STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1070

City of Grant, by and through its
City Clerk, Kim Points,
Respondent,

vs.

John D. Smith,
Relator.

Filed March 13, 2017
Affirmed
Johnson, Judge

Office of Administrative Hearings
File No. OAH 8-0325-33077

Amanda E. Prutzman, Eckberg Lammers, P.C., Stillwater, Minnesota (for respondent)

Richard D. Donohoo, Maplewood, Minnesota; and

Theresa R. Paulson, St. Paul, Minnesota (for relator)

Considered and decided by Tracy M. Smith, Presiding Judge; Johnson, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

The City of Grant held a special election in which residents voted on a proposed city charter. Before the election, a group of residents distributed campaign literature supporting the proposed charter. The literature bore the city's logo and other design

features that appear in city documents and on the city's website. The city clerk filed a complaint alleging a violation of the Fair Campaign Practices Act on the ground that the group's campaign literature falsely implied that the city was endorsing the proposed charter. After an evidentiary hearing, a panel of three administrative law judges found a violation of the act and imposed a $250 penalty on John D. Smith, a member of the pro-charter group who was found to have taken certain actions that caused the campaign literature to be sent to city residents. Smith and his wife challenge the hearing panel's decision on multiple grounds. We affirm.

FACTS

The City of Grant is a statutory city of approximately 4,000 residents in Washington County. It was a farming community in prior decades but has become increasingly residential. In its printed materials and on its website, the city often uses a logo, which consists of a depiction of a log cabin in front of two pine trees, the years in which the city was organized and incorporated, and the slogan, "A Home in the Country." When the city uses the logo on its newsletter, it superimposes the words "Grant News" over the log cabin.

In October 2015, the city held a special election on two questions. In the first ballot question, residents were asked whether the city should establish a home-rule charter.[1] In

[1]A home-rule charter outlines a "scheme of municipal government" for a specific municipality. *See* Minn. Stat. § 410.07 (2016). A home-rule charter recognizes that a city has "unique powers over local matters." *Gadey v. City of Minneapolis*, 517 N.W.2d 344, 348 (Minn. App. 1994), *review denied* (Minn. Aug. 24, 1994). "[I]n all matters pertaining to municipal government the provision of the home rule charter overrides general laws with respect to the same subject. So long as the municipal legislation involves matters of municipal concern and the state has not expressly or impliedly restricted the municipality's

the second ballot question, residents were asked whether to discharge the city's charter commission.[2] The city itself did not take a position on either ballot question.

Groups of city residents organized on both sides of the ballot questions and took various actions to promote their respective points of view. A group called the Rally for the Charter Committee (RFTCC) supported the proposed charter. John D. Smith (hereinafter "Smith") was the treasurer of the group. He filed a campaign finance report on behalf of the group, and he listed his home address as the mailing address for the group. He attended approximately two-thirds of the group's meetings. His wife, Karen Y. Smith, did not attend any RFTCC meetings and was not actively involved in the campaign.

Before the election, RFTCC distributed campaign literature, including a one-page flyer and a tri-fold brochure. Both the flyer and the brochure urged residents to vote in the affirmative on the first question and in the negative on the second question. At the top of the flyer is the city logo. Near the logo are the words "City of Grant Minnesota" in a distinctive typeface that is very similar to the typeface the city uses for the same words in its printed materials and on its website. At the bottom of the flyer is the phrase, "Prepared and paid for [by] Rally for [the] Charter Committee," with a mailing address that is the Smiths' home address.

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power over these matters, the municipality may enact local legislation that is inconsistent with state law." *Id.* (quotation and citation omitted).

[2]A charter commission is made up of between seven and fifteen qualified voters of the city and is tasked with framing a city charter. Minn. Stat. §§ 410.05, subd. 1, 410.06 (2016). A charter commission may be discharged if a majority of voters vote to discharge the commission. Minn. Stat. § 410.05, subd. 5.

