

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Steven Riley,

Complainant,

vs.

FINDINGS OF FACT,  
CONCLUSIONS, ORDER  
AND MEMORANDUM

Stephen Jankowski, Leonard Jankowski,  
and Lawrence Plack,

Respondents.

The above-entitled matter came on for hearing on April 20 and 21, 2005, before a panel of three Administrative Law Judges: Steve M. Milhalchick (Presiding Judge), Richard C. Luis, and Barbara L. Neilson. The hearing record closed on April 21, 2005, at the close of the hearing.

Alain Baudry and Morgan Holcomb, Attorneys at Law, Maslon, Edelman, Borman & Brand, LLP, 3300 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402, appeared on behalf of the Complainant, Steven Riley. Matthew Haapoja, Attorney at Law, Trimble & Associates, 10201 Wayzata Boulevard, Suite 130, Minneapolis, MN 55305, appeared on behalf of Respondent Stephen Jankowski. Stephen Jankowski, Attorney at Law, 8270 Pioneer Trail, Greenfield, MN 55357, appeared on behalf of Respondent Leonard Jankowski. Respondent Lawrence Plack, 6710 Woodland Trail, Greenfield, MN 55357, appeared on his own behalf.

**NOTICE**

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

**STATEMENT OF ISSUES**

1. Did Respondents violate Minn. Stat. § 211B.06, by preparing and disseminating campaign material that contained false statements that Respondents knew were false or communicated with reckless disregard of whether they were false?

The panel concludes that Respondents Plack and Stephen Jankowski violated Minn. Stat. § 211B.06.

2. Did Respondents violate Minn. Stat. § 211B.04 by failing to include on the campaign material a disclaimer substantially in the form required by § 211B.04(b)?

The panel concludes that Respondents Plack and Stephen Jankowski violated Minn. Stat. § 211B.04(b).

3. If any campaign violations occurred, what remedies, if any, are appropriate?

The penalties are discussed below.

Based on the record in this matter, and for the reasons set out in the attached Memorandum, the panel makes the following:

### **FINDINGS OF FACT**

1. The City of Greenfield is governed by a five-member Council, consisting of a mayor and four council members. The mayor serves a two-year term and the council members serve staggered four-year terms.<sup>1</sup> In even years, the mayor and two open seats on the City Council are up for election.<sup>2</sup>

2. Thomas Swanson was Mayor of Greenfield from January 1995 through December 2004. Swanson was first elected Mayor of Greenfield in November 1994, and was re-elected every two years thereafter until Respondent Larry Plack defeated him in the November 2004 election. Swanson lost to Respondent Plack by 472 votes (934 – 462).<sup>3</sup>

3. Cindy Sykes<sup>4</sup> was first appointed to the Greenfield City Council in 1995. In November of 1996, she was elected to the City Council and was re-elected in November 2000. In both elections, she won by wide margins. In November 2004, Ms. Sykes lost re-election to Leonard Jankowski and Sylvia Walsh. Leonard Jankowski received 689 votes, Sylvia Walsh received 674 votes, and Cindy Sykes received 421 votes.<sup>5</sup>

4. Roger Mattila was first elected to the Greenfield City Council in November of 2000. He lost re-election in November 2004 to Leonard Jankowski and Sylvia Walsh. Mr. Mattila received 343 votes.<sup>6</sup>

5. The Greenfield City Council routinely relied upon the advice of Jeffrey Carson, its longtime City Attorney.<sup>7</sup> Attorney Carson has been the

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<sup>1</sup> Testimony of Sykes (now known as Keating).

<sup>2</sup> Ex. 28.

<sup>3</sup> Testimony of Swanson; Ex. 29.

<sup>4</sup> Ms. Sykes is now known as Cindy Keating.

<sup>5</sup> Testimony of Sykes/Keating; Ex. 29.

<sup>6</sup> Testimony of Mattila.

<sup>7</sup> Testimony of Sykes/Keating.

Greenfield City Attorney for approximately 20 years, and the current City Council recently renewed his contract.<sup>8</sup>

6. Sometime in 1999 or 2000, the Greenfield City Council purchased approximately 17 acres of property known as the “Siwek property” located on the southwest side of Highway 55 in Greenfield. The City Council purchased the property to build a wastewater treatment plant on approximately four to six acres, and to market the rest for sale to developers at a later date.<sup>9</sup>

7. Sometime in the spring of 2003, and after construction of the wastewater treatment plant was completed, the City Council decided to put the remaining Siwek property up for sale. The property is zoned commercial/industrial and was preliminarily platted as five lots. The Council decided to try to sell the property on its own without the assistance of a real estate agent. At the advice of City Attorney Carson, the City Council arranged for appraisals of the property.<sup>10</sup>

