

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Michael D. Johnson,

Complainant,

vs.

Grant Residents Who Want to Save
Grant, Art and Joyce Welander, Kim
Linner, Tim Gangnon, Nancy Levitz, Brad
Hinseth, Kevin Fernandez, Tom Carr, and
Gary Erichson,

Respondents.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

The above-entitled matter came on for hearing on January 18, 2005, and May 19, 2005 before a panel of three Administrative Law Judges: Bruce H. Johnson (presiding judge), Steve M. Mihalchick, and Barbara L. Neilson. The hearing record closed on June 13, 2005, upon the filing of the final written submissions.

During the hearing on May 19, 2005, all nine of the Respondents moved to be dismissed from the Complaint. The Panel granted the motion as to Art Welander, Tim Gangnon, Nancy Levitz, Brad Hinseth, and Tom Carr. Accordingly, only Joyce Welander, Kim Linner, Kevin Fernandez, and Gary Erichson remain as Respondents in this proceeding.

Jay Benanav of the firm of Weinblatt & Gaylord, 111 E. Kellogg Blvd., Suite 300, St. Paul, MN 55101 appeared representing Complainant, Michael Johnson. Christopher K. Wachtler of the firm Collins, Buckley, Sauntry & Haugh, West 1100 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1379 appeared representing Respondents Art and Joyce Welander, Gary Erichson, Tom Carr, Kevin Fernandez, and Brad Hinseth. Emily Murphy, Attorney at Law, PO Box 2095, Stillwater, MN 55082 appeared representing Respondent Tim Gangnon; Mark. G. Schroeder of the firm Briggs and Morgan, 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 appeared representing Respondent Kim Linner. Nancy A. Levitz, Respondent, 10155 119th St. North, Stillwater, MN 55082, represented herself without counsel.

NOTICE

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

STATEMENT OF ISSUES

Did the Respondents violate Minn. Stat. § 211B.04, by failing to include a disclaimer on campaign flyers distributed prior to the election?

Did the Respondents violate Minn. Stat. § 211B.06, by making false statements in campaign flyers?

Did the Respondents know the statements were false or make them in reckless disregard of their truth or falsity?

If so, what remedy, if any, is appropriate?

Are these charges frivolous such that the Respondents are entitled to recover costs and attorney fees incurred in the defense of this matter?

Based upon the record in this matter, the panel makes the following:

FINDINGS OF FACT

1. The City of Grant (either “Grant” or “the City”) is a municipal corporation and a political subdivision of the State.

2. In the November 2, 2004 election, two City Council seats were up for election in Grant. Michael D. Johnson, Charles “Rick” Vanzwol, Kim Linner, and Nancy Levitz ran for these seats. Ms. Levitz and Ms. Linner won seats on the City Council. Mr. Vanzwol lost by nine votes, and Mr. Johnson lost by approximately 309 votes.^[1] Tim Gangnon and Nancy McNulty opposed each other in the Mayoral race, and Mr. Gangnon won the seat.

3. A few months before the election, Joyce Welander hosted a meeting of individuals at her home to discuss who of those in attendance might run for City Council. Present at that meeting were Nancy Levitz, Kim Linner, Tom Carr, Gary Erichson, and Kevin Fernandez.^[2] The group discussed the individual process for registering to become a candidate.^[3]

4. A month later, during a subsequent meeting at the Welander residence attended by Joyce Welander, Kim Linner, and Kevin Fernandez, among others, Tom Carr stopped by the Welander residence to ask if he could use the Welander’s address on some campaign material.^[4] Joyce Welander gave him permission to do so. The Welanders live at 10381 – 83rd Street North in Grant.^[5]

5. On October 26, 2004, one week before the election, Grant residents began receiving a series of four campaign flyers distributed by an organization identified as “Grant Residents Who Want to Save Grant” in the newspaper boxes at their homes.^[6] At the bottom of three of the four flyers was the language:

“Defeat Vanzwol, Johnson, and McNulty on Nov. 2.

This is an independent expenditure not approved by any candidate. Prepared by Grant residents who want to save Grant, 10381 83rd St N, Grant, 55082.”^[7]

Each of the flyers contained statements that the Complainant alleges are false.

6. The fourth flyer makes no reference to Mr. Vanzwol, Mr. Johnson, or Ms. McNulty. Instead, it asks Grant voters to support Mr. Gangnon, Ms. Levitz, and Ms. Linner and contains a slightly different disclaimer.^[8]

Road Plan Benefits

7. Two of the flyers contained the following statements:

A. “You now participate in paying someone else’s City road paving assessment on your City tax bill.”^[9]

B. “Vanzwol yard sign means that Grant resident favors you paying someone else’s paving assessment.”^[10]

8. In August, 2004, the City of Grant revised its Road Plan. Specifically, certain improvements that were formerly considered “extraordinary road maintenance” and were assessed 100% against those who lived on the road, such as asphalt overlays, were now considered “general road maintenance” paid for by the City out of the general fund.^[11]

9. The Road Plan states that one of the goals of the road plan is to, “Over time, improve the quality of all the roads in Grant whether they are gravel or paved.” It shows budget increases in the following categories for gravel roads: new gravel, dust control, and additional funding provided under the five-year plan.^[12] The Revised Plan also shows increases in many categories that benefit both gravel and paved roads including: snow & ice removal, brushing & mowing, signs, safety fund, and equipment fund.^[13]

10. Residents of Grant living on county or state roads would not see an improvement on the streets in front of their residences under the Revised Plan, but would benefit since they would also use city streets.

