

FILE NO. A10-2162

STATE OF MINNESOTA
IN COURT OF APPEALS

Steve Abrahamson and Tim Kotzian,

Petitioners,

vs.

The St. Louis County School District, Independent School District No. 2142,
Bob Larson, Tom Beaudry, Darrell Bjerklie, Gary Rantala, Andrew Larson,
Chet Larson and Zelda Bruns, in their capacity as School Board members,

Respondents,

and

The Minnesota Office of Administrative Hearings.

Respondent.

BRIEF OF RESPONDENTS THE ST. LOUIS COUNTY SCHOOL DISTRICT
INDEPENDENT SCHOOL DISTRICT NO. 2142, BOB LARSON, TOM
BEAUDRY, DARRELL BJERKLIE, GARY RANTALA, ANDREW LARSON,
CHET LARSON AND ZELDA BRUNS, IN THEIR CAPACITY AS SCHOOL
BOARD MEMBERS

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LEGAL ISSUES

1. Whether the School District or School Board constitutes a “committee” under Minnesota Statutes Chapter 211A?

The administrative law judge found that the School District and/or School Board do not constitute a “committee” under Minnesota Statutes Chapter 211A.

Apposite Authority: Minn. Stat. §§ 200.02, 211A.01, 211A.05, 211B.15

2. Whether the Administrative Law Judge’s decision to dismiss the claims for the distribution of false information for failure to allege *prima facie* violations of law was made in violation of the Constitution, in excess of statutory authority, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence in view of the entire record or arbitrary or capricious?

The administrative law judge found that the School District’s statements were not false and thus, the Petitioners did not demonstrate a *prima facie* violation of the statute.

Apposite Authority: Minn. Stat. § 211B.06, *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981)

STATEMENT OF THE CASE AND FACTS

On or about November 4, 2010, Petitioners filed a complaint with the Office of Administrative Hearings (OAH) under the Fair Campaign Practices Act, Minnesota Statutes § 211B.32. The complaint alleged that Independent School District No. 2142, St. Louis County Schools (“School District”), and its School Board members violated certain provisions of law related to election financial reporting (Minn. Stat. §§ 211A.02, 211A.03, 211A.05 and 211A.06); disseminating material that included false statements (Minn. Stat. § 211B.06) and contributing to a media project controlled by the School District to encourage passage of the ballot question (Minn. Stat. § 211B.15, subd. 9).¹

On or about November 9, 2010, Administrative Law Judge, Steve M. Mihalchick issued his decision and order of dismissal for failure to allege a *prima facie* case of any violation. The decision and order of dismissal was received by the Petitioners on November 10, 2010.

On or about December 8, 2010 the Petitioners filed their petition for writ of certiorari in the Court of Appeals seeking review of the decision under the Minnesota Administrative Procedures Act, Minnesota Statutes § 14.63-14.69.

¹ Petitioners apparently agree that the decision was correct with respect to the claimed violation of Minnesota Statutes § 211B.15, Subd. 9, since that portion of the decision was not addressed in Petitioner’s Brief.

STANDARD OF REVIEW

The final decision on a complaint filed under Minnesota Statutes § 211B.32 may be reviewed in accordance with the procedures provided in Minnesota Statutes § 14.63 to 14.69. *See* Minn. Stat. § 211B.36, subd. 5 (2010). The scope of review is set forth in Minnesota Statutes § 14.69, as follows:

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2010).

Agency decisions are presumed correct, and the Court defers to an agency's expertise and its special knowledge in the field of its technical training, education and experience. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). An agency's conclusions are not arbitrary and capricious if a rational connection between the facts found and the choice made is articulated. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn.2001). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Nat'l Audubon Soc'y v. Minn. Pollution Control Agency, 569 N.W.2d 211, 215 (Minn.App.1997), *rev. denied* (Minn. Dec. 16, 1997).

However, “[w]hen a decision turns on the meaning of words in a statute or regulation, a legal question is presented. In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise.” *See Barry v. St. Anthony-New Brighton Indep. Sch. Dist.*, 781 N.W.2d 898, 901 (Minn. App. 2010) (citations omitted). The Court of Appeals reviews questions of statutory interpretation *de novo*. *Id.*

On appeal, the appealing party bears the burden of establishing that the findings of the agency are unsupported by the evidence in the record, considered in its entirety. *Reserve Mining Co.* at 825.

ARGUMENT

I. BACKGROUND

The OAH has been granted with authority by the legislature to hear evidence and issue determinations with respect to alleged violations of Minnesota Statutes Chapters 211A and 211B. *See* Minn. Stat. § 211B.32 (2010). The procedure is commenced by filing a complaint with the OAH which “must be in writing, submitted under oath, and detail the factual basis for the claim that a violation of law has occurred.” *See* Minn. Stat. 211B.32, Subd. 3 (2010). The burden of proving the allegations in the complaint is on the complainant. *See* Minn. Stat. § 211B.32, Subd. 4 (2010). The complaint is randomly assigned to an administrative law judge for review. According to the statute, “if the administrative law judge determines that the complaint does not set forth a *prima facie*

violation of chapter 211A or 211B, the administrative law judge must dismiss the complaint.” *See* Minn. Stat. § 211B.33, Subd. 2(a) (2010).

