

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Michael Wigley and Robert Jackson,
Complainants,
vs.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
EVIDENTIARY HEARING**

Orono Public Schools, ISD 278, Jack
Veach, Dick Lewis, Martha Van de Ven,
John Malone, Michael Bash, Michele
Kunz, Karen Orcutt, and Orono Kids
Matter,

Respondents.

TO: The Above-Named Parties.

On April 28, 2008, Michael Wigley and Robert Jackson filed a Complaint with the Office of Administrative Hearings alleging that the Orono Public Schools violated Minn. Stat. §§ 211A.02 (financial reporting), 211A.05 (financial filing), and 211B.06 (false campaign material). The Complaint also alleges that each of the Orono School Board members and Superintendent Karen Orcutt violated Minn. Stat. §§ 211A.02, 211A.05, 211B.06 and 211B.09 (prohibited public employee activities). Lastly, the Complaint alleges that the organization "Orono Kids Matter" violated Minn. Stat. § 211A.02, 211A.05, and 211B.06.

After reviewing the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the Complaint sets forth prima facie violations of Minnesota Statutes § 211A.02 with respect to Respondent Orono Kids Matter. All of the other allegations and parties are dismissed. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a prehearing conference and evidentiary hearing to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101, before three Administrative Law Judges. The evidentiary hearing must be held within 90 days of the date the complaint was filed, pursuant to Minn. Stat. § 211B.35. You will be notified of the date and time of the prehearing conference and evidentiary hearing, and the three judges assigned to it, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the

unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judge and opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

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 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: May 1, 2008

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

This Campaign Complaint concerns the February 12, 2008, special election on the Orono School District's bond referendum ballot question. The Complaint alleges that the Orono School District, Superintendent Karen Orcutt, members of the Orono Board of Education, and an organization supporting the ballot question known as "Orono Kids Matter" engaged in campaign activities that violated fair campaign practices and financial reporting laws. Specifically, the Complaint alleges that the Respondents violated Minn. Stat. §§ 211A.02 (financial reporting), 211A.05 (financial filing), and 211B.06 (false campaign material). In addition to these violations, the Complaint also alleges that each of the Orono School Board members and Superintendent Orcutt violated Minn. Stat. § 211B.09 (prohibited public employee activities).

In reviewing the Complaint to determine whether it sets forth a prima facie violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently

false or inherently incredible. The allegations against each Respondent are addressed in turn below.

Orono Public School District, ISD 278

The Complaint alleges that the Orono School District violated campaign financial reporting laws by failing to report disbursements it made in support of the ballot initiative. According to the Complaint, the School District assisted Orono Kids Matter in its preparation and distribution of campaign material to influence passage of the February 12th ballot question. Specifically, the Complaint alleges that the School District created campaign literature and a campaign slogan, provided discs to Orono Kids Matter for reproducing a DVD promoting the ballot initiative, and used its non-profit mailing frank to disseminate material in support of the ballot question. The Complaint also asserts that the School District used its Honeywell Instant Alert system, which is funded with public money, to remind parents and guardians of District children to vote. The Complaint maintains that because these disbursements went beyond the expenditures allowed for school district elections under Minn. Stat. § 204B.32, the School District was required to file campaign financial reports disclosing these disbursements. By not doing so, the Complaint alleges that the School District violated Minn. Stat. §§ 211A.02 and 211A.05.

Under Minnesota Statutes § 211A.02, subd. 1, a *committee* or *candidate* acting to promote or defeat a ballot question who makes disbursements of over \$750 in a calendar year, must file financial reports with the appropriate filing officer. The reports filed by a candidate or committee must include the total amount of expenditures for each time period covered.¹ In addition, under Minn. Stat. § 211A.05, each candidate or treasurer of a committee is required to certify to the filing officer that all required financial reports have been filed.

The Complaint maintains that the School District, by acting on behalf of the Board of Education and with the Superintendent, constitutes a “committee” under Minn. Stat. § 211A.01, and is therefore subject to the campaign finance reporting requirements. Minnesota Statutes § 211A.01 defines “committee” to mean “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.” School districts are political subdivisions of the state. The Orono School District is neither a candidate nor a committee, and it is not required to report its disbursements under chapter 211A. However, as political subdivisions of the state, school districts are required to make available to the public all of their revenues, expenditures, and other financial information through mechanisms other than 211A.²

In addition, Minn. Stat. § 211A.01, subd. 6, explicitly excludes from the definition of “disbursement” payments by school districts for election-related expenses required or authorized by law. The Complainants argue that only the election-related expenses identified in Minn. Stat. § 204B.32 are required or authorized by law. That section requires school districts to pay for certain election expenses such as compensation for

¹ Minn. Stat. § 211A.02, subd. 2(5).