The tri-fold brochure is printed on both sides and folded in thirds such that it contains six panels. When folded, one of the external panels includes a space for the mailing address of the recipient and, in the space for a return address, the city logo with the words "Grant News" superimposed over the log cabin. Next to the logo are the words, "Reminder! City of Grant Special Election," and information about the date and hours of the special election and the place where the recipient could vote. The other external panel depicts a sample ballot, with votes superimposed in favor of the first question and against the second question. Inside the brochure, two panels contain text explaining the issues and urging voters to approve the charter. One panel contains four photographs with the city logo in the middle. And one panel lists city residents who support the proposed charter, including "John & Karen Smith." At the bottom of the brochure is the phrase, "This message prepared and paid for by Rally for the Charter Committee," with a mailing address that is the Smiths' home address.

Residents received the flyer in September 2015. The brochure was sent by mail in October 2015. Thereafter some recipients expressed concern that the literature implied that the city was endorsing the proposed charter. One married couple residing in the city sent an e-mail message to the city clerk, Kim Points, stating:

> We found the attached notice on our mailbox this morning and are outraged that the Rally for Charter Committee is using the official City of Grant letterhead for the purpose of advancing their cause. We are hopeful that action will be taken by the City immediately to stop this unethical (and likely unlawful) election activity.

One city council member received the brochure, noticed the city logo, and contacted Points to ask whether the city had authorized the brochure. Points also received other questions and complaints about the mailings. In response to the complaints, Points placed a disclaimer on the city's website to clarify that the city did not have an official position on either ballot question. The city attorney sent a cease-and-desist letter to the Smiths, demanding that they stop using the city logo in RFTCC mailings.

On election day, the first question failed, and the second question passed. In other words, voters rejected the proposed charter and dissolved the charter commission.

In November 2015, a complaint was filed with the Office of Administrative Hearings (OAH), alleging that John Smith and Karen Smith made false claims of endorsement, in violation of the Fair Campaign Practices Act. *See* Minn. Stat. § 211B.02 (2016). The complainant was identified as "City of Grant by City Administrator / Clerk, Kim Points through City Attorney Nicholas J. Vivian." The complaint was signed by Vivian.

A panel of three administrative law judges (ALJs) conducted an evidentiary hearing in May 2016. The city called five witnesses: Points, Smith, a city council member, and two city residents. Points testified that, as city clerk, she administers city elections, maintains the city's records, assembles the city's newsletter, and posts information on the city's website. Points testified that the logo on RFTCC's literature is the city's logo and that the words "City of Grant Minnesota" on the literature are in the same typeface in which the same words are shown on the city's website. The city introduced exhibits that visually illustrated Points's testimony. The city council member and the two residents testified that

they received RFTCC's literature and became concerned that some residents would be misled into believing that the city had sent the literature and was endorsing the charter. The city council member testified that she believed that the brochure implied that the city supported RFTCC's position. One of the residents testified that she had gone door to door to advise residents that the literature was not sent by the city.

Smith testified that he arranged for the printing and the mailing of the brochure but did not prepare the flyer or arrange for it to be printed. He testified that the city logo on one panel of the brochure was provided by the printer and that he decided to not change the brochure to omit the logo. He testified that the "Grant News" logo in the return-address field of the brochure was simply "an attention-getter" and that he chose it instead of the log cabin logo because of the word "news." But he testified that the logo "wasn't intended as any attempt to indicate this was coming from the City." He testified further that he hand-delivered some literature, possibly including the flyer, to newspaper receptacles of city residents.

After the city rested its case, Karen Smith moved for dismissal of the complaint with respect to her, and the hearing panel granted her motion. She then requested reimbursement of her costs. The hearing panel denied that request on the ground that the brochure stated that Karen Smith supported RFTCC and that RFTCC "was apparently . . . headquartered at" her home, which allowed "an inference that she was involved in the development of the literature that bore her address."

