

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by
Patrick S. Dwyer, Bridgewater

File No. 2014-049

FINDINGS AND CONCLUSIONS

The Complainant, filed this Complaint pursuant to Connecticut General Statutes § 9-7b, alleging that Regional School District 12 and Dr. Patricia Cosentino, its Superintendent of Schools, violated General Statutes § 9-369b on various occasions pertaining the expenditure of public funds to advocate for an April 29, 2014 referendum.

After an investigation of the complaint, the Commission makes the following findings and conclusions:

1. Regional School District 12 (hereinafter "Region 12") and its Board of Education ("BOE") serve the towns of Bridgewater, Roxbury and Washington.
2. Complainant filed this complaint, alleging that Region 12 and the BOE violated General Statutes § 9-369b "on no less than 4 occasions" when public funds were used to advocate for an April 29, 2014 referendum that was pending as of March 13, 2014.
3. Specifically, Complainant alleged that Region 12 violated the prohibition on the use of public funds to advocate for a referendum pursuant to General Statutes § 9-369b, as follows:
 - (1) On April 12, 2014 Region 12 published and disseminated the weekly *Region and Review*, which in addition to providing "neutral information," included architectural pictures and floor plans which were "clear attempts to advocate;"
 - (2) On April 21, 2014 the BOE at its meeting voted approximately \$5,000.00 for the creation and distribution of an "Information Pamphlet" that included architectural pictures and floor plans which were "clear attempts to advocate;"
 - (3) On April 21, 2014 the architectural firm commissioned by the BOE for the project that was subject of the April 29th referendum "*conducted a planned presentation on the benefits of a consolidated elementary school ... for the explicitly stated purpose of advocating for the approval of the project;*" and,
 - (4) Subsequent to the April 21st presentation by the architectural firm advocating for the referendum project, a video of the presentation was posted to, and available on, the Region 12 website that is funded by public tax dollars.

4. On March 13, 2014, the BOE voted to approve language for a referendum question that pertained a proposed amendment to the Regional School District Regionalization Plan. At a special BOE meeting following the March 13th Region 12 Meeting, the BOE voted to approve the referendum question concerning the amendment of the district regionalization plan, and approved the language for a referendum question concerning the bonding of \$41,879,191 for the construction of a consolidated elementary school and improvements and renovations at Shepaug Valley Middle High School. The Board also voted to set the referendum date for April 29, 2014 at that time.
5. General Statutes § 9-369b, provides in pertinent part:
 - (a) Except as provided in subsection (b) of this section, any municipality may, by vote of its legislative body, authorize the preparation and printing of concise explanatory texts of local proposals or questions approved for submission to the electors of a municipality at a referendum. ... The explanatory text shall also be furnished to each absentee ballot applicant pursuant to subsection (d) of section 9-140. Except as provided in subsection (d) of this section, ***no expenditure of state or municipal funds shall be made to influence any person to vote for approval or disapproval of any such proposal or question. Any municipality may, by vote of its legislative body and subject to the approval of its municipal attorney, authorize the preparation and printing of materials concerning any such proposal or question in addition to the explanatory text if such materials do not advocate the approval or disapproval of the proposal or question. ...***
 - (b) For any referendum called for by a regional school district, ***the regional board of education shall authorize the preparation and printing of concise explanatory texts of proposals or questions approved for submission to the electors of a municipality at a referendum.*** The regional school board of education's secretary shall prepare each such explanatory text, subject to the approval of the regional school board of education's counsel, and shall undertake any other duty of a municipal clerk, as described in subsection (a) of this section. [Emphasis added]
6. General Statutes § 9-369b prohibits the use of public funds to advocate for or against the outcome of a referendum. The statute specifies that "no expenditure of state or municipal funds shall be made to influence any person to vote for approval or disapproval of any such proposal or question." Further, this prohibition specifically applies to regional boards of education. See General Statutes § 9-369b.

