

**STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION**

In the Matter of a Complaint by
Matthew Knickerbocker, Bethel

File No. 2008-132

FINDINGS AND CONCLUSIONS

Complainant brought this Complaint pursuant to Connecticut General Statutes § 9-7b, alleging that the Bethel Republican Town Committee ("BRTC") paid for an advertisement, which appeared on or about October 2, 2008 in the local *Pennysaver*, and which advocated for the defeat of State Representative Jason Bartlett of the 2nd General Assembly District and the Democratic candidate for re-election to that office. Complainant alleged that the expenditure for the advertisement was impermissible as it was a "negative party listing" and that the advertisement should have included "the name of the candidate who benefits from the ad." Complainant further alleged that the expenditure for the aforesaid advertisement was impermissibly coordinated between the BRTC and the campaign of Melanie O'Brien, Mr. Bartlett's Republican opponent, resulting in an impermissible in-kind non-qualifying contribution to a participating candidate in the Citizens Election Program. After the investigation, the Commission makes the following findings and conclusions:

1. On or about October 1, 2008, an advertisement appeared in the local *Pennysaver* featuring "AN ELECTION MESSAGE" from then Bethel First Selectman Robert Burke. The advertisement occupied an entire side of the *Pennysaver*, which is approximately 8 ½" x 5". The advertisement, which included a photograph of Mr. Burke, prominently stated at the top "Jason Bartlett Has Failed to Serve Bethel" and went on to include in smaller print a list of alleged "failures" by Representative Bartlett. The last two lines of the advertisement stated in larger print: "After Two Years of Promises, Jason Bartlett Has Delivered Nothing/VOTE FOR ANYBODY BUT BARTLETT." Finally, the advertisement featured a "paid for by" attribution identifying the BRTC and its treasurer, Respondent Cliff Tager.
2. Beginning on April 17, 2008 and continuing through January 10, 2009, "O'Brien 2008" was the authorized candidate committee for Melanie O'Brien's candidacy for election to the Connecticut General Assembly in the 2nd House District for the November 4, 2008 general election.
3. Both Representative Bartlett and his opponent, Ms. O'Brien, were participating candidates in the Citizens' Election Program.
4. The Itemized Campaign Finance Disclosure Statements (SEEC 20) for the BRTC filed with the Commission on or about April 10, 2008 and October 28, 2008 reflect two expenditures for three advertisements with the *Pennysaver*, a deposit of \$500 made on March 18, 2008 and a final payment of \$1,390 made on October 14, 2008. The advertisement at issue here cost approximately \$630.

5. General Statutes § 9-601a provides, in pertinent part:

(a) As used in this chapter and sections 9-700 to 9-716, inclusive, the term “contribution” means:

...

(4) An expenditure when made by a person with the cooperation of, or in consultation with, any candidate, candidate committee or candidate’s agent or which is made in concert with, or at the request or suggestion of, any candidate, candidate committee or candidate’s agent, including a coordinated expenditure. . . .

(b) As used in this chapter and sections 9-700 to 9-716, inclusive, “contribution” does not mean:

...

(16) An organization expenditure by a party committee

[Emphasis added.]

6. The evidence establishes and the Respondent admits that the payments for the advertisement at issue were made by a political party—the Republican Party. As such, the \$630 for the advertisement is an “expenditure” pursuant to General Statutes § 9-601b.

7. Clifford Tager was the legally designated treasurer of the BRTC at the time the payments for the advertisements were made and authorized the expenditures. Pursuant to General Statutes § 9-606 (a), as treasurer, the Respondent was the only person authorized to make “expenditures,” as that term is defined in General Statutes § 9-601b, on behalf of the BRTC.

8. Complainant’s first allegation is that the expenditures by the BRTC for the subject advertisement were impermissible because the advertisement was a “negative party listing.”

9. As a preliminary matter party committees, such as town committees, may make “organization expenditures” that benefit their party’s candidates. Organization expenditures are specifically excluded from the definitions of “expenditure” and “contribution” in General Statutes §§ 9-601a & 9-601b, respectively. However, for candidates participating in the Citizen’s Election Program, organization expenditures to individual candidates for state representative are capped at \$3,500 per candidate, per party committee. *See* General Statutes § 9-718.