8. Nagell Appraisal & Consulting completed the assessments of the Siwek property in June 2003. In a letter report dated June 17, 2003, Nagell Appraisal & Consulting determined the fair market value of the Siwek property, excluding special assessments, to be \$592,111.<sup>11</sup> In a summary report dated July 9, 2003, Nagell Appraisal & Consulting determined the fair market value of the Siwek property, including special assessments for roads, water and sewer, to be \$932,000.<sup>12</sup>

9. At a June 2003 City Council meeting, the Council instructed City staff to put a sign on the property indicating that it was for sale, and to advertise the property on its website.<sup>13</sup>

10. City staff never placed a sign on the property indicating that the property was for sale. Instead, the property was only advertised through a link on the City’s website.<sup>14</sup>

11. Two companies, Dust Coating and Rels Manufacturing, contacted the City Council regarding the property.<sup>15</sup>

12. Sometime after June 2003, Mayor Swanson sought the advice of City Attorney Carson as to whether he could legally and/or ethically bid on the Siwek property. Attorney Carson advised Mayor Swanson that so long as he recused himself from voting on or participating in any decision-making regarding

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<sup>8</sup> Testimony of Sykes/Keating, Plack.

<sup>9</sup> Testimony of Sykes/Keating; Ex. 18.

<sup>10</sup> Testimony of Sykes/Keating; Exs. 3 and 21.

<sup>11</sup> Ex. 16.

<sup>12</sup> Testimony of Sykes/Keating; Ex. 10.

<sup>13</sup> Testimony of Sykes/Keating, Swanson; Ex. 18.

<sup>14</sup> Testimony of Sykes/Keating; Ex. 3 at 5, Ex. 10.

<sup>15</sup> Testimony of Swanson; Ex. 3 at 5, Ex. 18.

the sale in his capacity as Mayor, there would be nothing wrong with pursuing a bid.<sup>16</sup>

13. At the July 1, 2003 City Council meeting, Mayor Swanson informed the Council that he was interested in purchasing lots in the Siwek property. He stated that he would be putting together a proposal based on the appraisal of the property.<sup>17</sup>

14. In approximately July 2003, Mayor Swanson submitted two undated letters to Attorney Carson. In the first letter, Swanson informed Carson that he would like to purchase lots 2 and 3 of Block 2 of the Siwek property. The second letter detailed Swanson's proposal. Swanson offered to pay \$315,000 for Lots 2 and 3 of Block 2. This amount included \$190,348 for the land and \$124,652 to assume the special assessments.<sup>18</sup> This property had an appraised value of \$343,000 with the special assessments included.<sup>19</sup> Mayor Swanson indicated in his letters that he would like to close in April or May 2004.<sup>20</sup>

15. Sometime prior to December 16, 2003, Council member Mattila considered bidding on the Siwek property. Mattila owns a small business and "looks at" available property on a routine but casual basis. Mattila called City Attorney Carson and asked him if it would be legal and/or ethically appropriate for him to bid on the Siwek property. Carson told Mattila that he could bid on the property so long as he recused himself from voting on the bid as a member of the City Council.<sup>21</sup>

16. In a memo dated December 11, 2003, City Attorney Carson notified the Council that the City had received inquiries regarding the sale of the Siwek property. Carson recommended that negotiations with the interested parties begin and he requested that the Council authorize City staff to begin negotiations.<sup>22</sup>

17. By the December 16, 2003 City Council meeting, the City had received four or five letters of interest regarding the Siwek property, including Mayor Swanson's letter. Council member Mattila did not submit a letter of interest.<sup>23</sup> At the December 16 Council meeting, Attorney Carson informed the Council that the City had received a number of inquiries and letters of interest regarding the Siwek property. Carson disclosed that one inquiry came from Swanson's company and that another oral inquiry came from Council member

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<sup>16</sup> Testimony of Swanson; Ex. 18.

<sup>17</sup> Ex. 19.

<sup>18</sup> Ex. 18, attachment 1.

<sup>19</sup> Testimony of Swanson, Ex. 10.

<sup>20</sup> Ex. 18, attachment 1.

<sup>21</sup> Testimony of Mattila; Ex. 27 (Affidavit of Mattila).

<sup>22</sup> Ex. 1.

<sup>23</sup> Testimony of Sykes/Keating.

