STATE OF MINNESOTA
IN COURT OF APPEALS
A14-2167

In the Matter of the Contest of the Special Election held on November 4, 2014,
for the purpose of the passage of a ballot question
for Independent School District No. 2310,
Sibley County, Minnesota, Sibley East Public Schools,

Nathan Kranz, contestant,
Appellant,

vs.

Sibley East Public Schools,
Independent School District No. 2310, contestee,
Respondent,

Steve Simon, Secretary of State
for the State of Minnesota, contestee,
Respondent.

Filed March 9, 2015
Affirmed
Cleary, Chief Judge

Sibley County District Court
File No. 72-CV-14-199

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellant)

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Considered and decided by Cleary, Chief Judge; Chutich, Judge; and Smith, Judge.

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

CLEARY, Chief Judge

Appellant Nathan Kranz challenges the district court's dismissal of his challenge to the results of a special election held by respondent school district on a bonding proposal. Because the district court (a) found that the school district's errors were not the result of bad faith and did not have an impact on the election, and those findings are determinative, and (b) did not err in its application of the law, we affirm. We previously announced our decision by order, and now set out our reasoning for that decision in opinion form.

FACTS

This is a post-election challenge to the results of a special election held in conjunction with the state general election on November 4, 2014. Appellant filed a challenge to the results of the election in district court. *See* Minn. Stat. §§ 209.02-.021 (2014). The school district answered and the district court held an expedited bench trial. *See* Minn. Stat. §§ 209.03, .065 (2014).

The parties submitted a stipulation of facts to the district court and presented testimony by live witnesses. The essential facts are undisputed. On the November 2014 ballot, a question was included about whether the school district, whose boundaries fall primarily within Sibley County and partly within Nicollet County, should be authorized to issue general-obligation building bonds for a new elementary school, the sale or

demolition of an existing school facility, and renovations to another school. The ballot specifically advised voters that voting "yes" meant that they were voting for an increase in their property taxes. The proposal passed by a vote of 1,634 to 1,538, a difference of 96 votes and a margin of 51.5% voting in favor and 48.5% voting against.

Appellant based his contest on the school district's failure to (a) provide two weeks' published notice of the ballot question, as required by Minn. Stat. § 205A.07, subd. 1 (2014), and (b) publish a timely and adequate notice of the review and comment of the proposal by the commissioner of the Minnesota Department of Education, as required by Minn. Stat. § 123B.71, subd. 12(a) (2014). The district court found that the notices were published late and the notice about the commissioner's favorable review was inadequate. The school district did not seek review of these adverse findings, and we accept them as established, for purposes of this appeal. *See SN4, LLC v. Anchor Bank, FSB*, 848 N.W.2d 559, 565 (Minn. App. 2014) (indicating that respondent's failure to file notice of related appeal challenging determination favoring appellant gives rise to presumption on appeal).

The district court concluded that appellant failed to meet his burden of showing "not just that an error occurred, but that the error affected the election result or rendered it uncertain," and also failed to establish that the deficiencies were "the result of fraud, bad faith or a constitutional violation, or that the election results do not reflect a fair and free expression of the will of the legal voters upon the merits."

Appellant brought a timely appeal in this court and we expedited briefing and arguments. *See* Minn. Stat. § 209.09 (2014) (governing appeals).

D E C I S I O N

As a threshold matter, we note that this is a post-election challenge. Our supreme court has explained that it has always been "the policy of this state" that once an election has been held, if that "election . . . has resulted in a fair and free expression of the will of the legal voters upon the merits," the results "will not be invalidated because of a departure from the statutory regulations governing the conduct of the election except in those cases where the legislature has clearly and unequivocally expressed an intent that a specific statutory provision is an essential jurisdictional prerequisite" or there is a showing of "fraud or bad faith or constitutional violation." *Erickson v. Sammons*, 242 Minn. 345, 350, 65 N.W.2d 198, 202 (1954). "[B]efore an election is held, statutory provisions regulating the conduct of the election will usually be treated as mandatory and their observance may be insisted upon and enforced. After an election has been held, the statutory regulations are generally construed as directory."[1] *Id.* at 349-50, 65 N.W.2d at 202.

