

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Mike Trepanier,

Complainant,

**FINDINGS OF FACT,
CONCLUSIONS AND ORDER**

v.

John Audette,

Respondent.

The above-entitled matter came on for an evidentiary hearing on November 18, 2004 before a panel of three Administrative Law Judges: Richard C. Luis (Presiding Judge), Assistant Chief Administrative Law Judge Bruce H. Johnson and John A. Ellefson^[1]. The hearing record closed on November 18, 2004.

Mike Trepanier (Complainant) was represented by Attorney Steven E. Antolak, P. O. Box 43664, Brooklyn Park MN 55443-0664.

John Audette (Respondent) 9231 Queens Garden, Brooklyn Park MN 55443, appeared on his own behalf.

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this Order is the final decision in the case. Any party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

ISSUES

1. Whether clear and convincing evidence establishes that the Respondent violated Minn. Stat. § 211B.06 by knowingly or with reckless disregard of the truth preparing and disseminating campaign material about the Complainant that was false?

The Administrative Law Judges find that there is clear and convincing evidence that the Respondent violated Minn. Stat. § 211B.06, subd. 1 by preparing and disseminating campaign material that was false and that the Respondent knew was false or prepared and disseminated with reckless disregard for whether it was false with respect to the Complainant's service record on the Brooklyn Park City Council.

2. What sanction, if any, is appropriate?

The Administrative Law Judges find that it is appropriate to impose a civil penalty of \$300.00.

Based upon the record, the Administrative Law Judges make the following:

FINDINGS OF FACT

1. On October 26, 2004, John Audette (Respondent) distributed approximately 1,000 campaign flyers to houses in the eighth and ninth precincts of the Central Ward of Brooklyn Park. The flyer, approximately the size of a large postcard, is campaign material that makes negative statements and inferences regarding City Council candidate Mike Trepanier (Complainant) and urges the reader to vote for Trepanier's opponent, Rand Haglund. One side is a colorful display of small bits of factual information, presented in separate boxes to resemble newspaper headlines. The reverse is a three-paragraph text, bordered by large lettering that reads "Trepanier is hoping you will forget" on top and "Don't forget – Vote for Rand Haglund" across the bottom. Certain statements in the text and certain of the "headlines" represented on the other side of the flyer form the subject matter of this Complaint.

2. One of the headlines reads "**State Auditor's Investigation: Brooklyn Park, MN** – Three incumbents do not seek re-election; Mike Trepanier resigns from City Council,". Trepanier concedes that the three individual statements are true, but contends they are unrelated to each other and that assembling them in a fake headline form converts them to a single statement. He argues that the overall effect is grossly misleading and intended to damage his reputation and standing in the community.

3. On the reverse side of the flyer, the text reads, in part, that

"Under Mike Trepanier's watch, the City budget exploded and spending was so out of control that the State Auditor investigated the City's spending with an extensive audit. The results were devastating. Things were so bad that the City Mayor and two other council members did not seek re-election and Trepanier quit just three months after being re-elected to his 3rd term."

It is true that (1) State Auditors did investigate, (2) three incumbents did not seek re-election, and (3) Trepanier resigned, but Trepanier's resignation had nothing to do with the audit. Mr. Trepanier started his service on the Council in 1996. His resignation letter of May 25, 2001 indicates he resigned after receiving advice from the Public Employee Retirement Association (PERA) that service on the Council would impact negatively on his retirement benefits. The decisions of a former Mayor and a former City Council person not to seek re-election also had nothing to do with the audit.^[2]

4. With regard to the State Auditor's investigation and its implications, the Respondent's stated intent was not to suggest that Trepanier resigned because of the investigation, but to convey the message that when Brooklyn Park most needed elected leaders, the elected leaders chose to quit.

5. The flyer also contains a purported headline stating “Trepanier Votes for Maximum Tax Levy; results in double digit increase.” Mr. Trepanier submitted evidence that none of the five budgets he voted on between 1996 and 2000 had a double digit increase in either the levy rate or the actual tax revenue, by providing data taken from Brooklyn Park’s Annual Financial Report establishing that there was no percentage tax increase in those years higher than 7.2%. This data was presented in the pages appended to Mr. Trepanier’s Complaint Form, filed October 28, 2004.

