

## MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

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August 31, 2010

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Mary Jurek  
Civil Filing Supervisor  
600 Ramsey County Courthouse  
15 Kellogg Boulevard West  
St. Paul, MN 55102

RE: *Jack Shepard v. Teresa Collett and the Collett for Congress Committee*  
OAH Docket No. 48-0320-21516-CV

Dear Ms. Jurek:

Enclosed please find a copy of Administrative Law Judge Steve Mihalchick's Order of Dismissal in the above-entitled matter.

If you have any questions, please call me at the telephone number below.

Sincerely,

A handwritten signature in cursive script that reads "Mary Beth Gossman".

MARY BETH GOSSMAN  
OAH Staff Attorney  
Telephone: 651-361-7837

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Jack Shepard,

Complainant,

vs.

**ORDER OF DISMISSAL**

Teresa Collett and the Collett  
for Congress Committee,

Respondents.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge Steve M. Mihalchick on August 27, 2010, to consider a campaign complaint filed by Jack Shepard on August 20, 2010. The probable cause hearing was conducted by telephone conference call. The record closed on August 27, 2010.

Jack Shepard (Complainant) appeared on his own behalf without counsel. William Mohrman, Attorney at Law, Mohrman & Kaardal, P.A., appeared on behalf of Teresa Collett and the Collett for Congress Committee (Respondents).

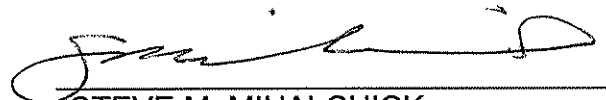
Based on the record and all of the proceedings in this matter, and for the reasons stated in the attached Memorandum, the Administrative Law Judge finds that there is not probable cause to believe that the Respondents violated Minn. Stat. § 211B.06.

**ORDER**

**IT IS HEREBY ORDERED:**

1. That there is not probable cause to believe the Respondents violated Minn. Stat. § 211B.06 as alleged in the Complaint, and therefore the Complaint is DISMISSED.
2. That Respondents' request for an award of costs and attorneys' fees, pursuant to Minn. Stat. § 211B.36, subd. 3, is DENIED.

Dated: August 31, 2010



STEVE M. MIHALCHICK  
Administrative Law Judge

Digitally recorded; no transcript prepared

## NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal. If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

## MEMORANDUM

The Complainant, Jack Shepard, was a candidate in the August 10, 2010, Republican primary for United States House of Representatives Fourth Congressional District of Minnesota. His opponent, Respondent Teresa Collett, won the Republican primary election by obtaining approximately 67% of the vote. Betty McCollum is the incumbent DFL-endorsed candidate for the Fourth Congressional District seat.

The Complaint alleges that Ms. Collett and her campaign committee, Collett for Congress Campaign, disseminated false campaign material regarding Dr. Shepard's candidacy in violation of Minn. Stat. § 211B.06. Specifically, the Complaint alleges that statements in the Respondents' campaign material that Dr. Shepard "has stated publicly that if he is successful in the Republican primary, he will withdraw from the race to ensure that Betty McCollum returns to Congress in January" are false. The Complainant maintains that he never made such statements, that he had no intention of dropping out of the race, and that it would have been legally impossible for him to withdraw his candidacy. The Complainant contends that Respondents disseminated these statements knowing they were false to defeat his candidacy.

By Order dated August 24, 2010, the Administrative Law Judge found that the Complaint set forth a *prima facie* violation of Minn. Stat. § 211B.06.

Prior to the probable cause hearing, both the Complainant and the Respondents submitted over 40 pages of copies of advertisements and other campaign material that the Complainant's campaign committee, "Jack Shepard

for Congress," had posted on various websites. In general, these materials encouraged people to vote for Dr. Shepard in order to defeat Ms. Collett and to assist Betty McCollum in her re-election efforts. One such advertisement stated as follows:

A VOTE FOR  
JACK SHEPARD  
FOR US CONGRESS 4<sup>TH</sup> CD  
IN THE GOP PRIMARY ELECTION  
AUGUST 10<sup>TH</sup>

...IS A VOTE for the legalization  
medical marijuana

... IS A VOTE to eliminate  
Teresa Collett, who is  
anti-gay & aggressively  
against women's free choice

... IS A VOTE against  
Teresa Collett, **which aids**  
**In the re-election of**  
**Betty McCollum<sup>1</sup>**

... IS A VOTE against continued  
Occupation and fighting  
In Afghanistan

... IS A VOTE to eliminate  
Teresa Collett, who is  
aggressively against the right  
to marry whomever you Love.

A disclaimer at the bottom of the advertisement reads: "This ad is provided by the Jack Shepard for Congress Committee.

Another web posting by the Complainant's campaign committee stated the following:

Tell EVERYONE a vote for Jack Shepard  
will aid in the re-election of Betty McCollum

...

Don't gamble; Don't ASSUME BETTY McCOLLUM'S Election  
Victory will be easy!

...

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<sup>1</sup> Emphasis added.

It's much Wiser & Safer to eliminate Teresa Collett as soon as possible! That ASAP date is August 10; by voting for Jack Shepard in Collett's 4<sup>th</sup> CD GOP Primary on August 10 – to remove her from the congressional race!