In the present case, the administrative law judge found that the Petitioners failed to set forth a *prima facie* case with regard to all of the statutory violations alleged in their complaint. (Ptters. App. 11.) To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B. *See Barry* at 902. Consequently, as the *Barry* Court stated, “a complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.” *See id.*

II. NEITHER THE SCHOOL DISTRICT NOR THE SCHOOL BOARD IS SUBJECT TO THE REPORTING REQUIREMENTS IN CHAPTER 211A.

Minnesota Statutes Chapter 211A is a series of statutes related to campaign finance reports. In their complaint to the OAH, the Petitioners alleged that the School District and/or School Board was required to file the financial report required under Minnesota Statutes § 211A.02. In this regard, Section 211A.02 provides as follows:

A committee or a candidate who receives contributions or makes disbursements of more than \$750 in a calendar year shall submit an initial report to the filing officer within 14 days after the candidate or committee receives or makes disbursements of more than \$750 and shall continue to make the reports listed in paragraph (b) until a final report is filed. A committee or a candidate who receives contributions or makes disbursements of more than \$750 in a calendar year shall submit an initial report to the filing officer within 14 days after the candidate or committee receives or makes

disbursements of more than \$750 and shall continue to make the reports listed in paragraph (b) until a final report is filed.

Minn. Stat. § 211A.02, subd. 1 (2010).

It is clear that the financial reporting requirement contained in Minnesota Statutes § 211A.02, subd. 1 only applies where certain factors are present. Those factors include the following: (1) “a committee or a candidate,” (2) “receives contributions or makes disbursements” and (3) the contributions or disbursements equal “more than \$750 in a calendar year.” Unless all three components are satisfied, the financial reporting requirement does not apply.

Consistent with this, the administrative law judge concluded that the Petitioners failed to state a *prima facie* case because the School District and/or School Board were not a “committee.” In addition, the administrative law judge found that even if the School District or School Board was a “committee,” neither “receive[d] contributions or ma[d]e disbursements.” Consequently, the administrative law judge concluded that the Petitioners failed to establish a *prima facie* case that the School District violated Minnesota Statutes § 211A.02, 211A.03, 211A.05 or 211A.06 and dismissed the allegations. The Petitioners appeal the conclusion of the administrative law judge.

A. Neither The School District Nor The School Board Is A “Committee.”

The Petitioners first claim that the School District and/or the School Board constitute a “committee” under Minnesota Statutes Chapter 211A. In making their argument, the Petitioners rely upon the definition of “committee” set forth in Minnesota Statutes § 211A.01 which provides as follows:

"Committee" means a corporation or association or persons acting together to influence the nomination, election, or defeat of a candidate or to promote or defeat a ballot question. Promoting or defeating a ballot question includes efforts to qualify or prevent a proposition from qualifying for placement on the ballot.

Minn. Stat. § 211A.01, subd. 4 (2010).

The definition of "committee" also requires the establishment of certain elements. In this regard, a "committee" must meet two components: (1) a "corporation," "association" or "persons acting together," and (2) "to influence the nomination, election, or defeat of a candidate or to promote or defeat a ballot question."²

1. The School District is not a "corporation."

The School District is not a "corporation" subject to the filing requirements of Minnesota Statutes § 211A.02, subd. 1. While the term "corporation" is not specifically defined in Chapter 211A, the Chapter incorporates all of the definitions set forth in Minnesota Statutes Chapter 200. *See* Minn. Stat. § 211A.01, subd. 1

² The Petitioners imply in their brief that the administrative law judge made a factual finding that the School District and/or School Board in fact "promoted" passage of the December 2009 ballot question. That implication is not true. As discussed above, at the *prima facie* stage of the process before the OAH, the administrative law judge must accept the facts alleged as true. *See Barry* at 902. Consequently, solely for the purpose of making the *prima facie* determination, the administrative law judge acknowledged that the Petitioners alleged facts to support their claim that the School Board and School District acted to promote the ballot question. *See Pttrs. App.* 4. In fact, absent the allegation of such facts, the Petitioners would have found themselves in the same situation as the Petitioners in *Barry* where the complaint was dismissed because the complainants failed to allege facts to support their general allegations that certain expenditures and communications were made to promote passage of the ballot question. *See Barry* at 903.

(2010); *see also* Minn. Stat. § 211B.01, subd. 1 (2010). Although Minnesota Statutes § 200.02 also does not define the term “corporation,” “school district” is defined as follows:

"School district" means an independent, special, or county school district.

Minn. Stat. § 200.02, subd. 19 (2010).