Mr. Audette provided a document establishing that in December of 1998, Trepanier voted to approve a budget certifying the 1999 tax levy at the maximum. He also provided evidence that property taxes, which include levies from school districts, the City, and other taxing authorities, had a double digit increase in 1998. Audette had this data in hand when he prepared the flyer.^[3] But in assembling the “headline,” Audette mistakenly connects Trepanier’s vote with the double-digit increase that actually occurred before the vote for the maximum tax levy for 1999.

6. As a member of the City Council, Mr. Trepanier has voted for maximum tax levies for the City. Greg Andrews, Finance Director for the City of Brooklyn Park, established that a vote for a maximum levy will not, by itself, result in a tax increase because a levy represents only the maximum amount the City is authorized to charge its taxpayers. Andrews has advised the Council to vote for a maximum levy authorization, to allow assessments to grow to a level necessary to help fund City services.

Audette combined two unrelated statements and linked them in a purported headline to suggest that Trepanier’s action in voting on the levy rate actually resulted in a double-digit tax increase. Mr. Audette mistakenly believed that a vote to increase the City’s maximum tax levy was the determining factor that resulted in a local tax increase for residents of the City. A number of other factors and authorities with the power to tax actually affect the local property tax bills for homeowners in Brooklyn Park.

7. One statement in the text of the flyer is that “[h]e (Trepanier) wants you to forget that he raised taxes on you every year he was in office,”. Trepanier voted for a maximum tax levy at least once. As found earlier, a vote to raise tax levies is not an action that, by itself, raises taxes. Many other factors affect whether a homeowner’s property taxes go up or down.

Trepanier maintains that the statement in the flyer is not true, and has provided data to show that the levy rates declined from 1996 to 1997, from 1997 to 1998 and from 1999 to 2000.

Audette’s Exhibit A may establish that property taxes in Brooklyn Park increased every year during Trepanier’s tenure, but that evidence ignores that property taxes are composed of levies of multiple taxing authorities, not just the City. The statement that Trepanier raised taxes every year he was in office, implying that he had the singular power to raise taxes by virtue of his vote, is false.

8. Another statement in the printed text of the flyer reads “[h]e (Trepanier) wants you to forget that while he was in office, Brooklyn Park became the 2nd highest

taxed City in the state and crime was out of control!" Trepanier, through the testimony of Greg Andrews, has established that Brooklyn Park has never been the second highest taxed city in the state. It was for some period of time ranked second in expenditures only among cities in the metro area with population between 50,000 and 100,000.^[4] The data establishing that ranking relates to per capita city expenditures, not tax revenues or the portion of property taxes to homeowners over which the City has control.

Only the allegation that Brooklyn Park became the second highest taxed city in the state while Trepanier was in office is at issue.^[5]

9. It is clear from examination of Respondent's Exhibit G that Brooklyn Park was or is the second highest city with respect to expenditures, but only within a class of cities consisting of those in the Twin Cities metropolitan area between 50,000 and 100,000 in population. The record contains no documentation to establish that Brooklyn Park was ever the second highest taxed city in the entire state.

10. The Respondent objected to the introduction of Complainant's Exhibits 9-12 and 14-16. The documents are six affidavits and one printed e-mail, either commenting on the statements made in the flyer distributed by Mr. Audette or representing that the flyer influenced the declarants to vote against Mr. Trepanier. The objections are SUSTAINED. Mr. Audette is correct in his objection that he has had no opportunity to cross examine the people making the statements. The Administrative Law Judges have not considered the Exhibits in making this Decision. The probative value of the facts stated in the Affidavits is outweighed by the prejudicial effect of not providing an opportunity for the Respondent to test the credibility of the allegations through the process of cross examination. Although the documents are NOT ADMITTED to the record, Exhibits 9-12 and 14-16 have been placed under seal and may be accessed by a reviewing court if our evidentiary Decision is overturned.