10. General Statutes § 9-601b provides, in pertinent part:

(a) As used in this chapter and sections 9-700 to 9-716, inclusive, the term “expenditure” means:

(1) Any purchase, payment . . . distribution, loan, advance, deposit or gift of money or anything of value, when made for

the purpose of influencing the . . . election of any person or . . .
on behalf of any political party. . . .

(b) The term “expenditure” does not mean:

...

(8) An organization expenditure by a party committee

11. General Statutes § 9-601 (25) provides, in pertinent part:

(25) “Organization expenditure” means an expenditure by a party committee, legislative caucus committee or legislative leadership committee for the benefit of a candidate or candidate committee for:

(A) The preparation, display or mailing or other distribution of a party candidate listing. *As used in this subparagraph, “party candidate listing” means any communication that meets the following criteria: (i) The communication lists the name or names of candidates for election to public office, (ii) the communication is distributed through public advertising such as broadcast stations, cable television, newspapers or similar media, or through direct mail, telephone, electronic mail, publicly accessible sites on the Internet or personal delivery, (iii) the treatment of all candidates in the communication is substantially similar, and (iv) the content of the communication is limited to (I) for each such candidate, identifying information, including photographs, the office sought, the office currently held by the candidate, if any, the party enrollment of the candidate, a brief statement concerning the candidate's positions, philosophy, goals, accomplishments or biography and the positions, philosophy, goals or accomplishments of the candidate's party, (II) encouragement to vote for each such candidate, and (III) information concerning voting, including voting hours and locations; . . .*
[Emphasis added.]

12. Examining the subject advertisement against the definition of organization expenditure in § 9-601 (25)(A), the Commission makes the following findings:

- (a) The advertisement lists the name of candidate Jason Bartlett;
- (b) The advertisement was distributed through public advertising;
- (c) The advertisement features a single candidate candidate; *however*
- (d) The advertisement explicitly advocates for the defeat of Jason Bartlett, which puts it outside the requirement that the content of the communication be limited to encouragement to vote for such candidate and general get-out-the-vote information.

13. Accordingly, although there is no requirement in the definition of organization expenditure that the candidate be of the same party as the party committee making the

expenditure, because the advertisement was negative, the expenditure for the advertisement was not a party candidate listing and thus was not an organization expenditure.

14. However, while the Complainant appears to be alleging that the advertisement did not qualify as an organization expenditure, his allegation regarding the fact that the advertisement is “negative” does not allege an impermissible act per se. The Commission does not find that an expenditure by a party committee is impermissible merely because it advocates for the defeat of a candidate of another party. Accordingly, this allegation is dismissed.
15. Turning to Complainant’s next allegation, he avers that the expenditure for the aforesaid advertisement was impermissibly coordinated between the BRTC and the campaign of Melanie O’Brien, resulting in an impermissible in-kind non-qualifying contribution to a participating candidate in the Citizens Election Program.
16. Preliminary to the determination of this allegation, it is important to note that subsequent to the publishing of the subject advertisement, “Jason ’08,” Representative Bartlett’s authorized candidate committee, filed a Citizens Election Program Supplemental Grant Request (SEEC Form CEP 16) based on the subject advertisement. At a Commission meeting to review the application, the Commission found that, based on the summary review expeditiously provided for by General Statutes § 9-714, the advertisement was an independent expenditure that promoted the defeat of candidate Bartlett and as such the Commission approved a supplemental grant in the amount of \$630, which was disbursed to “Jason ’08” on or about October 17, 2008. The Complainant here asks the Commission to depart from the initial finding that the expenditure was independent.
17. General Statutes § 9-702 (b) provides:

Any such candidate committee is eligible to receive such grants for a primary campaign, if applicable, and a general election campaign if (1) the candidate certifies as a participating candidate under section 9-703, (2) the candidate's candidate committee receives the required amount of qualifying contributions under section 9-704, **(3) the candidate's candidate committee returns all contributions that do not meet the criteria for qualifying contributions under section 9-704,** (4) the candidate agrees to limit the campaign expenditures of the candidate's candidate committee in accordance with the provisions of subsection (c) of this section, and (5) the candidate submits an application and the commission approves the application in accordance with the provisions of section 9-706. . . .

