The Election Law Changes:

What Can Schools Do?

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Overview

For many years, Michigan election law has provided, in essence, that public money could not be expended to advocate for or against ballot issues.

Public bodies could, however, provide factual information to voters to enable voters to decide how to vote.

Overview (continued)

Things changed in December with the passage of Public Act 269 – amendment to MCL 169.257.

And the changes have just kept on coming, with a strange signing statement from the Governor, a lawsuit, a federal court preliminary injunction, proposed amendments to PA 269, and lots of commentary.

So where are we now?

Public Act 269 of 2015 (SB 571)

Under the theory of "if it ain't broke, fix it anyway," the State Legislature passed Public Act 269 in December, 2015.

The Act was introduced as Senate Bill 571, and contained a few rather minor adjustments to the law.

The day before it was passed, the bill's House sponsor brought forth multi-page amendments to SB 571, and managed to get both houses to pass it on their way out of town for the holidays. Everything – new bill, House passage, Senate passage – happened on December 16.

Public Act 269 (continued)

Once the dust settled after its passage, public entities became aware of what had happened.

- **biggest issue – Section 57(3) – will discuss shortly.**
- **much criticism, not only of substance of bill, but also the way it is rammed through without notice or hearings.**
- **a number of legislators admitted they had voted for the bill without reading it.**
- **Passed essentially on party-line votes.**

Public Act 269 (continued)

School districts and municipalities implored Governor Snyder to veto the bill, return it for hearings, etc.

Governor signed the bill on January 6 – it became immediately effective.

Public Act 269 (continued)

When he signed the new bill, Governor included a signing statement – not his usual procedure.

Signing statement recognized problems in bill, vagueness, possible constitutional violations.

But rather than veto what he agreed was a defective bill, he signed it, then invited Legislature to fix it.

Public Act 269 (continued)

The new act became effective on January 6, 2016 –

- **exactly 62 days before a number of districts and municipalities had bond or other issues up for election on March 8**
- **this new language significantly limited what they could do.**

The Federal Court Lawsuit and Injunction

On January 26, a group of municipal and school district representatives filed suit in USDC in Detroit, challenging the constitutionality of Section 57(3).

Two principal challenges: 1) gag order violated First Amendment rights because it precluded free flow of political speech; 2) void for vagueness – so badly written and confusing that people couldn't tell what was legal, what wasn't.

The Federal Court Lawsuit and Injunction

Lawsuit was filed with a request for a preliminary, and ultimately a permanent, injunction against enforcement of Section 57(3).

On February 5, USDC Judge O'Meara issued an opinion granting motion and entering preliminary injunction against 57(3). Enforcement is enjoined until further order of the Court.

The Federal Court Lawsuit and Injunction

Judge O'Meara based his ruling on only one of the grounds asserted – finding that Section 57(3) is unconstitutionally vague and thus void.

Judge did not rule on First Amendment challenge – wasn't necessary.

The Federal Court Lawsuit and Injunction

No developments in court case since February 5, and thus those with March 8 elections were able to proceed without 57(3).

Those with May elections have some uncertainty – but unlikely at this point to see the injunction set aside before then. The State has not (yet) appealed, so the matter is with Judge O'Meara, who is unlikely to change his mind.

Legislative Activities

In the Legislature, several new bills were proposed after Act became effective; some to repeal Section 57(3), some to tinker with it.

Rep. Lyons, responsible for 57(3), introduced one of the latter – HB 5219.

After injunction entered, HB 5219 toned down further; passed by House on February 23; pending in Senate, no action yet. Nothing is imminent.

Section 57(3)

What was all the fuss about?

". . . a public body, or a person acting for a public body, shall not, during the period 60 days before an election in which a local ballot question appears on a ballot, use public funds or resources for a communication by means of radio, television, mass mailing, or prerecorded telephone message if that communication references a local ballot question and is targeted to the relevant electorate where the local ballot question appears on the ballot."

Section 57(3) (continued)

This section is still the law, although enforcement has been enjoined; may also be changed legislatively.

Nevertheless, analyzing what it would require is worthwhile.