11. Throughout the road planning process the City Council attempted to remain consistent with the philosophy underlying the City’s Comprehensive Plan – that is, maintaining Grant’s rural density and rural character. The City Council noted at the time it approved the modified Road Plan that this change to the Road Plan would increase taxes in Grant.^[14]

PUDs/Indian Hills II

12. One of the flyers contained the following two statements:

- A. “Vanzwol and his allies will not commit to opposing more intense development, such as planned unit development, which will open the door to metro sewer & water.”^[15]
- B. “Johnson is a developer, with past involvement in supporting a 300-acre planned unit development in Grant.”^[16]

13. In the mid-1970s, Grant, which was then a town, received an application for a special use permit to construct Indian Hills Country Club (Indian Hills I). At that time, land use in the Town of Grant was governed by County land use ordinances. And Indian Hills I met the County’s definition of a planned unit development (PUD).^[17] Since that time, many residents of Grant have, as a general matter, objected to intense development^[18] in Grant, including metro sewer and water and PUDs.

14. In May 2002, after Grant had been incorporated as a city, a proposal to expand Indian Hills Country Club (Indian Hills II) came before the Grant City Council.^[19] There was intense debate and discussion surrounding the issue and whether or not the proposed expansion was allowed under the City ordinances, which then governed land use within Grant, as well as whether the new proposal was consistent with the approved 1975 proposal.^[20] The City of Grant’s ordinances did not then, and do not now, contain a definition of a PUD, and the Grant City Attorney did not characterize Indian Hills II as a PUD.^[21] In preliminary Council votes, Mr. Vanzwol voted in favor of the Indian Hills II project.

15. Complainant also supported the Indian Hills II project, which the Grant City Attorney did not characterize as a PUD.^[22] Complainant is not in favor of bringing metro sewer and water and intense development into Grant.^[23]

16. During the October 5, 2004 City Council meeting, Mr. Vanzwol, when polled on his thoughts about PUDs, stated that he wanted a definition of a PUD before he would say he was for or against it.^[24]

17. However, on numerous occasions, including during City Council meetings and candidate forums, Mr. Vanzwol has voiced his opposition to metro sewer and water and intense development in Grant.^[25]

Town Hall/Fire Station

18. Two of the flyers contained the following statements:

- A. “Vanzwol yard sign . . . means that a Grant resident favors more massive taxation for a City Hall complex.”^[26]
- B. “Purchasing road maintenance and fire fighting equipment for Grant will multiply our costs for these services. . . The accumulation of equipment will eventually force the building of city facilities.”^[27]

19. During 2004, the Grant City Council engaged in a brief discussion at a Council meeting about the City's Insurance Services Organization (ISO) rating and therefore have to pay higher fire insurance premiums. Some Grant homeowners were located over 5 miles from a fire station. The Mahtomedi Fire Chief told the Council that any Grant homes that were not located within 5 miles of a fire station would receive a higher ISO rating. He informed the Council that this could be avoided by putting a Mahtomedi fire truck in a new substation in Grant. He also mentioned that an option would be for Grant to purchase a fire truck for the substation. There was a brief discussion but no decision by the City Council and no action was taken concerning the purchase of a fire truck. The participants never discussed whether Grant or Mahtomedi would pay for such a substation. A similar discussion took place at a later budget meeting, but no action was taken.^[28]

20. The Grant Town Hall^[29] is an old building in need of significant repair. Prior to the 2004 election, City Council discussions regarding the Town Hall had focused on repair and maintenance of the facility. The Town Hall basement had a severe mold problem that needed to be repaired before it affected those persons gathering on the first floor.^[30]

21. The 2005 Grant draft budget included a line item with \$15,000 appropriated for the Town Hall/Fire Station. That amount was appropriated primarily for mold removal in the Town Hall.^[31] There was no proposal to build a city hall complex.^[32]

22. The City's 2005 capital funds budget shows additional revenues of \$77,000 with no expenditures listed for 2005.^[33]

Taxes

23. Three of the flyers contained the following statements:

A. "Your average city tax increase will more than double in 2005. Voted in by Vanzwol, Schwarze and Kraemer without a citywide referendum."^[34]

