

BEFORE THE OHIO ELECTIONS COMMISSION

MICHAEL C. BOCK  
Complainant

v.

DR. ROBERT MENGERINK  
Respondent

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Case Nos.  
2009E-009

RECEIVED

JUL 13 2009

OHIO ELECTIONS COMMISSION

MEMORANDUM IN SUPPORT OF RESPONDENT'S  
REQUEST FOR A FINDING OF NO PROBABLE CAUSE

Now comes Respondent, Dr. Mengerink, by and through Counsel, and respectfully moves this Commission to issue a finding of no probable cause in the above reference matter. The basis for this request is set out more fully in the attached Memorandum in Support.

Respectfully submitted,



Miranda C. Motter (0073701)  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
Phone: 614/227-2300  
Fax: 614/227-2390  
Counsel for Respondent,  
Dr. Robert Mengerink

---

**MEMORANDUM IN SUPPORT**

---

The Complainant alleges that the following comment, made by Respondent and printed in The Blue Ribbon Report, is a false statement in violation of Ohio Revised Code Section (“R.C.”) 3517.22(B)(2): “Because this is a renewal levy, there will be absolutely no increase in taxes as a result of this Renewal Issue.” (See Complaint). Respondent’s comment is not a false statement, and consequently, not in violation of R.C. 3517.22(B)(2).

I. Legal Background

R.C. 3517.22(B)(2) provides:

No person, during the course of any campaign *in advocacy of or in opposition to the adoption* of any ballot proposition or issue, by means of *campaign material*, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall *knowingly and with intent to affect the outcome of such campaign* do any of the following:

\*\*\*

- (2) Post, publish, circulate, distribute, or otherwise disseminate, a *false statement*, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to *promote the adoption or defeat* of any ballot proposition or issue.

Political speech, including statements made in issue-based campaign literature and advertisements is subject to First Amendment protection unless clear and convincing evidence shows the statements are false and were made with actual malice. R.C. 3517.155(D).

Clear and convincing is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. The Team Working for You v. Ohio Elections Commission (2001), 142 Ohio App. 3d 114, 119, 754 N.E. 2d 273.

A statement is false when it “sets forth matters that are not true.” In re Pirko (1988), 44 Ohio App.3d 3, 7, 540 N.E. 2d 329. Statements without grounds in truth or fact are false

statements. Id. A statement is not false where, even though it is misleading and fails to disclose all the relevant facts, the statement has some truth in it. Id. at 9. Moreover, a statement that is subject to different interpretations is not “false.” SEIU v. OEC, 158 Ohio App. 3d 776, citing Briggs v. Ohio Elections Commission (C.A.6 1995), 61 F.3d 487, 494. To determine whether a statement is in fact false, courts utilize an objective standard, using the perspective of a reasonable reader. Id. at 777.

In determining whether Respondent’s comment is in violation of R.C. 3517.22(B)(2), the Commission must determine that the Respondent made the false comment with actual malice, either knowing that it was false or acting in reckless disregard of whether it was true or false. McKimm v. Ohio Elections Commission (2000), 89 Ohio St.3d 139, 146-147, 2000 Ohio 118, 729 N.E.2d 364; Pesttrak v. Ohio Elections Commission (C.A.6, 1991), 926 F.2d 573, 577; New York Times v. Sullivan (1964), 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed. 2d 686.

Proof of falsity differs significantly from proof of actual malice. Bose Corp. v. Consumers Union of United States, Inc. (1984), 466 U.S. 485, 511, 104 S. Ct. 1949, 80 L.Ed. 2d 502. “Falsity,” is judged under an objective standard using the perspective of a “reasonable reader” of a statement. “Actual malice,” however, requires proof of the Respondent’s subjective state of mind. McKimm, at 148, citing St. Amant v. Thompson (1968), 390 U.S. 727, 733, 88 S. Ct. 1323, 20 L. Ed. 2d 262. “There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” McKimm at 148, quoting St. Amant, at 731.