Mattila. Carson explained to the Council that neither Swanson nor Mattila would be able to vote once purchase agreements were created and recommended.<sup>24</sup>

18. At the recommendation of Attorney Carson, the Council authorized Greg Ingraham and Tim Hanson, two contract employees with the City, to enter into negotiations with parties interested in purchasing the Siwek property.<sup>25</sup> Ingraham is the City Planner and Hanson is the City Engineer. When the discussion regarding negotiations for the sale of the Siwek property came up during the December 16 City Council meeting, Mayor Swanson asked City Attorney Carson whether it was proper for him to “step down” on the issue given his interest in the property. Carson responded that he did not think there were any “real conflicts” in what Swanson was being asked to do that night in terms of authorizing staff to begin negotiations with interested parties. However, Carson stated that once actual purchase agreements were offered, Swanson would have to step down. Despite Carson’s opinion, Mayor Swanson recused himself from participating in the decision to authorize the City staff to begin negotiations with interested persons on the sale of the Siwek property and left the room. Council member Mattila also recused himself from the discussion because of his possible interest in the property and left the room.<sup>26</sup>

19. Earlier in the year, Mayor Swanson had appointed Cindy Sykes “Acting Mayor,” which authorized her to perform the Mayor’s duties in the event of his absence. As Acting Mayor, Sykes took over running the December 16 City Council meeting once Mayor Swanson recused himself. After discussing the appraisals, the Council, including Ms. Sykes, voted to authorize staff to begin negotiations with interested persons. Neither Mayor Swanson or Council member Mattila were present during the discussion or vote.<sup>27</sup>

20. Larry Plack was the only person remaining in the audience when the City Council began discussing the sale of the Siwek property at the December 16, 2003 City Council meeting.<sup>28</sup> Plack was a member of the Greenfield City Planning Commission and had run unsuccessfully for Mayor back in 2000. He was present at the Council meeting to discuss a project in the City he was developing. Plack was outraged when he learned that Mayor Swanson and Council member Mattila were considering bidding on the Siwek property.<sup>29</sup>

21. On December 17, 2004, Plack drove by the Siwek property. There was no sign on the property indicating that it was for sale. On or about the same day, Plack called the State Auditor’s Office. He spoke with David Kenney, an attorney with the Office, about the possible sale of city owned property to Mayor

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<sup>24</sup> Ex. 3.

<sup>25</sup> Testimony of Sykes/Keating; Ex. 3.

<sup>26</sup> Ex. 3.

<sup>27</sup> Testimony of Sykes/Keating; Ex. 3.

<sup>28</sup> Testimony of Sykes/Keating and Plack.

<sup>29</sup> Testimony of Plack.

Swanson and Council member Mattila. Kenney indicated to Plack that the sale of city owned property to the Mayor or a council person would not be legal.<sup>30</sup>

22. On January 9, 2004, Attorney Carson sent packets of information to all the parties who indicated an interest in the Siwek property. The packets included copies of the appraisals and the preliminary plats. Carson informed the parties that the City would accept bids until January 27, 2004, and directed the parties to enclose with their bid an earnest money check in the amount of \$10,000 made payable to the City.<sup>31</sup>

23. Sometime in January of 2004, Kenney called City Attorney Carson. Kenney told Carson that it was the position of the State Auditor's Office, as well as the Attorney General's Office and the League of Minnesota Cities, that cities could not sell land to members of the city council or the Mayor. On January 21, 2004, Kenney faxed Carson information from the League of Cities Clerks Handbook regarding sale of land to interested city officers.<sup>32</sup>

24. By letter dated January 22, 2004, City Attorney Carson informed Swanson and Mattila that it was the position of the League of Minnesota Cities, the State Auditor and the Attorney General that it is a conflict for cities to sell real estate to council members. Given this, Carson advised both Swanson and Mattila not to bid on the Siwek property.<sup>33</sup> Based on this advice, Swanson and Mattila took no further action with respect to bidding on the Siwek property. The City never entered into negotiations with Swanson or Mattila for purchase of the Siwek property.<sup>34</sup>

25. In January of 2004, Respondent Plack and Greenfield resident James Stewart formed "Greenfield Awareness." The group was formed out of Plack's and other Greenfield residents' frustration with what they viewed to be arrogance and a lack of communication on the part of the current City Council, and dissatisfaction with a City ordinance relating to the use of All-Terrain Vehicles (ATVs). According to information put out by Greenfield Awareness, the group's goal was to bring "accountability, respect and communication" back to the City government.<sup>35</sup>

26. By January 27, 2004, the City had received three sealed bids on the Siwek property. Neither Swanson nor Mattila submitted a bid. At the February 3, 2004, City Council meeting, the Council rejected all three bids as too low. None of the bids included the special assessments. The Council also decided to hire a Realtor to market the property for the City.<sup>36</sup>

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<sup>30</sup> Testimony of Plack; Ex. 9.

<sup>31</sup> Ex. 28.

<sup>32</sup> Ex. 9.

<sup>33</sup> Exs. 10 and 28.

<sup>34</sup> Testimony of Swanson and Mattila.

<sup>35</sup> Testimony of J. Stewart, Plack; Exs. 12, 13, and 28.

<sup>36</sup> Testimony of Sykes/Keating; Exs. 24 and 25.