As a result, the legislature specifically defined “school district” in the Minnesota Election Law, and specifically defined “committee” as “a corporation or association or persons acting together.” Importantly, a review of the two statutes establishes that the legislature failed to include, either intentionally or by mistake, a “school district” within the definition of “committee.” Therefore, the plain language of the statute does not support the conclusion that a school district is a corporation for purposes of Minnesota Statutes § 211A.02, subd. 1. *See Brandt v. Hallwood Management Co.*, 560 N.W.2d 396, 400 (Minn. App.1997) (“Where a statute enumerates the persons or things to be affected by its provisions, there is implied exclusion of others.”)

Further support for this conclusion can be found by reviewing the fair campaign practices provisions in Minnesota Statutes Chapter 211B. In that chapter, the term “committee” is virtually identical to the definition of “committee” in Minnesota Statutes § 211A.01, subd. 4. In Chapter 211B, there is a specific statute relating to political contributions by corporations. In this regard, the statute defines a “corporation” and addresses a corporation’s ability to make a contribution or

expenditure related to a ballot question. More specifically, the statute defines a “corporation” as:

For purposes of this section, "corporation" means:

- (1) a corporation organized for profit that does business in this state;
- (2) a nonprofit corporation that carries out activities in this state; or
- (3) a limited liability company formed under chapter 322B, or under similar laws of another state, that does business in this state.

Minn. Stat. § 211B.15, subd. 1 (2010).

The same section authorizes a corporation to make contributions or expenditures regarding a ballot issue, as follows:

A corporation may make contributions or expenditures to promote or defeat a ballot question, to qualify a question for placement on the ballot unless otherwise prohibited by law, or to express its views on issues of public concern. A corporation may not make a contribution to a candidate for nomination, election, or appointment to a political office or to a committee organized wholly or partly to promote or defeat a candidate.

Minn. Stat. § 211B.15, subd. 4 (2010).

Consequently, those corporations that fall within the definition of “corporation” in Minnesota Statutes § 211B.15, subd. 1 are specifically authorized to make contributions or expenditures to promote or defeat a ballot question under Minnesota Statutes § 211B.15, subd. 4. When Minnesota Statutes § 211B.15 is read together with Minnesota Statutes § 211A.02, it becomes clear that the legislature intended that only those corporations defined in Minnesota Statutes § 211B.15,

subd. 1 are required to file financial reports with respect to contributions or expenditures to promote or defeat a ballot questions.

Notwithstanding the clear relationship between Minnesota Statutes § 211B.15 and § 211A.02, the Petitioners argue that the School District is a “public corporation” and, therefore, is a “corporation” within the definition of “committee” in Minnesota Statutes § 211A.02, subd. 3. In support of this conclusion, the Petitioners cite to case law and statutes where school districts are defined as “public corporations.” To include school districts within the definition of “corporation” as Petitioners allege, however, flies in the face of the statutory framework that specifically recognizes and defines “school districts” with regard to the subject of elections and specifically defines “corporation” which does not include a “public corporation.” Consequently the Petitioner’s argument is without merit and must be rejected. Therefore, school districts are not “corporations” under Minnesota Statutes § 211A.02 and are not subject to the reporting requirements thereof.

2. School board members are not “persons acting together.”

The administrative law judge also found that the School Board did not fall within the “persons acting together” component of the definition of “committee.” In this regard, the administrative law judge concluded that “[s]chool board members are charged with the responsibility of managing and operating the school district” and “[u]nlike an *ad hoc* citizens group formed for the specific purpose of promoting or defeating a ballot question, school board members are the elected policy-makers for the district.” See Pttrs. App. 5; see also Minn. Stat. §§ 123B.02 and 123B.09 (2010).

The administrative law judge correctly looked beyond the seemingly simple requirement of “persons acting together” and distinguished the School Board from an “*ad hoc* citizens group formed for the specific purpose of promoting or defeating a ballot question.” *See id.* The latter condition that the group be “formed” for the purpose of promoting or defeating a ballot question is found in Minnesota Statutes § 211A.05 which sets forth the penalties to be imposed for failing to file the financial report required under Minnesota Statutes § 211A.02, and provides, in pertinent part, as follows:

The treasurer of *a committee formed to promote or defeat a ballot question* who intentionally fails to file a report required by section 211A.02 or a certification required by this section is guilty of a misdemeanor. Each candidate or treasurer of *a committee formed to promote or defeat a ballot question* shall certify to the filing officer that all reports required by section 211A.02 have been submitted to the filing officer or that the candidate or committee has not received contributions or made disbursements exceeding \$750 in the calendar year.

Minn. Stat. § 211A.05, subd. 1 (2010) (emphasis added).

This statute clarifies that in order to be a “committee” subject to the financial reporting requirements, the “committee” must have been “*formed to promote or defeat a ballot question.*” *See id.* (Emphasis added.) The addition of the word “formed” to describe “committee” indicates clear intent on the part of the legislature to qualify what constitutes a “committee” under the statute. Prior to the amendment, the statute simply provided that “a member of a committee” must file a report. *See id.* If the legislature only meant to identify who from the committee

was responsible for filing the report, the amendment could have read “[t]he treasurer of a committee that fails to file a report.”³ But it did not. The legislature went a step further to qualify a committee as one “formed to promote or defeat a ballot question.” Consequently, the amending language cannot be seen as anything other than the intent of the legislature to further define the term “committee” as one “formed to promote or defeat a ballot question.”

