

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Cheryl Schimming and Grace Marie Guy,  
Complainants,

**FINDINGS OF FACT,  
CONCLUSIONS  
AND ORDER**

vs.

Mark Riverblood,

Respondent.

The above-entitled matter came on for an evidentiary hearing on May 26, 2009, before a panel of three Administrative Law Judges: Richard C. Luis (Presiding Judge), Barbara L. Neilson, and Kathleen Behounek. The OAH hearing record closed at the end of the hearing on May 26, 2009.<sup>1</sup>

Cheryl Schimming and Grace Marie Guy (Complainants) appeared on their own behalves without counsel.

John Dehen, Dehen Law Firm, P.A., appeared on behalf of Mark Riverblood (Respondent).

**STATEMENT OF ISSUE**

Did Respondent Mark Riverblood violate Minnesota Statute § 211B.11 by displaying campaign material within 100 feet of a polling place on election day?

The panel concludes that the Complainants have established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.11 by driving his truck bearing a campaign sign promoting his candidacy past the Princeton Township Hall on election day. The other allegation concerning Mr. Riverblood's display of campaign material within the Long Siding Bar and Grill on election day is dismissed for the reasons given in the attached Memorandum.

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

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<sup>1</sup> On June 4, 2009, counsel for Mr. Riverblood filed a request to supplement the hearing record. That request is denied. However, the written submission and attached affidavits will remain in the record as an offer of proof in the event of an appeal.

## FINDINGS OF FACT

1. Princeton Township is located in Mille Lacs County near the City of Princeton.

2. On March 10, 2009, Princeton Township held an election for two open seats on the Princeton Township Board of Supervisors. Supervisors serve three-year terms.

3. Mark Riverblood was a candidate for one of the open seats on the Princeton Township Board. His opponent was Eric Minks.

4. The polling place for the election was located in the Princeton Township Hall, which is approximately one-fourth mile west of U.S. Highway 169, at 55<sup>th</sup> Street and County Road 13.<sup>2</sup> The address of the Princeton Township Hall is 10039 55<sup>th</sup> Street, Princeton, MN 55371.

5. The Long Siding Bar and Grill is a privately owned establishment located across County Road 13 from the Princeton Township Hall. It is on the north side of the road. The front entrance of the bar is located approximately 75 ½ feet from the front door of the Township Hall, which is on the south side of the road.<sup>3</sup>

6. At about 11:30 a.m. on March 10, 2009 (election day), Mr. Riverblood entered the Long Siding Bar and Grill carrying campaign flyers promoting his candidacy. He sat down at the bar, ordered lunch, and asked the bar manager, Grace Marie Guy, if he could put the flyers up in the bar.<sup>4</sup>

7. Ms. Guy allowed Mr. Riverblood to leave his campaign flyers in the bar and she posted one of his flyers on the bulletin board in the back pool table room by the restrooms. Throughout the day, the majority of the flyers remained in a stack on the bar counter. However, a few of the flyers were distributed throughout the bar by employees and patrons who picked them up to read them.<sup>5</sup>

8. Mr. Riverblood left the Long Siding Bar and Grill after finishing his lunch at approximately 12:30 p.m.<sup>6</sup>

9. On the afternoon of March 10, 2009, Beverly Kiel was working at the pull tab booth located within the Long Siding Bar and Grill. At about 2:30 p.m. she stepped outside the front entrance of the bar to check on the weather. (It had been snowing throughout the day and the bad weather had resulted in school closings and other

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<sup>2</sup> The township map (Ex. G) shows a roadway running north and south to the east of the Township Hall. At the hearing, that roadway became known as "55<sup>th</sup> Street." The township map shows County Road 13 and 55<sup>th</sup> Street as the same east-west roadway, but for the purposes of this Order, the east-west road will be referred to as County Road 13, and the north-south road will be referred to as 55<sup>th</sup> Street.

<sup>3</sup> Testimony of Grace Guy.

<sup>4</sup> Testimony of Guy and Beverly Kiel.

<sup>5</sup> Testimony of Guy.