B. "Vanzwol yard sign means that Grant resident favors doubling your city taxes without a citywide referendum."^[35]

C. "Your Grant taxes are increasing from 70% to 100% next year."^[36]

24. On July 27, 2004, the Grant City Council held a public hearing regarding the new road policy and its effect on the City's budget, taxes, and levy. Between 300 and 400 citizens attended the hearing. At the meeting, Mr. Vanzwol provided a handout with a table that estimated the increase in City taxes based upon various increases in the levy.^[37] The table showed the increases based upon home market values ranging from \$100,000 to \$750,000. The various percentage increases depicted on the table ranged from a low of 73% for homes valued at \$500,000 or more to a high of 363% for homes valued at \$100,000.^[38]

25. On July 29, 2004, the St. Paul Pioneer Press published an article entitled *Rough Roads Prompt City to Consider Doubling Taxes*.^[39] The article describes the Grant tax levy as “skyrocketing” from \$680,000 to \$1.2 million and quotes Mr. Vanzwol as telling Grant residents “It’s time to pay the piper.”

26. A few days later, the White Bear Press ran an article entitled *Grant Road Improvements Could Double City Taxes: City Council Considering a \$500,000 Levy to Help Fund Road Improvement Projects*.^[40] Mr. Vanzwol is quoted in this article as telling Grant residents, “You’ve gotten by free for a long time and now it’s time to pay.”

Based upon the foregoing Findings of Fact, the Panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the Administrative Law Judge Panel to consider this matter.

2. The Respondents received proper notice of the hearing in this matter.

3. That the Complainant may properly bring the complaint filed in this matter.

4. Minn. Stat. § 211B.01, subd. 2, amended in 2004, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election...”

5. The flyers that were distributed in this case constitute campaign material since they were literature that was distributed for the purpose of influencing voting at the Grant City Council election.

6. Minn. Stat. § 211B.04, provides that: “A person who participates in the preparation or dissemination of campaign material ... 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.”^[41]

7. Minn. Stat. § 211B.06, subd. 1, provides that: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation [or] dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or 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.”

8. Each of the four flyers distributed by the group identified as “Grant Residents Who Want to Save Grant”^[42] is campaign material with respect to the personal or political character or acts of a candidate and, therefore, is governed by Minn. Stat. Ch. 211B.

9. Minn. Stat. § 211B.32, subd. 4, provides that: “The burden of proving the allegations in the complaint is on the complainant. The standard of proof of a violation of section 211B.06, relating to false statements in ... campaign material, is clear and convincing evidence. The standard of proof of any other violation of 211A or 211B is a preponderance of the evidence.”

10. The Complainant has failed to establish by a preponderance of the evidence that the disclaimers on the flyers are not substantially in the form provided by statute.

11. The Complainant established by clear and convincing evidence that the first, second, and third flyers^[43] all contained statements that are false, within the meaning of Minn. Stat. Ch. 211B. The Complainant did not establish by clear and convincing evidence that the fourth flyer^[44] contained statements that were false, within the meaning of Minn. Stat. Ch. 211B.

12. The Complainant established by clear and convincing evidence that the Respondent Gary Erichson participated in the preparation or dissemination of either the first, second, or third flyer, and that he knew statements included therein were false or that the statements were being communicated with reckless disregard for their truth, all in violation of Minn. Stat. § 211B.06.

13. The Complainant failed to establish by clear and convincing evidence that Respondents Joyce Welander, Kim Linner, and Kevin Fernandez participated in the preparation or dissemination of either the first, second, or third flyers, in violation of Minn. Stat. § 211B.06.

14. The Complainant’s complaints against Respondents Art and Joyce Welander, Kim Linner, Tim Gangnon, Nancy Levitz, Brad Hinseth, Kevin Fernandez, and Tom Carr were not frivolous, within the meaning of Minn. Stat. § 211B.36, subd. 3.

15. These Conclusions are reached for the reasons discussed in the Memorandum below, which is incorporated into these Conclusions by reference.

Based upon these Conclusions, and for the reasons stated in the following Memorandum, the Panel of Administrative Law Judges makes the following:

ORDER

IT IS HEREBY ORDERED, as follows:

(1) That the motions to dismiss of Respondents Joyce Welander, Kim Linner, and Kevin Fernandez are GRANTED, and they are DISMISSED as Respondents in this proceeding;

(2) That the motion to dismiss of Gary Erichson is DENIED;

(3) That the motions of Respondents Art and Joyce Welander, Kim Linner, Tim Gangnon, Nancy Levitz, Kevin Fernandez, Brad Hinseth, Gary Erichson, and Tom Carr for assessments upon the Complainant of their costs and reasonable attorneys' fees, pursuant to Minn. Stat. § 211B.36, subd. 3, are DENIED; and

(4) That the Respondent Gary Erichson pay a civil penalty of \$1,800 by July 29, 2005, for violations of Minn. Stat. § 211B.06.^[45]

Dated this 27th day of June 2005.

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

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

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

Reported: Taped recorded (9 tapes).
No Transcript Prepared.