27. By letter dated February 9, 2004, City Administrator Krista Okerman returned the earnest money to the three parties who had submitted bids and notified them that their bids had been rejected.<sup>37</sup> To date, the Siwek property has not been sold by the City.<sup>38</sup>

28. Greenfield Awareness held its first public meeting on February 9, 2004. Larry Plack and Jim Stewart conducted the meeting. More than 100 people attended. At the meeting, Plack discussed Swanson's and Mattila's attempt to purchase City property.<sup>39</sup>

29. After the meeting, Mattila went up to Plack and told him that he thought what Plack had said at the meeting was false and irresponsible. Plack told Mattila that he would apologize for his mischaracterization of Mattila at the next Greenfield Awareness meeting, but Plack never apologized.<sup>40</sup>

30. At the February 17, 2004, City Council meeting, Council member Mattila clarified that he had only orally expressed an interest in the Siwek property and that he had never submitted a bid on any of the lots.<sup>41</sup>

31. On or about August 30, 2004, Respondent Larry Plack filed as a candidate for the office of Mayor of Greenfield in the November 2, 2004, election.<sup>42</sup>

32. In a position statement put out as part of his campaign for Mayor, Respondent Plack encouraged voters to vote for himself for mayor, and for Leonard Jankowski and Sylvia Walsh for City Council members. The position statement included a sample ballot with the names of Respondents Plack, Leonard Jankowski and Sylvia Walsh selected.<sup>43</sup>

33. In October 2004, Respondent Larry Plack compiled a campaign mailing to send to all residents of Greenfield, excluding Swanson and the other members of the City Council. The mailing consisted of a cover letter drafted by Plack and the following documents: (1) minutes of the December 16, 2003, City Council meeting regarding the City Attorney's request for authorization to enter into negotiations with parties interested in purchasing the Siwek property; (2) the undated letter from Mayor Swanson to City Attorney Carson regarding Swanson's request to purchase city-owned land; (3) an appraisal of the five Siwek lots; (4) the letter from Kenney to the Greenfield City Clerk notifying her of a complaint received regarding the sale of City owned property; and (5) the letter from City Attorney Carson to Swanson and Mattila advising them not to bid on

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<sup>37</sup> Ex. 24. One of the bids the City received was from Council member Mattila's brother, Jeffrey Mattila.

<sup>38</sup> Testimony of Sykes/Keating.

<sup>39</sup> Testimony of Mattila; Ex. 28.

<sup>40</sup> Testimony of Mattila.

<sup>41</sup> Ex. 8.

<sup>42</sup> Ex. 28.

<sup>43</sup> Ex. 28.

the Siwek property.<sup>44</sup> Leonard Jankowski had gathered many of the documents and his handwritten notations were on the copy of Swanson's undated letter to Carson.<sup>45</sup>

34. The cover letter drafted by Larry Plack and attached to the documents described Swanson's and Mattila's interest in the Siwek property and the City Council's decision at its December 16, 2003 meeting to begin negotiations with interested parties. The letter closed with the following paragraph:

Why should you vote for Tom Swanson, Roger Mattila or Cindy Sykes after they attempted to illegally profit (in the case of Swanson and Mattila) or allow the profiting (in the case of Sykes) from their elected positions. Every tax payer in Greenfield should be outraged at the arrogance of this council. If re-elected, who knows what they will try to get away with next or what it could cost us.

**Throw them out on November 2!**<sup>46</sup>

35. Before mailing the campaign material, Plack asked Stephen Jankowski, an attorney and the son of Leonard Jankowski, to review the cover letter. Stephen Jankowski reviewed the letter and approved its contents. Plack also asked Stephen Jankowski for permission to put his name on the envelope containing the material and Stephen Jankowski agreed to allow the material to be sent out under his name.<sup>47</sup>

36. The campaign material contained no disclaimer, but the complete packet was delivered in an envelope with Stephen Jankowski's name and address in the upper left hand corner. In addition, the envelope had a sticker on it that read: "This publication is not circulated on behalf of any candidate or ballot question."<sup>48</sup>

37. Respondent Plack's own campaign material contained no statement regarding the Siwek property.<sup>49</sup>

38. The City of Greenfield has approximately 2,900 residents and 800 households.<sup>50</sup>

39. The campaign material was sent by U.S. mail to all households in Greenfield, except for members of the then current Council, and was delivered

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<sup>44</sup> Testimony of Plack; Ex. 10.

<sup>45</sup> Testimony of Plack and Leonard Jankowski.

<sup>46</sup> Ex. 10 (emphasis in original).

<sup>47</sup> Testimony of Plack, S. Jankowski; Ex. 10.

<sup>48</sup> Ex. 10.

<sup>49</sup> Ex. 28.

<sup>50</sup> Testimony of Plack.

on approximately Friday, October 29, 2004, four days before the election.<sup>51</sup> There is no evidence that anyone in Greenfield received the material prior to October 29, 2004.