<sup>6</sup> Testimony of Mark Riverblood.

cancellations.)<sup>7</sup> At that point she observed Mr. Riverblood driving east on County Road 13 past the Township Hall in a truck bearing a campaign sign promoting his candidacy.<sup>8</sup>

10. The campaign sign that Mr. Riverblood had propped up in the back of his truck was 16" x 24" and read:

Vote March 10<sup>th</sup>  
[www.Mark-Riverblood.org](http://www.Mark-Riverblood.org)  
Princeton Township Board Supervisor  
A Serious Candidate for Serious Times  
NO Tax Increases  
Pro Business & Environment<sup>9</sup>

11. Also in the afternoon of March 10, 2009, Cheryl Schimming observed Mr. Riverblood drive east on County Road 13 in his truck bearing his campaign sign and then make a "U-turn" and head west on 13 toward the Township Hall. Ms. Schimming assumed that Mr. Riverblood had to have driven through the County Road 13-55<sup>th</sup> Street intersection in order to be heading east at the location where she first observed his truck.<sup>10</sup> The entirety of the County Road 13-55<sup>th</sup> Street intersection is within 100 feet of the northeast corner of the Township Hall.<sup>11</sup>

12. As it runs in front of the Princeton Township Hall, County Road 13 is within 100 feet of the polling place. As it runs to the east of the Township Hall, 55<sup>th</sup> Street is also within 100 feet of the polling place.

13. At about 5:30 p.m. on March 10, 2009, Mr. Riverblood's opponent, Eric Minks, entered the Long Siding Bar and Grill. A patron asked Mr. Minks a question about the election and Mr. Minks responded that he could not discuss the election while the polls were still open.<sup>12</sup>

14. Upon hearing Mr. Minks' comments, Ms. Guy took down Mr. Riverblood's flyer from the pool table room wall. Ms. Guy remembered that a public official, whom she believed was from the sheriff's office, had measured the distance between the town hall polling place and the Long Siding Bar and Grill last November for the general election and had determined that the bar was located within 100 feet of the polling place. Ms. Guy subsequently measured the distance from the township hall to the Long Siding Bar herself and concluded that the bar area (excluding the pool table room) was located within 100 feet of the township hall.<sup>13</sup>

15. Mr. Riverblood won election to the Princeton Township Board of Supervisors by two votes. He received 77 votes to Mr. Minks' 75 votes.

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<sup>7</sup> Ex. E.

<sup>8</sup> Testimony of Kiel; Exs. 7 and Q.

<sup>9</sup> Ex. Q.

<sup>10</sup> Testimony of Cheryl Schimming.

<sup>11</sup> Ex. I(1).

<sup>12</sup> Testimony of Guy.

<sup>13</sup> Testimony of Guy.

16. Ms. Schimming filed her complaint with the Office of Administrative Hearings on March 16, 2009. Ms. Guy filed her complaint on April 6, 2009. By Order dated April 8, 2009, the Chief Administrative Law Judge joined the complaints pursuant to Minn. Stat. § 211B.33, subd. 4.

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.11 governs election day prohibitions. Subdivision 1 provides as follows:

Subdivision 1. Soliciting near polling places. A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. This section applies to areas established by the county auditor or municipal clerk for absentee voting as provided in chapter 203B. . . .

3. The burden of proving the allegations in these complaints is on the Complainants. The standard of proof of a violation of Minn. Stat. § 211B.11 is a preponderance of the evidence.<sup>14</sup>

4. Although Minn. Stat. § 211B.11 makes no express distinction between public and private property in its prohibition against displaying campaign material and soliciting votes within 100 feet of a polling place, the panel concludes that this provision should not be interpreted to apply to private property or against a person who, as in this instance, displays campaign material within a private business.<sup>15</sup>

5. The Complainants have demonstrated that Respondent, Mark Riverblood, violated Minn. Stat. § 211B.11 by driving past the Princeton Township Hall on election day in a truck bearing an 16" x 24" campaign sign promoting his candidacy.

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

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<sup>14</sup> Minn. Stat. § 211B.32, subd. 4.

<sup>15</sup> See, *Burson v. Freeman*, 540 U.S. 191 (1992); *Anderson v. Spear*, 356 F.3d 651 (6<sup>th</sup> Cir. 2004); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11<sup>th</sup> Cir. 1985); *Calchera v. Procarione*, 805 F.Supp. 716 (E.D. Wisc. 1992).

**ORDER**

**IT IS ORDERED:**

That having been found to have violated Minn. Stat. § 211B.11, Mark Riverblood pay a civil penalty of \$100 by July 10, 2009.<sup>16</sup>

Dated: June 5, 2009

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

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

/s/ Kathleen Behounek  
KATHLEEN BEHOUNEK  
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**

Minnesota Statutes § 211B.11, subd. 1, prohibits persons from displaying campaign material, posting signs, soliciting, or in any manner trying to induce or persuade voters within 100 feet of a building in which a polling place is situated to vote

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<sup>16</sup> 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.

for or against a candidate on election day. The statute makes no distinction between public and private property in its prohibition against displaying campaign material and soliciting votes. There are no reported decisions interpreting the Minnesota statute or discussing its application to private property.

