

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Dave Bicking,

Complainant,

vs.

R.T. Rybak for Mayor,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

The above-entitled matter came on for an evidentiary hearing on July 7, 2009, before a panel of three Administrative Law Judges: Bruce H. Johnson (Presiding Judge), Beverly Jones Heydinger, and Patricia J. Milun. The hearing record closed on July 17, 2009.

Dave Bicking (Complainant) appeared on his own behalf without counsel.

Gregory Merz, Attorney at Law, Gray, Plant, Mooty, P.A., appeared on behalf of the R.T. Rybak for Mayor campaign committee (Respondent).

STATEMENT OF ISSUE

Did Respondent violate Minnesota Statute § 211B.02 by stating in written campaign material that Mayor Rybak has the support of Council Member Cam Gordon without first getting written permission from Council Member Gordon to do so?

The panel concludes that the Complainant has established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02, and assesses a civil penalty of \$250.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. The Complainant, Dave Bicking, is a member of the Green Party of Minnesota (Green Party) and is the Green Party's endorsed candidate for Minneapolis City Council Ward 9 in the upcoming 2009 election. He ran unsuccessfully as a candidate for Minneapolis City Council Ward 9 in the 2005 election.¹

2. Cam Gordon is a member of the Minneapolis City Council representing Ward 2.² He was first elected in November 2005. He is also a member of the Green Party and was the Green Party's endorsed candidate in 2005 for Minneapolis City Council Ward 2.

3. Mayor R.T. Rybak and Council Member Cam Gordon are both running for re-election this November 2009. Cam Gordon is again the Green Party's endorsed candidate for Ward 2.

4. Peter Wagenius is a senior policy aide for Mayor Rybak and serves as an advisor to the Mayor's campaign staff.³

5. In mid-2008, Mayor Rybak and Council Member Gordon agreed that they would each support each other's candidacy in the 2009 Minneapolis city elections.⁴

6. On December 31, 2008, Council Member Gordon, along with the other 12 City Council Members and other community leaders and elected officials, co-hosted a fundraiser for Mayor Rybak's re-election campaign at the home of Sam and Sylvia Kaplan. Mr. Gordon also attended the Mayor's campaign kick-off event in early February 2009.⁵

7. In mid-February 2009, the Respondent produced campaign literature that listed all of the current Minneapolis City Council Members, including Cam Gordon, as supporters of his re-election campaign.⁶

8. The campaign literature (Ex. 1) was first distributed at the March 3, 2009, DFL precinct caucuses and then again at the DFL Ward conventions, which took place between March 14 and April 25, 2009.⁷ The piece was only distributed at these specific events and was never mailed out.⁸

¹ Testimony of Dave Bicking.

² Ward 2 includes the West Bank/Cedar-Riverside, Prospect Park, and Seward neighborhoods.

³ Testimony of Peter Wagenius.

⁴ Testimony of Mayor R.T. Rybak.

⁵ Testimony of Wagenius.

⁶ Ex. 1.

⁷ Testimony of Gayle Bonneville and Wagenius.

⁸ Testimony of Wagenius.

9. The Respondent also developed and launched a campaign website in mid-February 2009. Like the campaign literature, the website listed Council Member Gordon as a supporter of Mayor Rybak's re-election campaign.⁹

10. On or about March 11, 2009, the Complainant obtained Mayor Rybak's campaign literature from someone who had attended the DFL precinct caucuses.¹⁰ On that same day, the Complainant looked at the Mayor's campaign website and noted that it also listed Council Member Gordon as supporting the Mayor's re-election.¹¹

11. On March 22, 2009, Council Member Gordon attended a Green Party membership meeting. At this meeting, Council Member Gordon told those attending that he had not endorsed Mayor Rybak's re-election bid. When the Complainant showed Mr. Gordon the Mayor's campaign literature that listed Council Member Gordon as supporting the Mayor's re-election, Mr. Gordon expressed surprise and stated that he would check with the Mayor's campaign staff to correct any misunderstanding regarding his endorsement.¹²