Appellant did not bring a pre-election petition challenging the conduct of those charged with responsibility for the special election. *See* Minn. Stat. § 204B.44 (2014). The fact that this is a post-election contest necessarily affects our analysis, because courts strive to avoid disenfranchising those who have already cast their ballots because of

[1] A "directory statute" is one "that indicates only what should be done, with no provision for enforcement." *Black's Law Dictionary* 1543 (9th ed. 2009); *see also State by Lord v. Frisby*, 260 Minn. 70, 76, 108 N.W.2d 769, 773 (1961) (describing "directory" statute as one that does "not declare the consequences of a failure of compliance" and indicating that "legislative intent can be accomplished in a manner other than that prescribed with substantially the same results").

technical defects. *See Sperl v. Wegwerth*, 265 Minn. 47, 52, 120 N.W.2d 355, 359 (1963). "From the beginning it has been the policy of the state to give effect to the votes of legal voters regardless of irregularities in the election." *Clayton v. Prince*, 129 Minn. 118, 119, 151 N.W. 911, 911 (1915). "[O]nce the result of an election is ascertained, it should be upheld if there is a way to do so, absent fraud, bad faith, or a jurisdictional defect in the proceeding of such magnitude that a free expression of the will of the people is absent." *Rolvaag v. Donovan (In re Application of Anderson)*, 264 Minn. 257, 270, 119 N.W.2d 1, 10 (1962). Thus, even if defects are alleged to be "jurisdictional," the contestant must still establish that they resulted in a defeat of the free expression of the will of the voters. *Id.*

Appellant asserts that the provisions of statutes governing school-district elections "must be strictly followed." This assertion ignores the supreme court's repeated references in *Rolvaag* to "substantial compliance." *Id.* at 263, 267, 272, 273, 119 N.W.2d at 6, 8, 11. Appellant also relies on cases addressing the district court's jurisdiction over election contests, which have no application here. *See Franson v. Carlson*, 272 Minn. 376, 378, 137 N.W.2d 835, 837 (1965) (holding that district court never acquired jurisdiction over contested city election because notice was not timely served); *Stransky v. Indep. Sch. Dist. 761*, 439 N.W.2d 408, 410 (Minn. App. 1989) (affirming district court's dismissal of election contest for lack of jurisdiction, where service was improper). There is no dispute in this case concerning the district court's jurisdiction over this election contest or its authority to determine whether appellant established that the alleged defects in the notices affected the results of the election.

Appellant asserts that the statutory provisions at issue are unambiguous and that the legislature must, therefore, have intended them to be jurisdictional. But this assertion ignores the fact that our supreme court has repeatedly declined to invalidate election results for violations of statutory notice provisions, in the absence of a clear expression of legislative intent that applicable provisions are jurisdictional, where the contestant failed to prove the existence of a direct impact on voter turnout or election results. We cannot ignore established precedent.

This is not the first election contest involving departures from statutory provisions that are unambiguous. *Erickson* involved notices of a school-district election that "clearly . . . violated" the applicable statute. *Erickson*, 242 Minn. at 348, 65 N.W.2d at 201. "No justification whatever exist[ed] for the statutory violations . . . involved herein since the statutory language [was] plain and direct." *Id.* at 349, 65 N.W.2d at 201. Nonetheless, the supreme court concluded that the irregularities in that case were insufficient to invalidate the results of the election. *Id.* at 354, 65 N.W.2d at 204 (affirming judgment sustaining election results).

In another case, also involving a school-district election, the supreme court indicated that it was "difficult . . . to understand why public officials chargeable with the duty of proceeding according to law, and their legal advisors, [chose] to ignore the plain requirement of a statute" that was not "ambiguous" and required published notice at least ten days prior to the date of an election in a legal newspaper. *State ex rel. Helling v. Indep. Consol. Sch. Dist. No. 160*, 253 Minn. 271, 278, 92 N.W.2d 70, 75-76 (1958). Again, the court concluded that failure to comply with notice-and-publication provisions

was not sufficient to invalidate the results, because those defects were not jurisdictional and did not affect the results of the election. *Id.* at 278-80, 92 N.W.2d at 76-77 (addressing notice requirements).