In *Burson v. Freeman*,<sup>17</sup> a divided U.S. Supreme Court upheld a Tennessee statute prohibiting the solicitation of votes and the displaying or distribution of campaign materials within 100 feet of the entrance to a polling place as applied to *public* property. The plurality opinion recognized that polling place “campaign-free” zones implicate “three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of speech.”<sup>18</sup> A restriction of any of those forms of speech requires strict scrutiny of the constitutionality of that restriction. That means that the restriction has to serve a compelling state interest; has to be narrowly tailored to serve that interest; and has to be the least restrictive means of achieving that interest.<sup>19</sup>

The Court found that states have a compelling interest in maintaining the integrity of the voting place and preventing voter intimidation and election fraud, and the Court concluded that the 100 foot boundary was narrowly tailored to achieve that interest even though it restricted speech in “quintessential public forums,” such as sidewalks and streets. The plurality opinion noted that, in light of a long history of problems with voter intimidation and election fraud in this country, Tennessee could decide that the “last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible.”<sup>20</sup>

In another challenge to a similar campaigning ban, homeowners in Wisconsin living across the street from a polling place challenged a statute banning electioneering within 500 feet of any polling place on election day.<sup>21</sup> The homeowners had posted campaign signs in their front yards and were thereafter threatened with a citation if they did not remove their signs. The Court struck down the statute as not narrowly tailored to achieve the State’s legitimate interest in maintaining the integrity of the election process. In addition to having a significantly larger boundary (500 feet), the Court distinguished the Tennessee statute at issue in *Burson*, which encompassed only sidewalks and streets, from the Wisconsin statute which included “private residences as well.” The Court noted that with its sweeping zone of protection, the Wisconsin statute “prohibits individual homeowners from expressing their political views *on their own property*.”<sup>22</sup> The Court concluded that the statute was not narrowly tailored to achieve the State’s interest and amounted to an unconstitutional infringement on free speech.<sup>23</sup>

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<sup>17</sup> 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

<sup>18</sup> *Id.* at 196.

<sup>19</sup> *Burson*, 504 U.S. at 198, 112 S.Ct. 1846.

<sup>20</sup> *Burson*, 504 U.S. at 210.

<sup>21</sup> *Calchera v. Procarione*, 805 F.Supp. 716, 720 (E.D. Wis. 1992).

<sup>22</sup> *Id.* at 720. (Emphasis in original.) (Wisconsin’s current statute limits the prohibited boundary to 100 feet and excludes private property. See, Wis. Stat. § 12.03(2)(b)2.)

<sup>23</sup> *Id.*

Similarly in *Clean-Up '84 v. Heinrich*,<sup>24</sup> the 11<sup>th</sup> Circuit Court of Appeals struck down as overbroad a statute that banned electioneering within 100 yards of a polling place because the radius at some polling sites included private homes and businesses. The state had argued that while it was conceivable that a sheriff or elections official might seek to enter a private home or business within 100 feet of a polling place and attempt to prevent a person from soliciting signatures, “it was unlikely that an elected official would use the power of his or her office in such an abusive manner.”<sup>25</sup> The Court dismissed this argument noting that the danger of an overbroad statute is not that actual enforcement will occur, but that parties may feel inhibited in using their protected first amendment communications.<sup>26</sup>

Finally, in *Anderson v. Spear*,<sup>27</sup> a write-in candidate challenged, among other things, Kentucky’s 500 foot non-campaigning buffer zone as overbroad. In attempting to distinguish this case from *Calchera*, the appellees pointed out that the Kentucky statute had an exception for electioneering on private property, while the Wisconsin statute did not. Appellees argued therefore that at voting places surrounded by private property, electioneering may in fact occur within 500 feet thereby obviating what would otherwise be 750,000 sq feet of enforced silence. The Sixth Circuit Court of Appeals, however, found the statute’s private property exception was far narrower than suggested by Appellees. The statute read:

Nothing contained in this section shall prohibit electioneering conducted within a private residence or establishment other than that in which the polling place is located by persons having an ownership interest in such property.