The Petitioners will likely argue that if the legislature intended to change the definition of “committee” it could have also added the amendatory language to Minnesota Statutes § 211A.02, subd. 4, but it did not. Consequently, according to the Petitioners, the amendment does not support intent by the legislature to amend the definition of “committee.”

Such an argument, however, would lead to an absurd or unreasonable result. In this respect, accepting the Petitioners’ argument as true, Minnesota Statutes Chapter 211A would create two types of “committees.” Only those “committees”

³ The amendment provided, in pertinent part, as follows:

Sec. 31. Minnesota Statutes 1988, section 211A.05, subdivision 1, is amended to read:

Subdivision 1. PENALTY. A candidate who intentionally fails to file a report required by section 211A.02 is guilty of a misdemeanor. ~~A member~~ The treasurer of a committee that formed to promote or defeat a ballot question who intentionally fails to file a report required by section 211A.02 is guilty of a misdemeanor. Each candidate or treasurer of a committee formed to promote or defeat a ballot question shall certify to the filing officer that all reports required by section 211A.02 have been submitted to the filing officer or that the candidate or committee has not received contributions or made disbursements exceeding \$750 in the calendar year.

“formed to promote or defeat a ballot question” could be subject to the penalty provided for in Minnesota Statutes § 211A.05, subdivision 1. On the other hand, other committees that promote or defeat a ballot question would not be subject to penalties for failure to file the financial report. It is a fundamental concept of statutory construction that courts may presume that the legislature does not intend an absurd result. *See* Minn. Stat. § 645.17(1); *Guderian v. Olmstead County*, 595 N.W.2d 540 (Minn. App. 1999).

In addition, statutory construction provides that a statute should be construed that, if it can be prevented, no clause, word, or sentence will be superfluous, void, or insignificant. *See* Minn. Stat. § 645.17 (the legislature intends the entire statute to be effective and certain); *Gale v. Commissioner of Taxation*, 37 N.W.2d 711, 715 (Minn. 1949). Thus, the legislature clearly meant something specific when it amended Minnesota Statutes § 211A.05, subd. 1 to describe a “committee” as “formed to promote or defeat a ballot question.” Therefore, a “committee” was intended to be more than simply “persons acting together” as suggested by the Petitioners, but rather, “persons acting together” and “formed to promote or defeat a ballot question.”

Since the School Board was created by statute and was not “formed to promote or defeat a ballot question” as provided in Minnesota Statutes Chapter 211A, applying the definition of “committee” to the School Board would ignore the 1989 amendment to Minnesota Statutes § 211A.05, subd. 1. Consequently, the School Board is not a “committee” subject to the requirements contained in

Minnesota Statutes §§ 211A.02, 211A.03, 211A.05 or 211A.06. Therefore, the administrative law judge's conclusion that the Petitioners did not state a *prima facie* violation of the statute should be affirmed.

B. The School District Did Not Make “Disbursements” Subject to Reporting Under Minnesota Statutes § 211A.02.

The administrative law judge found that even assuming that the School Board or School District constituted a “committee,” they did not make “disbursements” subject to the reporting requirements and, therefore, the Petitioners failed to state a *prima facie* violation of Minnesota Statutes § 211A.02. In reaching this conclusion, the administrative law judge turned to the definition of “disbursement” as provided in Minnesota Statutes § 211A.01 as follows:

"Disbursement" means money, property, office, position, or any other thing of value that passes or is directly or indirectly conveyed, given, promised, paid, expended, pledged, contributed, or lent. "Disbursement" does not include payment by a county, municipality, school district, or other political subdivision for election-related expenditures required or authorized by law.

Minn. Stat. § 211A.01, subd. 6 (2010).

Relying on the second sentence of the definition, the administrative law judge found that the expenditures described in the complaint appeared to be election-related expenditures. *See* Pttrs. App. 5. Since election-related expenditures are not “disbursements” under the statute, the administrative law judge concluded that the Petitioners failed to state a *prima facie* violation.