7. To determine whether a violation of General Statutes § 9-369b has occurred, the Commission considers first whether there was an expenditure of public funds and then whether the communication advocated for or against a referendum question while the referendum was pending. The Commission has found in prior cases that the costs associated with a website maintained by public schools is an expenditure of public funds under § 9-369b. *See Complaint by Matthew Grimes*, Brookfield, File No. 2008-070, (concluding that a message posted on a website maintained at public cost urging support of a budget while a budget referendum was pending violated § 9-369b). The Commission, consistent with its prior decisions, concludes that the Region 12 website used as detailed herein qualifies as an expenditure of public funds for the purposes of § 9-369b.
8. The second prong of the Section 9-369b analysis focuses on whether the communication advocated for or against the outcome of a referendum. The Commission looks at the entirety of the communication to determine whether it advocated for or against the outcome of a referendum. The Commission has previously concluded that communications that advocate a particular result, either expressly or when considered as a whole, and make an ordinary reasonable person understand that the communication advocates for a particular result, will be deemed to constitute *advocacy*. In determining whether a communication constitutes advocacy, the Commission reviews the entire communication and considers its style, tenor and timing. The Supreme Court analyzed this standard of review in *Sweetman v. State Elections Enforcement Commission* and concluded that the Commission could rely on this process to determine when communications advocated for or against the outcome of a referendum. *See Sweetman v. State Elections Enforcement Commission*, 249 Conn. 296 (1999).
9. After investigation, the Commission finds that at its March 13, 2014 meeting, the BOE voted to authorize the drafting of explanatory materials, as provided by General Statutes § 9-369b and, according to Respondents, the BOE Chairman "...then appointed a committee to work with Board counsel to develop explanatory text."
10. Additionally, the Commission finds that at the BOE April 21, 2014 meeting, "...the Board reviewed the proposed brochure with the explanatory text for the referendum questions, which had been developed by this committee and reviewed by counsel, and voted to approve it." Finally, the Commission finds that the BOE at the April 21st meeting, also voted to appropriate \$5,150 for postage and printing costs. Finally, the Commission finds that Respondents' narrative regarding the referendum process and timeline submitted to the Commission in response to this complaint and pertaining to the relevant March 13th and April 21st Region 12 and BOE meetings as detailed herein was corroborated upon investigation.

11. Allegation One

On April 12, 2014 Region 12 published and disseminated the weekly Region and Review, which in addition to providing "neutral information," included architectural pictures and floor plans which were "clear attempts to advocate" in violation of General Statutes § 9-369b.

12. Considering the communication *Region and Review* as it pertains to Allegation One, the Commission concludes that the mere inclusion of plans or pictures as alleged cannot form the basis that it constitutes advocacy *per se* for purposes of General Statutes § 9-369b. Specifically, the Commission does not deem the mere inclusion of visual images as indicative or inherent evidence of advocacy as urged by Complainant but rather evaluates the style, tenor and timing of the printed materials as a whole. *See Sweetman.*

13. Upon investigation, the Commission finds that *Region and Review* includes the following directly following after its masthead:

On April 7, 2014, the Board of Education, passed the following resolution: "We, the Board of Education, are committed to supporting a comprehensive middle high school on the Shepaug campus to educate our students in the Region."

14. The Commission must, consistent with its precedent, determine whether the inclusion of the above language on the *Region and Review* communication advocated for a pending referendum and produced by the expenditure of public funds and therefore prohibited by General Statutes § 9-369b. *See Complaint by Tom Nicholas, Guilford, File No. 2011-091* (where a slide presentation that included benefits of new construction was found by the Commission to leave no question about how the school board believed voters should vote on a referendum).

15. As distinguished from *Nicholas*, the Commission applying the *Sweetman* standard in weighing the totality of the circumstances pertaining to Allegation One does *not* find, on balance, that the language detailed in paragraph 13 above contains advocacy for purposes of § 9-369b. More specifically, while the Commission finds that such language plainly conveys the general position of the BOE as to the Region 12 middle school, it does *not* considering the style, tenor and timing of the entire communication lead the "reasonable person" to the singular conclusion that the BOE is advocating a "yes" vote on the April 29, 2014 referendum.

16. The Commission finds that the Respondents' expenditure of public funds for *Region and Review*, that was subject of Allegation One, did *not* contain advocacy while the April 29, 2014 Region 12 referendum was pending in Bridgewater, Roxbury and Washington and therefore concludes that there was no violation of General Statutes § 9-369b under these specific circumstances. The Commission therefore dismisses Allegation One.

17. Allegation Two

On April 21, 2014 the Region 12 BOE at its meeting voted over \$5,000.00 for the creation and distribution of an "Information Pamphlet" that included architectural pictures and floor plans which were "clear attempts to advocate" in violation of General Statutes § 9-369b.

18. Consistent with the analysis for Allegation One as it pertains the *mere inclusion of visual images* in a communication, the Commission finds that such inclusion is *not* indicative or inherent evidence of advocacy *per se* pursuant to General Statutes § 9-369b as urged by Complainant. Consistent with *Sweetman*, the Commission has concluded in prior cases that communications that advocate a particular result, either expressly or when considered as a whole, a reasonable person understands such communications to advocate for a particular result, constitute advocacy and are prohibited § 9-369b.

19. The Commission has never determined that the mere inclusion of architectural pictures and/or floor plans constitute advocacy or in and of themselves satisfy standards for advocacy as applied by the Commission pertaining to alleged violations of General Statutes § 9-369b. The Commission declines to make such a finding at this time or articulate a standard that equates the incorporation of architectural pictures, floor plans or other images, with the conclusion that visual representations of a proposed project that is subject to referendum are *per se* prohibited advocacy pursuant to § 9-369b

20. The Commission concludes, for the reasons detailed in paragraphs 18 and 19 above, that the communication pertaining to Allegation Two, after applying the Commission's standard of review for advocacy and considered in its totality, does *not* advocate for the referendum as prohibited by General Statutes § 9-369b . The Commission therefore dismisses Allegation Two.

