

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Bob Fine,

Complainant,
vs.

PROBABLE CAUSE
ORDER

Jim Bernstein,

Respondent.

The above-entitled matter came on for a telephone probable cause hearing as provided by Minn. Stat. § 211B.34 before Administrative Law Judge Steve Mihalchick on October 18, 2005, to consider a complaint filed by Bob Fine on October 12, 2005.

Bob Fine, 3932 York Avenue South, Minneapolis, MN 55410, participated on his own behalf ("Complainant").

Jim Bernstein, 5216 Ewing Avenue South, Minneapolis, MN 55410, participated on his own behalf ("Respondent").

Based upon the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is probable cause to believe that the Respondent violated Minnesota Statutes §§ 211B.04 and 211B.06.

ORDER

IT IS HEREBY ORDERED:

1. That there is probable cause to believe that Respondent violated Minnesota Statute § 211B.04 by placing a campaign advertisement in the *Southwest Journal* newspaper without a disclaimer.^[1]

2. That there is probable cause to believe that Respondent violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material.^[2]

3. That there is no probable cause to believe that the "cheerleader for private interests" statement identified in Complainant's Exhibit A is false campaign material under Minn. Stat. § 211B.06, and this allegation is dismissed.

4. That there is no probable cause to believe that the second statement identified in Exhibit C, regarding voting for a Superintendent who never applied for the job, is false campaign material under Minn. Stat. § 211B.06 and this allegation is dismissed.

5. That this matter is referred to the Chief Administrative Law Judge for assignment to a panel of three administrative law judges pursuant to Minnesota Statute § 211B.35.

Dated: October 20, 2005

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

NOTICE OF RECONSIDERATION RIGHTS

Complainant has the right, under Minn. Stat. § 211B.34, subd. 3, to seek reconsideration of the dismissal of the two allegations identified above. Such reconsideration shall be by the Chief Administrative Law Judge on the record. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this Order.

If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the issue will be heard as part of the evidentiary hearing on the remaining allegations.

MEMORANDUM

Bob Fine and Jim Bernstein are candidates in the November 8, 2005, election for the Minneapolis Park and Recreation Board's District 6 seat. Mr. Fine is the incumbent and Mr. Bernstein is a first-time candidate challenging him. Mr. Fine filed this Complaint alleging that Mr. Bernstein distributed campaign material that is false and that lacked the required disclaimer.

The Complaint alleges that the Respondent placed a campaign advertisement in the *Southwest Journal*^[3] (Ex. B) that failed to have a disclaimer as required by Minn. Stat. § 211B.04.

Minn. Stat. § 211B.04 states, in relevant part:

(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, . . .

At the probable cause hearing, the Respondent conceded that he failed to have the required disclaimer on the newspaper advertisement. He explained that the disclaimer was on the original copy of the advertisement that he submitted to the *Southwest Journal* but that the proof came back without it. Respondent admits, however, that he approved the proof and the advertisement ran without a disclaimer. Respondent states that he made an inadvertent error that was the result of an oversight and he takes full responsibility for it. The Administrative Law Judge finds that there is probable cause to believe that a violation of Minn. Stat. § 211B.04 occurred.

The Complaint also alleges that two campaign flyers distributed by the Respondent and the advertisement in the *Southwest Journal* (Exs. A, B, and C) contained false statements about the Complainant that Respondent knew were false or communicated with reckless disregard as to whether they were false. The Administrative Law Judge will address the alleged false campaign material identified in each exhibit.

Campaign Flyer (Ex. A)

The Respondent distributed a campaign flyer entitled "Jim Bernstein for Park Board Dist. 6 Committee" in which he made the following statement:

"Mr. Fine has become more like a cheerleader for private interests wishing to exploit the Minneapolis Parks system for themselves rather than protecting the parks for all."

The Complainant argues that this statement is false because he has not been a "cheerleader for private interests." The Respondent contends that there are several examples of the Complainant supporting proposals that benefit private interests, such as the proposal to build a football stadium for DeLaSalle High School, the proposal to build a sailing school on Lake Calhoun, and recently a proposal to build a restaurant in Loring Park. According to Respondent, these proposals will be operated by and benefit private interests and therefore, the statement that the Complainant is a "cheerleader for private interests" is not false.

***Southwest Journal* advertisement (Ex. B)**

The campaign advertisement Respondent placed in the *Southwest Journal* contains the following heading above two photographs:

The Future of Our Parks Is At Stake.

If We Don't Change Commissioners Now,
Our Parks Our Headed ...



From This



To This

The photograph on the left is of Lake Calhoun taken from the south shore looking north. There is no development shown on the lake, and downtown Minneapolis is in the background. The photograph on the right shows a lake with three high-rise buildings and some sort of marina-type structure in the foreground. Below the photographs the advertisement continues with a written description of the Respondent with a list of actions he pledges to take if elected District 6 Park Commissioner. Among his pledges, Respondent states that he will “make certain that a ‘mini mall’ is never built on the shore of Lake Calhoun or any other one of our lakes!”

