

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Tim Lynch,

Complainant,

vs.

Paul Neumann,

Respondent.

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

TO: Tim Lynch, [Street Address Redacted], Mayer, MN 55360; and Paul Neumann, [Street Address Redacted], Waconia, MN 55387.

On January 2, 2009, Tim Lynch filed a Complaint with the Office of Administrative Hearings alleging that Paul Neumann violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material concerning the November 2008 District 4 Carver County Commissioner election.

Following a review of the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the Complaint sets forth *prima facie* violations of Minnesota Statutes § 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.

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: January 7, 2009

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Complainant Tim Lynch and Respondent Paul Neumann were both candidates for Carver County Commissioner District 4 in the November 2008 election. The Complainant was the incumbent candidate and he won re-election by approximately 52 percent of the vote. The Respondent received approximately 48 percent of the vote.¹

The Complaint alleges that on or about October 30, 2008, the Respondent prepared and disseminated a campaign flyer that contained two false statements of fact that the Respondent either knew were false or communicated with reckless disregard as to whether they were false.

The two statements on the flyer that Complainant alleges are false are:

Lynch voted **“Yes” to every tax hike** budgeted since elected, even this year’s proposed 8.9% tax hike for 2009.²

Lynch voted **“Yes” to spend 2 ½ million** to buy and even **have the county run a Waconia dance hall & bar.**³

¹ Minnesota Secretary of State’s website.

² Emphasis in original.

³ Emphasis in original.

The Complainant maintains that the first statement is false because he has on several occasions voted against tax hikes since being elected in November 2004. In support of this claim, the Complainant has attached to the Complaint copies of minutes from various Carver County Commissioner proceedings that reflect votes cast by him against resolutions that would have increased taxes.⁴ For example, on September 12, 2006, the Complainant voted against a Resolution approving the Carver County Community Development Agency's 2007 proposed budget which included a levy of \$1,801,500 for taxes payable in 2007. The resolution was approved by a vote of three to two.⁵

The Complainant argues that the second statement is also false because he never voted to allow the County to "run a Waconia dance hall and bar." Instead, the Complainant asserts that the County Commissioners voted only on a resolution to buy the ballroom and property with the understanding that the current provider would be allowed to operate the ballroom through March 2009, and that thereafter county staff would solicit proposals for management of the building from private service providers. According to the Complaint, this land acquisition was part of a plan to expand the Lake Waconia Regional Park. The Complainant has attached a copy of the minutes of the June 24, 2008, Carver County Commissioners Proceedings reflecting this vote, and a local newspaper article from August 2008 explaining the County's plans for the lakeside ballroom.⁶

Minn. Stat. § 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.

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of specific facts.⁷

⁴ Attachments B-F of Complaint.

⁵ Attachment B of Complaint.

⁶ Attachments G and H of Complaint.

⁷ 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).

The statute does not bar criticism that is merely unfair or unjust.⁸ The statute is not intended to prevent criticism of candidates for office, or to prevent unfavorable deductions or inferences from a candidate's conduct; even if those conclusions might be misleading or incomplete.⁹ Likewise, 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.¹⁰

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.¹¹ Based upon this standard, the Complainant has the burden at an evidentiary hearing to show 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 campaign material or acted "with a high degree of awareness" of its probable falsity.¹²

The Administrative Law Judge concludes that the Complainant has alleged sufficient facts, and provided sufficient evidence, to state a violation of Minnesota Statutes § 211B.06 with respect to the two identified statements. Therefore, this matter will be referred to the Chief Administrative Law Judge for assignment of a three-judge panel.

S.M.M.

⁸ *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which "told only one side of the story," or were merely "unfair" or "unjust," without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

⁹ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

¹⁰ *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)). See also, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); ; *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).

¹¹ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹² *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).