11. The Administrative Law Judges take Official Notice that Mr. Trepanier defeated Rand Haglund for Brooklyn Park City Council (Central Ward) by 5,315 to 3,010. The Respondent's flyers were distributed only in Precincts 8 and 9. The vote in Precinct 8 was 786-388 and in Precinct 9 it was 613-383, both for Trepanier. Both the entire ward and the two precincts combined recorded Trepanier as winning with 64% of the vote. The Administrative Law Judges consulted the Secretary of State's website for this data after Mr. Audette argued that the flyers actually helped Trepanier rather than hurt him.

12. The Memorandum that follows explains the reasons for these Findings of Fact, and to the extent that the Memorandum may contain additional findings of fact, including findings on credibility, the Administrative Law Judges incorporate them into these Findings.

13. The Administrative Law Judges adopt as Findings any Conclusions that are more appropriately described as Findings.

Based on the above Findings of Fact, the Administrative Law Judges make the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.01, subd. 2, amended in 2004, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing the voting at a primary or other election, ...”

3. The color flyer that the Respondent delivered to approximately 1,000 households in Precincts 8 and 9 of the Central Ward of Brooklyn Park is campaign material within the meaning of that statute.

4. Minn. Stat. § 211B.06, subd. 1, provides in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation [or] dissemination...of campaign material with respect to the personal or political character or acts of a candidate...that is designed or tends to elect, injure, promote, or defeat a candidate for...election to a public office..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

5. The burden of proving the allegations in this Complaint is on the Complainant. The standard of proof for a violation of Minn. Stat. § 211B.06, relating to false campaign material is proof by clear and convincing evidence.^[6] The Complainant has proven by clear and convincing evidence that John Audette violated Minn. Stat. § 211B.06, subd. 1 by preparing and disseminating a piece of campaign material that contained three false statements about Candidate Mike Trepanier. With respect to those statements, the evidence is clear and convincing that Mr. Audette either knew the statements were false or communicated them with reckless disregard of whether they were false.

6. The Complainant has not proven by clear and convincing evidence that the false statement, styled as a “headline” in Mr. Audette’s flyer “Trepanier Votes for Maximum Tax Levy; Results in Double Digit Increase,” was prepared or disseminated with knowledge that it was false or with reckless disregard for whether or not it was false.

7. It is appropriate to assess a civil penalty of \$300.00 against John Audette for his violations of Minn. Stat. § 211B.06, subd. 1.

8. The Administrative Law Judges adopt as Conclusions any Findings that are more appropriately described as Conclusions.

9. The Memorandum that follows explains reasons for these Conclusions, and the Administrative Law Judges therefore incorporate that Memorandum into these Conclusions.

Based on the Conclusions above, and for the reasons stated in the Memorandum that follows, the Administrative Law Judges make the following:

ORDER

IT IS ORDERED that John Audette is assessed a civil penalty of \$300.00, to be paid within 30 days by check to the Office of Administrative Hearings; and

IT IS ORDERED FURTHER that this Order is stayed 30 days to allow time for appeal.

Dated this 24th day of November, 2004

 /s/ Richard C. Luis _____
RICHARD C. LUIS
Administrative Law Judge, Presiding

 /s/ Bruce H. Johnson _____
BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

 /s/ John A. Ellefson by R.C.L. _____
JOHN A. ELLEFSON
Compensation Judge

Reported: Taped.
Two tapes. No transcript.

MEMORANDUM

The Administrative Law Judges have considered separately each of the four portions of Mr. Audette's flyer for which Judge Sheehy found probable cause to believe Mr. Audette had violated Minn. Stat. § 211B.06 by making knowingly false statements in campaign material in her Order Finding Probable Cause issued November 3, 2004.

In the first instance, Judge Sheehy found probable cause regarding the "headline" which states "**State Auditor's Investigation; Brooklyn Park, MN**-Three Incumbents do not seek re-election; Mike Trepanier resigns from City Council." On the back of the flyer, Audette states:

"Under Mike Trepanier's watch, the City budget exploded and spending was so out of control that the State Auditor investigated the City's spending with an extensive audit. The results were devastating. Things were so bad that the sitting Mayor and two other council members did not seek reelection and Trepanier quit just 3 months after being elected to his 3rd term."

