

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Gary F. Menne,

Complainant,

vs.

Ted Phillips,

Respondent.

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

**TO: Gary F. Menne, 5311 264<sup>th</sup> St., Wyoming, MN 55092; and Ted Phillips, 5900 259<sup>th</sup> Street, Wyoming, MN 55092.**

On November 20, 2006, Gary Menne filed a Complaint with the Office of Administrative Hearings alleging that Ted Phillips violated Minnesota Statutes §§ 211B.02 (false claim of support), 211B.04 (improper disclaimer), 211B.06 (false campaign material) and 211B.07 (undue influence on voters). After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint only sets forth a prima facie violation of Minnesota Statutes § 211B.07.

**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, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota 55401, before three Administrative Law Judges. The evidentiary hearing must be held within 90 days of the date the complaint was filed, pursuant to Minnesota Statutes § 211B.35. You will be notified of the date and time of the evidentiary hearing, and the three judges assigned to it, 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](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 or proceed on their own behalf without counsel. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judge and opposing party.

At the conclusion of the evidentiary hearing, the Administrative Law Judges will choose to: (1) dismiss the complaint, (2) issue a reprimand, (3) find a violation of 211B.06, and/or (4) 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 Minnesota Statutes §§ 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 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401, or call 612/341-7610 (voice) or 612/341-7346 (TTY).

Dated: November 27, 2006

/s/ Eric L. Lipman  
ERIC L. LIPMAN  
Administrative Law Judge

### MEMORANDUM

Mr. Menne ran successfully as a candidate for the Wyoming City Council in the General Election on November 7, 2006. Mr. Phillips was an incumbent candidate for Wyoming City Council and was not re-elected. The Complaint concerns three flyers that Mr. Menne alleges were prepared and distributed by Mr. Phillips prior to the General Election. According to the Complaint, flyers 1 and 3 were placed in the newspaper boxes of a majority of the citizens of Wyoming, and flyer 2 was placed in the newspaper boxes of persons who had lawn signs in support of Mr. Menne. The Complaint alleges that by preparing and disseminating these flyers, Mr. Phillips violated Minnesota Statutes §§ 211B.02, 211B.04, 211B.06 and 211B.07.

#### Minnesota Statutes § 211B.02

Flyer 1 states as follows:

Re-Elect

*Sheldon*

Anderson

*Ted*

Phillips

*Joe*

Zerwas

For Wyoming City Council

The Complaint alleges that Flyer 1 violates Minnesota Statutes § 211B.02 by falsely implying that Mr. Phillips had the support of the other candidates listed on the

flyer. According to the Complaint, Mr. Phillips did not have written or oral consent from either Sheldon Anderson or Joe Zerwas to include their names on the flyer.

Minnesota Statutes § 211B.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.

This statute has two components – standards relating to claims of support from organizations and standards relating to claims of support from individuals. The first sentence of this statute prohibits a candidate from falsely stating or implying that he or she has the endorsement or support of a “major political party or party unit or of an organization.” The second sentence prohibits a candidate from “stating in written campaign material” that he or she has the “support or endorsement of an individual without first getting permission from the individual to do so.” The distinction in the two standards is important in this case. While the statute does prohibit false implications of organizational support or endorsement, the Legislature has not prohibited false implications of individual support or endorsement.

Likewise important, Minnesota Statutes § 211B.02 is a criminal statute, violation of which is a misdemeanor.<sup>1</sup> Therefore, the rule of strict construction of penal statutes must be applied, notwithstanding the civil nature of these proceedings, before the Administrative Law Judge.<sup>2</sup>

Applying the law to the facts in this case, Flyer 1 does not state that Ted Phillips has the support or endorsement of the other candidates. By grouping his name with the other candidates, the flyer may *imply* that Phillips has their support, but a false implication of individual support is not sufficient to show a violation of section 211B.02.<sup>3</sup> The Administrative Law Judge concludes that the Complaint fails to allege a prima facie violation of Minnesota Statutes § 211B.02, and this allegation is dismissed.