40. Respondents Plack's and Stephen Jankowski's intent in preparing and disseminating the campaign material at issue was to cause the defeat of Swanson, Mattila and Sykes.<sup>52</sup> Swanson and Plack were the only candidates for Mayor listed on the ballot.

41. Plack and Stephen Jankowski were aware at the time of the mailing of the campaign material that Mattila had only orally expressed an interest in the Siwek property and had never submitted a bid on the property.<sup>53</sup>

42. Prior to the November 2004 election, Leonard Jankowski went door-to-door meeting residents of Greenfield as part of his campaign. At every opportunity, he told residents about what he viewed to be the corrupt behavior on the part of Swanson and Mattila. By his own admission, Jankowski told "hundreds" of people about the "crookedness" of Swanson and Mattila.<sup>54</sup>

43. About one week before the November 2, 2004 election, Leonard Jankowski spoke with Catherine Olstad, a Greenfield resident, as part of his door-knocking campaign for City Council. Olstad told Jankowski that she was supporting Mayor Swanson in the election. Leonard Jankowski told Olstad that in a few days she would be receiving a letter regarding improprieties engaged in by Swanson and other members of the City Council. Jankowski stated that she should read the letter to find out what has been going on with the current Council.<sup>55</sup>

44. At the January 18, 2005 City Council meeting, the Complainant asked Leonard Jankowski what he knew about the campaign mailing at issue. Leonard Jankowski responded that he, Larry Plack and Sylvia Walsh had all participated in distributing the material. Leonard Jankowski misunderstood the Complainant's question and thought that he was referring to a separate distribution of campaign flyers he, Plack and Walsh had placed in residents' newspaper boxes.<sup>56</sup>

45. On January 27, 2005, the Complainant filed complaints with the Office of Administrative Hearings against Stephen Jankowski and Leonard Jankowski alleging that they violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material. On February 2, 2005, the Complainant filed two additional complaints against Lawrence Plack and Sylvia Walsh alleging

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<sup>51</sup> Testimony of Sykes/Keating, Riley, Olstad.

<sup>52</sup> Testimony of Plack.

<sup>53</sup> Testimony of Plack.

<sup>54</sup> Testimony of L. Jankowski.

<sup>55</sup> Testimony of Olstad and L. Jankowski.

<sup>56</sup> Testimony of Leonard Jankowski; Ex. 4.

that they violated Minn. Stat. § 211B.06 by disseminating false campaign material. An Administrative Law Judge determined that all four complaints set forth prima facie violations of section 211B.06.

46. On February 4, 2005, the Chief Administrative Law Judge ordered that all four complaints be joined for disposition, pursuant to Minn. Stat. § 211B.33, subd. 4.

47. At the request of Leonard Jankowski, the State Auditor's Office reviewed the procedures used by the City when it was considering selling the Siwek property. In a letter to Mayor Plack dated March 2, 2005, State Auditor Patricia Anderson stated that her office found no violations of law governing municipal land sales and conflicts of interest.<sup>57</sup>

48. On April 15, 2005, the panel of Administrative Law Judges granted Respondent Sylvia Walsh's motion to dismiss and the Complainant's motion to amend the Complaints to add a claim that Respondents violated Minn. Stat. § 211B.04 by failing to have a proper disclaimer.

Based on the Findings of Fact, the panel makes the following:

### **CONCLUSIONS**

1. Minn. Stat. § 211B.35 authorizes the panel of 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 voting at a primary or other election, ..." The cover letter that was part of the packet of material delivered on October 29, 2004, is campaign material within the meaning of that statute.

3. 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 nomination or 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."

4. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.<sup>58</sup> The

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<sup>57</sup> Ex. 6.

<sup>58</sup> Minn. Stat. § 211B.32, subd. 4.

standard of proof of any other violation of chapter 211A or 211B is a preponderance of the evidence.<sup>59</sup>

5. Minn. Stat. § 15.054 (2002) provided, in relevant part, as follows:

No officer or employee of the state or any of its political subdivisions shall sell or procure for sale or possess or control for sale to any other officer or employee of the state or the subdivision, as appropriate, any property or materials owned by the state or subdivision except pursuant to conditions provided in this section. Property or materials owned by the state or a subdivision, *except real property*, and not needed for public purposes, may be sold to an employee of the state or the subdivision after reasonable public notice at public auction or by sealed bid if the employee is the highest responsible bidder and is not directly involved in the auction or sealed bid process.<sup>60</sup>

6. Minn. Stat. § 15.054 was amended by the Legislature in 2004. Effective August 1, 2004, the clause “except real property” was deleted.<sup>61</sup>

7. The Complainant has shown by clear and convincing evidence that Respondents Larry Plack and Stephen Jankowski intentionally prepared and disseminated campaign material (the cover letter to the mailing delivered October 29, 2004).

