

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Wallace Fatland,

Complainant,

vs.

**NOTICE OF DETERMINATION
OF PRIMA FACIE VIOLATION**

Brian Smith and Gary Larsen,

Respondents.

TO: The Parties

On March 26, 2010, Wallace Fatland filed a Campaign Complaint with the Office of Administrative Hearings alleging that Brian Smith and Gary Larsen violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material relating to the March 9, 2010 Burlington Township election. 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. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a telephone prehearing conference and an evidentiary hearing, to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. The mailing address for the Office is P.O. Box 64620, St. Paul, MN 55164-0620.

Pursuant to Minn. Stat. § 211B.35, the evidentiary hearing must be held within 90 days of the date the complaint was filed.

You will be notified of the dates and times of both the prehearing conference and evidentiary hearing, and the three judges assigned to hear this matter, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if 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

Judges. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judges and the opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

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 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: March 31, 2010

/s/ Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

The Complaint concerns the March 9, 2010, election for Burlington Township Supervisor.¹ Incumbent Township Supervisor Dave Green ran for re-election and was challenged by Respondent Gary Larsen. Mr. Green received 223 votes to Mr. Larsen's 63 votes. The Complaint alleges that prior to the election, Respondents Larsen and Township Supervisor Brian Smith prepared and disseminated false campaign material regarding Supervisor Green and other members of the Township Board.

Specifically, the Complaint alleges that Respondents Larsen and Smith falsely stated in letters to the editor that were published in the *Frazee-Vergas Forum* that the Township would soon be out of money due to mismanagement by the current Township Board. In particular, the Respondents blamed the Township's alleged financial crisis on Supervisor Green's and Township Chairperson Kathleen Froelich's support of a controversial and costly road paving project. According to the Complaint, Respondent Smith repeated these false statements about the Township's finances on a local radio program.

¹ Burlington Township is located in Becker County, Minnesota.

The Complainant has attached to the Complaint the letters to the editor at issue, as well as other supporting documents.

In Respondent Larsen's first letter to the editor published in the *Frazee-Vergas Forum* on July 16, 2009, Mr. Larsen claimed that the Township would be out of money after August 2009.² In that letter, Mr. Larsen wrote:

After August the Burlington Township check book balance will be *Zero!*
The savings reserve will be *Zero!* Property tax distribution will be *Zero!*
Burlington Township will not be able to pay the insurance, the snow removal, the electric bill, or even the Internal Revenue Service.

...

At last week's meeting, Chairperson Kathleen Froelich must have realized Burlington Township would be left penniless from the paving project that runs in front of her house. She abruptly resigned her position.³

This letter spurred several rebuttal letters to the editor, including one from the Township Treasurer, Linda Olsen. In her letter to the editor, which was published in the *Frazee-Vergas Forum* on July 30, 2009, Ms. Olson addressed Mr. Larsen's claims that the Township would be out of money after August.⁴ Ms. Olson detailed the Township's financial obligations and resources, and noted that the Township had approximately \$38,000 in a checking account as of June 26, 2009, and approximately \$121,000 in a money market account.⁵

In Mr. Larsen's second letter to the editor that was published in the *Frazee-Vergas Forum* on February 25, 2010, he again claimed that the Township would soon be out of funds.⁶ In that letter Mr. Larsen wrote:

Not only did I not ignore the [township] treasurer's report, but used the report to inform the public that we would be out of funds as was finally admitted in August by the chairman when she repeatedly told the residents that the township was out of money.⁷

Mr. Larsen closed the letter by encouraging residents of the township to vote for him.

² Complaint Ex. 3.

³ Complaint Ex. 3 (emphasis in original).

⁴ Complaint Ex. 6.

⁵ *Id.*

⁶ Complaint Ex. 1.

⁷ *Id.*

In Respondent Smith's letter to the editor, which was also published in the February 25, 2010, edition of the *Frazee-Vergas Forum*,⁸ he stated that the road paving project supported by Supervisor Green and Township Chairperson Kathleen Froelich "took all of the money" and that Ms. Froelich repeatedly told residents in August that "the township had no money."⁹ Mr. Smith asserted in his letter that "[t]his is not a rumor. It is a fact."¹⁰ Mr. Smith closed his letter by encouraging residents to vote for Gary Larsen.

The Complaint maintains that contrary to the claims of Respondents Smith and Larsen, the Township is not now, and was not in the summer of 2009, out of money. The Complainant has attached a copy of the Township's bank statement dated July 15, 2009, which reflects a balance of approximately \$380,000. The Complainant has also attached the rebuttal letter to the editor from Linda Olsen detailing the Township's finances, and the Township's January 2010 newsletter which lists the Township's monthly checking account balances for 2009. According to the newsletter, the balance in that account fluctuated between approximately \$115,000 to \$349,000 throughout 2009.¹¹ The Complainant also maintains that the Chair of the Township Board, Ms. Froelich, never stated at the August meeting that the Township was out of money.