21. Allegation Three

On April 21, 2014 the architectural firm commissioned by the Region 12 BOE for the project that was subject of the April 29th referendum "conducted a planned presentation on the benefits of a consolidated elementary school ... for the explicitly stated purpose of advocating for the approval of the project" in violation of General Statutes § 9-369b.

22. Upon investigation, it was determined that the “presentation” referenced by the Complainant referred to an item which appeared on the agenda for the BOE’s April 21, 2014 meeting.

According to Respondents:

The Board invited individuals who have been involved with the proposed project, both professionals and volunteers, to present information concerning the project to the Board of Education. Individual Board members could, and did, offer statements both in favor and opposed to the proposed project during this agenda item. Later, members of the public spoke about the project during the "Public Comment" agenda item.

23. After investigation, it was determined that the BOE’s counsel consulted with a Commission attorney prior to and regarding the above presentation. The aforementioned discussion included the proposed participation of an architect consulted for the project in a presentation to the BOE regarding the referendum. Furthermore, that discussion specified that the architects and the other professionals employed by Region 12 regarding the construction project were to receive no additional or separate compensation for their appearance before the BOE. Commission staff did not view the discussion of a matter subject to a referendum as a violation of General Statutes § 9-369b under these specific and narrow circumstances.

24. Commission finds that the aforementioned staff advice was *consistent* with Commission precedent that has consistently held that it does not construe § 9-369b in a manner that precludes elected officials from freely discussing issue and business on a meeting agenda. *Complaint by Jess Haskill, Coventry, File No. 2005-264; Complaint by Arthur Screen, Plainville, File No. 2005-167; Complaint by Craig Powers, Woodstock, File No. 2009-050; Complaint by George Ruhe, Wethersfield, File No. 2012-045.*

25. The Commission under these narrow circumstances declines to take further action regarding Allegation Three based on the attempts by Respondents to comply with Commission Staff advice, and the practical consideration of the need of public discussions and meetings during the pendency of a referendum that necessarily and in the ordinary course incorporates public interest and business.

26. The Commission, for the reasons detailed in paragraphs 21 through 25 above, therefore dismisses Allegation Three regarding the violation of General Statutes § 9-369b pertaining to the April 21, 2014 presentation by public officials and their agents to the BOE on the benefits of a consolidated elementary school and a school renovation project that was the subject of a pending Region 12 budget referendum.

27. Allegation Four

Subsequent to the April 21st presentation by the architectural firm, a video of the presentation advocating for the referendum project was posted to and available on the Region 12 website that is funded by public tax dollars in violation of General Statutes § 9-369b.

28. The Complainant alleged in Allegation Four that the posting of the video of the April 21, 2014 meeting and presentation (detailed in Allegation Three above) to the Region 12 website violated General Statutes § 9-369b. In its written response to this complaint the Region 12 and BOE attorney explained:

As with other issues, Board's counsel consulted with an attorney at the Commission concerning this matter, who confirmed that as long as the posting of meeting minutes and video was a regular and pre-existing practice, and that this meeting video was not separately and specifically created for the referendum or was uniquely available on the district's website, it would not constitute a violation of Conn. Gen. Stat. § 9-369b.

29. After investigation and review, the Commission finds that the BOE video that remained on the BOE website while the April 29, 2014 contained various representations and statements during a panel discussion regarding the consolidation of elementary schools in Region 12 that on balance did *not* tip the scale to a degree necessary for the Commission to make a finding that it constituted advocacy. However, the Commission notes that certain representations contained in the video that remained available at public cost while a referendum was pending lent weight to the Complainant's argument pertaining to Allegation Four. Specifically, the Commission was troubled regarding a publicly funded presentation during the pendency of a referendum that:

- (1) Detailed the design merits and benefits to a consolidated elementary school and the renovation and repairs of the existing middle school;
- (2) Articulated operating cost savings resulting from the new facility; and,
- (3) Projected increased tax savings based on the approval of the bonding pertaining to the referendum.

30. The Commission finds that Respondents failure to remove the video of the April 21, 2014 meeting and presentation to the BOE from the BOE website did *not* result in the use of public funds to promote a pending referendum as prohibited by General Statutes § 9-369b, as the materials on balance and in their entirety did not advocate for the April 29, 2014 referendum. The Commission therefore dismisses Allegation Four.

31. The Commission finds after applying its standard of review for determining advocacy in the context of the requirements and prohibitions in General Statutes § 9-369b to the circumstances pertaining to Complainant's four allegations, the Commission finds that the BOE and Region 12 did *not* use public funds to advocate for the April 29, 2014 budget referendum in Bridgewater, Roxbury and Washington as alleged. The Commission therefore concludes that § 9-369b was not violated under the circumstances detailed herein and dismisses this complaint.

ORDER

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

That the matter is dismissed.

Adopted this 16th day of December, 2014 at Hartford, Connecticut.



Anthony J. Castagno, Chairman
By Order of the Commission