18. Pursuant to the express language of General Statutes § 9-702 (b)(3), a participating candidate committee is not eligible to receive a grant unless it, inter alia, returns the value of all non-monetary contributions to the respective contributors. That express eligibility requirement necessarily implies the legislature’s intention to prohibit a

participating candidate's candidate committee from receiving any non-qualifying contribution, which includes, but is not limited to non-monetary contributions, after that candidate applies for an initial grant under General Statutes § 9-706. *See SEEC Declaratory Ruling No. 2007-3, Citizens' Election Program: Qualifying Contributions* (concluding that qualifying contributions may not be in the form of non-monetary contributions.) Said legislative intention is supported by an examination of the remaining provisions of Chapter 157 as well as the legislative history of Public Acts, Special Session, Oct. 2005, No. 05-5.

19. Here, Ms. O'Brien applied for her grant on August 7, 2008. As noted above, the payments for the subject advertisement were reported as being made in the form of a deposit of \$500 made by the BRTC on March 18, 2008 and a final payment of \$1,390 made by the BRTC on October 14, 2008. The advertisement at issue here cost approximately \$630. In order to determine whether her candidate committee received an impermissible in-kind contribution, the Commission must first determine (1) that the BRTC made an "expenditure" as that term is defined in General Statutes § 9-601b; and (2) that that expenditure was not an independent expenditure as that term is defined in General Statutes § 9-601 (18) but rather was made with the cooperation of, in consultation or concert with, or at the request or suggestion of Ms. O'Brien or her agents. The Commission has determined above that the BRTC made an "expenditure." Accordingly, we turn to the second question.

20. General Statutes § 9-601 (18) and (19) provide, in pertinent part, as follows:

(18) "Independent expenditure" means an expenditure that is made without the consent, knowing participation, or consultation of, a candidate or agent of the candidate committee and is not a coordinated expenditure.

(19) "Coordinated expenditure" means an expenditure made by a person:

(A) In cooperation, consultation, in concert with, at the request, suggestion or direction of, or pursuant to a general or particular understanding with (i) a candidate, candidate committee . . . or (ii) a consultant or other agent acting on behalf of a candidate, candidate committee

(B) For the production, dissemination, distribution or publication, in whole or in substantial part, of any broadcast or any written, graphic or other form of political advertising or campaign communication prepared by (i) a candidate, candidate committee . . . or (ii) a consultant or other agent acting on behalf of a candidate, candidate committee

(C) Based on information about a candidate's plans, projects or needs, provided by (i) a candidate, candidate committee . . . or (ii) a consultant or other agent acting on behalf of a candidate,

candidate committee . . . with the intent that such expenditure be made;

(D) Who, in the same election cycle, is serving or has served as the campaign chairperson, campaign treasurer or deputy treasurer of a candidate committee . . . benefiting from such expenditure, or in any other executive or policymaking position as a member, employee, fundraiser, consultant or other agent of a candidate, candidate committee

(E) For fundraising activities (i) with or for a candidate, candidate committee, political committee or party committee, or a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee, or (ii) for the solicitation or receipt of contributions on behalf of a candidate, candidate committee, political committee or party committee, or a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee;

(F) Based on information about a candidate's campaign plans, projects or needs, that is directly or indirectly provided by said candidate, the candidate's candidate committee . . . or a consultant or other agent acting on behalf of said candidate, candidate committee . . . to the person making the expenditure or said person's agent, with an express or tacit understanding that said person is considering making the expenditure; or

(G) For a communication that clearly identifies a candidate during an election campaign, if the person making the expenditure, or said person's agent, has informed said candidate, the candidate's candidate committee . . . or a consultant or other agent acting on behalf of said candidate, candidate committee concerning the communication's contents, intended audience, timing, location or mode or frequency of dissemination. . . .

21. General Statutes § 9-601 provides, in relevant part, as follows:

...
(10) "Person" means an individual, committee, firm, partnership, organization, association, syndicate, company trust, corporation, limited liability company or any other legal entity of any kind but does not mean the state or any political or administrative subdivision of the state.

