

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Minnesota Voters Alliance and Donald
Huizenga,
Complainants,

v.

Anoka Hennepin County School District,
Respondent.

**NOTICE OF DETERMINATION
OF PRIMA FACIE VIOLATION
AND
PREHEARING CONFERENCE**

TO: William Butler, Butler Law Office, Suite 4100, 33 South Sixth Street, Minneapolis, MN 55402; Anoka-Hennepin School District, Attention: Paul Cady, General Counsel, 11299 Hanson Boulevard, N.W., Coon Rapids, MN 55433

On November 2, 2012, the Minnesota Voters Alliance and Donald Huizenga filed a Complaint with the Office of Administrative Hearings alleging that Anoka Hennepin County School District violated the Fair Campaign Practices Act. The Complaint alleges three violations of the law; each of which arise out of the District's development and circulation of a brochure relating to a levy referendum in 2011. Specifically, the Complainants allege that the District: (1) wrongfully used public moneys to promote approval of the referendum; (2) failed to report these expenditures to Ramsey County election officials; and (3) circulated campaign material that included false statements of facts.

After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint does set forth *prima facie* violations Minn. Stat. §§ 211A.02 and 211B.06.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter is scheduled for a telephone scheduling conference to be held by telephone before the undersigned Administrative Law Judge at **10:00 a.m.** on **Tuesday, November 27, 2012**. The scheduling conference will be held by "meet me" telephone conference call. At the appointed hour, the parties are directed to:

- (a) Telephone 1-888-742-5095
- (b) Enter the Conference Code: 566-872-4759#

Counsel for the parties are directed to have their calendars available during the telephone prehearing conference.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: November 7, 2012

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

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 unchallenged or accepted as true, would be sufficient to prove a violation of Chapter 211A or 211B.¹ For purposes of a *prima facie* determination, the tribunal must accept the facts that are alleged in the Complaint as true, without independent substantiation, provided that those facts are not patently false or inherently incredible.² 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.³

A. Failure to Make Report

The Complainants allege that because the brochure entitled *Anoka-Hennepin School District Levy 2011* presents information in a biased and non-objective manner it qualifies as “campaign material” under Minn. Stat. 211B.01, subd. 2.⁴

While School Districts are ordinarily not permitted to use public funds to engage in advocacy in support of, or opposition to, ballot measures;⁵ if School Districts do

¹ *Barry and Spano v. St. Anthony-New Brighton Independent School District 282*, 781 N.W.2d 898, 902 (Minn. App. 2010).

² *Id.*

³ *Id.*

⁴ *Complaint*, at 2-4 and Exhibit 1.

undertake such advocacy they are not relieved of the reporting requirements following campaign-related expenditures.⁶

Thus, if the Complainants' statements are credited as true, they have stated a violation of Minn. Stat. § 211A.02. This claim will proceed to an evidentiary hearing.

B. False Literature Claim

1. Timing

The Complainants assert that three statements made in the brochure *Anoka-Hennepin School District Levy 2011* are demonstrably false – specifically, that:

- (1) “If Question 1 passes, the District will be able to maintain current class size and educational programs and activities in place now.”
- (2) “[The referendum levy] is not a tax increase.”
- (3) “The District’s costs of providing educational programs and services increase roughly 2.5% to 3% per year but state funding increases have averaged only 1 percent per year over the past ten years.”⁷

Under Minn. Stat. § 211B.32, subd. 2, a complaint alleging violations of chapter 211B “must be filed . . . within one year after the occurrence of the act or failure to act that is the subject of the complaint.”

Because the *Anoka-Hennepin School District Levy 2011* brochure is not dated, it is not clear from the Complainants' pleadings whether it was circulated on or before November 2, 2011 – one year prior to the Complainant's filing. For the purposes of the *prima facie* review the Administrative Law Judge resolves the doubt as to the date of publication in favor of Minnesota Voters Alliance and Mr. Huizenga.⁸

2. Elements of the Claim

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material. The prohibition has two elements: (1) A person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person developing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false.