The Petitioners claim, however, that this conclusion was incorrect because only the expenditures contained in Minnesota Statutes § 204B.32 are “election-related expenditures required or authorized by law.” According to the Petitioners, the expenditures contained in Minnesota Statutes § 204B.32 do not include expenses related to publications or postage for the dissemination of publications.⁴

While Minnesota Statutes § 204B.32 governs the election-related expenses of a school district “required by law,” the Petitioners do not address the election-related expenses of a school district that are “authorized by law,” which are also exempt.⁵ In this respect, the Minnesota Attorney General was asked whether a school district may expend funds for printed literature, newspaper space and radio time to conduct an educational program for voters on an issue that would be presented to them. *See Op. Atty. Gen. 159b-11 (Sept. 17, 1957)*. The Attorney General opined that if the voters of the district will have to exercise their judgment on the subject matter, then the facts and data should be made known to them. In addition, the Attorney General indicated that how the information would best be

⁴ According to Minnesota Statutes § 204B.32, subd. 1(d), school districts “shall pay the compensation prescribed for election judges and sergeants-at-arms, the cost of printing the school district ballots, providing ballot boxes, providing and equipping polling places and all necessary expenses of the school district clerks in connection with school district elections not held in conjunction with state elections. When school district elections are held in conjunction with state elections, the school district shall pay the costs of printing the school district ballots, providing ballot boxes and all necessary expenses of the school district clerk.”

⁵ Minnesota Statutes Section 211B.12 also provides for certain legal expenditures such as printing and expenditures made for the purpose of providing information to constituents. *See Minn. Stat. 211B.12(4) and (7) (2010)*.

made available to the voters was for the school board to decide and that a reasonable amount of school district funding could be used for that purpose. Statutory authority cited by the Attorney General included the management and care of the school district is vested in the school board (now Minn. Stat. § 123B.09) and that the school board shall have the general charge of the business of the district, the school houses and the interests of the schools thereof (now Minn. Stat. § 123B.02). Consequently, school districts are authorized by law to make election-related expenditures with respect to informing the voters on the issue that will be placed before them.

An opinion of the Attorney General on “all school matters” “shall be decisive until the question involved shall be decided otherwise by a court of competent jurisdiction.” *See* Minn. Stat. § 8.07 (2010). Since no court of competent jurisdiction has decided contrary to the opinion of the Attorney General cited above, the School Board and the School District were “authorized by law” to inform the voters of the facts and figures related to the ballot question.⁶ Consequently, the

⁶ In addition, the Attorney General opined that the school board could employ the services of another entity or business to conduct a survey of the school district and inform the district what it needed in the way of school buildings. *Op. Atty. Gen. 155B-1* (March 3, 1955). Thus, the Petitioners’ suggestion that the School Board improperly contracted with Johnson Controls, Inc. for assistance with informing the public is without merit.

School District did not make “disbursements” as defined in Minnesota Statutes § 211A.01, Subdivision 6.⁷

The School District and the School Board are not a “committee” subject to the financial reporting requirements of Minnesota Statutes §§ 211A.02, 211A.03, 211A.05 and 211A.06. In addition, the School District did not make “disbursements” which trigger the reporting requirements under Minnesota Statutes § 211A.02. Therefore, the decision of the administrative law judge that the Petitioners failed to allege a *prima facie* violation of Minnesota Statutes §§ 211A.02, 211A.03, 211A.05 and 211A.06 should be affirmed.

II. THE PETITIONERS DID NOT STATE A PRIMA FACIA VIOLATION AGAINST THE SCHOOL DISTRICT FOR VIOLATION OF MINNESOTA STATUTES § 211B.06.

A. Minnesota Statutes § 211B.06 Prohibits False Campaign Material

The Petitioners alleged in their complaint to the OAH that the School District disseminated false campaign material in order to promote passage of the ballot question. Minnesota Statutes § 211B.06 provides, in pertinent part, as follows:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends . . . 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.

⁷ Even assuming, for the sake of argument that the School District or School Board did make “disbursements” as defined in Minnesota Statutes § 211A.01, subdivision 6, the School District and School Board were not a “committee” and, therefore, not subject to the reporting requirement of Minnesota Statutes § 211A.02.

Consequently, under the facts herein, to state a *prima facie* violation of the statute, a complainant must establish that a person intentionally participated in the preparation, dissemination or broadcast of campaign material⁸ that is: (1) false and (2) that the person knows is false or communicates to others with reckless disregard of whether it is false. The administrative law judge reviewed the seven statements that the Petitioners claimed were false and found that no false statements were made. In addition, the administrative law judge found that the record did not include evidence that the statements were disseminated with a high degree of awareness of its probable falsity. Therefore, the administrative law judge dismissed the complaint based upon the failure of Petitioners to demonstrate a *prima facie* violation.

On appeal, the Petitioners claim that they provided sufficient facts to demonstrate that the statements were false. In addition, the Petitioners claim that the administrative law judge misapplied the law and incorrectly found that a *prima facie* violation was not stated because they did not allege that anyone knew the

⁸ The definition of “campaign material” is “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.” See Minn. Stat. § 211B.01, subd. 2. The School District disputes any allegation that the information it disseminated to the voters was “for the purpose of influencing voting” in favor of the bond referendum and, therefore, disputes that the information it disseminated falls within the definition of “campaign material.” That being said, the School District understands that at the *prima facie* determination stage, the administrative law judge must accept the alleged facts as true.

information was false or communicated it to others with reckless disregard for the truth.⁹

B. The Petitioners Failed To Establish Intentional Participation

Although not addressed by the administrative law judge, the Petitioners failed to identify in their complaint to the OAH the “person” who intentionally participated in the preparation and dissemination of the alleged false campaign material. The Petitioners put forth no evidence to suggest that any of the School Board members had any involvement in preparing or disseminating the publications they rely upon for their complaint. Therefore, a *prima facie* violation of Minnesota Statutes § 211B.06 was not made.

