed," however, is too vague to imply the endorsement from any particular labor group and the Complainant has not alleged that "Labor" has not endorsed the Respondent's candidacy. This allegation fails to allege a *prima facie* violation of Minn. Stat. § 211B.02 and is dismissed.

The Respondent's list of endorsements on his website also includes "Councilmember Julie Wasiluk." The Complainant does not allege that Ms. Wasiluk has not endorsed the Respondent in his current campaign for reelection to the City Council. Rather, she contends that identifying Ms. Wasiluk as a current Councilmember when she is a former Councilmember renders the endorsement false. The Administrative Law

¹ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

² *Id.*

³ *Id.*

Judge finds that this allegation does not support a *prima facie* violation of Minn. Stat. § 211B.02. 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. There is no allegation that Ms. Wasiluk has not endorsed the Respondent in his reelection bid. Incorrectly identifying Ms. Wasiluk as a current Councilmember is insufficient to form the basis of a § 211B.02 claim. This § 211B.02 allegation is dismissed.

Minnesota Statutes § 211B.06 False Campaign Material

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material with respect to the personal or political character or acts of a candidate. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false. Campaign material is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”⁴

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.⁵ It does not prohibit inferences or implications, even if misleading. 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.⁶

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*.⁷ 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

⁴ Minn. Stat. § 211B.01, subd. 2.

⁵ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

⁶ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

⁷ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.⁸

The Administrative Law Judge concludes that the statements “Elect Marv Koppen for Mayor of Maplewood” and “help get Marv elected Mayor of Maplewood,” as well as the incorrect identification of Ms. Wasiluk as a current Councilmember are not false statements of fact concerning any candidate’s character or acts (Mr. Koppen’s or any of his opponents’) and cannot form the basis of a § 211B.06 complaint. These allegations are dismissed.

Minnesota Statutes § 211B.07

Minnesota Statutes § 211B.07 prohibits undue influence on voters and provides as follows:

A person may not directly or indirectly use or threaten force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal, undue influence, or temporal or spiritual injury against an individual to compel the individual to vote for or against a candidate or ballot question. Abduction, duress, or fraud may not be used to obstruct or prevent the free exercise of the right to vote of a voter at a primary or election, or compel a voter to vote at a primary or election. Violation of this section is a gross misdemeanor.

To allege a *prima facie* violation of Minn. Stat. § 211 B.07, the Complainant must put forward facts that would support finding the Respondent used or threatened force, coercion, violence, restraint, damage, harm, loss, etc., to “compel” a person to vote for him. The Merriam Webster Dictionary defines “compel” to mean “to drive or urge forcefully or irresistibly;” or “to cause to do or occur by overwhelming pressure.”⁹ The Complainant has failed to allege any facts to support finding that the Respondent used or threatened force or undue influence to compel voters to vote for him. The Complainant alleges only that the Respondent incorrectly identified himself as running for Mayor and listed prior endorsements of groups and individuals. This behavior, even if true, is insufficient to support a *prima facie* violation of Minn. Stat. § 211B.07. The Administrative Law Judge concludes that the Complainant has failed to establish a *prima facie* violation of Minn. Stat. § 211B.07 and this claim is dismissed.

Minnesota Statutes § 211B.17

Minn. Stat. § 211B.17 provides that if a candidate is found guilty of violating chapter 211B, the court, after entering the adjudication of guilty, shall enter a supplemental judgment declaring that the candidate has forfeited the nomination or office. This provision applies only when a court has found the candidate “guilty” of violating this chapter. Although the provisions of chapter 211B provide for criminal

⁸ *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).

⁹ Merriam Webster Online Dictionary.

penalties, this current proceeding is an administrative process. A criminal conviction for violating a provision under chapter 211B may only be pursued by the appropriate county attorney after completion of the administrative process,¹⁰ and an adjudication of guilty may only be made by a district court. The Administrative Law Judge lacks the jurisdiction to find a party “guilty” of a criminal offense. Accordingly, this allegation is dismissed.

Minnesota Statutes §§ 211B.32 and 211B.34

Minnesota Statutes § 211B.31 through 211B.37 govern the campaign complaint process. The Complainant has not explained in what manner the complaint process has been violated. Minnesota Statutes § 211B.32 governs the filing of the complaint with the Office of Administrative Hearings and 211B.34 governs the probable cause hearing. These are procedural statutory provisions and not provisions that when violated would form the basis of a campaign complaint. These allegations are dismissed.

In summary, only the Complainant’s allegation that the Respondent falsely claimed he has the endorsement of Maplewood DFL will proceed to a probable cause hearing as ordered.

R.C.L.

¹⁰ Minn. Stat. § 211B.35, subd. 2.