Even when statutory provisions "clearly and expressly" impose certain requirements on school bonding elections, a court is not required "to impose the drastic consequence of invalidity," if the court concludes "there was no fraud, bad faith, or misleading of the voters." *Lindahl v. Indep. Sch. Dist. No. 306*, 270 Minn. 164, 169-70, 133 N.W.2d 23, 27 (1965). While appellant asserts that violations of unambiguous statutory provisions regarding notice require the invalidation of election results, that position is inconsistent with these cases.

Statutes that provide "that certain things shall be done within a particular time or in a particular manner," and which "do[] not declare that their performance shall be essential to the validity of an election" will be regarded as directory if the departure does not "affect the merits of the election." *Erickson*, 242 Minn. at 350, 65 N.W.2d at 202 (quotation omitted). The statutes at issue here prescribe that notices be given a specified amount of time in advance of the election and that certain information be included. *See* Minn. Stat. §§ 205A.07, subd. 1 (requiring two weeks' published notice of ballot question); 123B.71, subd. 12(a) (requiring publication of summary of commissioner's review and comment at least 20 days before referendum). However, these provisions do not include any language that could be characterized as a clear and unequivocal expression of legislative intent that any departure "shall have the drastic consequence of invalidity." *See Erickson*, 242 Minn. at 350, 65 N.W.2d at 202; *see also Lindahl*, 270

Minn. at 170, 133 N.W.2d at 27 ("While we agree that the initiating resolution is jurisdictional, there are no circumstances here to compel us to impose the drastic consequence of invalidity on this election." (quotation omitted)).

One of the statutes could be read to include an expression of legislative intent to establish a prerequisite to the holding of an election, but there is no language in the same statute that would support invalidating the results, once an election has been held. *See* Minn. Stat. § 123B.71, subd. 8 (indicating that school district "must not . . . hold a referendum for bonds . . . prior to review and comment by the commissioner"). But it is undisputed that the school district obtained the required review and comment by the commissioner. Because the referendum was not held prior to the commissioner's review and comment, this provision was not violated. *Cf. Helling*, 253 Minn. at 285, 92 N.W.2d at 79 (concluding that approval by state officials was essential and express denial meant that election was invalid). Moreover, the statute contemplates that an election will proceed, after the commissioner's review, whether the proposal "receive[s] a positive or unfavorable review and comment." Minn. Stat. § 123B.71, subd. 12(a).

Our supreme court has indicated that when one subdivision in a statute specifies consequences for failure to comply, and another subdivision of the same statute establishes a deadline without specifying consequences, the latter may be "only directory because [it] does not" expressly impose consequences for "noncompliance." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 542 (Minn. 2007). Appellant emphasizes that the statute says that "the school board shall publish a summary of the commissioner's review and comment." Minn. Stat. § 123B.71, subd. 12(a). The

argument that this language renders the statute mandatory was specifically rejected by the supreme court in *Hans Hagen*, where the court recognized that statutes had sometimes been called "mandatory simply because [they used] the words shall or must." *Hans Hagen*, 728 N.W.2d at 541. But the court held that the use of the word "shall" does not mean that there are "specific but unexpressed consequences." *Id.*; *see also In re Petition of M.O.*, 838 N.W.2d 577, 583 (Minn. App. 2013) (indicating that rule requiring use of specific form by court administrator was directory, even though it used the word "shall," because it did not specify consequences for noncompliance). In the absence of an expression of legislative intent that election results must be invalidated when there is any departure from the applicable publication provision, the district court correctly rejected the arguments offered by appellant.[2]