In June 2016, the hearing panel issued its findings of fact, conclusions of law, and order. The hearing panel concluded that Smith knowingly used the city's "logos and

symbols" in a way that "falsely implied that the City of Grant endorsed approval of Ballot Question 1 and opposed approval of Ballot Question 2." The hearing panel imposed on Smith a civil penalty of $250. Smith moved for reconsideration, but the hearing panel denied the motion on the ground that there is no authorization in the Fair Campaign Practices Act for a post-hearing motion for reconsideration. Both John Smith and Karen Smith appeal by way of a writ of certiorari.

D E C I S I O N

The statute on which this matter is based provides as follows:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

Minn. Stat. § 211B.02 (2016). A person who wishes to seek a remedy for a violation of section 211B.02 may file a complaint with OAH. Minn. Stat. §§ 211B.31, .32, subds. 2, 3 (2016). A panel of three ALJs must conduct an evidentiary hearing within no more than 90 days and must issue a decision within no more than 14 days. Minn. Stat. § 211B.35, subds. 1, 3 (2016).

"A party aggrieved by a final decision" on a fair-campaign-practice complaint "is entitled to judicial review of the decision as provided in sections 14.63 to 14.69." Minn. Stat. § 211B.36, subd. 5 (2016). This court may reverse or modify an administrative decision only if it (a) violates constitutional provisions; (b) exceeds the authority of the

agency; (c) was made using unlawful procedure; (d) was affected by an error of law; (e) is unsupported by substantial evidence; or (f) is arbitrary or capricious. Minn. Stat. § 14.69 (2016). "A presumption of correctness attaches to an agency decision, and deference is shown to an agency's conclusions in the area of its expertise." *In re 2005 Adjustment of Charges*, 768 N.W.2d 112, 119 (Minn. 2009). "An agency's conclusions are not arbitrary and capricious if a rational connection between the facts found and the choice made is articulated." *Fine v. Bernstein*, 726 N.W.2d 137, 142 (Minn. App. 2007), *review denied* (Minn. Apr. 17, 2007).

I. Standing

Smith first argues that Points did not have standing to file a complaint under the Fair Campaign Practices Act.

The issue of standing typically arises in a civil action that is commenced in district court. In such a case, the plaintiff must have "a sufficient stake in a justiciable controversy to seek relief from a court." *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007). Standing may be acquired in either of two ways: "either the plaintiff has suffered some 'injury-in-fact' or the plaintiff is the beneficiary of some legislative enactment granting standing." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). The parties have not cited any caselaw concerning standing in the OAH, and we are unaware of any such caselaw.

Smith raised the issue of standing at the evidentiary hearing. The hearing panel expressly discussed and resolved the issue in its decision on the merits. The hearing panel initially noted that the act does not impose any limits on who may file a complaint. The

hearing panel also noted that Points's employment by the city made her responsible for safeguarding city property and administering elections, that she fielded complaints about RFTCC's literature, and that she posted a disclaimer on the city's website stating that the city was not taking a position with respect to the ballot questions. The hearing panel concluded that Points had an interest in enforcing the act in light of the duties of her position and, thus, had standing to file the complaint.

On appeal, Smith contends that Points did not have standing because there is no legislative authorization for a city clerk to file a complaint under the Fair Campaign Practices Act.[3] As an initial matter, we question whether Points is the complainant. The complaint itself states that the complainant is "City of Grant by City Administrator / Clerk, Kim Points through City Attorney Nicholas J. Vivian." The complaint was signed by only one person, the city attorney. Smith does not contend that the city did not have standing to file the complaint.

In any event, Smith's contention ignores the reasoning of the hearing panel, which did not conclude that Points had standing pursuant to a legislative enactment. Rather, the hearing panel concluded that Points sustained a cognizable injury because of the nature of her responsibilities as city clerk. Smith does not challenge the hearing panel's findings

[3]Smith contends, in part, that a city clerk may not file a complaint under the act because "the only entity with the authority to prosecute, sue, or bring legal action is the city council." This contention is apparently based on a statute that specifies the powers of a city council in a statutory city, which includes the power to "provide for the prosecution or defense of actions or proceedings at law in which the city may be interested." *See* Minn. Stat. § 412.221, subd. 5 (2016). We do not consider the contention because Smith did not preserve it by presenting it to the hearing panel. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

concerning Points's duties. The hearing panel correctly noted that the Fair Campaign Practices Act does not place any limits on who may file a complaint. The act states only that a complaint "must be in writing, submitted under oath, and detail the factual basis for the claim that a violation of law has occurred" and that it must be filed with OAH within one year. Minn. Stat. § 211B.32, subds. 2, 3.

