ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. § 211B.02, Respondent Saint Paul Better Ballot Campaign shall pay a civil penalty of $5,000 by January 1, 2010.[36]

Dated: November 30, 2009

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Presiding Administrative Law Judge

s/Cheryl LeClair-Sommer
CHERYL LECLAIR-SOMMER
Administrative Law Judge

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

Reported: Digitally recorded, no transcript prepared.

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

There are two issues in this case. The first is whether the St. Paul BBC knowingly and falsely claimed that the ballot question was endorsed by organizations including the Minnesota DFL, the Minnesota League of Women Voters, and the St. Paul League of Women Voters. The second is whether the St. Paul BBC claimed

[36] 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.

endorsement by several individuals—President Obama, Sen. John McCain, Ralph Nader, and Cynthia McKinney—without obtaining their written permission.

With regard to the claim of false endorsement by the organizations, the Respondent's evidence focused on the extent to which these organizations have indicated support for IRV. It is not disputed that the Minnesota DFL generally supports the use of IRV in state and local elections and that this position is included in the DFL Action Agenda. Nor is it disputed that the League of Women Voters (both the Minnesota League and the St. Paul affiliate) has found IRV to be an acceptable voting system, along with plurality voting. The issue here is whether the St. Paul BBC properly used these general statements of support for IRV in claiming in its literature that the DFL and the League of Women Voters "endorsed" the ballot question in St. Paul.

The Respondent argues that there is no legal or factual distinction between "support" for IRV and "endorsement" of a ballot question. It contends that the two words are interchangeable and that it is free to call the general statements of support by these organizations an "endorsement" of the ballot question.[37]

As a legal matter, the statute at hand provides that a person may not "knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization."[38] The statute by its terms expressly differentiates between "support" and "endorsement." In interpreting this language, the Minnesota Supreme Court has recognized that there is a distinction between the words "support" and "endorsement." In *Schmitt v. McLaughlin*, a candidate who was not endorsed by the DFL party used the initials "DFL" on advertisements and lawn signs.[39] The Court concluded that the "use of the initials 'DFL' would imply to the average voter that [the candidate] *had the endorsement or, at the very least, the support of* the DFL party."[40] This interpretation is consistent with the canon of statutory construction requiring that meaning be given if possible to each word in a statute.[41] Moreover, the Court indicated that the determination whether a person has the endorsement or support of a political party is a matter that can be objectively determined.[42]

As a factual matter, the record reflects that the organizations themselves have specific procedures for persons wishing to obtain statements of support or

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[37] The Respondent provided testimony to this effect and cites to *Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976), for the proposition that these words are synonymous. In *Buckley*, the United States Supreme Court held, among other things, that the independent expenditure provisions of the Federal Election Campaign Act were unconstitutional. The cited footnote explains that communications expressly advocating the election or defeat of a candidate for public office were subject to this limitation. The panel does not believe *Buckley* sheds any light on the issues raised in this case.

[38] Minn. Stat. § 211B.02.

[39] 275 N.W.2d 587 (Minn. 1979).

[40] *Id.*, 275 N.W.2d at 591 (emphasis added).

[41] Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions"); Minn. Stat. § 645.17(2) (it is presumed that "the legislature intends the entire statute to be effective and certain").

[42] 275 N.W.2d at 591.

endorsement. The DFL party permits endorsements of candidates only by a 60% affirmative vote of delegates present and voting, but no convention representing a geographical area less than the area competent to elect the public official may endorse a candidate.[43] The DFL's position on ballot questions is similar. The process for taking a formal DFL Party position on any ballot question and, if desired, placing the question on the official DFL Sample Ballot, requires a 60% affirmative vote, and the body with authority to take an official stand on that question is the party unit having the smallest jurisdiction that includes the entire electoral district that will vote on the ballot question.[44] In this case, that means that only the St. Paul DFL had the authority to take a position on the St. Paul ballot question. The League of Women Voters has an official position statement, developed in 2005 and unchanged since then, that supports both the use of IRV in state and local single-seat elections, and the continued use of a plurality voting system.[45] Neither the Minnesota League of Women Voters nor the St. Paul League of Women Voters has specifically endorsed the use of IRV in lieu of plurality voting in any election.