C. The Statements Were Not False.

1. Background.

The Minnesota Supreme Court determined that Minnesota Statutes § 211B.06 is directed against false statements of specific facts. *See Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981). The statute does not prohibit inferences or implications, even if misleading. Moreover, 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

⁹ *See* Petitioners’ Principal Brief at 41. (“Thus, for the complainants to meet the *prima facie* standard, they must acknowledge under oath they know the subjective intent of each respondent at the time of filing. The acknowledgement must affirm that the complainants know that each respondent knew the statements made and disseminated were false or were probably false at the time they were made.”)

detail are immaterial. *See Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

2. Statement 1

The Petitioners alleged that the following statement was false in violation of Minnesota Statutes § 211B.06,

If residents vote no, their taxes will most likely still increase – in some, by a large amount. That’s because if the plan is not approved, the school district would enter into “statutory operating debt” by June 2011, which means the State of Minnesota recognizes that the school district can no longer balance its expenditures and revenues, and would need to dissolve. Children in the School District would then go to the neighboring school districts.

As an initial matter, the allegations related to this statement must be dismissed as untimely. Although not addressed by the administrative law judge, it is clear from the face of the complaint that the statement was made more than one year prior to the filing of the complaint. According to Minnesota Statutes § 211B.32, subd. 2, the complaint must be filed with the OAH within one year after the occurrence of the act or failure to act that is the subject of the complaint, except in the case where the act or failure to act involves fraud, concealment, or misrepresentation, none of which has been alleged in the present case. See Minn. Stat. § 211B.32, subd. 2 (2010). Consequently, to be timely, the allegedly false statement must have been made within one year of November 4, 2010, the date that the complaint was filed with OAH, and, thus, by November 4, 2009.

In their complaint, the Petitioners cite to their Exhibit E in support of “Statement 1.” *See* Pttrs. App. 23. Exhibit E is dated September/October 2009 and “Statement 1” is found on the second page thereof. *See* Pttrs. App. 66-67. Consequently, it is clear from the face of the documents that the complaint was filed more than one year after the occurrence of the act, which was distribution of Exhibit E, and was the subject of the complaint. Therefore, for this reason alone, dismissal of the complaint with respect to “Statement 1” should be affirmed.

Beyond the timeliness issue, the administrative law judge found that the statement was not demonstrably false, concluding “[t]he statement reflects an inference and the phrase ‘would need’ is at most a pessimistic possibility in a conditional sentence” and “[t]he [School District] did not state that St. Louis County School District will dissolve or will be required to dissolve if it enters into statutory operating debt.” *See* Pttrs. App. 7.

Although the Petitioners prefer to isolate the phrase “would need to dissolve,” to support their claim that a false statement was made, the phrase cannot be viewed in a vacuum. As found by the administrative law judge, the phrase is included in a conditional sentence, “if the plan is not approved . . . the school district would enter into ‘statutory operating debt’ . . . and would need to dissolve.”

Although not included in their complaint to the OAH, the Petitioners on appeal allege that by using the word “would,” the past tense of the word “will,” the School District was stating an absolute conclusion. Therefore, according to the

Petitioners the statement was false because a school district entering into statutory operating debt does not necessarily result in dissolution.

The Petitioners' argument fails for two reasons. First, the Petitioners provide no evidence to support their conclusion that the statement intended to use the word "would" in the form of the past tense of "will."¹⁰ Second, a closer look at the dictionary definition of "would" reveals that, among other things, it was "used in auxiliary function in the conclusion of a conditional sentence to express a contingency or possibility." *See Webster's Ninth New Collegiate Dictionary*, 1361 (1985). Accordingly, as found by the administrative law judge, the phrase "would need to dissolve" was the conclusion of the conditional sentence to express a contingency or possibility "if the plan is not approved." Therefore, contrary to the Petitioners' claim, "Statement 1" did not reflect a definitive state of occurrence of "statutory operating debt" or a "need to dissolve" as alleged.

In addition, the Petitioners failed to allege any facts that the publisher knew "Statement 1" was false or communicated with reckless disregard as to whether it was false. The administrative law judge found that there was "nothing in the record to show ["Statement 1"] was disseminated with a high degree of awareness of its probable falsity." Pptrs. App. 7.

¹⁰ The Petitioners' apparent attempt to do this by citing to the sentence "Children in this school district would then go to the neighboring school districts" is unavailing. The aforementioned sentence is not a conditional sentence like the sentence containing the allegedly false phrase "would need to dissolve" and, therefore, does not support the conclusion that they are to be interpreted in the same manner.