These statements must be viewed as a single statement. We conclude that the statement falsely states that Mr. Trepanier resigned from the City Council as a result of

an investigation by the State Auditor. We agree with Judge Sheehy – the three individual statements are true but they are unrelated to each other. Assembling them in a fake headline and reading that “headline” together with the passage quoted above from the back of the flyer created a false statement that was intended to damage Trepanier’s reputation and standing in the community. With respect to this “headline”, the Complainant has proven by clear and convincing evidence that Mr. Audette has prepared and disseminated a piece of campaign material that is false and that Mr. Audette knew was false, in violation of Minn. Stat. § 211B.06, subd. 1. The Judges do not find credible Mr. Audette’s argument that his intent in producing this headline was to convey the message that when Brooklyn Park most needed elected leaders, the elected leaders chose to quit.

The next statement for which Judge Sheehy found probable cause is that “Trepanier Votes for Maximum Tax Levy; Results in Double Digit Increase,”. This “headline” is also false. Trepanier has established that none of the five budgets he voted on between 1996 and 2000 had a double digit increase in either the levy rate or in actual tax revenue. The City’s Certified Annual Financial Reports, paraphrased in the addendum to Mr. Trepanier’s Complaint, established that there was no percentage tax increase in those years higher than 7.2%.

In response, Mr. Audette provided evidence that property taxes, which include levies from the school district, the county, the City and other taxing authorities, had a double digit increase in 1998.^[7] Based on that data, Mr. Audette placed together two unrelated statements in a “headline” suggesting that Trepanier’s action in voting on the levy rate resulted in a double digit tax increase. The testimony of the City’s Finance Director, Greg Andrews, establishes clearly that the City’s levy is but one piece of the property tax bill received by homeowners in Brooklyn Park. The impression made by the “headline” that Trepanier’s vote for a maximum tax levy resulted in a double digit tax increase is false.

The Administrative Law Judges conclude that the “headline” under consideration is a false statement with respect to the acts of Mr. Trepanier that is designed or tends to injure his candidacy or election to public office, that the statement was prepared intentionally by Mr. Audette, but that Mr. Audette did not communicate it to others with knowledge it was false or with reckless disregard of whether it was false. We are persuaded that Mr. Audette did not know that a vote to increase Brooklyn Park’s maximum tax levy will not result, by itself, in an increase in a homeowner’s tax bill. Mr. Audette relied on Respondent’s Exhibit B, which shows an increase in total property taxes of 110.15% in 1998, over the amount of property taxes for 1997. Audette’s Exhibit A shows that Trepanier voted on December 21, 1998 to certify the City’s 1999 tax levy at the maximum. On their face, Exhibits B and A, taken together, fail to show that Mr. Trepanier’s vote was related to the increase in taxes between 1997 and 1998, because the vote recorded on Exhibit A relates to the levy for 1999. The falsity of Mr. Audette’s “headline” suggesting that Trepanier’s vote for a maximum tax levy resulted in a double digit tax increase comes from the disconnect between the date of Trepanier’s vote, as shown on Exhibit A and the part of Exhibit B that shows the vote on December 21, 1998 came after anything that would account for the double-digit increase in property taxes between 1997 and 1998.

The Administrative Law Judges conclude that the Statement “Trepanier Votes for Maximum Tax Levy; Results in Double Digit Increase,” is one that Mr. Audette did not know was false, and that he did not make it with reckless disregard of whether it was false. We are persuaded he simply misinterpreted the data before him and did not violate Minn. Stat. § 216B.06, subd. 1. Our impression of Mr. Audette is that he was unsophisticated on matters of municipal finance, and that he simply missed the discrepancy between the dates of Trepanier’s vote and the double-digit rise in property taxes.