⁵ *Abrahamson v. St. Louis County School District 2142*, 819 N.W.2d 129, 135 (Minn. 2012); Op. Att’y Gen. (159a-3, May 24, 1966); Op. Att’y Gen. (July 10, 1952).

⁶ *Abrahamson*, at 819 N.W.2d at 135.

⁷ *Complaint*, at 2-4 and Exhibit 1.

⁸ The Complaint alleges that Mr. Huizenga received the brochure “a few days before” the November 8, 2011 election.

As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. The statute does not proscribe critiques that are merely unfair or uncharitable.⁹ Indeed, this statute is set against the backdrop of the First Amendment; which assures Americans in the public square sufficient “breathing space” to assemble data, construct arguments and present conclusions to their fellow citizens.¹⁰ The statute does not punish poor reasoning, but instead relies upon voters to discern the merits of arguments made in campaign brochures.

With respect to the second element of the statute, the test is subjective: OAH inquires into whether the Respondent “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.¹¹

3. Analysis of Statement 1

To the extent that the statement “if Question 1 passes, the District will be able to maintain current class size and educational programs and activities in place now,” says anything at all, it is a forecast of future events. Because none of us can know the future, it is not falsifiable by the Complainants or provable by the District that the assertion is beyond dispute. Readers of such brochures know that this kind of prediction represents a blend of opinion and speculation. For these reasons, this claim is not actionable under the Fair Campaign Practices Act and does not survive *prima facie* review.¹²

The claim as to Statement 1 is dismissed.

4. Analysis of Statement 2

The District’s claim that “[the referendum levy] is not a tax increase,” is likewise not actionable under the Fair Campaign Practices Act. The context in which the statement appears makes clear the District did not regard the re-authorization of a tax

⁹ *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).

¹⁰ See, *Boos v. Barry*, 485 U.S. 312, 322 (1988), (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment”); compare also, *State v. Machholz*, 574 N.W.2d 415, 422 (Minn. 1998) (“Commenting on matters of public concern is a classic form of speech that lies at the heart of the First Amendment, and speech in public arenas is at its most protected on public sidewalks, a prototypical example of a traditional public forum”) (citing *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997)).

¹¹ *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.) review denied (Minn. 2006).

¹² *Hill v. Notch, et. al*, OAH Docket No. 8-6326-17585-CV (2006) (http://mn.gov/oah/multimedia/pdf/632617585_prima_facie_ord.pdf).

that was expiring soon to be a “tax increase” – and its particular construction of the term was explained to voters. The District stated:

A referendum levy that has been an important source of revenue for this district since 2002 is expiring next year. Voters will be asked to choose whether or not to renew this levy. This will continue an existing tax. It will not increase your taxes.¹³

As interpreted by the Minnesota Supreme Court, the false claims statute is directed against statements of fact and not against unfavorable deductions or inferences based upon fact.¹⁴ Likewise, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.¹⁵ Thus, while Mr. Huizenga and the Minnesota Voters Alliance may reasonably regard taxation that immediately follows the expiration of an earlier tax, as a “tax increase,” the District’s contrary opinion that this action is a “continuation” of the status quo, and not an “increase,” is not demonstrably false. In the context in which the statement was made, District’s use of the term “increase” is clear to readers, understandable and protected speech.

The claim as to Statement 2 is dismissed.

5. Analysis of Statement 3

The Complainants allege that the District’s statement that “[t]he District’s costs of providing educational programs and services increase roughly 2.5% to 3% per year but state funding increases have averaged only 1 percent per year over the past ten years,” is false.

For the purposes of *prima facie* review the Administrative Law Judge assumes that the term “state funding” is possible of only one construction and that this amount, as alleged in the Complaint, was in fact, increased at a rate of more than two percent per year over the past ten years.¹⁶

The claim as to Statement 3 will proceed to an evidentiary hearing.

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¹³ Exhibit 1 at 1.

¹⁴ *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).

¹⁵ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).

¹⁶ See, *Complaint*, at 5.