In light of the evidentiary record and the lack of any restrictions in the statute concerning who may file a complaint, the hearing panel did not err by concluding that Points had standing to file the complaint with OAH.

II. City as "Organization"

Smith next argues that the hearing panel erred by concluding, "The City is an 'organization' within the meaning of Minn. Stat. § 211B.02."

As stated above, section 211B.02 prohibits "a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an *organization*." Minn. Stat. § 211B.02 (emphasis added). The term "organization," as used in section 211B.02, is not defined within the statute. The hearing panel adopted the following definition: "A body of persons (such as a union or corporation) formed for a common purpose." *Black's Law Dictionary* 1210 (9th ed. 2009). Smith contends that the term should be interpreted narrowly to include only private political organizations but not governmental entities.[4]

[4]The city contends in response that Smith did not preserve this argument by presenting it to the hearing panel. It appears that the city is correct that Smith did not specifically argue to the hearing panel that the city is not an "organization" within the

To resolve Smith's argument, we must engage in statutory interpretation. We begin the task of interpreting a statute by asking "whether the statute's language, on its face, is ambiguous." *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute is unambiguous if it "is susceptible to only one reasonable interpretation." *Nelson v. Schlener*, 859 N.W.2d 288, 292 (Minn. 2015). If a statute is unambiguous, we "interpret the words and phrases in the statute according to their plain and ordinary meanings." *Graves v. Wayman*, 859 N.W.2d 791, 798 (Minn. 2015). A statute is ambiguous, however, if it has "more than one interpretation." *Lietz v. Northern States Power Co.*, 718 N.W.2d 865, 870 (Minn. 2006) (quotation omitted). If a statute is ambiguous, we apply "the canons of statutory construction to determine its meaning." *County of Dakota v. Cameron*, 839 N.W.2d 700, 705 (Minn. 2013).

The common meaning of the word "organization," in the sense it is used in section 211B.02, is "[a] group of persons organized for a particular purpose; an association," or "[a] structure through which individuals cooperate systematically to conduct business." *American Heritage Dictionary* 1275 (3d ed. 1992). That definition does not exclude a municipality or any other governmental entity. The definition adopted by the hearing panel previously was adopted by the supreme court in a case involving another statute. *See Nichols v. State*, 858 N.W.2d 773, 777 (Minn. 2015) (interpreting Minn. Stat. § 181.64 and quoting *Black's Law Dictionary* 1274 (10th ed. 2014)). The supreme court noted that the word "*could* encompass the State." *Id.* If the definition of the word could encompass a

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meaning of the statute. Nonetheless, the hearing panel considered the matter and made an express conclusion of law on the issue.

state government, it is logical to conclude that the definition also could encompass a municipal government. The word is not limited or restricted in any way as used in section 211B.02. Accordingly, we interpret section 211B.02 to include municipalities within the meaning of "organization."

Thus, the hearing panel did not err by concluding that the city is an organization for purposes of section 211B.02.