Regarding the statement in the text that “[h]e wants you to forget that he raised taxes on you every year he was in office,” the Administrative Law Judges conclude that the Complainant has established by clear and convincing evidence that Mr. Audette knew the statement was false and that he communicated it to others with reckless disregard of whether it was false. The third line of Respondent’s Exhibit B shows that property taxes in Brooklyn Park increased every year between 1995 and 2002. The taxes therefore increased every year Mr. Trepanier was in office (between the fall of 1996 and August, 2001). From this, Mr. Audette states the simplistic conclusion in the flyer that because Mr. Trepanier was on the City Council during years when total property taxes rose in Brooklyn Park that Mr. Trepanier was responsible for those increases.

But a city resident’s total property tax bill is made up of taxes levied by the city, county, and school district(s). And the evidence established that the City’s portion of property taxes did not experience increases during every year of the period in question.

Mr. Audette may be unsophisticated about the intricacies of municipal finance, but we believe he knew the City’s portion of the property taxes did not rise every year and was aware that Mr. Trepanier, with his lone vote on the Council, did not cause taxes to rise. That Trepanier alone did cause such an increase is what the statement clearly says. The Judges conclude that the evidence is clear and convincing that Mr. Audette knew the statement was false or was communicated to others with a reckless disregard of whether it was false. We conclude that in this instance Mr. Audette violated Minn. Stat. § 211B.06, subd. 1.

As to the statement in the text that “[h]e wants you to forget that while he was in office, Brooklyn Park became the 2nd highest taxed city in the state...”, we have concluded that the evidence is clear and convincing that the statement is false, and that Mr. Audette made the statement with reckless disregard of whether it was false.

Audette has provided evidence that he obtained his information for making the statement from watching televised City Council meetings and also that he recalled the same information being published in newspapers and magazines. However, the evidence shows that the only category for which Brooklyn Park is ranked second for the period involved is for expenditures, not tax revenues for cities in the metropolitan area having populations between 50,000 and 100,000. There is nothing in the documentary evidence to show that Brooklyn Park’s taxes were ever the second highest of all the cities in the state. Mr. Audette’s reckless disregard in this instance violates Minn. Stat. § 211B.06, subd. 1.

We conclude that a penalty of \$300.00 is sufficient in this instance. For the three instances detailed above where we concluded that the statute was violated, we believe that Mr. Audette's actions in preparing and distributing his flyer were ill-considered and negligent to the point of demonstrating reckless disregard for the truth or falsehood of the allegations made. However, the severity of the violations is mitigated by the fact that there has been minimal or no impact on voters demonstrated on the record. The flyers were distributed in only two (of nine) precincts involved in the election for City Council, and Finding 11 shows clearly that Trepanier carried those areas decisively on November 2. The severity of the violations is also mitigated by the fact that Mr. Audette stopped distributing the flyers when the Complaint was filed.

R.C.L., B.H.J. and J.A.E.

^[1] Compensation Judge assigned to act as an Administrative Law Judge by the Chief Administrative Law Judge pursuant to Minn. Stat. §§ 14.48, subd. 3(c), and 14.50.

^[2] Probable Cause Order, page 3.

^[3] Respondent's Exhibits A and B. It is noted that these Exhibits actually establish that the maximum tax levy vote occurred at the end of the year (1998) when the City experienced a double-digit increase in tax revenues (compared to 1997).

^[4] Respondent's Exhibit G.

^[5] On October 29, 2004, Administrative Law Judge Kathleen Sheehy dismissed the charge regarding the assertion that "crime was out of control". Mr. Trepanier has lost the right to challenge Judge Sheehy's dismissal. He could have requested that the Chief Administrative Law Judge reconsider that dismissal, but he never appealed for such reconsideration. The dismissal of the "crime was out of control" charge has become final and is the law of the case. Trepanier's counsel contends that the issue is still an open question and may still be a subject for contest because Judge Sheehy's subsequent Probable Cause Order of November 3, 2004 did not mention specifically that the charge with respect to "crime was out of control" was dismissed. In that connection, he offered Exhibit 21, a graph that suggests that crime in Brooklyn Park actually went down during Trepanier's time in office. The Administrative Law Judges denied the admission of Exhibit 21 to the record because the issue is moot, but have placed the document under seal in the event a reviewing court rules that its exclusion was improper.

^[6] Minn. Stat. § 211B.32, subd. 4.

^[7] Exhibit B, line 3.