

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Carol Kummer,

Complainant,

vs.

Jason Stone,

Respondent.

ORDER FINDING
NO PRIMA FACIE VIOLATION
AND DISMISSING
COMPLAINT

TO: Carol Kummer, 4818 30th Avenue South, Minneapolis, MN 55417; and
Jason Stone, 1708 57th Street East, Minneapolis, MN 55417.

On October 28, 2005, Carol Kummer filed a Complaint with the Office of Administrative Hearings alleging the Respondent violated Minn. Stat. § 211B.06 by making false statements about her on his website. The Chief Administrative Law Judge assigned this matter to Administrative Law Judge Kathleen D. Sheehy to make a determination whether the complaint states a prima facie violation.

After reviewing the Complaint and attached documents, and for the reasons set forth in the attached Memorandum, the undersigned Administrative Law Judge has determined that the complaint fails to set forth a prima facie violation of Minn. Stat. § 211B.06.

ORDER

IT IS ORDERED:

1. That the complaint fails to set forth a prima facie violation of Minn. Stat. § 211B.06; and
2. That this Complaint is DISMISSED.

Dated: November 1, 2005

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

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

MEMORANDUM

Carol Kummer is an incumbent Park Commissioner in District 5 who is running for election. Jason Stone is her opponent. Kummer's complaint asserts that the Respondent's website contains five false statements that violate Minn. Stat. § 211B.06, which provides in relevant part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent deductions and arguments from their official conduct that are unfavorable to them. It does not reach criticism which is merely unfair or unjust. It does reach false statements of specific facts.¹

First, the Respondent's website provides that "The Board created a half-million dollar slush fund and relaxed controls on spending by the Park Superintendent."² This is not material with respect to the personal or political character or acts of Carol Kummer, but rather criticism of a financial decision made by the Park Board. It does not violate Minn. Stat. § 211B.06.

Second, the website provides that "the incumbent has contributed to the lack of transparency and process breakdowns on the Board today." Examples cited include the "Failure to maintain Minutes for public meetings" and the statement that "This Board has consistently failed to take Minutes."³ Kummer maintains that these statements are false because the Board keeps records of all

¹ *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

² Ex. A at 2.

³ Ex. A at 6-7.

votes, and meetings are recorded on audiotape or videotape, or are digitally recorded and made available on the Park Board's website. Kummer attached to the complaint a legal opinion to the effect that the Park Board is not required to produce written minutes of every meeting and that its practice of keeping written records of votes, together with the recordings of meetings, is sufficient to comply with the Park Board's legal obligations to produce "records necessary to a full and accurate knowledge of their official activities," as required by Minn. Stat. § 15.17, subd. 1.⁴ Again, the website does not contain material with respect to the personal or political character or acts of Carol Kummer, but rather it criticizes a decision made by the Park Board as to the type of meeting records it would keep. Furthermore, it appears that the statements are substantially true; Kummer agrees that the Park Board does not take written minutes of its meetings, but that it records its votes in writing, and she contends that the practice of digitally recording meetings produces a record that is better than written minutes. At most the statement on the website suggests that Kummer has contributed to a "lack of transparency" due to this dispute about whether the Board should keep written minutes. It is not a provably false statement of fact about Kummer, and it does not violate Minn. Stat. § 211B.06.

Third, the website provides that \$2.5 million in liens have been filed against 'The Fort' skate park development because the Park Board failed to secure a performance bond for the project.⁵ Kummer maintains this is false because only \$1.8 million in liens have been filed against the Park Board, the matter is currently in litigation, and the Park Board has not agreed it is liable for any of this amount. This statement is not campaign material with respect to the personal or political character or acts of Carol Kummer, but rather criticism of the Park Board's decision to build the project in the manner it did. It does not violate Minn. Stat. § 211B.06.

Fourth, the website provides that sports fields constructed in the Fort Snelling area were improved with "expensive infrastructure . . . built on land with a short term lease."⁶ Kummer contends this statement is false because the Park Board owns some of the land at issue and executed a 30-year lease with the Department of Natural Resources for the rest. This is not campaign material with respect to the personal or political character or acts of Carol Kummer, but rather criticism of a decision made by the Park Board to make these improvements. It does not violate Minn. Stat. § 211B.06.

Fifth, the website provides as follows concerning the Park Board's actions with regard to Dutch Elm disease:

The health of the urban forest and Dutch Elm Disease is the most pressing environmental concern facing the city.

⁴ Ex. D.

⁵ Ex. A at 1; Ex. F.

⁶ Ex. A at 1; Ex. G.

The Minneapolis Tree Commission was recently formed to foster interagency cooperation, develop recommendations and implement a plan for dealing with the Dutch Elm Disease crisis. I fully support the Tree Commission and will do everything I can to make this initiative successful. The Park Board should work closely with the Tree Commission to implement a comprehensive strategy including public education, early detection, early treatment, rapid sanitation and replanting.

To date, the Park Board's efforts have fallen short. *The incumbent, before campaign season, made no attempt to address this crisis.*⁷

Park leadership was very slow to call Dutch Elm Disease a crisis and responded poorly. At about \$9 million/year, funding for tree care is \$3 million less now than it was in the late 70s—despite inflation. There has been no comprehensive plan. By not removing diseased trees quickly enough, the disease has spread faster than necessary. About 35% of the diseased trees on private land marked for removal over the summer still stand (as of March, 2005). The Park Board has been replanting neighborhoods with identical tree species, leaving them particularly susceptible to recurring tree epidemics.

Tree removal is expensive and I would like to help ease the financial pain for homeowners that must pay for their own tree removal, perhaps through a long term repayment plan. Likewise, the Park Board and City should negotiate with vendors to obtain discounted pricing for private homeowners that seek to treat Elms or remove diseased trees and also to protect consumers from fraud.⁸

Kummer contends that the statement “The incumbent, before campaign season, made no attempt to address this crisis” is false and that during her tenure she has always voted for funding to fight Dutch Elm Disease. In addition, she maintains that she voted last year to transfer additional money to inspect, identify, remove, and replace diseased Elm trees, and that she voted to include seeking state funding to fight Dutch Elm Disease as part of the Park Board's legislative agenda in 2005. She argues that while the Respondent may not approve of the amount of funding the Park Board has allocated, he cannot say that she has made “no attempt” to address the crisis.

⁷ (emphasis added).

⁸ Ex. A at 3-4.

The statement “[t]he incumbent . . . made no attempt to address this crisis” must be viewed in context. The statement that must be proved false is not necessarily the literal phrase published but rather what a reasonable reader would have understood the author to have said; expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand the statement is not a representation of fact.⁹ Before and after the phrase at issue, the text makes clear that the Park Board has spent millions of dollars, has marked and removed dead trees, and has replanted with other species. The ordinary reader would not conclude from this passage that Carol Kummer, a member of the Park Board, literally made no attempt to address Dutch Elm disease in the City of Minneapolis. Rather, the ordinary reader would understand from this passage that the incumbent and other members of the Park Board have in fact acted to address Dutch Elm disease, but that the Respondent believes those efforts were not adequate to address what he characterizes as a “crisis” and that he would advocate additional funding and different programs. The passage at issue is hyperbole, not a false statement of fact. It does not violate Minn. Stat. § 211B.06.

K.D.S.

⁹ *Jadwin v. Minneapolis Star and Tribune*, 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); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).