...
(27) "Agent" means any person acting at the direction of an individual

22. The Commission acknowledges that notwithstanding an expenditure made by a party committee that benefits one of its party's candidates, directly or indirectly, such expenditure may still be found to have been made independently of the candidate or his/her committee. That is, the fact of the expenditure alone does not establish that the expenditure was, *per se*, made with the cooperation of, in consultation or concert with, or at the request or suggestion of the candidate or her/his agents. *See, Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) (party can make an independent expenditure benefiting one of its candidates).
23. As a consequence, the Commission must consider the facts and circumstances surrounding the expenditure in order to determine whether or not the expenditure was independent of the O'Brien campaign. More specifically, the Commission must determine whether the expenditure was made with the cooperation of, in consultation or concert with, or at the request or suggestion of Ms. O'Brien or her agents.
24. Here, while Mr. Tager admits that he approved the payments for the subject advertisement and knew that it would be placed in the *Pennysaver*, the evidence establishes that the content and placement of the advertisement was created and arranged solely by Nick Ellis, a member of the BRTC, with the cooperation of then First Selectman Robert Burke, who appeared in the advertisement. And while the evidence establishes that at least four members or alternate members of the BRTC were volunteers on the Melanie O'Brien campaign, including Deputy Treasurer Robert Kozlowski and Ms. O'Brien's web designer Hank Karl, there is no evidence that anyone other than Mr. Ellis or Mr. Burke had a hand in the creation of the subject advertisement.
25. While there is no evidence that Mr. Burke had any substantive contact with Ms. O'Brien or her agents, there is evidence that Mr. Ellis was also an early volunteer on the campaign of Ms. O'Brien.
26. However, while the evidence establishes that Mr. Ellis had a limited role in the "O'Brien 2008" campaign during the early months after the candidate committee was established, Mr. Ellis' role was significantly diminished to largely the purchase of "O'Brien 2008" campaign lawn signs and paraphernalia by approximately July 2008. In early May and June of 2008, Mr. Ellis advised Ms. O'Brien to take an aggressive posture against Representative Bartlett in her campaign and Ms. O'Brien repeatedly rejected this recommended strategy. By July 2008, Ms. O'Brien was largely relying on the Republican State Central Committee ("RSCC") for strategy and "messaging" for the O'Brien campaign. Once the candidate decided to do this and once the RSCC decided to strictly adhere to a "positive" message of "Melanie cares" rather than make any specific criticisms of her opponent, Mr. Ellis abandoned his involvement with the campaign other than purchasing campaign lawn signs and paraphernalia; subsequent to this strategy decision, with which Mr. Ellis ardently disagreed, the candidate and Mr. Ellis had no contact. Moreover, while there is evidence that Mr. Ellis did make independent attempts to solicit input from Ms. O'Brien's campaign regarding the creation of the subject advertisement as well as evidence that he attempted repeatedly to contact her personally, the evidence shows that his overtures were rebuffed. The only contact regarding the expenditure for the subject advertisement occurred when a

member of the RSCC called Mr. Ellis at Ms. O'Brien's direction and told Mr. Ellis that if the RSCC planned on making expenditures concerning her race, that the RSCC should adhere to positive messages directly supporting her candidacy. There is no evidence that Mr. Ellis made Ms. O'Brien's agent aware of the content of the subject advertisement during the telephone call.

27. There is evidence to establish that Mr. Ellis did obtain Ms. O'Brien's mobile telephone number and did reach her in an attempt to speak with her regarding the subject advertisement, but this occurred only after the advertisement had been sent to be printed and mailed. Moreover, Ms. O'Brien flatly refused to even entertain Mr. Ellis' attempt to tell her about the content of the subject advertisement, even after the fact of its creation, and abruptly hung up the phone on Mr. Ellis.
28. Considering the aforesaid, the Commission finds that the evidence does not establish that the expenditure for the subject advertisement was not made independently. That is, that it was not made with the cooperation of, in consultation or concert with, or at the request or suggestion of Ms. O'Brien or her agents. Moreover, the evidence also does not sufficiently establish that the expenditure was a "coordinated expenditure" as defined in General Statutes § 9-601 (19).
29. With respect to the first example of coordination set forth in General Statutes § 9-601 (19)(A), the evidence does not establish sufficiently that the expenditure was made by the BRTC "[i]n cooperation, consultation, in concert with, at the request, suggestion or direction of, or pursuant to a general or particular understanding with" Ms. O'Brien nor her agents.
30. The evidence shows that the expenditure was made without any knowledge of the candidate or any of the candidate's or candidate committee's agents, much less in concert with, at the request, suggestion or direction of, or pursuant to a general or particular understanding with the candidate or any of the candidate's or candidate committee's agents. Moreover, although Mr. Ellis had a role in the campaign early on, he was not tasked, explicitly or implicitly, with creating communications such as the one at issue here. Finally, substantive contact had been severed at the time the expenditure was made; there is no evidence that Mr. Ellis was acting as an agent of the campaign at the time the expenditure was made, as he was not acting at the direction of an individual associated with the campaign at the time the subject advertisement was created.
31. With respect to General Statutes § 9-601 (19)(B), the evidence does not establish that the subject advertisement was prepared by Ms. O'Brien, or her agents. Although the communication at issue here was produced and disseminated as a piece of political advertising, there is no evidence that it was produced by the candidate or the candidate committee, nor is there evidence that Nick Ellis or Robert Burke was a consultant or other agent acting at the direction of an individual associated with the candidate committee at the time the subject advertisement was created.
32. With respect to General Statutes § 9-601 (19)(C) & (F), the evidence does not establish that the candidate, or any consultant or other agent acting on behalf of the candidate and/or candidate committee shared such information with Mr. Ellis or Mr.