Our supreme court has invalidated the results of elections where there was *no* notice given to voters, but that is not the situation presented here. *See, e.g.*, *State ex rel. Maffett v. Turnbull*, 212 Minn. 382, 3 N.W.2d 674 (1942) (holding election of write-in

[2] In his posttrial submission to the district court and in his briefs to this court, appellant compared the notice given by respondent school district to one given by another district. Because we accept the district court's finding that the notice regarding the commissioner's review was both untimely and inadequate, we decline to offer an advisory opinion on what information must be included to satisfy the statutory requirement that the school board publish "a summary of the commissioner's review and comment." *See* Minn. Stat. § 123B.71, subd. 12(a). In light of the district court's finding that the notice given was inadequate, we also decline to address the school district's assertion that it "was following the instructions given" by the commissioner concerning what to publish or the related argument that any such reliance would be unjustified. *See Paquin v. Mack*, 788 N.W.2d 899, 905-06 (Minn. 2010) (declining to address factual dispute over information allegedly provided by member of secretary of state's staff concerning required information to be included on nominating petition and holding that auditor correctly rejected signatures that did not comply with state law).

candidate for village assessor was invalid because *no* notice was given to voters that office was among those to be filled, no candidates filed for office, official ballot contained no spaces for voting on office, and fact that just 8.8% of ballots cast included vote for this office established that there was no election and no expression of will of electorate as result of omissions of election officials); *State ex rel. Dosland v. Holm*, 202 Minn. 500, 279 N.W. 218 (1938) (characterizing write-in election of judge as invalid, where *no* notice of any kind was given that office was to be filled at election and official ballot had no space for voting on office); *State ex rel. Wells v. Atwood*, 202 Minn. 50, 277 N.W. 357 (1938) (rejecting challenge by write-in candidate who argued that he had been elected at general election held eight days after incumbent died, where *no* notice was given to voters of any vacancy and official ballot did not have any space for casting vote for that office); *Ferguson v. City of Morris*, 197 Minn. 446, 267 N.W. 264 (1936) (affirming district court's invalidation of special election for failure to publish proposed ordinances *at least once* in official newspaper before election, as required by city home-rule charter, and because description on ballot was radically defective). In this case, notices were published late, but they were published.

"The posting of the notices of election one day late should not alone vitiate the election." *Ferguson*, 197 Minn. at 446, 267 N.W. at 264. And a large number of votes cast may demonstrate "that notice [was] as efficiently conveyed" in a shorter period "as if it had been" posted for the required period. *Id.* at 452, 267 N.W. at 267. In this case, voters cast a large number of votes and testimony established that the voter turnout in Sibley County was approximately the same in November 2014 as for the previous mid-

term election in 2010. No one, including appellant, testified that he or she was unaware of the election or would have voted differently, with more notice or information.

On appeal from a final decision by a district court in an election contest, "the conclusion of the district court that the contestant failed to prove" that a "violation . . . occurred by reason of lack of good faith" is subject to review for clear error. *Daugherty v. Hilary (In re Contest of Election in DFL Primary)*, 344 N.W.2d 826, 833 (Minn. 1984) (Wahl, J., dissenting). The district court specifically found that appellant failed to establish that deficiencies in following the statutory requirements were the result of fraud, bad faith, or a constitutional violation. No evidence of fraud or bad faith was presented at trial.[3] The district court obviously believed testimony by school district employees about their limited experience with conducting elections. And our

[3] In his brief and at oral arguments, appellant asserted that the school district "did not take any action . . . to ensure" that the statutory requirements were met, even after the school district discovered that it had missed publication deadlines. This is a mischaracterization of the record. There was trial testimony establishing that the superintendent and school-district staff responsible for assisting with the election began meeting with the county auditor and deputy auditor in July, when they sought and received assurances that county officials would help to "guide" the school district through the election process. The parties' stipulation of facts, submitted to the district court, also establishes that the school district sought and received instructions on the publication requirements and the wording of official notices. Finally, when school district officials realized that the notice on the commissioner's favorable review had not been published, the superintendent testified that he immediately sought legal advice, posted information on the school district's website, and arranged for publication in multiple media outlets on October 17, 18, and 23. The school district also disputes that it could have delayed the election after October 15, without violating applicable statutes. *See* Minn. Stat. §§ 205A.05, subd. 3 (requiring that motion to cancel special election be passed by school board "not less than 74 days before an election"), .055 (addressing postponement of elections not held in conjunction with state elections in event of severe or inclement weather) (2014). The record supports the district court's finding that there was no proof of bad faith and does not support the assertion by appellant that the school district failed to take steps to comply with the applicable statutes.

