

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Jeannette M. Pahl,

Complainant,

vs.

Nick Mucciacciaro, Ward 1,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

The above-entitled matter came on for an evidentiary hearing on January 28, 2009, before a panel of three Administrative Law Judges: Eric L. Lipman (Presiding Judge), Manuel J. Cervantes and Jennifer Patterson. The hearing record closed on January 28, 2009.

Jeannette M. Pahl (Complainant) appeared on her own behalf without counsel.

Nick Mucciacciaro (Respondent) appeared on his own behalf without counsel, but with the assistance of Kevin Foley.

STATEMENT OF ISSUE

Did Respondent Nick Mucciacciaro violate Minnesota Statute § 211B.06 by intentionally preparing and disseminating false campaign material that he knew was false or communicated to others with reckless disregard as to whether it was false?

The panel concludes that the Complainant has established by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06.

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

FINDINGS OF FACT

1. The Complainant, Jeannette Pahl, is an Afton resident and was the chair of Patricia Snyder's successful campaign for mayor of Afton in the November 2008 election.¹

¹ Ex. 14

2. The Respondent, Nick Mucciacciaro, served on the Afton City Council as a Councilmember for Ward 1 for several terms. In October of 2008, Mr. Mucciacciaro was the incumbent City Councilmember for Ward 1. Mr. Mucciacciaro did not seek re-election to this post in the November 2008 election.

3. The Afton City Council meets the third Tuesday of every month. In preparation for these meetings, council members typically receive a packet of material on the Thursday before the meeting. Included in the packet are monthly financial reports prepared by the Afton City Accountant, Tom Niedzwiecki.²

4. A standing item on the agenda for the monthly Afton City Council meetings is the review of the monthly financial statements prepared by the Mr. Niedzwiecki.³

5. Although Mr. Mucciacciaro has a vision impairment that renders him legally blind, he is able to read printed documents, albeit slowly, with the aid of a hand-held illuminated magnifier.

6. It was undisputed at the evidentiary hearing that Mr. Mucciacciaro was engaged in the monthly City Council meetings, frequently asked questions regarding Council agenda items and seemed to have read the staff-developed memoranda that were circulated in advance of Council meetings.⁴ It was likewise undisputed that if supplemental information was provided to Council members just before, or during, the Council meetings, Mr. Mucciacciaro would require assistance in order to access this information; such as having someone read aloud to him the recently-arriving documents.⁵

7. In 2004, the Afton City Council established a “special reserve fund,” which was funded primarily from savings the City achieved by cutting staff positions, contracting out services, and instituting other cost savings measures. In its first full year, the Council was able to put approximately \$180,000 into the fund and the fund grew by another \$100,000 the following year.⁶ No new money was added to the fund in 2007 and 2008.⁷

8. The November 2006 election resulted in a politically divided Afton City Council, with Mr. Mucciacciaro being in the minority on many actions approved by the Council. In 2007, both the City Council meetings and the process for developing a City budget were more contentious and than in prior years.⁸

² Testimony of Peg Nolz.

³ Testimony of Nolz and Julia Welter; Ex. E.

⁴ Testimony of Welter.

⁵ Testimony of Shelly Strauss.

⁶ Ex. 13 (The special reserve fund had a balance of \$182,132 on December 31, 2005, and a balance of \$281,854 on December 31, 2006.); Testimony of David Engstrom.

⁷ Testimony of Charles Devine.

⁸ Testimony of Strauss.