MEMORANDUM

I. Violations of Minn. Stat. § 211B.06

As Minn. Stat. § 211B.06 relates to the issues in this case, a person commits a violation of that statute:

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

Upon analysis, that statute involves five essential elements, each of which must be established by “clear and convincing evidence.”^[46]

- (1) That what was disseminated was “campaign material”;
- (2) That the person complained of intentionally participated in the preparation and dissemination of that campaign material;
- (3) That the campaign material was designed to elect, injure, promote, or defeat a candidate for election to a public office;
- (4) That the campaign material was false; and
- (5) That the person complained of either knew that the campaign material was false or communicated it to others with reckless disregard of whether it was false.

The Panel concludes (1) that the four flyers at issue in this case were campaign material; (2) that the campaign material was designed or tended to elect, injure, promote, or defeat a candidate for election to a public office;^[47] and (3) that, with one exception, those flyers contained false statements.^[48] And the Panel concludes that the evidence was such that whoever intentionally participated in the preparation and dissemination of the three false flyers either knew they were false or helped communicate their contents to others with reckless disregard of whether they were false. Rather, the problem in this case is determining by clear and convincing evidence who intentionally participated in the preparation and dissemination of the flyers.

A. What was at issue here met the definition of “campaign material.”

Minn. Stat. § 211B.01, subd. 2, amended in 2004, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election...” On their face, the purpose of Flyers One, Two, and Three was to influence voters to “defeat” candidates Vanzwol, Johnson,

and McNulty for election to City of Grant municipal offices in the November 2004 general election.^[49] On its face, the purpose of Flyer Four was to influence voters to vote “Yes” for candidates Gangnon, Levitz, and Linner in that same general election.^[50] In other words, the purpose of all four flyers was to influence voting in the election, and all four flyers represent “campaign material” within the meaning of the statute.

B. The campaign material was designed to elect, injure, promote, or defeat a candidate for election to a public office.

Again, Flyers One, Two, and Three were expressly designed to “defeat” candidates Vanzwol, Johnson, and McNulty.^[51] By asking voters to vote “Yes” for candidates Gangnon, Levitz, and Linner, Flyer Four was clearly designed to “promote” the election of those candidates.^[52]

C. Three of the four flyers contained statements that were false.

Road Policy

“You now participate in paying someone else’s City road paving assessment on your City tax bill.”

Complainant alleges that this is a false statement because it leads Grant voters to believe that a new assessment will appear on their tax bills for paving that is done for other residents in Grant. He argues that the new Road Policy did not change the way special paving assessments are levied on benefiting properties.

Respondents argue that the statement is not false because Grant residents will see an increase in their tax bills due to the effect of the new Road Policy on the manner in which Grant residents pay road-paving costs. Under the new Road Policy, the cost of paving in Grant will be paid out of the general fund, which is money collected from all residents of Grant, even those living on county roads and state highways. Therefore, Respondents assert that, because all Grant residents pay into the general fund, they are, in essence, paying someone else’s paving assessment.

The Panel has concluded that the way in which the statement is worded clearly makes it false. Under the new Road Policy, Grant residents are not paying “someone else’s” assessment. The new policy simply makes certain paving costs the responsibility of all Grant taxpayers.^[53] The statement in the flyer, as worded, is a mischaracterization of the new Road Policy and is false.

“Vanzwol yard sign means that Grant resident favors you paying someone else’s paving assessment.”

This statement is also false for the reasons stated above.

PUDs/Indian Hills II

“Vanzwol and his allies will not commit to opposing more intense development, such as planned unit development, which will open the door to metro sewer & water.”

Complainant alleges that this is a false statement because Mr. Vanzwol has a 12-year record of supporting the current population density in Grant and opposing sewer and water. Mr. Vanzwol supports keeping Grant rural and opposes outside annexation.

Respondents argue that Mr. Vanzwol’s statement at the October 5, 2004 City Council meeting that he wanted a definition of a PUD before he would say whether he was for one or against one, demonstrates that Mr. Vanzwol “will not commit” to opposing more intense development, such as PUDs.

Despite the impact that this statement may have had on the election, it does not fall within the jurisdiction of the statute as interpreted by the Minnesota Supreme Court. In Kennedy v. Voss,^[54] the court decided that the predecessor statute to § 211B.06 was directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from a candidate’s conduct.

While it is true that Mr. Vanzwol has a long history of opposing intense development in Grant, it is also true that he would not commit to being against PUDs. The fact that Grant ordinances do not currently contain a definition of a PUD is not material to this argument. The statement is sufficiently equivocal so as not to make it false under the statute.

“Johnson is a developer, with past involvement in supporting a 300-acre planned unit development in Grant.”

Complainant argues that this statement is false because the PUD (Indian Hills II) that Complainant allegedly supported in 2002 was not actually defined as a PUD by the Grant City Attorney.