The Complainant argues that the purpose of this advertisement is to suggest that he would allow high rise development on the city’s lakes. According to the Complainant, this suggestion is false and is intended to harm his candidacy. The Complainant asserts that he has never voted for or supported any such structures around any lake or park. In fact, the Complainant points out that in the last year he has voted in favor of resolutions opposing the development of high rise buildings on the northern shore of Lake Calhoun. In addition, the Complainant maintains that he recently proposed a master plan for Lake Calhoun intended to protect the lake from the encroachment of such developments.

The Respondent argues that the advertisement is not false campaign material. With respect to the picture on the right, Respondent asserts that he deliberately chose a picture showing three buildings on a lake because Lake Calhoun does have three high rise buildings on it. According to the Respondent, the purpose of the photograph on the right was to depict the marina-type building in the foreground that, according to the Respondent, is very close in size to the one that has been proposed for Lake Calhoun. Respondent asserts that his intent was to alert voters to the fact that if the Complainant is elected, there will be some kind of marina built on Lake Calhoun. Respondent insists that he was not alleging or trying to imply that the Complainant wants to build more high rises on Lake Calhoun.

Campaign Flyer (Ex. C)

The Respondent prepared and distributed another campaign flyer that compared his position to the Complainant’s position on several issues. The flyer states as follows:

Either Business As Usual For The Minneapolis Park & Recreation Board Or ... *It’s Time For A Change.*

Compare The Differences ... THEN YOU DECIDE!

	Jim <u>BERNSTEIN</u>	Bob <u>Fine</u>
Allow building a retail “mini-mall” on the southwest shore of Lake Calhoun?	NO!	“Neutral”
Vote to hire a Superintendent who never applied and was never screened for the job?	NO!	YES
Preserve Theo Wirth House at Lyndale Farmstead Park as a Historic Site and Interpretive Center?	YES!	Doesn’t Support
More funding for speedy removal of trees infected by Dutch Elm disease and replant new trees?	YES!	Doesn’t Support
Provide Superintendent with a \$500,000 slush fund?	NO!	Yes!
Accelerate replacement of worn out playground equipment before kids get seriously hurt?	HIGH PRIORITY	Not A Priority
Fund and finish Lake of the Isles restoration?	HIGH PRIORITY	Not A Priority

The Complainant argues that all of these statements are false and that Respondent either knew they were false or communicated them with reckless disregard as to whether they were false. Specifically, the Complainant contends that the Superintendent does not have a “\$500,000 slush fund” and that the

Complainant has never supported such a fund; funding and finishing the restoration of Lake of the Isles has been a high priority of his and the “unanimous legislative priority” of the entire Board for the last four years; Complainant has always supported replacement of worn out playground equipment and has voted continuously for new “tot lots”; and the Complainant has always supported funding for quick removal of diseased trees and replanting. In addition, the Complainant asserts that there is no “mini-mall” proposal for Lake Calhoun and if there were, the Complainant would not support it. According to the Complainant, a group has come forward with a proposal to develop a small building to be used for the Calhoun Yacht Club’s sailing school. The Complainant asserts that the proposal has not advanced to a committee yet and it is not a “retail mini mall.”

Complainant also maintains that he has never indicated a lack of support for preserving the Theodore Wirth House. And finally, as to the statement regarding hiring a Superintendent who never applied for the job, the Complainant states only that when the search for a Superintendent failed and there were no remaining candidates, he voted along with others to appoint an interim Superintendent for one year.

The Respondent states that the term “slush fund” refers to the Superintendent’s \$500,000 discretionary “innovation fund,” which the Board approved and that the Complainant did not vote against. According to the Respondent, critics of the “innovation fund” call it the “Superintendent slush fund” and the Respondent argues that he is just repeating what the critics are saying. As to the statement claiming that Complainant is “neutral” on the proposal to build a retail “mini mall” on Lake Calhoun, the Respondent contends that the Complainant did initially support building a “sailing village” and retail complex on Lake Calhoun but later stated that he was “neutral” pending the final proposal. While the Complainant may refer to this building proposal as a “sailing village,” the Respondent maintains that it is accurate to refer to it as a “mini-mall.” According to the Respondent, the original proposal presented was for a five-building complex, which included an event center, three retail concession buildings and a sailing school. Based on this, the Respondent argues that it is not false to describe Complainant’s position on building a retail “mini-mall” as “neutral.”