The Petitioners on appeal claim that “the fact that the statements were made objectively shows the intent of stating them as fact.” *See* Petitioners’ Principal Brief at 42-43. This conclusory statement does not demonstrate any facts to support that “Statement 1” was disseminated with a high degree of awareness of its probable falsity. Consequently, the administrative law judge correctly concluded that the Petitioners failed to show both elements of the *prima facie* case. Therefore, dismissal of the Petitioners’ claim of a false statement regarding “Statement 1” should be affirmed.

3. Statement 2.

The Petitioners alleged that the following statement was false in violation of Minnesota Statutes § 211B.06,

[I]f a “no” vote passes, you’ll likely be paying taxes of
the district shown here that’s closest to your home.

See Pptrs. App. 24.

Initially, “Statement 2”, like “Statement 1” appeared in Exhibit E, dated September/October 2009. *See* Pptrs. App. 67. Therefore, “Statement 2” should also be dismissed as untimely.

The Petitioners’ do not challenge the dismissal of “Statement 2” as no argument is included in their brief. Consequently, it appears that the Petitioners concede that the dismissal of “Statement 2” was appropriate.

In the event that the Petitioners subsequently claim oversight on their part, the administrative law judge correctly dismissed the alleged violation of Minnesota Statutes § 211B.06. The administrative law judge found that the statement was not factually false because “[t]he statement that voters ‘will likely’ pay taxes of a neighboring district is an inference or unfavorable deduction based on the assumption that the school district would dissolve.” *See* Pttrs. App. 8.

In addition, the Petitioners failed to allege any facts that School District or School Board knew “Statement 2” was false or communicated with reckless disregard as to whether it was false. Therefore, dismissal should be affirmed.

3. Statement 3.

The Petitioners alleged that the following statement was false in violation of Minnesota Statutes § 211B.06,

Projected annual deficit in 2011-12: \$4.1 million.

See Pttrs. App. 25.

The allegedly false “Statement 3” does not exist standing alone in Exhibit H cited by the Petitioners. The only reference to a “projected deficit” of \$4.1 million in Exhibit H was to the “projected shortfall” for the 2011-12 school year in the context of the following, “This 2008-09 adopted budget shortfall is projected to be \$1.5 million. Without adoption of the proposed plan, the projected shortfall would be near 4.1 million for the budget year 2011-2012 . . .” *See* Pttrs. App. 8 and 85.

Consequently no facts support the allegation that “Statement 3” as pled was ever made. On this basis alone, dismissal is appropriate.

The Petitioners also alleged in their complaint that the projection was false because it “reflected ‘worst case’ assumptions,” and “the budget projection was never a realistic budget projection.” The administrative law judge stated “[t]o say that the [School District’s] budget forecast was gloomy, unrealistic or improbable, is not to say that it was demonstrably false.” *See* Pptrs. App. 8. In fact, the Petitioners stated that the budget projection was not realistic because it “assumed that no teacher layoffs or staff reductions would occur, no steps would be taken to curb rising health insurance costs, and that energy costs would rise by ten percent annually from record highs in 2008.” Since the Petitioners were able to explain the assumptions used in developing the projection, it was clear that they had knowledge of and understood the assumptions and the effect of those assumptions on the projection. The Petitioners then compared the projection to the approved 2009-10 School Board approved budget which was not based upon the assumptions used in developing the projection, in an apparent attempt to create the appearance of a false statement.¹¹

¹¹ The Petitioners also rely upon an unfounded, unsupported and bare allegation that the School District’s Business Manager “admitted that the budget projections were not realistic and had an alternative motive.” *See* Petitioners’ Principal Brief at 44, *see also*, Pptrs. App. 25-26 (no copy of the alleged “media interview” was provided).

Even assuming, for the sake of argument, that the projection was not realistic, it did not amount to being false. This was echoed by the administrative law judge's finding that "nothing in the record shows that the [School District's] statements are demonstrably false . . . they are not items that the State may reach, regulate, outlaw or punish," and dismissal should be affirmed. *See id.*

In addition, the Petitioners failed to allege any facts that the School District or School Board knew "Statement 3" was false or communicated with reckless disregard as to whether it was false. The Petitioners claim that the School District knowingly made false statements by citing to budget projections that were known to be outdated. The Petitioners provided no evidence to support this allegation. Therefore, the Petitioners failed to meet their *prima facie* burden and the administrative law judge's decision should be affirmed.

5. Statement 4.

The Petitioners alleged that the following statement was false in violation of Minnesota Statutes § 211B.06,

The plan now up for a December 8 public vote was developed to not only save millions of dollars and ensure the district's continued operation, its implementation will provide many new opportunities for our young people's education.