The Respondent argues that it could properly characterize the general statements of support by these organizations as an "endorsement," because based on *Kennedy v. Voss*,[46] even "extreme and illogical inferences" based upon accurate statements of fact are not actionable as false statements in campaign literature. That case involved an allegedly false statement regarding a candidate's voting record, and the violation alleged was of Minn. Stat. § 210A.04, subd.1, a predecessor of Minn. Stat. § 211B.06. Claims asserted under § 211B.06 are subject to a different and higher standard of proof. As noted by the Minnesota Supreme Court, the support or endorsement of an organization, when challenged under § 211B.02, is a matter that can be objectively determined. In addition, claims of ignorance about the permissible limits of claiming endorsements, particularly with regard to the implication of endorsement by the DFL party, are viewed with some skepticism.[47]

The record is clear in this case that the Respondents were well aware of the official positions of these organizations. The Respondent successfully obtained the endorsement of the St. Paul DFL party in 2007; however, the presentation of the ballot question to voters was delayed due to the litigation over IRV in Minneapolis. When that matter was resolved,[48] the Respondent again sought the endorsement of the St. Paul DFL; this time, however, it failed to obtain the requisite number of votes. This was the second major campaign spearheaded by Ms. Massey, who previously directed the successful ballot initiative in Minneapolis. She was personally involved in the BBC's unsuccessful effort to obtain the endorsement in St. Paul, and her testimony that she

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[43] Ex. R-14 at Art. 3, Section 4, subsection H.
[44] *Id.* Section 15.
[45] Ex. R-7.
[46] 304 N.W.2d 299 (Minn. 1981).
[47] *See In the Matter of Ryan*, 303 N.W.2d 462, 468 (Minn. 1981); *In the Matter of Daugherty v. Hilary*, 344 N.W.2d 826, 832 (Minn. 1984).
[48] *See Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (rejecting a number of constitutional challenges to IRV, as adopted by ordinance in Minneapolis).

was unaware that she could not claim endorsement by the "DFL" or the "Minnesota DFL" is not credible.

Likewise, the Respondent was well aware of the position of the League of Women Voters; it worked with League representatives to put the "Vote Yes" question on the ballot in 2007, and it participated in a forum shortly before the recent election in which the League's official position was read before the commencement of a debate between the Respondent and Complainant Chuck Repke. The argument that the Respondent believed it could claim "endorsement" of the ballot question by the League, based on either a partial reading of the League's position, or on personal expressions of support by individual League members or officers, is lacking in credibility.

With regard to the claimed endorsements by individuals, the Respondent admits that it made no effort to obtain written permission from President Obama, Sen. McCain (the endorsed Republican candidate for president in the last election), Ralph Nader (an independent, endorsed Reform Party, and endorsed Green Party candidate for president in the past), or Cynthia McKinney (an endorsed Green Party candidate for president in the last election). The Respondent contends that it would be "absurd" to require that national political leaders, who have taken public positions on specific issues, must provide written permission to use their names in support of local ballot initiatives addressing those issues. In addition, Ms. Massey testified that she was unaware that it was necessary to obtain written permission before using the names of individuals in its literature.

The statute unequivocally provides that "A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so."[49] There is no exception for national political leaders. As with support claimed from organizations, it should be an easy matter to objectively determine whether an individual has provided permission to use that individual's name in support of a candidate or ballot question. The Respondent could truthfully have said in its literature, without obtaining written permission, that as a state legislator in 2002, President Obama introduced legislation that would have permitted municipalities to adopt instant runoff voting for the positions of mayor, city clerk, and city treasurer.[50] It could truthfully have said, without obtaining written permission, that Sen. McCain, in 2002, supported an IRV ballot question in Alaska; or that Ralph Nader said in a debate in 2008 that IRV was something that should be examined. But these are far different messages than saying, without written permission, that the St. Paul ballot question was "endorsed" by President Obama, Sen. McCain, and the others.

The Respondent's testimony that it was not aware that written permission was required from individuals is contradicted by its acknowledgment that it in fact obtained written permission from most if not all of the state and local elected officials, former state and local officials, and other business and community leaders whose names were

[49] Minn. Stat. § 211B.02.
[50] Ex. R-23.

used in the mailings. It specifically obtained written permission from Brian Melendez, the chair of the Minnesota DFL, to say that he personally supported the ballot question. In addition, the Respondent's web site was designed to incorporate a mechanism by which individuals could provide electronic written permission to use their names as a public endorsement of "advanced voting methods like Instant Runoff Voting."[51] To the extent that the Respondent is relying on testimony that it was not aware of the requirement to obtain written permission from individuals, the panel finds that this testimony is not credible.

Accordingly, the panel has concluded that the Respondent made knowingly false claims that the Minnesota DFL and the League of Women Voters "endorsed" the St. Paul ballot question and that it failed to obtain written permission from the national political figures before using their names as supporters of the ballot question, in violation of Minn. Stat. § 211B.02. The panel has concluded that these violations, which were reflected in approximately 40,000 pieces of campaign literature, were multiple and deliberate. They were made despite the clarity of the statutory prohibitions, and the Respondent remains completely unapologetic. The timing of these mailings made it difficult for opponents to respond before the election and created an unfair advantage. These false claims of support or endorsement likely influenced some voters, but the impact on the election cannot be quantified on this record. Under all the circumstances, the panel believes a fine in the amount of $5,000 is the appropriate penalty.

K.D.S., B.L.N., C.L.S.

[51] Ex. C-3.