Where the statement is supported by some basis in fact, insufficient evidence of actual malice has been found even if the statement is ultimately found to be untrue. See St. Amant, at 733 (finding actual malice lacking where the defendant published a source’s false statements about a public officer but the defendant had no personal knowledge that the statements were false, had verified other aspects of the source’s information, and had affidavits from other sources substantiating the statements); Flannery v. Ohio Elections Commission, 156 Ohio App. 3d

134,142-143, 2004 Ohio 582, 804 N.E.2d 1032 (finding no malice where ultimately incorrect statements were published but the defendant had a factual foundation and an arguably rational basis for making the statements); Mosley v. Evans (1993), 90 Ohio App. 3d 633, 638, 630 N.E.2d 75 (finding no malice where some factual determination existed for statements).

## II. The Issue

The issue before the Commission is whether the statement alleged, under the undisputed circumstances of this complaint could satisfy the legal requirements to constitute a “false statement” under R.C. 3517.22(B)(2). Respondent asserts that it could not, for three reasons. First, as a matter of law, the statement is not false under the circumstances of this complaint. Second, even if the Commission should believe that the statement met the legality test of falsity, it was not made with malice and for that reason as well, fails to rise to the “false statement” standard. Finally, the context in which this statement was one that provided information to the public, and was not election advocacy.

## III. Argument

### A. Respondent’s Statement is not False.

The comment at issue here – “[b]ecause this is a renewal levy, there will be absolutely no increase in taxes as a result of this Renewal issue” – is not false. Complainant erroneously interprets this statement as meaning that there will be no increase in his individual property taxes as a result of the Renewal Issue. (See Complaint). As explained in more detail below, Complainant presumes that “tax” and “effective tax rate” are the same. On the contrary, Respondent’s statement referred to the total revenue generated to the school district as a result of the Renewal Issue. (See Respondent’s Affidavit, attached).

In 2004, Kettering voters approved a 6.9 mill levy for the purpose of raising \$8.2 million each year for Kettering Schools. Kettering voters were asked to approve a five year renewal of this levy by ballot on May 5, 2009.

The May 2009 6.9 mill renewal levy was not a new levy, but merely an extension of the 6.9 mill levy approved in 2004. The renewal levy does not create any additional new money for the Kettering School District and is not a new tax. Ohio law specifically prohibits such, as R.C. 5705.213(A)(2)(b) provides: “the amount of the renewal tax, which shall be no more than the amount of tax levied during the last year the tax being renewed is authorized to be in effect.” The word tax was used by Respondent to refer to the revenue generated by the renewal levy for the District. Id. Complainant erroneously presumes that the word “tax” is synonymous with “effective tax rate.” The word “tax” was not used to refer to the effective tax rate imposed on each individual property owner needed to fund the renewal levy, nor did Respondent use the term “effective tax rate.”

Respondent did not have knowledge and could not have personal knowledge as to fluctuations in Complainant’s property values or in any individual property owner’s property value. Respondent could not, and did not, make representations about the effective tax rate or how it might impact each individual owner.

Rather, Respondent did know and accurately conveyed that the renewal extended the 2004 6.9 mill levy, which would generate *the same amount of revenue* for the District if approved by the voters. Id. Whether or not an individual’s property taxes increases or decreases is a separate issue dependent entirely upon that individual’s property value. And, whether or not an individual’s property value increases or decreases is entirely independent of whether a renewal levy passes or fails.

Furthermore, Respondent’s comment must be analyzed in the context of the entire article in which it appeared. The 2009 Spring Blue Ribbon Report included an article which focused on the impact of the renewal levy the District’s operating costs and the importance of the renewal levy to continue to fund important District activities and operations. Respondent’s comment appeared in that particular article.

Because the evidence demonstrates that the renewal issue would result in no increase in the total revenue generated to the school district as a result of renewal issue, Respondent’s interpretation of the statement is true and his comment does not “set forth matters that are not true.” Respondent’s statement is not a “false statement.”