The Court noted that the word “within” made the exception virtually non-existent by prohibiting any political speech outside the interior confines of the actual house or business. Based upon the plain language of the statute, an individual who owns a house within 500 feet of a polling place would not be able to display a political yard sign or stand on his property distributing literature, because the speech would not be “within” a private residence or establishment. The Court also noted that, because the statute only exempts speakers who have an ownership interest in the property, the owner of a home or business could not invite a person into her home or establishment to speak about the election without running afoul of the 500 foot restriction. For these and other reasons, the Court struck down the statute. The Court stated that this “wafer-thin exception does not cure the overbroad speech regulation.”<sup>28</sup>

As a general rule, Administrative Law Judges and agency heads lack jurisdiction to declare a statute unconstitutional on its face in a contested case proceeding, since

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<sup>24</sup> 759 F.2d 1511 (11<sup>th</sup> Cir. 1985).

<sup>25</sup> *Id.* at 1514.

<sup>26</sup> *Id.*

<sup>27</sup> 356 F.3d 651 (6<sup>th</sup> Cir. 2004).

<sup>28</sup> *Id.*

that power is vested solely in the judicial branch of government.<sup>29</sup> It is permissible, however, for an agency or ALJ to determine a constitutional question in the interpretation of a statute or its application to particular facts, taking into account relevant judicial decisions.<sup>30</sup>

In this instance, taking into account the particular facts of the case and the relevant judicial decisions, the panel concludes that the 100 foot campaigning restriction mandated by Minn. Stat. § 211B.11 must be interpreted to apply only to public property. To apply the restriction to private property, and in this case within the confines of a private business, would render the statute overbroad and result in an unconstitutional restriction of free speech. Accordingly, while the panel found the testimony of Grace Marie Guy and Beverly Kiel (a witness who supported Ms. Guy's version of the events on March 10 inside the Long Siding Bar and Grill) to be very credible and believes that Mr. Riverblood did bring campaign material into the establishment for distribution on election day,<sup>31</sup> the panel is compelled to conclude that Ms. Guy's allegations concerning Mr. Riverblood's display of campaign material within the Long Siding Bar and Grill are not within the proper reach of the statute and must be dismissed.

The panel concludes, however, based on the testimony of Ms. Kiel and Ms. Schimming, that Mr. Riverblood did drive past the Princeton Township Hall on election day within 100 feet of the polling place in his truck displaying a campaign sign promoting his candidacy. While Ms. Kiel could not actually identify Mark Riverblood as the driver of the truck, she saw the truck pass between the buildings on County Road 13. The panel believes Ms. Kiel's testimony that she recognized Mr. Riverblood's truck and the record contains no evidence that anyone but Mr. Riverblood drove his truck that day. Mr. Riverblood denied delivering flyers to the Long Siding Bar and Grill on election day and driving within 100 feet of the polling place. However, the panel does not find Mr. Riverblood's testimony persuasive in light of consistent contrary testimony by witnesses who had no reason to exaggerate or fabricate their account of the events. The panel also believes Ms. Schimming's testimony that she saw Mr. Riverblood driving east on County Road 13 just beyond the intersection with 55<sup>th</sup> Street and accepts the logic that, in order to be in that position, Mr. Riverblood had to have driven within 100 feet of the polling place. Ms. Schimming also recognized Mr. Riverblood specifically as the driver of the truck.<sup>32</sup> Although the record shows that Ms. Schimming supported Mr. Riverblood's opponent, the panel believes her straightforward and sincere testimony regarding what she observed on election day.

Given the size of the campaign sign, the prominent location in which it was displayed on the truck, and the panel's finding<sup>33</sup> that Mr. Riverblood was campaigning inside the Bar and Grill on election day, the evidence supports the conclusion that the

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<sup>29</sup> See, e.g., *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. App. 1993).

<sup>30</sup> *Smith v. Willis*, 415 So.2d 1331, 1336 (Fla. Dist. Ct. App. 1982); *Jackson County Educ. Ass'n v. Grass Lake Community*, 95 Mich. App. 635, 641, 291 N.W.2d 53, 56 (1980); *Petterssen v. Commissioner of Employment Serv.*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975).

<sup>31</sup> See Finding 6.

<sup>32</sup> See Findings 11 and 12.

<sup>33</sup> See Finding 6.

display of this material on his truck within 100 feet of the polling place violated Minn. Stat. § 211B.11. However, the panel views this violation as *de minimis*. The record shows that Princeton Township was hit with a winter snowstorm featuring high winds and poor visibility on election day.<sup>34</sup> And, there is no other evidence establishing that Mr. Riverblood's vehicle was within 100 feet of the polling place, apart from the two sightings of his moving vehicle detailed above. Accordingly, the panel concludes that a \$100 civil penalty is appropriate.

**R.C.L., B.L.N., K.B.**

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<sup>34</sup> See Ex. E; Testimonies of Kiel and Riverblood.