III. Findings of Fact

Smith next argues that the hearing panel erred in certain findings of fact. We review Smith's arguments to determine whether the hearing panel's decision was supported by substantial evidence. *See* Minn. Stat. § 14.69(e); *In re Application of Minn. Power*, 838 N.W.2d 747, 757 (Minn. 2013). To satisfy this standard, an agency's finding must be adequately explained and must be a reasonable conclusion based on the record. *In re Denial of Eller Media Co.'s Applications*, 664 N.W.2d 1, 7 (Minn. 2003). "We defer to an agency's conclusions regarding conflicts in testimony" and "inferences to be drawn from testimony." *In re Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

Smith's primary argument concerns the hearing panel's finding that he "*knowingly* made a false claim that the City endorsed" certain positions on the ballot questions. (Emphasis added.) As an initial matter, he contends that the hearing panel erred because its legal conclusion was not based on an accompanying finding of fact. Smith is correct that the statement quoted above is made under the heading "Conclusions of Law," not in the previous section under the heading "Findings of Fact." But the headings are immaterial. We construe findings of fact and conclusions of law according to their true

nature, regardless of labels. Specifically, "a fact found by the court, although expressed as a conclusion of law, will be treated upon appeal as a finding of fact." *Big Lake Lumber, Inc. v. Security Prop. Invs., Inc.*, 836 N.W.2d 359, 366, n.8 (Minn. 2013) (quotation omitted). Whether a person knowingly made a false claim is a question of fact. *In re Contest of Election in DFL Primary*, 344 N.W.2d 826, 830 (Minn. 1984). Accordingly, we construe the hearing panel's determination that Smith acted knowingly as a finding of fact.

Smith argues that the city failed to prove that he knowingly violated section 211B.02. A knowing violation requires proof that he "knew that his literature falsely claimed or implied" that the city had endorsed RFTCC's position on the ballot questions. *In re Ryan*, 303 N.W.2d 462, 467 (Minn. 1981). Smith contends that there is a lack of evidence of culpable knowledge because he denied any knowledge that RFTCC's literature made a false claim. But other evidence tends to show that Smith knew that the literature made a false claim. Smith admitted that some of the mailings he delivered bore the city's logo. He testified that he knew that the city had not taken any official position on the ballot questions. He testified that he knew that RFTCC's literature reproduced the sample ballot that had been published by the city. He testified that RFTCC used the city's "Grant News" logo to capitalize on the meaning of the word "news." He also testified that he thought about whether the literature was within permissible bounds and concluded that the city did not have any protectable interest in its logo and that RFTCC's use of the city's logo would not be confusing. That evidence is similar to the evidence introduced in the *DFL Primary* case, in which the candidate testified that she "used the sample ballot because it was a

common campaign technique used to influence voters," which demonstrated that the candidate knowingly implied that she had the endorsement of the DFL party. *DFL Primary*, 344 N.W.2d at 831. Furthermore, the evidence establishing that the literature made a false claim of endorsement also supports an inference that Smith knew that the literature made a false claim of endorsement. *See State v. Siirila*, 292 Minn. 1, 10, 193 N.W.2d 467, 473 (1971) (concluding that circumstantial evidence is sufficient to establish knowledge). To be more specific, the flyer and the brochure were introduced into evidence as exhibits, as were exemplars of the city's printed materials and website, and the hearing panel naturally was able to compare those documents to each other. We have reviewed the exhibits as well and are struck by the similarity of the RFTCC literature to the city's printed materials and website in ways that are difficult to describe in words but surely were obvious to the person or persons responsible for sending them. *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring). Thus, the hearing panel's determination that Smith knowingly made a false claim is supported by substantial evidence.

Smith challenges a few other findings of the hearing panel on peripheral issues. For example, Smith challenges factual statements concerning the year in which the city adopted its logo, the dates stated in e-mail messages that may have been incorrectly stated, and whether a logo was "small." None of these factual issues is material. Whether these factual statements are correct or incorrect has no effect on the hearing panel's ultimate conclusion. For that reason, we need not consider Smith's arguments on immaterial factual issues.

Thus, because the hearing panel's factual findings are supported by substantial evidence, the hearing panel did not err in its findings of fact.

IV. Constitutionality

Smith next argues that the hearing panel's decision is in conflict with the United States Constitution, for three reasons.