Respondents argue that expansion of an existing PUD is also a PUD, so that Complainant’s support of Indian Hills II constitutes support of a PUD, since the original Indian Hills in 1975 was a PUD. Respondents also assert that, despite what the City Attorney advised the City Council in 2002 about Indian Hills II, it was ultimately up to the City Council to decide whether or not it was a PUD.

Complainant supported Indian Hills II based upon the fact that the project met the zoning requirements of Grant which do not define a PUD, and based upon the City Attorney’s lengthy analysis and conclusion that Indian Hills II was not a PUD. To say that Complainant supported a 300-acre planned unit development in Grant is not true. The statement is false under the statute.

Town Hall/Fire Station

“Vanzwol yard sign . . . means that a Grant resident favors more massive taxation for a City Hall complex.”

Complainant contends that the statement is false because the City Council never had a developed plan to build such a complex. Complainant argues that the \$15,000 appropriated to Town Hall/Fire Station in Grant's 2005 draft budget had nothing to do with a City Hall complex and was instead earmarked for the correction of the mold problems in the basement of the Town Hall. Furthermore, Complainant references the testimony of then-Mayor Tom Carr, in which he stated that there was no proposal to build a new city complex and that he, in fact, had spoken with a contractor about the mold problem and received a bid for the project.

Respondents counter that the City had spent money on and budgeted for new maintenance equipment, and that the City was hiring employees for maintenance services. Respondents reason that the grader that the City had recently purchased and the fire truck that might be purchased or borrowed from the Mahtomedi Fire Department would require a new larger storage space, and that such a space would require increased taxation in Grant.

The record demonstrates clearly that the Town Hall had a severe mold problem that needed to be corrected and that steps had been taken to arrange for such a project. Any talk of a new city complex was speculation and/or rumor. At no time did Mr. Vanzwol state that he favored "more massive taxation for a City Hall complex." The statement is false under the statute.

"Purchasing road maintenance and fire fighting equipment for Grant will multiply our costs for these services. . . The accumulation of equipment will eventually force the building of city facilities."

This statement appeared on the piece of campaign material that makes no reference to Complainant, Mr. Vanzwol, Ms. McNulty, Ms. Schwarze, or Mr. Kraemer. It makes no statements with respect to the personal or political character or acts of a candidate, and therefore, is not actionable under the statute. Accordingly, allegations related to the fourth flyer are dismissed from the Complaint.

Taxes

"Your average city tax increase will more than double in 2005. Voted in by Vanzwol, Schwarze and Kraemer without a citywide referendum."

Complainant claims that this statement is false because most Grant residents will see a tax increase of approximately 70-80%. Complainant presented complex expert testimony demonstrating that it would not be possible for the average tax to "more than double" in Grant under these circumstances.

Respondents first point out that this issue was previously adjudicated in the *Johnson v. Levitz* matter (OAH Docket No. 22-6381-16304-CV), where the statements regarding doubling of taxes were dismissed from the complaint at the *prima facie* stage. Accordingly, Respondents assert that the Office of Administrative Hearings is bound by the principles of *res judicata*, *collateral estoppel*, and binding precedent since the exact same set of facts is involved in both matters with only the Respondents differing

between matters. In the alternative, Respondents maintain that the tax increase information presented by Complainant focuses on the tax increase for residents with homes valued at \$500,000 or more. Respondents also argue that Mr. Vanzwol has been inconsistent and unclear about when and where and from whom he obtained and provided information.

The panel recognizes that the factors that play into a tax increase are many. Chris Samuel presented complicated testimony about how taxes are calculated, and he reached the conclusion that the average tax could not “more than double” in Grant under the circumstances. Yet when the handout from the July public hearing and its subsequent amendment are examined, it is possible to see how a reasonable person could reach a conclusion that taxes would “more than double” for Grant residents with homes valued between \$100,000 and \$150,000. Furthermore, when the percentage increases from the July handout are averaged (73%, 73%, 88%, 132% and 363%), the result is that the average tax will more than double (146%). This statement has not been shown to be false by clear and convincing evidence

“Vanzwol yard sign means that Grant resident favors doubling your city taxes without a citywide referendum.”

This statement is also not false for the reasons stated above.

“Your Grant taxes are increasing from 70% to 100% next year.”

This statement appeared on the piece of campaign material that makes no reference to Complainant, Mr. Vanzwol, Ms. McNulty, Ms. Schwarze, or Mr. Kraemer. It makes no statements with respect to the personal or political character or acts of a candidate, and therefore, is not actionable under the statute. As previously noted, allegations relating to the fourth flyer are dismissed from the complaint.

D. The Complainant only established by clear and convincing evidence that the Respondent Gary Erichson intentionally participated in the preparation and dissemination of false campaign material.