² See e.g., Minn. Stat. § 123B.10, subd. 1.

election judges and sergeants-at-arms, the cost of printing ballots, providing ballot boxes, and equipping polling places. The Complainants point to no authority for the proposition that expenditures are limited to those listed in § 204B.32 or that the School District is prohibited from making disbursements to promote the passage of a bonding referendum.

For all of these reasons, the Administrative Law Judge finds that the Complainants have failed to allege prima facie violations of Minn. Stat. §§ 211A.02 and 211A.05 on the part of the Orono School District. These allegations are dismissed.

The Complaint also alleges that the School District allowed the dissemination of false campaign material on the eve of the ballot election. According to the Complaint, the School District provided Orono Kids Matter with School District mailing lists of parents whose children attend Orono schools. The Complaint maintains that on February 11, 2008, Orono Kids Matter used these lists to distribute via e-mail false campaign material to parents. The e-mail communication included the following statement: “The bad news is: “No” voters have already submitted hundreds of absentee ballots.” The Complaint asserts that this must be a false statement of fact because absentee ballots may not be counted before the election. Therefore, the Complaint maintains that Orono Kids Matter could not know whether hundreds of “No” voters had submitted absentee ballots. The Complaint contends that because the School District provided the e-mail addresses, it participated in the dissemination of false campaign material in violation of Minn. Stat. § 211B.06.

Minnesota Statutes § 211B.06 prohibits a *person* from intentionally preparing or disseminating false campaign material with respect to the effect of a ballot question that the person knows is false or communicates to others with reckless disregard of whether it is false. A school district is a political subdivision of the state and is not a person. Because the prohibition against preparing or disseminating false campaign material is directed to persons, a school district cannot be found to have violated Minn. Stat. § 211B.06. This allegation is dismissed, and the Orono School District is dismissed as a party in this matter.

Superintendent Karen Orcutt and Orono School Board Members

The Complaint alleges that Superintendent Orcutt, “with the apparent approval of Board members,” directed staff and used School District resources to create or assist in creating campaign material in support of the ballot question.³ Specifically, the Complaint maintains that Superintendent Orcutt and the Board members created campaign material including letters, booklets, e-mails, mailing lists, a campaign slogan and at least one DVD, and used the School District’s non-profit postage frank to disseminate material in support of the ballot question. In addition, the Complaint contends that Superintendent Orcutt used the School District’s Instant Alert system “as a tool to get-out-the-vote in support of the ballot question.”⁴

According to the Complaint, by creating and disseminating campaign material and by providing School District resources to Orono Kids Matter, Superintendent Orcutt

³ Complaint at 6.

⁴ *Id.*

and the School Board members made disbursements of more than \$750 and were required to report these disbursements under Minn. Stat. §§ 211A.02 and 211A.05.

Superintendent Orcutt is an employee of the Orono School District. The School Board members are elected officials charged with governing the School District. The disbursements at issue in this matter concern School District materials and resources that were given or expended by the School District. As already discussed above, Chapter 211A does not require the School District to report these disbursements. The Complainants have not alleged any facts to suggest that the disbursements at issue were unauthorized or were made by Superintendent Orcutt or the Board members outside of their roles as a School District employee or elected officials. Therefore, the Administrative Law Judge finds that the Complainants have failed to allege prima facie violations of Minn. Stat. §§ 211A.02 and 211A.05 against Respondents Karen Orcutt, Jack Veach, Dick Lewis, Martha Van de Ven, John Malone, Michael Bash, and Michele Kunz. These allegations are dismissed.

The Complaint also alleges that Superintendent Orcutt and the School Board members violated Minn. Stat. § 211B.09.⁵ This section prohibits employees or officials of a political subdivision from using their official authority or influence to compel a person to take part in political activity. The Complaint alleges that Superintendent Orcutt instructed School District employees to create campaign material and to participate in promoting passage of the ballot question. The Complaint alleges further that the Board members allowed and encouraged these actions.

