OAH 5-0325-33926

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Joyce Borchardt,

Complainant,

vs.

North Branch Municipal Water & Light Commission,

Respondent.

ORDER FINDING NO PRIMA FACIE VIOLATION AND DISMISSING COMPLAINT

On October 24, 2016, Joyce Borchardt (Complainant) filed a Fair Campaign Practices Complaint (Complaint) with the Office of Administrative Hearings alleging that the North Branch Municipal Water and Light Commission (Respondent) violated Minn. Stat. §§ 211B.01, subds. 2, 4, 5, 6, 211B.04, 211B.09 (2016) with respect to campaign material concerning the November 8, 2016 ballot question on whether to abolish the North Branch Water and Light Commission.

On October 25, 2016, the Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge pursuant to Minn. Stat. § 211B.33 (2016).

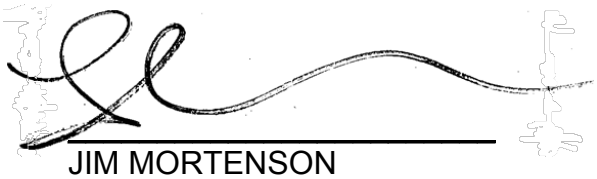
After reviewing the Complaint and the attached documents, and for the reasons set out in the attached Memorandum, the Administrative Law Judge finds that the Complaint fails to set forth prima facie violations of the Fair Campaign Practices Act.

ORDER

IT IS ORDERED THAT:

The Complaint filed by Joyce Borchardt against the North Branch Municipal Water & Light Commission is **DISMISSED**.

Dated: October 27, 2016



JIM MORTENSON
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5 (2016), this Order is the final decision in this matter. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2016).

MEMORANDUM

The Complaint concerns a campaign flyer that encourages voters in the City of North Branch to vote down a ballot question in the November 8, 2016 election asking whether the North Branch Water and Light Commission should be abolished.[1] The flyer includes a partial disclaimer that states: "Paid for by the North Branch Crusade for Ethics in Government [-] Follow 'North Branch Know the Facts/Vote No' on Facebook."[2]

The Complaint alleges the campaign flyer is biased and one-sided in its opposition to the ballot question. The Complaint asserts further that Respondent permitted the flyers to be placed on its front counter for dissemination and that Respondent's employees encouraged people to take a flyer. The Complaint argues that by placing the flyers on its front counter and encouraging people to take fliers, Respondent violated several provisions of the Fair Campaign Practices Act.

Standard for Prima Facie Determinations

To establish a prima facie violation of the Fair Campaign Practices Act, Complainant must allege sufficient facts to show that a violation of law has occurred.[3] The complaining party must submit evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of Minnesota Statutes, chapter 211A or 211B (2016).[4]

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.[5] 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.[6]

Disclaimer Requirement

Minnesota Statutes, section 211B.04 makes it unlawful to prepare or disseminate most types of campaign material without prominently disclosing the person or committee

---

[1] A scanned copy of the campaign flyer is attached to this decision as Exhibit A.

[2] *Id*.

[3] Minn. Stat. § 211B.32, subd. 3 (2016).

[4] *Barry and Spano v. St. Anthony-New Brighton Indep. Sch. Dist. 282*, 781 N.W.2d 898, 902 (Minn. Ct. App. 2010).

[5] *Id*.

[6] *Id*.

causing the material to be prepared or disseminated. The statute provides, in relevant part:

> (a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.
>
> (b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the ..... committee, ... (address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the ..... committee, ... (address)" for material prepared and paid for by a person or committee other than a principal campaign committee. If the material is produced and disseminated without cost, the words "paid for" may be omitted from the disclaimer.
>
> . . .
>
> (e) This section does not apply to an individual or association that is not required to register or report under chapter 10A or 211A.
>
> (f) This section does not apply to the following:
>
> > (1) bumper stickers, pins, buttons, pens, or similar small items on which the disclaimer cannot be conveniently printed;
> >
> > (2) skywriting, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; and
> >
> > (3) online banner ads and similar electronic communications that link directly to an online page that includes a disclaimer.
>
> . . .

"Campaign material" is defined as "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election."[7] The purpose of the disclaimer requirement is to "identify who or what committee prepared, disseminated and paid for the campaign material."[8]

The flyer at issue meets the definition of "campaign material" and is required to have a disclaimer "substantially in the form" provided in Minn. Stat. § 211B.04 unless one of the exceptions provided at section 211B.04(e) and (f) applies. The partial disclaimer

---

[7] Minn. Stat. § 211B.01, subd. 2.

[8] *Hansen v. Stone*, No. 4-6326-16911, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER at 4 (Minn. Office Admin. Hearings Oct. 28, 2005).

on the campaign flyer indicates that it was paid for by "the North Branch Crusade for Ethics in Government" but lacks an address. The disclaimer also includes a Facebook site, but the Complaint alleges the referenced Facebook page does not include the name and address of the committee that prepared and paid for the campaign flyer. The flyer does not state it was paid for or prepared by the Respondent.

Complainant maintains that, by permitting the flyers to be placed on its front counter and encouraging people to take a flyer, "it would appear that [the Respondent] or [its] employees are part of and participating [in] these political committees…."[9] This claim is a supposition, however, and not an alleged fact. Thus, on its face, the Complaint only shows that the North Branch Crusade for Ethics in Government is the committee which prepared and paid for the flyers. The Complaint is not against that committee. Thus, the allegation is dismissed.