In their disclaimers, Flyers One, Two, and Three indicated that they had been prepared by and were being disseminated by “Grant residents who want to save Grant.”^[55] Flyer Four indicated that it had been prepared by and was being disseminated by “concerned Grant residents.”^[56] In both cases, the disclaimers indicated that the address of those two entities was “10381 83rd St. N., Grant, 55082.” And that was the address of Respondents Art and Joyce Welander. In their testimony at the hearing, Mr. and Mrs. Welander both confirmed that that was their address, but both denied being members of any such groups or of being involved in any way in the preparation and dissemination of the four flyers.^[57] Joyce Welander’s explanation for how her address came to be on the disclaimers was that many people in Grant ask to use her address for various purposes because her home is centrally located and she is known in the community. She admitted that Kim Linner or Tom Carr asked her if her address could be used on unspecified campaign literature, and she concurred.

However, there was no clear evidence that Joyce Welander was specifically asked if “Grant Residents Who Want to Save Grant” or “Concerned Grant Residents” could use her address. She testified that she never heard the names of these groups until after the election and asserted that she never saw any of the four flyers until after the election. The Panel considered Mrs. Welander’s testimony on these issues to be highly evasive and regarded her explanation of how her address came to be on the flyers and her denial of any prior involvement with the flyers with considerable skepticism. But there was no other substantial evidence of any kind in the record to link her with preparation or dissemination of the flyers. And suspicion, skepticism, and incredulity fall far short of the clear and convincing evidence standard established by Chapter 211B, even when added to the evidence that was in the record.

The other named Respondents were added to this proceeding after evidence was produced at the first hearing on January 18th that they had been present at one or more meetings at the Welander home during which the upcoming municipal general election was discussed. After the close of the Complainant’s case in chief on May 19th, the Panel concluded that, viewing the evidence and inferences that could be drawn from the evidence in the light most favorable to the Complainant, there was still insufficient evidence in the record to establish by clear and convincing evidence that Respondents Art Welander, Tim Gangnon, Nancy Levitz, Brad Hinseth, and Tom Carr had intentionally participated in the preparation and dissemination of any of the four flyers. The Panel therefore dismissed those five respondents, leaving only Joyce Welander, Kim Linner, Kevin Fernandez, and Gary Erichson as respondents in this proceeding. As discussed above, the Panel has concluded that the Complaint failed to establish by clear and convincing evidence that Joyce Welander intentionally participated in the preparation and dissemination of any of the four flyers. The Panel did not dismiss the Complaint against Kim Linner at that time. The evidence had established that Ms. Linner had been present at two meetings at the Welander home, either one or both of which inferentially could have been meetings of the Group “Grant residents who want to save Grant.” The evidence had also established that Ms. Linner had asked Joyce Welander to use the Welander address on some campaign literature, which could have been the campaign literature in question. But when Ms. Linner presented her case in chief, she testified that she had asked to use the Welander address for her own campaign literature, that Joyce Welander had agreed, but that Ms. Linner had later decided to use her own address for her campaign literature. That testimony turned out to be uncontradicted and not seriously challenged except, perhaps, for some adverse inferences. After viewing the evidence as a whole, the Panel concluded that the Complainant had failed to establish by clear and convincing evidence that Ms. Linner had been intentionally involved with preparation or dissemination of the flyers in question in violation of Minn. Stat. § 211B.06.

The evidence against Kevin Fernandez presented a closer case. He testified that he saw drafts of the First and Fourth Flyers, which were then in a slightly different form than the ones that were actually circulated, although he did not indicate when and where he saw them or who had presented them to him for examination. During direct examination, Mr. Fernandez denied having seen the flyers in their final form until some were later placed in his newspaper box by persons unknown. But the evidence also

established that on a day before the election, Mr. Fernandez and the Complainant encountered each other while both were distributing campaign literature in Grant. Both agree that a dispute arose between them regarding taking campaign literature out of residents' newspaper boxes. The Complainant testified that he observed Mr. Fernandez in the act of distributing one of the four flyers at issue, but that he could not recall which of the four. The Panel tended to believe the Complainant's version of the events of that day. The problem of proof is that if Mr. Fernandez had been distributing Flyer Four, there was no violation because the Panel has concluded that Flyer Four contained no false statements. Merely seeing drafts of four flyers in their incomplete form falls short of intentionally preparing or disseminating them, and the evidence failed to establish that the flyer Mr. Fernandez disseminated was one that contained false statements. And for those reasons, the Panel concluded that that the Complainant had failed to establish by clear and convincing evidence that Mr. Fernandez had been intentionally involved with preparation or dissemination of the flyers in question in violation of Minn. Stat. § 211B.06.

On the other hand, demonstrating a candor that most of the other witnesses lacked, Respondent Gary Erichson testified during the first day of hearing on January 18th that he copied some of the fliers on his own copy machine, and that he distributed "some of those flyers" in his neighborhood, but that he did not recall how many or which ones he distributed.^[58] During the second day of hearing on May 19th, Mr. Erichson attempted to mute the effect of his earlier testimony. But the Panel accorded the greatest weight to what appeared to be candid and truthful testimony on January 18th that was against his own interest. Based on Mr. Erichson's own testimony, the Panel concluded that there was clear and convincing evidence that he had been intentionally involved with preparation or dissemination of those flyers that contained false statements in violation of Minn. Stat. § 211B.06.