In order to allege a prima facie violation of Minn. Stat. § 211B.09, the Complaint must put forward facts that would support a finding that Superintendent Orcutt or the School Board members used their influence to “compel” persons 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.”⁶ Complainant has alleged no facts to support finding that the Respondents used forceful or overwhelming pressure to compel anyone to create and disseminate campaign material or to take part in some other political activity. The Complainants have failed to allege sufficient facts that would support finding a prima facie violation of Minn. Stat. § 211B.09 on the part of Respondent Orcutt and the School Board members. This allegation is dismissed, and Superintendent Karen Orcutt and the named School Board members are dismissed as parties in this matter.

Orono Kids Matter

The Complaint alleges that Orono Kids Matter is an organization of individuals formed to support the bonding referendum, and that this organization also formed a sub-committee known as “The ‘Vote Yes’ Group.”⁷ The Complaint asserts that Orono Kids Matter received in-kind contributions from the Orono School District that it did not report on its campaign financial filings. Specifically, the Complaint asserts that the School District provided Orono Kids Matter with School District mailing lists, blank discs

⁵ Complaint at 19.

⁶ Merriam Webster Online Dictionary.

⁷ Complaint at 5; Complaint Ex. 1.

for the reproduction of a DVD promoting the referendum, and possibly assistance from the School District's Communications Director in the creation of the DVD.⁸ According to the Complaint, Orono Kids Matter failed to report any of these in-kind contributions on its campaign financial reports.

As an association or persons acting together to promote the passage of a ballot question, Orono Kids Matter meets the definition of a "committee" under Minn. Stat. § 211A.01, subd. 4. "Contribution" is defined as anything of monetary value that is given or loaned to a candidate or committee for a political purpose.⁹ The Administrative Law Judge finds that the Complaint does allege a prima facie violation of Minn. Stat. § 211A.02 with respect to Orono Kids Matter. If the evidence at the hearing were to establish that Orono Kids Matter received contributions of more than \$750 and that it did not identify the in-kind contributions it received from the School District on its campaign financial reports, this may be a violation of Minn. Stat. § 211A.02.

The Complaint fails, however, to allege a prima facie violation by Orono Kids Matter of Minn. Stat. § 211A.05. This section governs the penalty and process for candidates and committees who fail to timely file financial reports required by Minn. Stat. § 211A.02. Minn. Stat. § 211A.05, subd. 2 provides as follows:

If a candidate or committee fails to file a report on the date it is due, the filing officer shall immediately notify the candidate or committee of the failure to file. If a report is not filed within ten days after the notification is mailed, the filing officer shall file a complaint under section 211B.32.

Only filing officers may file complaints under section 211A.05, and such complaints must be filed only ten days after the filing officer has sent written notification to the candidate or committee of the failure to file a report. The statute gives the filing officer the discretion to allow untimely filings without resorting to the complaint process. The Complainants lack standing to bring this claim. Moreover, they have failed to allege that the filing officer for the School District notified Orono Kids Matter of its failure to file the financial reports. The Administrative Law Judge concludes that the Complainants have failed to allege a prima facie violation of Minn. Stat. § 211A.05 on the part of Respondent Orono Kids Matter and this allegation is dismissed.

The Complaint also alleges that Orono Kids Matter disseminated false campaign material via an e-mail communication on February 11, 2008. The e-mail communication included the following statement: "The bad news is: "No" voters have already submitted hundreds of absentee ballots." The Complaint asserts that this is a false statement of fact because absentee ballots may not be counted before the election. Therefore, Orono Kids Matter could not know that hundreds of "No" absentee ballots were submitted. The Complaint contends that this statement was a deliberate falsification of information to promote the passage of the ballot question.

Minnesota Statutes § 211B.06 prohibits a person from intentionally preparing or disseminating false campaign material with respect to the effect of a ballot question that is designed to promote or defeat a ballot question and that the person knows is false or

⁸ Complaint at 12, 17 and 21.

⁹ Minn. Stat. § 211A.01, subd. 5.

communicates to others with reckless disregard of whether it is false. The alleged false statement at issue in this matter does not concern the *effect* of the ballot question. It is a statement about the number of votes cast. Moreover, Complainants have failed to allege any facts to support an allegation that the person who made this statement knew it was false or likely knew it was probably false.¹⁰ While the intent of the statement was no doubt to encourage those who support the ballot question to get out and vote, it falls outside of the purview of Minn. Stat. § 211B.06 and is not actionable as a false statement of fact. This allegation is dismissed.

This matter will proceed to a prehearing conference and evidentiary hearing to be scheduled in the near future on the alleged violations of Minn. Stat. § 211A.02 by Respondent Orono Kids Matter.

K.D.S.

¹⁰ See, *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).