supreme court has recognized that this is one of the policy reasons behind the general rule against invalidating election results. "Elections are conducted, for the most part, by people in our communities who are unfamiliar with the niceties of legal verbiage. As long as there is substantial compliance with our laws and no showing of fraud or bad faith," the results will not be invalidated. *Rolvaag*, 264 Minn. at 267, 119 N.W.2d at 8.

We note that this is not a case involving numerous or serious violations relating to the selection or behavior of election judges, the handling or counting of ballots, or the reporting of results, which could "cast doubt and suspicion upon the election and impeach the integrity of the vote." *Kerrigan v. Vetsch (In re Contest of Election)*, 245 Minn. 229, 241, 71 N.W.2d 652, 660 (1955). The record clearly supports the district court's finding that appellant failed to establish the existence of fraud or bad faith.

Appellant argues that because there were just 96 votes between passage and defeat of the bonding referendum, and 1,266 registered voters did not cast ballots, the results cannot be sustained as a "fair and free expression of the will of the legal voters upon the merits." *See Erickson*, 242 Minn. at 350, 65 N.W.2d at 202. However, the district court specifically found that the deficiencies did not defeat the "fair and free expression of the will of the legal voters upon the merits." In fact, the district court indicated that publication of a more complete summary of the commissioner's favorable review and comment would have made it "likely more voters would have voted favorably, not the reverse." A "trial court's finding that [an] irregularity did not affect the outcome of [an] election . . . is determinative." *Hahn v. Graham*, 302 Minn. 407, 409, 225 N.W.2d 385, 386 (1975). This is not a case where only a small percentage of eligible voters cast their

votes. *Cf. Maffett*, 212 Minn. at 385, 3 N.W.2d at 676 (indicating that only 88 out of more than 1,000 eligible voters cast their votes because "of the omissions of the election officials," compelling the conclusion that there was no election in fact). Appellant had the burden of establishing that the deficiencies in providing notice affected this election, and the record supports the district court's finding that he failed to do so.

Appellant asserts that the district court lacks "jurisdiction" to consider a request for costs and attorney fees, although no such request was actually brought. Minn. Stat. § 209.07, subd. 3 (2014), specifically provides for payment by the contestant of the costs of an unsuccessful election contest, and the statute confers subject-matter jurisdiction on the district court to address the issue of costs. Because no such motion had actually been filed in the district court and appellant neither presented his arguments regarding the types of expenses that may be recoverable nor obtained an adverse ruling on those issues, the issue is not ripe for appellate review. It is premature for this court to address issues that have not been ruled on by the trial court. *Wornson v. Chrysler Corp.*, 436 N.W.2d 472, 475 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989).

We acknowledge that voters who opposed the referendum, the district court, and appellant may be understandably frustrated by shortcomings in the content and timing of the required notices in this case.

> We do not minimize the importance of insisting that an election law be observed in all its essentials. It is difficult to condone the failure to follow simple statutory steps or the failure to give reasonably complete [information] in both posted and published notices. Where there is a showing that such errors have in fact misled the voters and made an election uncertain or inaccurate as a fair and free expression

> of the popular will, the consequences can indeed be serious where school authorities have invested public funds or have otherwise acted in reliance upon the validity of such an election.

Erickson, 242 Minn. at 353, 65 N.W.2d at 204. But we agree with the district court that appellant failed to establish that the deficiencies that occurred before the special election at issue in this case affected the results. Accordingly, we affirm.

Affirmed.