Prohibited Public Employee Activities (Minn. Stat. § 211B.09)

Minnesota Statutes, section 211B.09 provides:

> An employee or official of the state or of a political subdivision may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. A political subdivision may not impose or enforce additional limitations on the political activities of its employees.

Complainant alleges that Respondent engaged in prohibited public employee activities in violation of section 211B.09 by disseminating campaign material that Complainant contends is biased and one-sided.

In order to allege a prima facie violation of Minn. Stat. § 211B.09, Complainant must put forward facts that would support finding Respondent used its authority or influence to "compel" individuals to "take part in a political activity." The Merriam Webster Dictionary defines "compel" to mean "to drive or urge forcefully or irresistibly;" or "to cause to do or occur by overwhelming pressure."[10]

The Complaint does not allege that any of Respondent's employees used official authority or influence to compel anyone to take part in political activity, in this case voting a certain way on a ballot question. No forceful or overwhelming pressure to vote or even take a flyer was alleged. Encouraging people who come into the North Branch Water & Light Commission building to take a flyer, even if the flyer is biased or one-sided, in insufficient to support a determination that a prima facie violation of Minn. Stat. § 211B.09 occurred. A photo of Respondent's employees on a Facebook page supporting a particular vote on a ballot question also does not equate to compelling anyone to vote a certain way. Finally, Minn. Stat. § 211B.09 does not attempt to prohibit biased speech. Because none of the alleged facts, if true, would demonstrate a violation of Minn. Stat. § 211B.09, this allegation is dismissed.

---

[9] Complaint at 3-4.

[10] Merriam Webster Online Dictionary at http://www.merriam-webster.com/dictionary/compel.

Section 211B.01 Claims

The Complaint also alleges that Respondent violated Minn. Stat. 211B.01, subds. 2, 4, 6. Section 211B.01 provides definitions applicable to chapter 211B (Fair Campaign Practices Act). Subdivision 2 defines "campaign material," subdivision 4 defines "committee," and subdivision 6 defines the term "political purpose."

While these subdivisions define particular concepts in the - namely, what constitutes "campaign material," a "committee," and acts with a "political purpose" - they do not proscribe any particular conduct. It is not proper to say, therefore, that Respondent "violated" a definition of statutory terms. Accordingly, these claims are dismissed.

For all of these reasons, the Complaint fails to allege prima facie violations of the Fair Campaign Practices Act. Accordingly, the Complaint is dismissed in its entirety.

J. R. M.

ON NOV. 8, NORTH BRANCH VOTERS WILL BE ASKED: "SHOULD THE WATER AND LIGHT COMMISSION BE ABOLISHED?"

VOTE NO!

A "NO" VOTE MEANS:

- Control of North Branch Water and Light would remain with the local utility commission.
- Dedicated and committed commission members are focused on providing clean drinking water and safe electric services to our city while keeping rates affordable. This is a non-profit enterprise.
- State law requires a utility commission to keep a separate fund, for all money in and out, for each utility. Maintaining separate funds helps prevent cities from using money raised through the utility bill to pay for pet projects unrelated to utility service. Politicians may be tempted to look at the utility for revenue beyond what is being collected through taxes. The commission is a check on that tendency.
- The Water and Light Commission is a non-political entity focused on the long-term interests of the community, not the short-term interest of a small group.
- Licensed, educated and experienced business professionals manage the $6 million water and light utilities as a not-for-profit business.
- North Branch's water is currently at or above the state's standards.
- If the Utility Commission needs to issue debt to finance a project, that debt is repaid by utility customers only.
- Merging public agencies comes with upfront costs. No one knows how high these costs will get.
- We shouldn't undo decades of successful governance because of one unhappy customer without studying the implications of abolishing the utility commission.

A "YES" VOTE MEANS:

- Control of the utility (and its revenue) would be turned over to the City Council.
- The City Council has a broad scope of statutory roles over services such as public works, zoning, police, fire, and economic development. Do they have the time and expertise to successfully take on the responsibilities of the operations of a complex non-profit business?
- Under City Council control, rates on our water, sewer, or electric bills could be raised to fund any pet project of the City.
- Utilities could be used as a political football under City Council control.
- Should we place the safety of our drinking water and safe operation of our electric utility in the hands of people who have no experience or license in clean drinking water or electric regulatory and safety requirements?
- An inexperienced City Council could cut corners to save money, which could have disastrous outcomes, like what happened in Flint, Michigan.
- If the City borrowed money to pay for any utility project on a General Obligation Bond, that loan could be paid back by all property taxpayers (even those on private wells or septic systems).
- The City has already authorized over $30,000 just to study transitioning utility operations from Commission to City control if this ballot question passes. This cost will be paid by all of North Branch taxpayers. Who knows what other costs may come.
- Proponents of this ballot measure declined to study the rate impacts of abolishing the commission. Should voters really support such a drastic measure because one City Council member is unhappy with the utility?

IF YOU BELIEVE OUR WATER AND LIGHTS ARE SAFER IN THE HANDS OF THE COMMISSION THAN THE CITY COUNCIL,

VOTE NO!

Paid for by the North Branch Crusade for Ethics in Government

Follow "North Branch Know the Facts/Vote No" on Facebook