8. The Complainant has shown by clear and convincing evidence that the cover letter contained a false statement, namely, that Swanson, Mattila and Sykes attempted to use their elected positions to allow Swanson and Mattila to profit illegally.

9. The Complainant has shown by clear and convincing evidence that Respondents Plack and Stephen Jankowski knew that no illegal conduct was committed or attempted by Swanson, Mattila and Sykes or they communicated the false statement with reckless disregard for its falsity. The evidence demonstrates instead that Swanson and Mattila appropriately asked for legal advice from the City Attorney and acted reasonably based on that advice. When the City Attorney’s advice changed, Swanson and Mattila took no further action with respect to their interest in the Siwek property. Neither Swanson nor Mattila submitted a bid on the property.

10. The Complainant has failed to show by clear and convincing evidence that Respondent Leonard Jankowski violated Minn. Stat. § 211B.06 by

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<sup>59</sup> Minn. Stat. § 211B.32, subd. 4.

<sup>60</sup> Emphasis added.

<sup>61</sup> Minn. Stat. § 15.054 (2004). Other statutes, such as Minn. Stat. § 471.87, may prohibit public officers from voluntarily having a personal financial interest in a city’s sale of real property.

participating in the preparation or dissemination of the cover letter at issue in this case.

11. Minn. Stat. § 211B.04 provides, in pertinent part, as follows:

(a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.

(b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the ..... committee, .....(address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the ..... committee, .....(address), in support of .....(insert name of candidate or ballot question)" for material prepared and paid for by a person or committee other than a principal campaign committee.

(c) In the case of broadcast media, the required form of disclaimer is: "Paid for by the ..... committee."

(d) Campaign material that is not circulated on behalf of a particular candidate or ballot question must also include in the disclaimer either that it is "in opposition to .....(insert name of candidate or ballot question.....)"; or that "this publication is not circulated on behalf of any candidate or ballot question."

12. The Complainant has established by a preponderance of the evidence that the campaign material at issue was prepared and circulated by Larry Plack and Stephen Jankowski on behalf and in support of the candidacies of Larry Plack, Leonard Jankowski and Sylvia Walsh. Respondents Plack and Stephen Jankowski violated Minn. Stat. § 211B.04 by failing to place a disclaimer substantially in the form required by § 211B.04(b) on the campaign material they prepared and disseminated.

13. Plack's and Stephen Jankowski's failure to include the proper disclaimer on the campaign material delivered on October 29, 2004, was an intentional attempt on their part to mislead the voters of Greenfield as to the purpose of the material, which was to promote the candidacies of Plack, Leonard Jankowski and Sylvia Walsh.

14. These Conclusions are reached for the reasons discussed in the Memorandum below, which is incorporated into these Conclusions by reference.

Based on the record, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

**ORDER**

IT IS ORDERED:

1. That the Complaint as to Leonard Jankowski is DISMISSED.
2. That Respondent Plack pay a civil penalty of \$2,400 by June 15, 2005, for violating Minn. Stat. § 211B.06.<sup>62</sup>
3. That Respondent Stephen Jankowski pay a civil penalty of \$2,400 by June 15, 2005, for violating Minn. Stat. § 211B.06.
4. That Respondent Plack pay a civil penalty of \$600 by June 15, 2005, for violating Minn. Stat. § 211B.04.
5. That Respondent Stephen Jankowski pay a civil penalty of \$600 by June 15, 2005, for violating Minn. Stat. § 211B.04.
6. That this matter be referred to the Hennepin County Attorney's Office for further consideration, pursuant to Minn. Stat. § 211B.35, subd. 2.

Dated this 5<sup>th</sup> day of May 2005.

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

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

s/Barbara L. Neilson  
BARBARA L. NEILSON  
Administrative Law Judge

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<sup>62</sup> Respondents' checks should be made payable to "Treasurer, State of Minnesota", and sent to the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

## MEMORANDUM

Complainant Riley alleges that Respondents Larry Plack, Leonard Jankowski and Stephen Jankowski violated Minn. Stat. § 211B.06 by preparing and distributing campaign material that contained a false statement. Specifically, Riley contends that the statement in the closing paragraph of the cover letter at issue that Swanson and Mattila “attempted to illegally profit” from their elected positions, and that Sykes attempted to “allow the profiting” is false and that the Respondents knew it was false or acted with reckless disregard as to whether it was false. The Complainant also alleges that the Respondents violated Minn. Stat. § 211B.04 by not having a disclaimer on the campaign material substantially in the form required by § 211B.04(b).