See Pttrs. App. 26. That introductory statement was followed by examples of new opportunities for education that the School District intended to provide through implementation of its plan. *See id.* The Petitioners claimed that the statement and examples were false because the School District could not use any of the \$78.8 million in capital bonding funds for the educational improvements described in the publication. As found by the administrative law judge, the Petitioners also acknowledged that “School District officials were claiming that operational savings made possible by the school consolidation would free up funding for such improvements.” *See* Pttrs. App. 9 and 28. Consequently, it is clear from the face of the complaint that the School District communicated that it would use operational savings to fund the educational improvements. This undermines the Petitioner’s claim. The administrative law judge determined that a *prima facie* violation was not alleged because even if the School District’s claim that operations savings would support the funding for the improvements was “unrealistic or speculative, it did not make them factually false,” and that there was no requirement that information provided to the public be “thorough or complete enough to prohibit incomplete and unfair campaign statements, even those that are clearly misleading.” *See* Pttrs. App. 10.

The Petitioners also seek to have the Court find that the educational improvements listed are false “since the [School] District ‘can in no way assure’ the promises made.” *See* Petitioners Principal Brief at 46. The Petitioners have

provided no factual evidence to support their conclusion that the School District cannot or will not be able to provide the educational improvements described such as to render “Statement 4” false. Therefore, the administrative law judge’s decision should be affirmed.

6. Statements 5 through 7.

Statements 5 through 7 consisted of verbal statements made by School Board members and the Superintendent in a public meeting. Expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that that statement is not a representation of fact. *See Jadwin* at 441. The administrative law judge found that the Petitioners conceded that the statements were “statements of opinion.” *See* Pttrs. App. 10. Therefore, the administrative law judge concluded that the statements of opinion were not within the purview of Minnesota Statutes § 211B.06 and the Petitioners failed to allege a *prima facie* violation of the statute.¹²

The Petitioners have not challenged the conclusion of the administrative law judge that the statements of opinion are not within the purview of Minnesota Statutes § 211B.06. Therefore, the Petitioners have conceded that the decision was correct.

¹² In their brief, the Petitioners also allege that the School District used the “ploy” of including “at least one published-editorial plea from a sophomore high school student to ‘VOTE YES’ on the ballot question.” Notwithstanding that the editorial appears in one of the exhibits attached to the Petitioners’ complaint, the Petitioners did not include the editorial as an allegation in their complaint. Therefore, the Petitioners have waived their ability to rely upon said editorial at this late date.

On appeal, however, the Petitioners claim that the administrative law judge “mistakenly” considered the statements as alleging violations under Minnesota Statutes § 211B.06. Such a claim however, is uninformed at best and disingenuous at worst. The procedure contained in Minnesota Statutes § 211B.32 specifically places the burden on the complaining party to clearly set forth his or her allegations and proof. Minn. Stat. § 211B.32, subd. 4. If the allegations and proof are not clear, the complaining party cannot push the inadequacies of the complaint onto the administrative law judge to decipher. Thus, the Petitioners’ claim on appeal should be rejected and dismissal of “Statement 5” through “Statement 7” should be affirmed.

Notwithstanding the complaint’s obvious deficiencies, the Petitioners claim that they sought to use the opinion statements as “examples of the [School] District’s promotions of the ballot question” alleging that such activities are “reportable under Minn. Stat. § 211A, or in the alternative unlawful but reportable.” Even assuming, for the sake of argument, that the three identified statements promoted passage of the ballot question, as the administrative law judge was required to accept, the Petitioners failed to demonstrate how such statements gave rise to the requirement to file a financial report under Minnesota Statutes Ch. 211A. In this respect, all three statements were made by individuals, not by a “candidate” or a “committee.” Therefore, the reporting requirements of Minnesota Statutes § 211A.02 did not apply.

Even going one step further and assuming, for the sake of argument, that the statements of opinion by individuals are somehow considered campaign material through their publication, no financial reporting requirement was triggered.. As discussed above, the School District is not a “committee” and, as a result, was not subject to the reporting requirement of Minnesota Statutes § 211A.02.

Finally, the Petitioners spend a number of pages citing to cases from several jurisdictions to support the proposition that a school district does not have authority to advocate or actively campaign for passage of a bond issue. Whether those cases have any application in the present case remains to be seen as no actual finding has been made that the School District in fact distributed information that promoted or advocated in favor of the bond referendum. The Petitioners’ mere allegations of promotion and advocacy, which must be accepted as true by the administrative law judge, do not transform into factual findings and conclusions merely upon appeal. The reality is that contrary to the Petitioners’ suggestion, burdensome or not, Minnesota Statutes Chapter 211A only requires the filing of financial reports by a “candidate” or “committee.” Since the School District is neither a “candidate” nor a “committee” it is not required to file a financial report under Minnesota Statutes § 211A.02.

CONCLUSION

The School District is not a committee subject to the financial reporting requirements of Minnesota Statutes Chapter 211A. In addition, the School District

did not make false statements prohibited under Minnesota Statutes § 211B.06. Consequently, the Petitioners failed to meet their burden to establish a *prima facie* violation of Minnesota Statutes §§ 211A.02, 211A.03, 211A.05, 211A.06 and 211B.06. The decision of the administrative law judge to dismiss the complaint in its entirety should be affirmed.

Respectfully submitted,

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