### **Legal Analysis of Minn. Stat. § 211B.06 Claim**

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation or dissemination of campaign material that is false and which the person knows is false or communicates to others 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*.<sup>2</sup>

Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondent prepared or disseminated the material 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 Respondent "in fact entertained serious doubts" as to the truth of the material or acted "with a high degree of awareness" of its probable falsity.<sup>3</sup>

To be found to have violated section 211B.06, therefore, two requirements must be met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to 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 unfavorable deductions or inferences based on fact, even if misleading.<sup>4</sup>

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.<sup>5</sup> The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.<sup>6</sup> The purpose of a probable cause determination is to determine whether, given the facts

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

<sup>3</sup> *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).

<sup>4</sup> *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *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).

<sup>5</sup> Minn. Stat. § 211B.34, subd. 2.

<sup>6</sup> 239 N.W.2d 892 (Minn. 1976); see also Black's Law Dictionary 1219 (7<sup>th</sup> ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime.")

disclosed in the record, it is fair and reasonable to require the respondent to address the claims in the Complaint at a hearing on the merits.<sup>7</sup>

Both Ms. Collett and Fletcher Warren, a staff member of her campaign, submitted sworn affidavits that they saw on a website purporting to support Jack Shepard's campaign a statement that if Mr. Shepard was successful in winning the Republican primary, he would drop out of the general election in order to ensure Betty McCollum's victory. Neither Ms. Collett nor Mr. Warren printed out a copy of the web page at the time, and they have been unable since to find the posting. The Respondents maintain that they disseminated the statements at issue in their campaign material based on that posting.<sup>8</sup> The Respondents also assert that the many statements of support for Ms. McCollum on the Complainant's web pages indicated to them that Mr. Shepard actually wanted Betty McCollum to be re-elected.<sup>9</sup>

The Complainant insists that he never stated in any of his campaign material that he would withdraw from the race to ensure Betty McCollum's return to Congress. The Complainant conceded, however, that he made statements in his campaign material that a vote for him would "aid in the re-election of Betty McCollum" and other statements that generally indicated support for Ms. McCollum. The Complainant asserts, however, that he did so as part of a strategy to win votes and that had he won the Republican primary he would have directed his attacks at Betty McCollum to win the general election.

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.<sup>10</sup> A statement is substantially accurate if its "gist" or "sting" is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.<sup>11</sup>

Dr. Shepard's campaign material is overwhelmingly directed at defeating Ms. Collett's candidacy to aide Ms. McCollum's re-election effort. A person reading the Complainant's many web postings would have reasonably understood that if the Complainant won the Republican primary, he would continue to advocate for the re-election of Ms. McCollum. Whether Mr. Shepard literally said he would withdraw from the general election is not determinative. A reviewing tribunal will look beyond the literal phrase that was published to what a reasonable reader would have understood the author to have said. Based on all of the evidence in the record, the Respondents' statement that Jack Shepard

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<sup>7</sup> *State v. Florence*, 239 N.W.2d at 902.

<sup>8</sup> Affidavit of Teresa Collett at ¶ 3; Affidavit of Fletcher Warren at ¶ 2.

<sup>9</sup> Affidavit of Collett at ¶ 4.

<sup>10</sup> *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

<sup>11</sup> *Id.*

“has stated publically that if he is successful in the Republican primary, he will withdraw from the race to ensure Betty McCollum returns to Congress,” even if not literally true, is substantially accurate and cannot form the basis of a § 211B.06 complaint.

Moreover, the Complainant has failed to put forward any evidence that the Respondents disseminated their statements either knowing they were false or did so while entertaining serious doubts as to their truth. Given Mr. Shepard’s many statements indicating support for Ms. McCollum’s re-election bid, he cannot show that the Respondents published their statement with reckless disregard or a “high degree of awareness” of its probable falsity.

Finally, contrary to the Complainant’s repeated assertion, candidates may withdraw prior to the general election by filing an affidavit of withdrawal no later than 16 days before the general election.<sup>12</sup> If a candidate withdraws after the 16<sup>th</sup> day before the general election but before four days before the general election, the Secretary of State must instruct the election judges to strike the name of the withdrawn candidate from the ballot.<sup>13</sup> Thus, the Complainant’s argument that Respondents’ statement is factually false because it would be legally impossible for him to withdraw his candidacy is unsupported and contrary to the statutes governing elections held in this state.

After reviewing the Complaint, its attachments, and the additional evidence and argument offered by the parties at the probable cause hearing, the Administrative Law Judge concludes that the Complainant has failed to establish probable cause to believe that Respondent violated Minn. Stat. § 211B.06 as alleged in the Complaint. The Complaint is therefore dismissed in its entirety.

At the probable cause hearing, the Respondents argued that the Complaint is frivolous and moved for an award of attorney’s fees. Pursuant to Minn. Stat. § 211B.36, subd. 3, the assigned Administrative Law Judge or panel may order a complainant to pay the respondent’s reasonable attorney’s fees and costs of the Office of Administrative Hearings if the judge or panel determines the complaint is frivolous. A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law.<sup>14</sup>

Respondents’ request that the Complaint in this matter be found to be frivolous is denied as the Complaint was supported by good faith argument and had a sufficient basis in law to survive initial *prima facie* review.

**S.M.M.**

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<sup>12</sup> Minn. Stat. § 204B.12 (governing candidates for constitutional office).

<sup>13</sup> Minn. Stat. § 204B.13, subd. 6. (Vacancies occurring through death or catastrophic illness after the 16<sup>th</sup> day before the general election are governed by section 204B.41.)

<sup>14</sup> *Maddox v. Department of Human Services*, 400 N.W.2d 136, 139 (Minn. App. 1987).