

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Sarah MacRunnels,

Complainant,
vs.

Elena Ostby,

Respondent.

NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
PROBABLE CAUSE HEARING

TO: Sarah MacRunnels, c/o Alan Weinblatt, Weinblatt & Gaylord, PLC, 111 East Kellogg Blvd, Suite 300, St. Paul, MN 55101; and Elena Ostby, 430 County Road B2 West, Roseville, MN 55113.

On November 2, 2006, Sarah MacRunnels filed a Complaint with the Office of Administrative Hearings alleging that Elena Ostby violated Minn. Stat. § 211B.06. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a prima facie violation of Minn. Stat. § 211B.06.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **4:00 p.m. on Wednesday, November 8, 2006**. The hearing will be held by call-in telephone conference. You must call: **1-888-677-3757** at that time. Follow the directions and enter the numeric pass code **"17622"** when asked for the meeting number. The probable cause hearing will be conducted pursuant to Minn. Stat. § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be faxed to Administrative Law Judge Steve M. Mihalchick at 612-349-2665.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based upon a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minn. Stat. § 211B.35. If the presiding Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minn. Stat. § 211B.34, subd. 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401, or call 612/341-7610 (voice) or 612/341-7346 (TTY).

Dated: November 3, 2006

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Respondent is a Ramsey County District Court Judge. She was appointed to the bench in 2004, and is seeking to retain her seat in the November 7, 2006, General Election. The Complaint alleges that the Respondent violated Minn. Stat. § 211B.06 by posting a false statement of fact on her campaign website. The alleged false statement of fact is as follows:

First, Judge Ostby *has* recused herself 87 times in over two years on the bench.¹

The Complaint asserts that the Respondent did not *recuse* herself from a single case between January 1, 2005, and June 28, 2006. Instead, the Complaint maintains that the Respondent was *removed* by parties from 87 cases during that

¹ Complaint Ex. 1 (italics original).

time frame.² “Recusal” is a voluntary act. Under the rules of criminal procedure, a judge may recuse him or herself from presiding over a trial or other proceeding without a motion.³ “Removal,” on the other hand, is an involuntary act. In order to remove a presiding judge, the defendant or prosecuting attorney must serve and file a notice to remove. Parties are permitted to disqualify the presiding judge as a matter of right, but thereafter may disqualify the substitute judge only upon an affirmative showing of cause.⁴

The Complaint alleges that, as a sitting Ramsey County Judge, the Respondent knows the difference between involuntary removals and voluntary recusals. According to the Complainant, the difference is significant because removal rates are one of the few objective ways to measure a judge’s character. The Complainant argues that, by stating that she recused herself from 87 cases, the Respondent was attempting to mislead the electorate and disseminated false campaign material in violation of Minn. Stat. § 211B.06.

Minn. Stat. § 211B.06 prohibits a person from intentionally preparing or disseminating false campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false. Campaign material is defined as “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”⁵ Respondent’s website appears to be campaign material.

The statement identified as false by the Complainant precedes several more sentences that appear to use the words “recusal” and “removal” interchangeably. The complete paragraph reads as follows:

First, Judge Ostby *has* recused herself 87 times in over two years on the bench. All of these came in response to requests from criminal defense attorneys-possibly because of Judge Ostby’s reputation for being tougher on crime than other judges. This does not mean that she is not a fair judge. All criminal defendants have a legal right to ask that a judge be removed without giving a reason for their request. In fact, in just two years, Judge Ostby has handled thousands of cases and there were no requests to remove in the vast majority of those cases. Recusals are a fact of life for most judges. Also, Judge Ostby has surveyed attorneys who have handled cases over which she has presided and she has used their constructive advice to do a better job. There is a learning curve with new judges and Judge Ostby has worked hard to learn to become a fine judge.

² Complaint Ex. A.

³ Minn. Rule Crim. Pro. 26.03, subd. 13(5).

⁴ Minn. R. Crim. Pro. 26.03, subd. 13(4).

⁵ Minn. Stat. § 211B.01, subd. 2.

While noting that the meaning of the statement will need to be construed together with its context, the Administrative Law Judge concludes that the Complainant has put forward sufficient facts to allege a prima facie violation of Minn. Stat. § 211B.06. The statement at issue in this Complaint concerns Respondent's personal or political character, and it can be proven true or false. Accordingly, the allegation in the Complaint will proceed to a probable cause hearing.

S.M.M.