12. On March 23, 2009, Peter Wagenius received an email from Council Member Gordon's campaign manager, Robin Garwood. In the email, Mr. Garwood requested that Council Member Gordon not be publicly listed as a supporter of the Mayor's re-election campaign until after the Green Party's May 9th city-wide endorsing meeting. Mr. Garwood specifically requested that Council Member Gordon's name be removed from the list of supporters identified on the Mayor's campaign website. Mr. Garwood assured Mr. Wagenius, however, that when asked by constituents, Council Member Gordon "continues to talk about what a good job he thinks RT is doing and how he is the best declared candidate."¹³ Mr. Garwood closed the email by apologizing for any lack of clarity (regarding the endorsement) on his or Council Member Gordon's part.¹⁴

13. Mr. Wagenius works with Council Member Gordon and the other City Council Members on a regular basis. Through various discussions with both Council Member Gordon and his campaign manager, Mr. Wagenius believed that the Mayor's campaign had Council Member Gordon's permission to list him as a supporter with the understanding that if the Green Party endorsed another candidate for mayor, Mr. Gordon might have to withdraw that support.¹⁵

14. Within a day of receiving the email from Mr. Garwood, staff with the Mayor's campaign removed Council Member Gordon's name from the list of City Council Members supporting the Mayor on the Mayor's campaign website.¹⁶

⁹ Ex. 2; Testimony of Wagenius.

¹⁰ Ex. 1; Testimony of Bicking and Bonneville.

¹¹ Ex. 2; Testimony of Bicking.

¹² Testimony of Farheen Hakeem.

¹³ Ex. 3; Testimony of Wagenius.

¹⁴ Ex. 3.

¹⁵ Testimony of Wagenius.

¹⁶ Testimony of Wagenius.

15. Respondent continued to distribute the campaign literature piece (Ex. 1) at the Minneapolis DFL Ward endorsing conventions that took place between March 14 and April 25, 2009.¹⁷

16. On or about April 4, 2009, the Complainant learned that the Respondent's literature listing Cam Gordon as a supporter of the Mayor had been disseminated at a DFL ward convention.¹⁸

17. At the Minneapolis DFL Ward 2 convention that took place on April 18, 2009, the Respondent sponsored a resolution praising Council Member Gordon's service on behalf of the Ward and supporting his re-election to the City Council.¹⁹

18. On or about April 25, 2009, the Complainant again asked Council Member Gordon if he had endorsed Mayor Rybak and Mr. Gordon responded "no."²⁰

19. On May 8, 2009, the Complainant sent an email to Council Member Gordon asking him if he ever gave written permission to the Mayor's campaign to list his name as a supporter of the Mayor's re-election bid. The Complainant requested that Council Member Gordon respond to the email by the next day so that the Complainant would know whether to proceed with filing a campaign complaint. The Complainant explained in the email that he was motivated to file the complaint because he believed it was important to challenge violations of the campaign laws and to show unity among Green Party members. In addition, the Complainant stated that he believed the filing of a complaint "would be good to take Rybak down a notch."²¹

20. On May 9, 2009, the Green Party held its citywide endorsing meeting for the November 2009 elections.²² Council Member Gordon attended the meeting. The Complainant asked Mr. Gordon if he had endorsed Mayor Rybak or given the Mayor's campaign committee written permission to list him as a supporter, and Mr. Gordon responded in the negative.²³

21. The Green Party did not endorse a candidate for mayor of Minneapolis.

22. On May 12, 2009, the Complainant filed this campaign complaint with the Office of Administrative Hearings.

23. On May 13, 2009, Council Member Gordon signed a statement in support of Mayor Rybak's re-election campaign and gave the Mayor's campaign his written permission to list him publicly as a supporter of the Mayor's re-election efforts.²⁴

¹⁷ Testimony of Wagenius.

¹⁸ Testimony of Bicking and Bonneville.

¹⁹ Testimony of Wagenius.

²⁰ Testimony of Bicking.

²¹ Ex. A; Testimony of Bicking.

²² Ex. 3; Testimony of Bicking.

²³ Testimony of Bicking.

²⁴ Ex. 4.