### False Campaign Material

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false. The Complainant has established by clear and convincing evidence that in late October of 2004, Respondents Larry Plack and Stephen Jankowski prepared and disseminated campaign material that consisted of a cover letter attached to several public documents concerning the sale of the Siwek property to interested parties. Respondent Plack admitted to drafting the letter and Respondent Stephen Jankowski admitted to reviewing the letter for legality and allowing it to be mailed out under his name. This evidence is sufficient to establish that both Respondents Plack and Stephen Jankowski intentionally participated in the preparation and dissemination of the campaign cover letter.

The Complainant failed, however, to establish by clear and convincing evidence that Respondent Leonard Jankowski intentionally participated in the preparation or dissemination of the cover letter. Therefore, the allegations against Respondent Leonard Jankowski are dismissed.

The closing paragraph of the cover letter prepared and disseminated by Respondents Plack and Stephen Jankowski stated as follows:

Why should you vote for Tom Swanson, Roger Mattila or Cindy Sykes after they attempted to illegally profit (in the case of Swanson and Mattila) or allow the profiting (in the case of Sykes) from their elected positions. Every tax payer in Greenfield should be outraged at the arrogance of this council. If re-elected, who knows what they will try to get away with next or what it could cost us.

**Throw them out on November 2!**<sup>63</sup>

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<sup>63</sup> Ex. 10 (emphasis in original).

The cover letter is campaign material as it was disseminated for the purpose of influencing voting. As noted above, Respondent Larry Plack admitted writing the cover letter, compiling the attached documents, and having it mailed. Respondent Stephen Jankowski admitted reviewing the letter for “legality” and agreeing to allow the mailing to go out under his name. Both Respondents Plack and Stephen Jankowski deny, however, that the statement at issue is false, or that it was made with knowledge that it was false or with reckless disregard for the truth.

The term “reckless disregard” is not defined in the statute. When considering the predecessor to this statute, the Minnesota Court of Appeals, in *State v. Jude*,<sup>64</sup> rejected the argument that section 211B.06 could constitutionally create an ordinary or gross negligence standard. At that time, § 211B.06 made it a crime to prepare or disseminate campaign material that a person knows “or has reason to believe is false.” The court found that extending criminal liability to those who have only a “reason to believe” the campaign material is false made the statute unconstitutionally overbroad.

Instead, the court held that a criminal sanction could only be imposed for political speech that meets the “actual malice” standard of *New York Times Co. v. Sullivan*.<sup>65</sup> That is, the statement must be made with knowledge that it is false or with reckless disregard of whether it is false or not. The court explained further that the phrase “reckless disregard” involved a subjective element of “actual conscious disregard of the risk created by the conduct.”<sup>66</sup>

Following the *Jude* decision, the Minnesota Legislature amended Minn. Stat. § 211B.06 in 1998 to incorporate the “reckless disregard” standard of *Sullivan*. Thus, it appears that the legislature intended, in accord with *Jude*, to require that complainants show by clear and convincing evidence that the statement is false and that respondents either knew it was false or acted with actual conscious disregard of whether it was false or not, in order to establish a violation of Minn. Stat. § 211B.06.

The statement in the campaign letter that Swanson and Mattila “attempted to illegally profit from their elected positions” is false. The record established that both Swanson and Mattila orally expressed an interest in the Siwek property and sought the advice of City Attorney Jeffrey Carson as to whether they could legally and/or ethically bid on the lots. Attorney Carson advised Swanson and Mattila that they could bid on the property, so long as they recused themselves from the decision-making process. Thereafter, the City Attorney learned that it was the position of the State Auditor’s Office and the Attorney General’s Office that it is a conflict for cities to sell real property to mayors or council members. Based on this information, the City Attorney advised Swanson and Mattila not to bid on the

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<sup>64</sup> 554 N.W.2d 750 (Minn. App. 1996).

<sup>65</sup> 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964).

<sup>66</sup> 554 N.W.2d at 754, *citing*, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 1519, 131 L.Ed.2d 426 (1995).

Siwek lots. Swanson and Mattila followed this advice and neither submitted a bid on the Siwek property.

There is no evidence in the record that either Swanson or Mattila attempted to engage in illegal conduct. Instead the record established that they appropriately sought legal advice from the City Attorney and acted reasonably based on that advice. When the City Attorney's advice changed, Swanson and Mattila took no further action with respect to their interest in the Siwek property. Swanson and Mattila did not intend to do anything illegal and their preliminary inquiries regarding the property and subsequent recusal at the December 16 City Council meeting cannot properly be characterized as an attempt to engage in illegal conduct.

Respondents Plack and Stephen Jankowski were aware prior to October 2004 that neither Swanson nor Mattila submitted a bid on the Siwek property. They were also aware that the most Mattila did with respect to purchasing the Siwek lots was to orally express an interest in the property and to recuse himself from the decision to begin negotiations at the December 16, 2003 City Council meeting. Nothing in Swanson or Mattila's behavior can fairly be characterized as "attempting to illegally profit from their elected positions." This is a very serious allegation. The Complainant has established by clear and convincing evidence that Respondent Plack and Stephen Jankowski knew the statement was false or at least communicated the statement with a reckless disregard of whether it was false.