B. Respondent's Comment was not made with Actual Malice.

There is no evidence to demonstrate that Respondent made the statement with actual malice. Respondent did not entertain serious doubt as to the truth or accuracy of his statement. (See Respondent's Affidavit). On the contrary, the statement was true and Respondent still believes it to be true. Consequently, clear and convincing evidence is lacking that Respondent knew the statement at issue was false or acted in reckless disregard of its truth or falsity when the statement was disseminated. Respondent's interpretation of his statement is rational and has a basis in fact to support it. A reasonable reader would not presume that a renewal levy locks in his property tax rate in a vacuum or without regard to property valuations in the community as a whole. It is a fact that the total revenue generated to the school district as a result of the Renewal Issue did not increase. In other words, there were no increases in taxes.

Accordingly, because a factual foundation and an arguably rational basis supported Respondent's interpretation of the statement, the Respondent disseminated the statement at issue in good faith, not with malice.

C. Respondent's statement, included in The Blue Ribbon Report, was not designed to promote the adoption of the Renewal Levy. R.C. 9.03(C)(1) provides:

No governing body of a political subdivision shall use public funds to do any of the following:

\*\*\*

(1) publish, distribute, or otherwise communicate information that does any of the following:

\*\*\*

(d) supports, or opposes the nomination or election of a candidate for public office, the investigation or prosecution or recall of a public official, or the *passage of a levy or bond issue*.

R.C. 9.03(C)(1)(e) does, however, permit the governing body of a political subdivision to use public funds to "communicate information about the plans, policies, and operations of the political subdivision to members of the public within the political subdivision and to other persons who may be affected by the political subdivision."

The Blue Ribbon Report is a school-sponsored newsletter, intended to provide information to Kettering School District residents about school activities, plans, policies, operations, and events. (See Respondent's Affidavit). Because the Report is a school-sponsored newsletter, public resources were permitted to be utilized to prepare and distribute the Report. Id. The Report is not a campaign piece, and cannot under Ohio law include any statements designed to promote the adoption or defeat of any ballot issue.

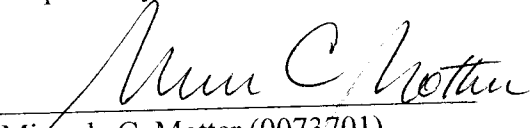
R.C. 3517.22(B)(2) requires that the false statement be designed to promote the adoption or defeat of any ballot issue. Here, Respondent's statement was intended to communicate information to residents about the school district's operations and how the Renewal Issue would impact those operations. (See Respondent's Affidavit). By design, nothing in the Report urged readers to vote one way or the other way on the renewal levy.

#### IV. Conclusion

Respondent respectfully argues that his comment included in The Blue Ribbon Report does not fall under the prohibition provided in R.C. 3517.22(B)(2). Respondent's comment was in fact true. At best, the comment is subject to two different interpretations if, as Complainant apparently has, one believes "tax" is synonymous with "effective tax rate."

Respondent made the comment in good faith with reliance upon factual information. For the foregoing reasons, Respondent respectfully requests that the Commission issue a finding of no probable cause.

Respectfully submitted,

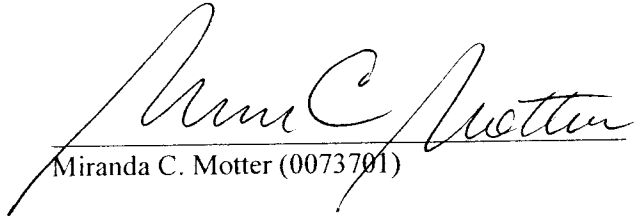


---

Miranda C. Motter (0073701)  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
Phone: 614/227-2300  
Fax: 614/227-2390  
Counsel for Respondent,  
Dr. Robert Mengerink

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Respondent's Memorandum in Support was sent via regular U.S. Mail to Michael C. Bock, at 3808 LeFevre Drive, Kettering, Ohio 45429 on this 3<sup>rd</sup> day of July 2009.

  
Miranda C. Motter (0073701)