Burke with the knowledge that Mr. Ellis or Mr. Burke planned on making the expenditure or with the intent that Mr. Ellis or Mr. Burke make such an expenditure in the future. There is no evidence to establish that Mr. Ellis and Mr. Burke themselves were acting as agents of the campaign, as they were not acting at the direction of an individual associated with the campaign at the time the subject advertisement was created.

33. With respect to General Statutes § 9-601 (19)(D), the Commission has held that an expenditure is made by the person (committee or individual) that causes that expenditure to occur. *See Complaint of Edward Raff*, SEEC File No. 2008-141. Here, the expenditure for the subject advertisement was made by the BRTC and its treasurer, Clifford Tager, as he authorized the checks paid to the *Pennysaver* for said advertisement. There is no evidence to establish that Mr. Tager ever served during the 2008 election cycle as the campaign chairperson, campaign treasurer or deputy treasurer of a “O’Brien ’08,” or in any other executive or policymaking position as a member, employee, fundraiser, consultant or other agent of Melanie O’Brien or her candidate committee.
34. With respect to General Statutes § 9-601 (19)(E), the subject advertisement does not, on its face, directly solicit contributions, nor does it make reference to fundraising activities of any kind.
35. Finally, with respect to General Statutes § 9-601 (19)(G), this subdivision does not apply here as the subject advertisement clearly identifies only Representative Bartlett—who was the opponent of the BRTC, which made the expenditure—and urges the reader to vote against him.
36. Considering the aforesaid, the Commission therefore concludes that the evidence is insufficient to establish that the expenditure at issue was made by the BRTC with the cooperation of, in consultation or concert with, or at the request or suggestion of the candidate, Melanie O’Brien, or her agents. That is, the evidence establishes that the expenditure was in fact and independent expenditure. Nor is it sufficient to establish that it was a coordinated expenditure. Accordingly, the Commission declines to depart from its initial finding at the hearing referenced in Paragraph 16.
37. Turning to Complainant’s final allegation, he avers that the subject advertisement should have included an attribution identifying “the name of the candidate who benefits from the ad;” the Commission assumes for the purposes of this allegation that the Complainant refers to Representative Bartlett’s opponent, Ms. O’Brien. General Statutes § 9-621 governs the requirements concerning the attribution of communications that, *inter alia*, advocate for the success or defeat of any candidate’s campaign for nomination at a primary or election.
38. General Statutes § 9-621 provides, in pertinent part:
 - (a) . . . no candidate or committee shall make or incur any expenditure including an organization expenditure for a party candidate listing, as defined in subparagraph (A) of subdivision (25) of section 9-601, for any written, typed or other printed

communication, . . . which promotes the success or defeat of any candidate's campaign for nomination at a primary or election . . . unless such communication bears upon its face **(1) the words "paid for by" and the following: . . . (C) in the case of a party committee, the name of the committee,** and (2) the words "approved by" and the following: (A) In the case of an individual making or incurring an expenditure with the cooperation of, at the request or suggestion of, or in consultation with any candidate, candidate committee or candidate's agent, the name of such individual; or (B) in the case of a candidate committee, the name of the candidate . . .

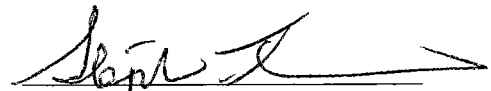
39. As the subject advertisement was solely paid for by the BRTC, a party committee, the "approved by" language was not required. Accordingly, this allegation is dismissed.

ORDER

The following Order is recommended on the basis of the aforementioned finding:

That the Complaint be dismissed.

Adopted this 24th day of March of 2010 at Hartford, Connecticut


Stephen F. Cashman, Chairman
By Order of the Commission

7