24. On May 15, 2009, Council Member Gordon sent an email to 5th District Green Party members in which he publicly announced that he was endorsing Mayor Rybak's re-election campaign.²⁵ Council Member Gordon also posted his endorsement of the Mayor and his reasons for the endorsement on the "e-democracy.org" web blog.²⁶

25. On June 6, 2009, the Green Party membership committee held a meeting and discussed whether to "un-endorse" Council Member Gordon. Although a motion was made at the meeting to "un-endorse" Council Member Gordon, it was eventually withdrawn.²⁷

Based upon the foregoing 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.02 provides in relevant part as follows:

A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

3. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.²⁸

4. The Complainant has demonstrated by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 by stating in written campaign material that Mayor R.T. Rybak has the support of Council Member Gordon without first getting Mr. Gordon's written permission to do so.

5. The Respondent shall pay a fine of \$250 for the violation.

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

²⁵ Ex. 5.

²⁶ Ex. B.

²⁷ Testimony of Hakeem and Bicking.

²⁸ Minn. Stat. § 211B.32, subd. 4.

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. § 211B.02, Respondent R.T. Rybak for Mayor committee pay a civil penalty of \$250.00 by August 31, 2009.²⁹

Dated: July 28, 2009

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Presiding Administrative Law Judge

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

/s/ Patricia J. Milun
PATRICIA J. MILUN
Administrative Law Judge

Reported: Digitally recorded, no transcript prepared.

NOTICE

This is the final decision in this case, as provided in 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.

MEMORANDUM

Minn. Stat. § 211B.02 provides in relevant part that a person or candidate may not state in written campaign material that the candidate has the support or endorsement of an individual without first getting written permission from the individual to do so. The Respondent does not dispute that it violated the statute by disseminating written campaign material that listed Council Member Cam Gordon as supporting the Mayor's re-election campaign without first obtaining Mr. Gordon's written permission to

²⁹ The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, P.O. Box 64620, St. Paul MN 55164-0620.

do so. Given this admission, the only issue for the Panel to determine is what remedy or penalty is appropriate under the circumstances of the case.

Minnesota Statute § 211B.02 is directed against false claims that a candidate has the support or endorsement of an individual or major political party. In this case, there is no allegation that the Mayor's campaign committee *falsely* claimed that the Mayor had the support of Council Member Gordon. Instead, the record established that Council Member Gordon and Mayor Rybak supported each other's candidacies as early as mid-2008, and that in early 2009 Council Member Gordon attended and co-hosted public fundraisers and other public events in support of the Mayor's re-election campaign. Thus, the statement in Respondent's campaign material that Council Member Gordon supported the Mayor's re-election was in fact true. However, the Respondent did not get written permission from Gordon as required by the statute before disseminating the statement.

The Complainant argues that the Respondent's violation of the statute is serious, willful, and deserving of the maximum civil penalty.³⁰ The Complainant maintains that the identification of Council Member Gordon in the Mayor's campaign material may have discouraged potential Green Party challengers from entering the mayoral race and may have misled voters into believing that Council Member Gordon's endorsement of the Mayor meant that the Green Party endorsed the Mayor. The Complainant also contends that the material's claim of unanimous City Council support may have likewise discouraged DFL candidates from challenging Mayor Rybak. The Complainant suggests that the unanimity of the Council's support may have compelled potential candidates to conclude that the Mayor's race was wrapped up and not worth attempting a challenge.

The Complainant, however, failed to put forward any persuasive evidence, such as testimony from a dissuaded Green Party or DFL candidate or misled voter, to support these claims. Moreover, the Panel does not find credible the Complainant's claim that unanimous Council support would be that much more of a deterrent to a potential candidate than claiming the support of all but one Council Member. Finally, the campaign literature at issue was distributed to relatively small groups of DFL Party activists and occurred more than five months before the election. It is unlikely that such a limited distribution would have had any impact on potential Green Party candidates or voters beyond that which Cam Gordon's own appearance at fundraisers and other public events for the Mayor already had on the Green Party faithful.

The Panel concludes that the Respondent committed a technical violation of the statute by not obtaining Cam Gordon's written permission before disseminating the campaign material at issue. The violation was negligent but there is no evidence beyond mere speculation that failing to get Mr. Gordon's written permission had any impact on voters or that it adversely affected the electoral process in any way. The panel concludes that a \$250 fine in this case is appropriate.

B.H.J., B.J.H., P.J.M.

³⁰ See, Minn. Stat. § 211B.35, subd. 2. (The panel may issue a reprimand, may impose a civil penalty of up to \$5,000, and may refer the complaint to the appropriate county attorney for criminal prosecution.)