

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by Roger J. Kern,
Essex

File No. 2010-004

FINDINGS AND CONCLUSIONS

Complainant Roger J. Kern brings this complaint pursuant to §9-7b, General Statutes of Connecticut, alleging that the *Valley Courier* newspaper allowed State Senator Eileen Daily to author an opinion column which lacked an attribution and was not properly reported by her campaign committee as an in-kind contribution by Senator Daily in violation of Campaign Finance Law; further that such contribution was a prohibited business entity contribution; and finally, that the op-ed did not have an appropriate attribution as campaign literature for Senator Daily.

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

1. The Day Publishing Company, publishes the *Valley Courier*. The *Valley Courier*, covering Essex, Chester and Deep River and the *Harbor News*, covering Clinton, Westbrook and Old Saybrook are two weekly publications of Shore Publishing, LLC, a subsidiary of The Day Publishing Company.
2. Eileen Daily, is the incumbent State Senator from the 33rd district and was so at all times relevant to this complaint. The 33rd State Senatorial district encompasses and includes the towns of Essex, Chester, and Deep River in part. Senator Daily has a standing monthly column during non-election season that appears in the *Valley Courier* updating her constituents on the business of the State.
3. The *Valley Courier*, once Senator Daily announces her candidacy for elected office, suspends her column for the duration of the election season. It is a stated policy of the *Valley Courier* that all candidates for elected office are allowed to use the Letters to the Editor forum or provide press releases.
4. Senator Daily, who was not a candidate at the time the opinion pieces were published, at all times immediately preceding and after the January 19, 2010 Complaint, did not have or register a candidate committee. On May 18, 2010 registered a candidate committee for her re-election. Senator Daily denies all allegations made by Complainant.

5. General Statutes § 9-601, provides in pertinent part:
(11) "Candidate" means ***an individual who seeks nomination for election or election to public office*** whether or not such individual is elected, and for the purposes of this chapter and sections 9-700 to 9-716, inclusive, an individual shall be deemed to seek nomination for election or election if such individual has (A) been endorsed by a party or become eligible for a position on the ballot at an election or primary, or (B) ***solicited or received contributions, made expenditures or given such individual's consent to any other person to solicit or receive contributions or make expenditures with the intent to bring about such individual's nomination for election or election to any such office.*** "Candidate" also means a slate of candidates which is to appear on the ballot in a primary for the office of justice of the peace. For the purposes of sections 9-600 to 9-610, inclusive, and section 9-621, "candidate" also means an individual who is a candidate in a primary for town committee members.
[Emphasis added.]

6. 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 nomination for election, or election, of any person or for the purpose of aiding or promoting the success or defeat of any referendum question or on behalf of any political party.
...

(b) The term "***expenditure***" ***does not mean:***

...
(5) Any news story, ***commentary*** or editorial ***distributed through the facilities of any*** broadcasting station, ***newspaper***, magazine or other periodical, unless such facilities are owned or controlled by any political party, committee or candidate; . . .

[Emphasis supplied.]

7. General Statutes § 9-613, provides in pertinent part:

(a) No business entity shall make any contributions or expenditures to, or for the benefit of, any candidate's campaign for election to any public office or position subject to this chapter or for nomination at a primary for any such office or position, or to promote the defeat of any candidate for any such office or position. No business entity shall make any other contributions or expenditures to promote the success or defeat of any political party, except as provided in subsection (b) of this section. No business entity shall establish more than one political committee. A political committee shall be deemed to have been established by a business entity if the initial disbursement or contribution to the committee is made under subsection (b) of this section or by an officer, director, owner, limited or general partner or holder of stock constituting five per cent or more of the total outstanding stock of any class of the business entity.

...

[Emphasis added.]

8. The Commission has previously considered the question of whether an article appearing in a newspaper that is written by a state legislator can be considered a contribution to that legislator's reelection campaign (*See In the Matter of a Complaint by Joseph Ribeiro*, New Fairfield, File No. 98-232; State Elections Enforcement Commission Advisory Opinion 84-1). In AO 84-1 it developed a standard for evaluating such situations, and summarized its reasoning as follows:

Since there can be no contribution without the making of expenditure and a news story comment, commentary or editorial is excluded by law from the meaning of the term expenditure, it may be concluded that a news story, editorial or commentary may not be considered a contribution provided the facilities are not owned or controlled by any class of person or entity referred to in the statute.