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<sup>1</sup> Minn. Stat. § 211B.19 provides that a violation of chapter 211B for which no other penalty is provided is a misdemeanor.

<sup>2</sup> *In the Matter of the Contest of General Election [Graves v. Meland]*, 264 N.W.2d 401, 403 (Minn. 1978).

<sup>3</sup> See, *Anderson v. Hauser for 8th Ward Volunteer Committee*, OAH Docket No. 11-6326-16855-CV (2005) (statement in candidate Hauser’s literature that a certain collection of candidates was “Your 8th Ward Team,” did not state that the other listed candidates were supporting Hauser’s bid for office, or result in a false claim of support) (<http://www.oah.state.mn.us/aljBase/632616855.DISM.OR.htm>); accord, *Tyler v. Lee*, OAH Docket No. 15-6326-16963-CV (2005) (characterization in campaign literature that certain candidates for local offices were “the very best candidates for North Minneapolis” does not state cross-endorsements among the listed candidates, or a violation of section 211B.02) (<http://www.oah.state.mn.us/aljBase/632616963.DISM.OR.htm>).

## **Minnesota Statutes § 211B.04**

The Complaint alleges that Mr. Phillips violated Minnesota Statutes § 211B.04 by failing to include a disclaimer on any of the three campaign flyers. Minnesota Statutes § 211B.04 requires most campaign material to include a disclaimer substantially in the form provided in subdivision (b).

However, earlier this year, the Minnesota Court of Appeals ruled that the disclaimer requirement of Minnesota Statutes § 211B.04 violates the First Amendment of the U.S. Constitution.<sup>4</sup> The Court of Appeals held that the disclaimer requirement directly regulated the content of pure speech and that there was no way to narrowly construe the statute so as to avoid this constitutional violation. Because the Minnesota Court of Appeals has determined that Minnesota Statutes § 211B.04 is unconstitutional on its face, and therefore unenforceable, Mr. Menne's allegation that Mr. Phillips violated this statute is dismissed.

## **Minnesota Statutes § 211B.06**

Flyers 2 and 3 are similar. They both have the heading "THE MANY FACTS ABOUT GARY MENNE" and they both list the same three facts. The three facts listed on each flyer state as follows:

Fact #1 – Mr. Menne for three years has NOT paid his water/sewer bill with the City of Wyoming and now owes over \$2900.00 to US. Question – Is this the type of person YOU want running OUR city? Someone that feels he is above the rest of US.

Fact #2 – Mr. Menne has his property newly list [sic] with Welsh Properties for sale. Question? – Doesn't this show he has NO commitment to the CITIZEN'S [sic] of Wyoming for which he is supposed to support?

Fact #3 – Attached you will see Mr. Menne's issue's [sic] when it comes to doing business as a person in Wyoming. He has many judgments against him, which will tell you that we ALL may have to pay the price for his poor decisions he makes while on council.<sup>5</sup>

Attached to both Flyers 2 and 3 are lists of judgments, liens, lawsuits, and UCC filings involving Mr. Menne, his company, Gary F. Menne & Sons Inc., and a Linda M. Menne.

The Complainant alleges that the attachments render the campaign material false for the following reasons: (1) Mr. Phillips implies that the UCC filings are judgments against Mr. Menne when they are in fact filings for bank loans; (2) Mr. Phillips implies that all of the judgments listed are judgments against Mr. Menne or his company, when some of the judgments listed are judgments Mr. Menne's company obtained against others; (3) the judgments do not include dates that would demonstrate that they cover a long span of time; and (4) by listing the IRS lien against a "Linda M.

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<sup>4</sup> *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.) *review denied* (Minn. 2006).

<sup>5</sup> Emphasis in original.

Menne,” Mr. Phillips has suggested that the IRS has a lien against Mr. Menne’s wife when it does not. Mr. Menne’s wife’s name is Linda Lou Annette Menne, not Linda M. Menne. For all of these reasons, Mr. Menne argues that the flyers and attachments are false campaign material and that Mr. Phillips has violated Minnesota Statutes § 211B.06 by disseminating the material.