Respondent also contends that the Complainant, as an incumbent Park Commissioner, did not secure any additional funds to finish the Lake of the Isles restoration, which, according to the Respondent, demonstrates that the Complainant does not view this project to be a priority. As for the worn-out playground equipment, Respondent asserts that the Complainant has not offered any budget resolutions or amendments to accelerate the funding of playground equipment, which again demonstrates that the Complainant does not view accelerating the replacement of worn out playground equipment to be a priority. And the same argument applies to the statement regarding the removal of diseased trees. The Respondent contends that the Complainant supports the current funding levels and does not support increasing funding for removal of diseased trees. Finally, with respect to the statement regarding preserving the

Theodore Wirth House as a historic site and interpretive center, the Respondent argues that the Complainant has declined to support this project.

Minn. Stat. § 211B.06, subd. 1, provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect ... [or] promote ... 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.

At the probable cause stage of the complaint process, a Complainant must present sufficient evidence to support finding that there is probable cause to believe the violations of law alleged in the complaint have occurred.^[4] Probable cause is not specifically defined in the statute, but it is analogous to the probable cause standard in a criminal proceeding.^[5] Probable cause is “a reasonable ground in fact and circumstance for a belief in the existence of certain circumstances.” The facts alleged in a complaint and presented at the probable cause hearing are to be considered in the light most favorable to Complainant. A Respondent must show that the facts relied upon to establish the elements of the violation are “inherently incredible”.^[6]

With respect to Exhibit A, the Administrative Law Judge finds the Respondent’s statement that the Complainant “has become more like a cheerleader for private interests wishing to exploit the Minneapolis Parks system ...” is not false campaign material within the meaning of Minn. Stat. § 211B.06, because it is an opinion or inference rather than a statement of fact. When interpreting the prohibition against false statements in a predecessor statute, the Minnesota Supreme Court observed that the statute was “directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from the candidate’s conduct.”^[7] In that case, *Kennedy v. Voss*,^[8] a candidate used an incumbent’s “no” vote on a county budget vote to infer that the incumbent did not support any of the individual items in that budget. In fact, the incumbent did support a number of the individual items, but voted “no” because the budget included an additional \$18,000 appropriation, which the incumbent opposed. The Minnesota Supreme Court held that inferences based on *fact* (in this case, the incumbent’s “no” vote) did not come within the purview of the statute even if the inferences are “extreme and illogical.” The Court pointed out that the public is protected from such extreme inferences by the candidate’s ability to rebut remarks during the campaign process. Here, the Respondent is stating his opinion that the Complainant is a cheerleader for private interests based on the Complainant’s support of several proposals, such as the “sailing village,” that have been presented by private interests. The Administrative Law Judge finds this statement to be an opinion or inference and not a false statement of fact.

With respect to Exhibit B, the advertisement in the *Southwest Journal*, the Administrative Law Judge concludes that there is probable cause to believe that a violation of Minn. Stat. § 211B.06 occurred. Respondent is running against the Complainant for the District 6 Commissioner seat. Viewing the facts in the light most favorable to the Complainant, as is required at this stage, the advertisement states in effect that if Bob Fine remains Commissioner, Lake Calhoun will change from a lake with little development to a lake with greater development. The Complainant has set forth sufficient facts to find there is probable cause to believe that this is false campaign material about the Complainant and that Respondent either knew it is false or communicated it with reckless disregard as to whether it is false in violation of Minn. Stat. § 211B.06.

Finally, with respect to Exhibit C, the Administrative Law Judge concludes that there is probable cause to believe that all of the statements, except for the one concerning the hiring of a Superintendent who never applied for the job, are false and Respondent either knew they were false or, by failing to check the facts and Park Board record, communicated the statements with reckless disregard as to whether the statements were false. The Complainant failed to put forth any evidence to believe that the statement that he voted to hire a Superintendent who never applied for the job is false. Rather, the Complainant merely explained the circumstances that caused him to vote for the interim Superintendent. Accordingly, there is no probable cause to believe that this statement in Exhibit C is false and it cannot form the basis of a violation of Minn. Stat. § 211B.06. However, with respect to the remaining statements, the Complainant has met his burden of demonstrating that there is probable cause to believe the law was violated.

The remaining allegations will be referred to the Chief Administrative Law Judge for assignment to a panel and scheduling of an evidentiary hearing. At this hearing, the Complainant will have the burden of proving, by clear and convincing evidence, that the campaign material identified in Exhibits B and C is false and that Respondent either knew the material was false or communicated it with reckless disregard as to whether it was false.

S.M.M.

^[1] Exhibit B.

^[2] Exs. B and C.

^[3] October 10-23, 2005 edition.

^[4] Minn. Stat. § 211B.34, subd. 2.

^[5] “Upon the information presented, the Court shall determine whether there is probable cause to believe that an offense has been committed and that the person arrested committed the offense.” Minn. R. Crim. Pro. 4.03, subd. 4.

^[6] See *State v. Florence*, 306 Minn. 442, 239 N.W.2d 892 (1976); *State v. Harris*, 265 Minn. 260, 121 N.W.2d 327 (1963).

^[7] *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

^[8] 304 N.W.2d 299 (Minn. 1981).