A. First Amendment Challenge

Smith argues that section 211B.02 violates his First Amendment right to free speech because it penalizes political speech without a compelling governmental interest. In response, the city argues that section 211B.02 serves a compelling interest by "preventing electorate confusion and avoiding false speech that misleads the public regarding elections and harm[s] the political process."

A content-based restriction on a person's speech is presumed to be unconstitutional, and the burden lies with the government to demonstrate that such a restriction is constitutional. *State v. Melchert-Dinkel*, 844 N.W.2d, 13, 18 (Minn. 2014). "Content-based restrictions on speech survive First Amendment strict-scrutiny analysis only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end." *Prolife Minnesota v. Minnesota Pro-Life Comm.*, 632 N.W.2d 748, 753 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). A statute is narrowly tailored if it advances a compelling state interest in the "least restrictive means among available, effective alternatives." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666, 124 S. Ct. 2783, 2791 (2004).

We do not characterize section 211B.02 as a content-based restriction in the sense that it regulates the content of the speaker's support or endorsement of (or opposition to) a particular candidate or ballot question. Rather, section 211B.02 is a content-based restriction only insofar as it regulates speech concerning the identity of the speaker. Section 211B.02 simply prohibits a speaker from misrepresenting himself, herself, or itself by purporting to make a statement on behalf of "a major political party or party unit or of an organization." But the United States Supreme Court has stated that "the identity of the speaker is no different from other components of the document's content" and, thus, is subject to First Amendment protection. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348, 115 S. Ct. 1511, 1519 (1995). The Supreme Court also has stated that a state has a legitimate "interest in preventing fraud" in that type of speech and that the state's interest "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *Id.* at 348-49, 115 S. Ct. at 1519-20.

Although a state may not constitutionally prohibit anonymous leaflets, *see id.* at 357, 115 S. Ct. at 1524, a leaflet that misrepresents the identity of its author is another matter. In another recent case, the United States Supreme Court upheld the constitutionality of a state law that allows for public disclosure of the signatures on a petition for a referendum. *John Doe No. 1 v. Reed*, 561 U.S. 186, 200-02, 130 S. Ct. 2811, 2821 (2010). The Court reasoned that the state has a compelling interest in preserving the integrity of the electoral process and preventing or detecting fraudulent signatures, "which not only may produce fraudulent outcomes, but [may] ha[ve] a systemic effect as well" by

"driv[ing] honest citizens out of the democratic process and breed[ing] distrust of our government." *Id.* at 197, 130 S. Ct. at 2819 (quotation omitted). That is essentially the city's argument in this case. Our supreme court has recognized that preventing voter confusion in an election is a compelling state interest. *Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979). Accordingly, we agree with the city that the state has a compelling interest in proscribing political speech that fraudulently misrepresents the identity of the speaker.

Smith also argues that section 211B.02 is not narrowly tailored because it proscribes not only statements that expressly state a false claim of endorsement but also statements that merely *imply* such a false claim. In response, the city cites *Schmitt*, in which the supreme court concluded that a predecessor statute was "narrowly drawn" to serve a compelling governmental interest because it was "directed specifically at false claims of endorsement or support." *Schmitt*, 275 N.W.2d at 590-91 (applying Minn. Stat. § 210A.02 (1978)). The version of the statute at issue in *Schmitt* was identical insofar as Smith's argument is concerned because it prohibited a person from "mak[ing], directly or indirectly, a false claim stating *or implying* that the candidate has the support or endorsement of any political party, or unit thereof, or of any organization." Minn. Stat. § 210A.02 (1978) (emphasis added). Smith's argument that section 211B.02 is not narrowly tailored is foreclosed by *Schmitt*.

Thus, section 211B.02 does not violate Smith's First Amendment right to free speech.

B. Challenge Concerning Actual Malice

Smith next argues that the hearing panel erred by not requiring the city to prove that he acted with actual malice. In response, the city argues that Smith failed to preserve this argument because he did not present it to the hearing panel. The city is correct that Smith did not present the argument to the hearing panel. But Smith did not have an obligation to do so because an ALJ or panel of ALJs is not empowered to declare a statute facially unconstitutional. *Pine County v. State Dep't of Natural Resources*, 280 N.W.2d 625, 629 (Minn. 1979); *In re Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. App. 1993).