Section 57(3) (continued)

Basics:

- **applies only when local ballot question appears – no application to elections for officers.**
  - but public bodies can't take sides there anyway.
- **bans, within 60 days of election, public funds spent for certain media (discussed below) that "references" – mentions – the ballot question and is targeted to the relevant electorate.**

Section 57(3) (continued)

Media affected: communication by means of

1) **radio,**
2) **television,**
3) **mass mailing, or**
4) **prerecorded telephone message.**

Section 57(3) (continued)

What isn't covered?

- **email – e-blasts; isn't "mass mailing" as defined.**
- **social media.**
- **statements of Board members in meetings – First Amendment right to speak their minds.**
- **TV, radio, etc. coverage of Board meetings where statements are made.**
  - **where media cover Board meetings, no public funds spent to get the message out.**
- **So PA 269 didn't leave schools without tools.**

Section 57(3) (continued)

Violation: Misdemeanor – criminal offense.

Individual: Up to 1 year imprisonment, fine of up to $1,000, or both.

Organization: Fine of up to $20,000 or value of the improper contribution, whichever is greater.

Serious consequences.

HB 5219

Passed by House on February 23; pending in Senate.

My guess is that it or something very similar will become law.

- **when is anybody's guess.**

Much less restrictive, less dangerous.

HB 5219 (continued)

Key language:

"… a public body, or a person acting for a public body, shall not, during the period 60 days before an election in which a local ballot question appears on a ballot, use public funds or resources for a communication by means of radio or television advertisement, mass mailing, or prerecorded telephone message if that communication references a local ballot question and is targeted to the relevant electorate where the local ballot question appears will appear on the ballot."

HB 5219 (continued)

This is similar to original 57(3).

Refers to radio or television advertisement – differs from original in that an advertisement is more intentional; no longer covers, for example, radio or TV interview.

Uses "communication" – defined below – here is where the big difference is.

HB 5219 (continued)

As used in this subsection, "communication" does not include:

(A) the language of a local ballot question.

(B) the date of an election.

(C) factual and neutral information concerning the purpose or direct impact of a local ballot question on a public body or electorate except if the communication can reasonably be interpreted as an attempt to influence the outcome of a local ballot question.

HB 5219 (continued)

Thus, can still communicate factual, neutral information about the "purpose or direct impact" of the question . . .

So long as communication can't reasonably be interpreted as an attempt to influence the outcome.

Even that may be so vague that it won't stand up to constitutional review.

What Law Governs Now?

Original 57(3) still in effect, but enforcement stayed; unless that change, 57(3) doesn't exist.

The injunction only applies to Section 57(3); no effect on balance of PA 269 or existing law.

HB 219 may pass – in current or similar form – but is not yet the law.

Governing Law

Most of the furor regarding Public Act 269 was about 57(3); little else in the law was changed.

Thus, the law regarding conduct of public employees relating to ballot issues is still as set forth in MCL 169.57(1) – unchanged by Public Act 269.

MCL 169.57(1)

A public body or a person acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services [in connection with a ballot issue] . . .

MCL 169.57(1) (continued)

This subsection does not apply to:

(a) The expression of views by an elected or appointed public official who has policy making responsibilities.

(b) Subject to subsection (3), the production or dissemination of factual information concerning issues relevant to the function of the public body.

- **subsection (3) requirements currently stayed.**

MCL 169.57(1) (continued)

NOT APPLICABLE TO:

(c) The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication.

(d) The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the public facility.

MCL 169.57(1) (continued)

NOT APPLICABLE TO:

(e) The use of a public facility owned or leased by, or on behalf of, a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund-raising event. [N/A]

(f) An elected or appointed public official or an employee of a public body who, <u>when not acting for a public body but is on his or her own personal time</u>, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.

Acceptable (and unacceptable) conduct list

We have distributed a list that I have used and updated to illustrate what is and what is not permitted of Board members, districts, district employees, etc.

Not exhaustive – I'm sure there are other things that could come up.

Heard just recently about a district giving pizza to kids who brought in parents "I voted" stickers – questionable, but not clearly advocating.

Conclusion

I've told you what the law is as of March 17, 2016.

Could be different on March 18 – but I doubt it will change much.

- **this tempest seems to have subsided.**

Questions

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Thank you.

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