II.

The Complainant Failed to Establish that The Disclaimers on the Flyers Were Defective

Minn. Stat. § 211B.04, provides that: "A person who participates in the preparation or dissemination of campaign material ... 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."^[59] Although the disclaimers on the four flyers at issue^[60] are phrased in language that is somewhat different from the statutory form, they contain the essential information that the statute intended be communicated to voters and therefore are substantially compliant. Although the disclaimers do not identify the individuals who comprise "Grant residents who want to save Grant" or "concerned Grant residents," the statute does not require disclaimers to do so. If there is some requirement in law that a group distributing campaign material publicly identify its membership, that requirement is outside this office's statutory jurisdiction.

III.

The Respondents Are Not Entitled to Costs and Attorneys Fees

During the election campaign that preceded the municipal elections in the City of Grant in November 2004, some group of persons identifying themselves as "Grant residents who want to save Grant" worked in concert to produce four campaign flyers, three of which were expressly intended to defeat certain candidates for the City's municipal offices and one of which was designed to promote the candidacies of three others. The former three flyers all contained false statements. The evidence at least created a suspicion that all of the respondents had some knowledge of who comprised "Grant residents who want to save Grant," some perhaps more knowledge than others. And much of the testimony in this case was not distinguished by its candor. But suspicion is not evidence, and in the final analysis, the Complainant was only able to establish by clear and convincing evidence the intentional involvement of only one individual in preparation or dissemination of those flyers. But a failure of proof does not make a complaint frivolous so as to warrant imposition of costs and attorneys' fees. Moreover, the process that the legislature selected for these kinds of administrative hearings made the Complainant's ability to prove his claims against others somewhat difficult. Minn. Stat. §§ 211B.31 through 211B.37 clearly indicate a relatively simple and expeditious process that particularly would allow complaints filed before an election to be disposed of before the election occurred. In order to simplify the process to accomplish that goal, the legislature specifically provided that these proceedings were not to be treated as contested case proceedings under Chapter 14, with all the process that might involve, except for purposes of appellate review.^[61] As a result, all of the discovery procedures available to parties to contested case proceedings^[62] are not available to parties in these kinds of cases. Moreover, administrative law judges possess no investigative or inquisitorial power, which, in any event, would likely be inconsistent with the Code of Judicial Conduct to which they are subject. And although county attorneys do have investigative powers, the Panel has concluded that this case does not warrant referral to the Washington County attorney for criminal prosecution pursuant to Minn. Stat. § 211B.35, subd. 2(e). Whether availability of discovery or a criminal investigation would have produced a different result is speculative and debatable. The point is that given the limited investigative measures available in these kinds of proceedings, the Panel concludes that the Complainant's complaints were not frivolous, but that he proceeded according to a good faith belief, based on some foundation, about the substance of his claims against the Respondents. The Panel therefore concludes that the Complainant should not be taxed with any of the Respondents' costs and attorneys' fees pursuant to 211B.36, subd. 3.

IV. Civil Penalty

There were three separate violations of Minn. Stat. § 211B.06 in the three flyers. The evidence does not clearly establish that the violations were knowing or intentional. But they were clearly reckless, negligent and ill-considered. Little effort was made to collect accurate information when it would have been easy to do so. The appropriate level of willfulness in the penalty matrix is therefore "negligent." In considering the gravity of the violation, the flyers were distributed within a week of the election, which made it difficult to counter and likely created an unfair advantage for the Respondents

that ran for City Council. The appropriate gravity category on the penalty matrix is “some impact on several voters, difficult to correct/counter.”

The facts of this case are similar to those in the *Levitz* case, which involved the same election in the City of Grant. But in *Levitz*, the Respondent was responsible for city-wide distribution of false campaign material and therefore bore responsibility for all of the impact that the campaign material had on the outcomes of the election. This Panel believes that a civil penalty should reflect the actual impact that a Respondent’s individual involvement with the campaign material had on the outcome of the election. The evidence indicated that Mr. Erichson only copied enough flyers to distribute to homes in his own neighborhood and only disseminated them there. So, he bears only partial responsibility for any city-wide impact on the election that the flyers may have had, and the assessed civil penalty reflects that diminished responsibility.

The OAH penalty matrix calls for a civil penalty of \$600 to \$1200 for each violation with the above-described level of willfulness and gravity of violations. The Panel therefore assesses a civil penalty on Mr. Erichson, the only Respondent whose involvement was established by clear and convincing evidence, of \$600 for each violation.^[63]

B.H.J., B.L.N., S.M.M.

^[1] Testimony of Rick Vanzwol and Complainant.

^[2] Testimony of Joyce Welander, Kevin Fernandez, Kim Linner, and Nancy Levitz. Art Welander was present in the house at the time of the meeting, but did not take part in the discussion.