Finally, the Complaint asserts that the Respondents knew their statements were false when they published them. The Complainant notes that, as a sitting Township Supervisor, Respondent Smith had received copies of the Township's bank statements and was well aware that the Township was not out of money as he claimed. Likewise, the Complainant contends that both Respondents had access to the Township newsletters and information from the Township Treasurer regarding the Township's finances. According to the Complainant, both Respondents disseminated their claims that the Township was out of money knowing the claims were false or communicated them with reckless disregard as to whether they were false.

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

⁸ Complaint Ex. 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Complaint Ex. 7.

A person is guilty of a misdemeanor who intentionally participates in the drafting of a letter to the editor with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat any candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.¹²

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate's conduct, even if misleading.¹³ It does not reach criticism that is merely unfair or unjust.¹⁴ It does reach false statements of specific facts.¹⁵ In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.¹⁶

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.¹⁷ Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondents "in fact entertained serious doubts" as to the truth of the ad or acted "with a high degree of awareness" of its probable falsity.¹⁸

¹² Minn. Stat. § 211B.06, subd. 1 (emphasis added).

¹³ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

¹⁴ *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which "told only one side of the story," or were merely "unfair" or "unjust," without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

¹⁵ *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

¹⁶ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

¹⁷ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹⁸ *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 (Minn. App.), rev. denied (Minn. 2006).

To allege a *prima facie* violation at this stage of the proceeding, the Complainant must allege sufficient facts to show that a violation of law has occurred.¹⁹ “*Prima facie*” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”²⁰ “*Prima facie* evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”²¹ In determining whether a campaign complaint sets forth a *prima facie* violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

As an initial matter, the Complainant’s claims regarding alleged false statements made by Respondent Smith on a local radio program must be dismissed. The definition of “campaign material” is limited to written material.²² Oral statements fall outside of the definition and cannot form the basis of a claim under Minn. Stat. § 211B.06.²³

Likewise, the assertions made by Respondents in their letters to the editor that Ms. Froehlich repeatedly told residents that the Township was out of money are also not actionable under Minn. Stat. § 211B.06. The statute proscribes false campaign material and “letters to the editor ... with respect to the personal or political character or acts of a candidate.” Because Ms. Froehlich was not a candidate for election, the Complainant’s claim that Respondents disseminated false campaign material with respect to her is dismissed.

With that said, the letters to the editor identified by the Complainant declaring that the Township was, or would soon be, out of money, do fall within the purview of Minn. Stat. § 211B.06. These statements reflect upon the personal or political character of incumbent candidate Green and are susceptible of being proven either true or false. The Administrative Law Judge concludes that the Complainant has alleged sufficient facts to support a *prima facie* finding that those statements are false and that the Respondents prepared and disseminated these statements with knowledge of their falsity or reckless disregard for their accuracy. Such conduct, if proven, violates Minn. Stat. § 211B.06.

¹⁹ Minn. Stat. § 211B.32, subd. 3.

²⁰ *Black’s Law Dictionary* 1228 (8th ed. 2004).

²¹ *Id.* at 598.

²² Minn. Stat. § 211B.01, subd. 2.

²³ See, *Koalska v. Juneau*, OAH Docket No. 7-6312-16225-CV (2004) (the Administrative Law Judge concluded that “campaign material” is limited to written matter and excludes oral statements) (<http://www.oah.state.mn.us/aljBase/631216225.DISM.OR.htm>). See also, *Potter v. Hinseth, et al*, OAH Docket No. 7-6381-20011-CV (2008) (<http://www.oah.state.mn.us/aljBase/638120011.DISM.OR.htm>); *Holter v. Melbye*, OAH Docket No. 12-0320-17816-CV (2007) (statements made on radio program not campaign material) (<http://www.oah.state.mn.us/aljBase/032017816.primafacie.ord.htm>); and *Behrens v. Rossbach & Committee*, OAH Docket No. 12-6361-17183-CV (2006) (“Oral statements -- particularly those not made by the Respondent -- are not campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2, and 211B.06”) (<http://www.oah.state.mn.us/aljBase/636117183.DISM.OR.smm.htm>).

These allegations will proceed to an evidentiary hearing before a panel of three Administrative Law Judges.

At that hearing, the burden will be on the Complainant to prove by clear and convincing evidence that the statements are factually false and that Respondents either knew they were false or disseminated the statements with reckless disregard as to whether they were false.

E. L. L.