Respondents Plack and Stephen Jankowski also accused Cindy Sykes of "attempting to allow the illegal profiting." The evidence established that all Ms. Sykes did was take over the running of the December 16, 2003 City Council meeting once Mayor Swanson recused himself and vote along with the other Council members in support of the motion to authorize staff to begin negotiations with parties interested in purchasing the Siwek property. Nothing in this conduct amounts to "allowing" Swanson and Mattila to "attempt to illegally profit from their elected positions."

As stated in *Jude*, Respondents Plack and Stephen Jankowski acted with "actual conscious disregard of the risk created" by their conduct. An accusation that office holders (Swanson and Mattila) tried to leverage their office to gain "illegal profit" or allowed such profiteering to occur (Sykes) is inflammatory on its face, and in this case the accusation is also false. Even if Plack and Stephen Jankowski believed the accusation (as they testified), they did so only with a distorted interpretation of Swanson's, Mattila's and Sykes' actions and they must bear the consequences of their reckless disregard for whether the accusation was false.

Having found that Respondents Plack and Jankowski violated Minn. Stat. § 211B.06, the panel may make one of several dispositions.<sup>67</sup> The panel may issue a reprimand, may impose a civil penalty of up to \$5,000, and may refer the

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<sup>67</sup> Minn. Stat. § 211B.35, subd. 2.

complaint to the appropriate county attorney for criminal prosecution. The panel concludes that Respondents Plack's and Stephen Jankowski's conduct was a deliberate violation of the statute. In addition, given that the mailing made such negative and inflammatory allegations and was issued on the Friday before the election, Swanson, Mattila and Sykes had little ability to counter the allegations or otherwise address the situation. Based on these factors, the panel concludes a penalty of \$2,400 each is appropriate. Finally, given the very serious nature of the accusation of using elected office to gain an illegal profit and the possibility that a significant number of voters were misled, the panel concludes that this case warrants further review by the County Attorney.

#### Disclaimer

Respondents Plack and Stephen Jankowski disseminated the campaign material by U.S. mail in envelopes bearing the following disclaimer: "This publication is not circulated on behalf of any candidate or ballot question."<sup>68</sup> At the hearing, Respondent Plack testified that the campaign material was meant to inform Greenfield residents about the improprieties of the then current City Council and not to promote himself, Leonard Jankowski or Sylvia Walsh. However, Plack conceded that his goal in disseminating the campaign material was to cause the defeat of Mayor Swanson and Council members Mattila and Sykes. Plack was the only candidate challenging Swanson for mayor. Leonard Jankowski and Sylvia Walsh were two of only three candidates challenging incumbents Sykes and Mattila for the open City Council seats. Plack, Leonard Jankowski and Sylvia Walsh assisted each other's campaigns by distributing each other's campaign flyers. In addition, Respondent Plack distributed a position statement in which he encouraged voters to vote for himself, Leonard Jankowski and Sylvia Walsh.

The Complainant has shown by a preponderance of the evidence that the disclaimer on the envelope that the campaign material was not circulated on behalf of a particular candidate was false. Respondents Plack and Stephen Jankowski disseminated the campaign material in support of the candidacy of Plack, Leonard Jankowski and Walsh. Plack drafted and Stephen Jankowski approved the cover letter accusing the incumbents of attempting to "illegally profit" from their elected positions or of allowing that profiteering to occur and encouraging voters to throw Swanson, Mattila and Sykes out of office. The letter was clearly disseminated in opposition to Swanson, Mattila and Sykes and in support of Plack, Leonard Jankowski and Walsh. The Respondents' disclaimer stating that the material was not circulated on behalf of a particular candidate was a deliberate attempt to mislead the voters of Greenfield as to the purpose of the material, which was to promote the candidacies of Plack, Leonard Jankowski and Walsh.

Pursuant to Minn. Stat. § 211B.04, campaign material disseminated on behalf of a particular candidate must include a disclaimer substantially in the form

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<sup>68</sup> Ex. 10.

required by Minn. Stat. § 211B.04(b). Respondents Plack and Stephen Jankowski failed to include a disclaimer on their campaign material that was substantially in the form of § 211B.04(b). The Complainant has established that Respondents Plack and Stephen Jankowski violated Minn. Stat. § 211B.04(b).

The panel concludes that the violation of Minn. Stat. § 211B.04(b) was deliberate, but had little additional impact on voters beyond its falsity. The panel finds a civil penalty in the amount of \$600 for both Respondent Plack and Respondent Stephen Jankowski is appropriate.

S.M.M. R.C.L. B.L.N.