^[3] Testimony of Kim Linner.

^[4] Testimony of Tom Carr, Kim Linner, Kevin Fernandez, and Joyce Welander.

^[5] Testimony of Art and Joyce Welander.

^[6] Exhibits O, P, and Q; Testimony of Complainant and Kevin Fernandez.

^[7] Exhibits A, B, C, and D.

^[8] The disclaimer on Exhibit D stated “Prepared and paid for by concerned Grant residents, 10381 83rd St N, Grant 55082.”

^[9] Exhibit B.

^[10] Exhibit C.

^[11] Exhibits 15 and 16; Testimony of Rick Vanzwol.

^[12] Exhibit 15.

^[13] Exhibit 15.

^[14] Exhibit 16.

^[15] Exhibit A.

^[16] Exhibit A.

^[17] Exhibit 7; Testimony of Gary Erichson.

^[18] Mr. Vanzwol testified that he considers intense development to be development on more than 10 acres.

^[19] Exhibits 11 and 13; Testimony of Complainant and Gary Erichson.

^[20] Exhibits 10, 11, and 13.

^[21] Testimony of Rick Vanzwol and Complainant; Ex. Z.

- [22] Testimony of Complainant and Gary Erichson; Exhibit Z.
- [23] Testimony of Complainant; Exhibits G and I.
- [24] Exhibit 5; Testimony of Rick Vanzwol and Gary Erichson.
- [25] Exhibits G, J, and X; Testimony of Rick Vanzwol.
- [26] Exhibit C.
- [27] Exhibit D.
- [28] Exhibits 5, 27, and 33; Testimony of Todd Rogers, Kim Linner, and Tom Carr.
- [29] Still referred to as such by residents, although Grant has become a city.
- [30] Exhibits 5 and 33; Testimony of Rick Vanzwol.
- [31] Exhibit 17; Testimony of Rick Vanzwol and Complainant.
- [32] Testimony of Tom Carr.
- [33] Exhibit 17.
- [34] Exhibit A.
- [35] Exhibit C.
- [36] Exhibit D.
- [37] Exhibit 16, page 6; Testimony of Gary Erichson.
- [38] Exhibit 1, pages 6-7.
- [39] Exhibit 3.
- [40] Exhibit 4.
- [41] The required disclaimer in paragraph (b) reads as follows: "Prepared and paid for by the _____ committee, _____ (address), in support of _____ (insert name of candidate or ballot questions).
- [42] Exhibits A through D.
- [43] Exhibits A through C.
- [44] Exhibit D.
- [45] The check should be made payable to "Treasurer, State of Minnesota", and sent to the Office of Administrative Hearings, (Attn. Finance Director) Suite 1700, 100 Washington Ave. S., Minneapolis, MN 55401.
- [46] Although the burden of proof for most substantive provisions of Chapter 211B is the "preponderance of the evidence" standard, the burden of proof for violations of Minn. Stat. § 211B.06 is "clear and convincing evidence." See Minn. Stat. § 211B.32, subd. 4
- [47] The Fourth Flyer (Exhibit) D did not mention the Complainant or any other unsuccessful candidate for the Grant City Council. Rather, it promoted the candidacies of Respondents Gangnon, Levitz, and Linner and, therefore, satisfied this element by "promoting" their candidacies.
- [48] See discussion in Part I-C, below.
- [49] See Exhibits A, B, and C.
- [50] See Exhibit D.
- [51] See Exhibits A, B, and C.
- [52] See Exhibits A, B, and C.
- [53] The fact that Mr. Vanzwol's campaign material says that those who do not live on city roads, including himself, will see a tax increase but receive no direct benefit under the policy is not material in considering whether the statements in the flyers are false.
- [54] 204 N.W. 2d 299, 300 (Minn. 1981).
- [55] Exhibits A, B, and C.
- [56] Exhibit D.
- [57] There was so little evidence of Art Welander's involvement with the flyers, that the Panel granted his motion to dismiss him as a Respondent at the close of the Complainant's case in chief.
- [58] Testimony of Gary Erichson on January 18, 2005. The fact that Mr. Erichson testified that he copied and distributed more than one of the flyers negates the possibility that he, unlike Mr. Fernandez, may only have distributed the Fourth Flyer (Exhibit D), which the Panel has concluded was not false.
- [59] The required disclaimer in paragraph (b) reads as follows: "Prepared and paid for by the _____ committee, _____ (address), in support of _____ (insert name of candidate or ballot questions).
- [60] Exhibits A through D.
- [61] See Minn. Stat. § 211B.36, subd.
- [62] See Minn. R. pt. 1400.8600 (2003).

¹⁶³ The Panel considers it regrettable that the weight of this civil penalty is solely on the one Respondent who came forward to testify candidly and honestly about his involvement with the flyers and accepted responsibility. The Panel considered this in calculating the amount of the civil penalty, along with Mr. Erichson's testimony that he only distributed the flyers in his own neighborhood.