[Emphasis added.]

9. The Commission developed its press exemption standard, as described in paragraph 8 above, in light of guidelines articulated by the Federal Election Commission (hereinafter "FEC") and *its* application of a press exemption. Specifically, the Commission in determining whether to apply the press exemption to an expenditure has considered: 1) the regularity on which the publications written by the legislator appears, 2) the general nature of the information provided in the publication, 3) whether the information imparted is designed to influence the legislator's candidacy and 4) consideration of whether the legislator provides this service free of charge or the services provided are contracted for. *See* Advisory Opinion 84-1 (setting out four part test); *Ribeiro*, File No. 98-232 (applying AO 84-1 to determine press exemption did *not* apply).
10. The Commission in this instance abandons its past standard for determining whether an article appearing in media satisfies the press exemption pursuant to General Statutes § 9-601b(b)(5), as described in paragraphs 8 and 9 above. Instead, the Commission here adopts a new press exemption standard in cases applying § 9-601b(b)(5).
11. Historically, when the Commission decides to adopt changes in the law, it looks to sister jurisdictions for guidance. *See* State Elections Enforcement Commission Advisory Opinion 2008-01 (reliance on the Maine Commission on Governmental Ethics and Election Practices and the FEC to create standard for regulating press releases). Consistent with this principle, the Commission turns to the Federal Election Commission for guidance in adopting, articulating, and applying a new *press exemption* standard pursuant to § 9-601b(b)(5).
12. The Commission finds that in *FEC v. Reader's Digest Ass'n*, 509 F. Supp. 1210 (S.D.N.Y. 1981) and according to the Federal Election Commission (hereinafter "FEC") Advisory Opinion 2008-14, the "press exemption" is a three part examination of whether an expenditure is exempt, which determines whether:
 - 1) the entity engaging in the activity is a press or media entity;
 - 2) the entity is not owned or controlled by a political party, political committee, or candidate; and
 - 3) the entity is acting as a press entity in conducting the activity at issue (i.e., whether the press entity is acting in its "legitimate press function")
13. In light of the FEC *press exemption* described in paragraph 12 above and the court's approach in *FEC v. Reader's Digest Ass'n, Inc.*, the Commission now and henceforth adopts the "press exemption" standard as applied in FEC Advisory Opinion 2008-14.

14. Therefore, pursuant to the standard adopted by the Commission a three prong test must be applied to the preliminary facts determined in this matter. Specifically, the Commission concludes that under the existing facts in this matter it can be determined:

- 1) that *The Day* is a newspaper and wholly owns the newspapers subject to this complaint, and is a press entity;
- 2) that *The Day* is owned by an endowed trust; not controlled by a political party, political committee, or candidate; and
- 3) that *The Day* in publishing an opinion column by Senator Daily was acting as a press entity in conducting the activity which was a "legitimate press function."

15. In light of the Commission's new approach and based on *FEC v. Reader's Digest Ass'n, Inc.* that "until and unless the press exemption" is "found inapplicable" an investigatory agency is "barred from investigating the substance of the complaint."

16. Based on the reasons described above it would appear that the "press exemption" is applicable to the underlying allegations and facts in the Complaint of Roger J. Kern, File No. 2010-004 as they relate to *The Day Publishing Company* and the Commission concludes therefore that there is no further investigation available to the Commission based on the Commission's application of the *press exemption* standard pursuant to § 9-601b(b)(5) as expressed herein.

17. Therefore based on the above analysis the Commission concludes that it is precluded from further investigation of the matters of complaint described herein pursuant to the *press exemption* standard and no further action will be taken pertaining to Complainant's allegations.

ORDER

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

That the matter be dismissed.

Adopted this 22nd day of Sept. 2010 at Hartford, Connecticut



Stephen F. Cashman, Chairman
By Order of the Commission