9. In addition, in the first eight months of 2007, seven lawsuits were filed against the City; resulting in the City incurring significant legal fees and other costs.⁹

10. Throughout 2007, the cash balance of the special reserve fund was at or near \$290,000.¹⁰

11. At the November 7, 2007 City Council meeting, Mr. Mucciacciaro made a motion to transfer \$60,000 from the special reserve fund to the general fund to pay for the Afton-Lakeland Gully Stabilization Project. The motion was approved.¹¹ However, the money was not actually transferred from the special reserve fund to the general fund until October or November of 2008.¹²

12. On September 30, 2008, the City's special reserve fund had a balance of \$302,757.¹³

13. Mr. Mucciacciaro was concerned that because the City had been drawn into a series of lawsuits, each with mounting legal costs, and the State of Minnesota was considering reductions in local government aid (LGA), the City Council would be obliged to drain the special reserve fund in order to cover the City's expenses.¹⁴

14. In mid-October 2008, Mr. Mucciacciaro prepared and disseminated to the residents of Afton a letter entitled "State of the City." In the letter, Mr. Mucciacciaro praised the previous City Council for assembling nearly \$300,000 in a budget reserve fund, and criticized the current City Council for not adding to the reserve fund. Mr. Mucciacciaro further claimed in the letter that the current City Council spent down the reserve. Mr. Mucciacciaro stated:

Since this current council has been in office not one penny has been added to our reserve fund. In fact, **the reserve has been spent down to where it stands at only \$60,000.** I am not saying that all that money was completely wasted. But as a member of the minority on the current council, the majority members were not particularly interested in alternative points of view as to how to be more prudent, efficient and cost effective with your tax dollars.¹⁵

15. Mr. Mucciacciaro went on in the letter to endorse the non-incumbent candidates for the Afton Mayoral and City Council elections. Mr. Mucciacciaro warned against continuing the "irresponsible and wrong-headed policies of the current mayor and council majority." Mr. Mucciacciaro signed the letter: "Nick 'tell it like it is' Mucciacciaro."¹⁶

⁹ Testimony of Strauss.

¹⁰ Testimony of Nolz; Exs. A and 13.

¹¹ Testimony of Nolz; Ex. 11 at 4-5.

¹² Testimony of Nolz, Welter and Strauss; Exs. 2, 7 and 8.

¹³ Ex. C.

¹⁴ Testimony of David Engstrom.

¹⁵ Letter attached to Complaint. (Emphasis in original.)

¹⁶ Letter attached to Complaint.

16. In November of 2008, the City Council mailed a copy of its proposed budget for 2009 to residents of Afton. Certain significant increases in expenditures were not reflected in this proposed budget.¹⁷

17. For example, the budget estimated \$35,000 in legal fee co-payments for 2009, notwithstanding the fact that its exposure for these litigation costs was likely twice this figure. As a member of the League of Minnesota Cities Insurance Trust (LMCIT), the City of Afton pays a \$250 deductible on the first \$25,000 in litigation costs and then a 15 percent co-payment for litigation costs above \$25,000 and up to \$250,000. For litigation costs in excess of \$250,000, Afton's co-payment increases to 40 percent.¹⁸

18. As of late October 2008, the City had incurred \$27,552 in litigation costs for which it was responsible, in one lawsuit, and the overall costs of the defense in this action had topped \$200,000.¹⁹ In a second court case, as of this same date, the City's co-payment for litigation costs had reached \$10,560.²⁰

19. According to the November 30, 2008, balance sheet prepared by Mr. Niedzwiecki, the City's special reserve fund had a balance of \$243,331.²¹ This figure reflected the \$60,000 transfer to the general fund that occurred in October or November of 2008.

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. Campaign material is defined to mean "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, ..." ²² The letter prepared and disseminated by Mr. Mucciacciaro is campaign material within the meaning of that statute.²³

3. Minn. Stat. § 211B.06, subd. 1, provides, in part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast 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

¹⁷ Testimony of Devine; Exs. 2, 4 and 8.

¹⁸ Exs. 3, 5 and 6; Testimony of Devine.

¹⁹ Testimony of Devine; Exs. 3 and 5.

²⁰ Ex. 3.

²¹ Ex. F.

²² Minn. Stat. § 211B.01, subd. 2.

²³ Ex. J-1.

person knows is false or communicates to others with reckless disregard of whether it is false.

4. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.²⁴

5. The Complainant has demonstrated that Respondent, Nick Mucciacciaro, violated Minn. Stat. § 211B.06 by intentionally preparing and disseminating campaign material that was false and that he knew was false or communicated to others with reckless disregard as to whether it was false.