Section 211B.06 prohibits a person from intentionally preparing or disseminating false campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false. The Minnesota Supreme Court observed that the statute is directed against the evil of making false statements of fact and not against unfavorable deductions, or inferences based on fact – even if the inferences are “extreme and illogical.”<sup>6</sup> The Court pointed out that the public is protected from such extreme and illogical inferences by the ability of other speakers to rebut these claims during the campaign process.<sup>7</sup> In addition, 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.<sup>8</sup>

In this case, the Complaint argues that by attaching the lists of judgments, lawsuits, liens, and UCC filings to the flyers, Mr. Phillips is falsely claiming that Mr. Menne has more judgments against him than he actually does, and that Mr. Menne’s wife has an IRS lien against her. However, the information contained in the lists of creditors is not demonstrably false. Rather, Mr. Menne charges that Mr. Phillips’ literature creates a false impression because it does not include other information about the filings or a more complete context for the items that are listed.

As the Minnesota Supreme Court noted in *Kennedy v. Voss*, this is not enough to state a violation. In *Kennedy*, the defeated incumbent complained that his rival, citing the incumbent’s vote on the County budget, falsely claimed in campaign literature that the incumbent did not support programs for the elderly. The incumbent argued that other votes, not cited in the opponent’s literature, would lead to a different conclusion. The court held that a complaint which states that an opponent’s literature is incomplete, or makes inappropriate inferences from accurately stated facts, does not state a violation of the false campaign literature statute.<sup>9</sup>

At most, Mr. Menne has identified misleading implications from the lists of creditor filings – not misstatements of fact. Accordingly, even if the implications that Mr.

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

<sup>7</sup> *Id.*

<sup>8</sup> *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).

<sup>9</sup> *Kennedy v. Voss*, 304 N.W.2d at 300; *accord, Bundie v. Christensen*, 276 N.W.2d 69, 71 (Minn. A979) (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).

Phillips has drawn from the information are untrue, this would not support finding a prima facie violation of Minnesota Statutes § 211B.06. These allegations are dismissed.

### **Minnesota Statutes § 211B.07**

Finally, Mr. Menne alleges that Mr. Phillips violated Minnesota Statutes § 211B.07 with respect to Flyer 2. According to the Complaint, this flyer was placed in the newspaper boxes of Wyoming residents who had posted lawn signs in their yard in support of Mr. Menne. Flyer 2 differs from Flyer 3 only in the final paragraph following the three fact items. The final paragraph of Flyer 2 states as follows:

NOW you have a choice – Take down the sign in your yard and tell your neighbors that you NO longer support Mr. Menne for the facts listed above. The only way to avoid Mr. Menne getting into office is to vote for the incumbents – ANDERSON – PHILLIPS – ZERWAS. If you don't remove the sign and still believe in Mr. Menne than you must believe in cheating the rest of US in the city and that will not go unnoticed in the future. THANK YOU.<sup>10</sup>

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.

Flyer 2 states that if the recipients do not remove their lawn signs, and withdraw their support for Mr. Menne's bid for office, it will be interpreted to mean that these Wyoming residents "believe in cheating the rest of us in the city and *that will not go unnoticed in the future.*" Construing all of the facts in favor of Mr. Menne,<sup>11</sup> and noting that Mr. Phillips is a sitting City Council member, the Complaint states a sufficient claim that voters were impliedly threatened with harm if they supported Mr. Menne's candidacy.

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<sup>10</sup> Emphasis in the original. The last paragraph in Flyer 3 stated only: "NOW you have a choice – This Tuesday go to the polls and vote for the incumbents – Anderson – Phillips – Zerwas – for your Wyoming city council."

<sup>11</sup> Tribunals in Minnesota are obliged to "construe pleadings liberally in favor of the pleader and judge them by their substance not their form." See, *Basich v. Board of Pardons*, 493 N.W.2d 293, 295 (Minn. App. 1992).

Therefore, this allegation will proceed to an evidentiary hearing before a panel of three Administrative Law Judges.

E.L.L.