Smith relies on the United States Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), in which the Court held that a state could not impose liability on a defendant alleged to have libeled a public figure unless the defendant acted with actual malice, *i.e.*, with "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80, 84 S Ct. at 726. In a case concerning a different section of the Fair Campaign Practices Act, the Minnesota Supreme Court noted that the text of that statutory provision (which prohibited a statement "the person knows is false or communicates to others with reckless disregard of whether it is false") "closely tracks the standard for actual malice" in *New York Times v. Sullivan*. *Abrahamson v. St. Louis County Sch. Dist.*, 819 N.W.2d 129, 137 (Minn. 2012) (applying Minn. Stat. § 211B.06, subd. 1 (2010)). But the language of section 211B.02 is different from the language of the statute at issue in *Abrahamson*. There is no textual basis in section 211B.02 for a requirement that a complainant prove actual malice. There also is no Minnesota

authority for imposing such a requirement as a constitutional matter. In *Abrahamson*, the supreme court conducted a statutory analysis, not a constitutional analysis. *Id.* at 137-39. Having concluded that section 211B.02 is not an unconstitutional abridgement of the right to free speech, *see supra* part IV.A., we have no reason to superimpose an actual-malice standard on the statute's requirement of a knowing violation.

C. Due Process Challenge

Smith last argues that section 211B.35 is unconstitutional on the ground that it does not allow him to conduct discovery, thereby exposing him to a civil penalty without due process. Smith contends that, without discovery, he did not have notice of the evidence against him, which impeded his ability to defend against the city's complaint. A rule of appellate procedure protects the attorney general's right to intervene and defend a Minnesota statute by requiring a party who challenges the constitutionality of a statute to "file and serve on the attorney general notice of that assertion within time to afford an opportunity to intervene." Minn. R. Civ. App. P. 144. If an appellant fails to notify the attorney general of a constitutional challenge, this court deems the constitutional challenge waived. *See Losen v. Allina Health Sys.*, 767 N.W.2d 703, 711 (Minn. App. 2009), *review denied* (Minn. Sept. 29, 2009). Smith failed to notify the attorney general of this particular constitutional challenge. His statement of the case referred to his constitutional challenge to section 211B.02, but he did not provide notice that he intended to challenge the constitutionality of section 211B.35. Thus, we will not consider the issue.

V. Karen Smith's Request for Costs

Karen Smith argues that the hearing panel erred by not granting her request for reimbursement of her costs. She contends that the city should be responsible for her costs on the ground that the city did not have any evidence that she was responsible for the RFTCC's campaign literature such that the complaint against her was frivolous.

The Fair Campaign Practices Act provides that a panel of ALJs may "order the complainant to pay the respondent's reasonable attorney fees" if the panel "determines the complaint is frivolous." Minn. Stat. § 211B.36, subd. 3 (2016). Karen Smith requested reimbursement of her costs in conjunction with her pre-hearing motion to dismiss. The presiding ALJ denied her motion to dismiss at that stage of the proceedings. The presiding ALJ reasoned, "When all of the facts in the City's complaint are considered true, and all inferences drawn [in] its favor, the City has stated a proper claim under Minn. Stat. § 211B.02." The record supports this reasoning inasmuch as Karen Smith's name was listed among the persons supporting RFTCC's viewpoints and her home address was shown at the bottom of the literature, which was attached to the complaint. We find no fault in the ALJ's reasoning in denying Karen Smith's pre-hearing motion to dismiss. That the hearing panel ultimately dismissed her from the case at the evidentiary hearing, based on a lack of evidence at the conclusion of the city's case, does not mean that the complaint was frivolous. Karen Smith does not argue that the hearing panel erred by denying her motion for reconsideration.

Thus, the hearing panel did not err by not ordering the city to reimburse Karen Smith for her costs.

Affirmed.