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

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. § 211B.06, Nick Mucciacciaro pay a civil penalty of \$175 by April 30, 2009.²⁵

Dated: February 11, 2009

/s/ Eric L. Lipman

ERIC L. LIPMAN

Presiding Administrative Law Judge

/s/ Manuel Cervantes

MANUEL CERVANTES

Administrative Law Judge

/s/ Jennifer Patterson

JENNIFER PATTERSON

Administrative Law Judge

Reported: Digitally recorded, no transcript prepared.

²⁴ Minn. Stat. § 211B.32, subd. 4.

²⁵ 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.

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

Sometime in mid-October of 2008, Mr. Mucciacciaro prepared and disseminated a letter to Afton residents in which he stated that the current city council had spent down the City's special reserve fund to \$60,000. This statement was false. In fact, at the time that Mr. Mucciacciaro made this representation, the special reserve fund had a cash balance of approximately \$300,000.

The fund was reduced by \$60,000 in late October or November of 2008, when the council transferred that amount to its general fund to pay for the Afton-Lakeland Gully Stabilization Project. This transfer was done in accordance with a motion made by Councilmember Mucciacciaro and approved by the City Council in November of 2007. After the transfer was completed in November of 2008, the special reserve fund had a balance of \$243,331.

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false. The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.²⁶ Based upon this standard, the Complainant has the burden at the hearing to prove by clear and convincing evidence that the Respondent either published the statements knowing the statements were false, or that he "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.²⁷

As the U.S. Supreme Court has noted, there is not one precise definition of "reckless disregard." Inevitably, its outer limits must be marked through case-by-case adjudication. A respondent cannot automatically ensure a favorable decision by testifying that he published with a belief that the statements were true.²⁸ A statement may have been made with actual malice if it

is fabricated by the defendant, is the product of his imagination, . . . is based wholly on an unverified anonymous telephone call [or if] the

²⁶ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).

²⁷ See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

²⁸ *St. Amant*, 390 U.S. at 732; *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1253 (9th Cir. 1997) ("As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence.").

publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.²⁹

In determining whether a respondent had serious doubts about the truth of his statement, the panel must assess the information available when the statement was made, including the identities of the sources and what those sources said.³⁰

The Complainant, Ms. Pahl, argues that because Mr. Mucciacciaro was a councilmember who reviewed and discussed the City's financial statements at the monthly city council meetings, he knew his claim about the amount of money remaining in the reserve account was false when he disseminated it.

Rather than confess the error, and maintain that the \$60,000 figure followed from an innocent but regrettable misreading of the city's spreadsheets,³¹ Mr. Mucciacciaro's defense of his claim became only more steadfast as the hearing progressed. The testimony that he adduced into the record was to the effect that he intended to communicate to Afton voters that the then-current level of the special reserve account was \$60,000; he knowingly disseminated this claim; and that the figure was scrupulously checked and re-checked before it was disseminated.³² Because the 2009 budget did not accurately reflect significant expenditures facing the city of Afton, Mr. Mucciacciaro argues that it was proper for him to claim that the amount of the special reserve fund had been drawn down to \$60,000.

While Mr. Mucciacciaro has a First Amendment right to circulate projections of the City's actual liabilities that are gloomy, or even improbable, he may not disseminate claims that are demonstrably false.³³ There is no evidence in the record for how Mr. Mucciacciaro arrived at the \$60,000 figure – as opposed to \$0, a negative number, or any other sum – and no such tabulation is derivable from this record.

Whatever frustration Mr. Mucciacciaro (or others) may feel about the management of the city's affairs, this frustration is not a license to disseminate campaign material that is factually inaccurate. The panel concludes that a penalty of \$175 is appropriate.

E. L. L., M. J. C., J. P.

²⁹ *St. Amant*, 390 U.S. at 732.

³⁰ See *In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 815-16 (Minn. 2006).

³¹ Compare, Ex. C with Ex. 7.

³² Testimony of Kevin Foley; Testimony of Nick Mucciacciaro.

³³ Compare, *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).