

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by Eric Fanwick, Wilton

File No. 2014-146

AGREEMENT CONTAINING CONSENT ORDER

This Agreement, by and between Edward Papp, of the Town of Wilton, County of Fairfield, State of Connecticut and the authorized representative of the State Elections Enforcement Commission is entered into in accordance with Section 9 7b 54 of the Regulations of Connecticut State Agencies and Section 4 177 (c) of the General Statutes of Connecticut. In accordance herewith, the parties agree that:

BACKGROUND

1. The Complainant alleged that on September 23, 2014 a flyer was produced without proper attribution and distributed within the 75' restricted area at a polling place for a referendum held in the Town of Wilton to vote on issuing bonds to fund a renovation of the Miller-Driscoll school facility in town.¹
2. At a July 21, 2014 joint meeting of the Boards of Selectmen and Finance, the Board of Selectmen unanimously approved the schematic plan and budget for a project to renovate the Miller-Driscoll school in town. On September 2, 2014 the Board of Selectmen approved a resolution to issue municipal bonds in order to pay for the project. This triggered the Town meeting and referendum clause of the Charter, which called for a Town Meeting on September 23, 2014 and a referendum to be held at the close of said meeting on the same day with voting on that day, as well as September 27, 2014.

ALLEGATIONS

3. The Complainant alleges that "at the vote regarding the bonding issue" for the Miller-Driscoll school, he was handed a flyer at the door of the auditorium in which the Town

¹ The following are the Commission's findings and conclusions based on those portions of the Complainant's statement of complaint which the Commission could reasonably construe as alleging facts amounting to a specific violation of those laws within the Commission's jurisdiction. Any statements within the Complaint not addressed herein either did not specifically allege a violation or alleged facts which if proven true would not have amounted to a violation within the Commission's jurisdiction.

Meeting took place either before or while the Town Meeting took place. He asserts that this flyer was the product of a group called "Sensible Wilton, who advocated a "no" vote on the referendum and that such act was a violation of the prohibitions in General Statutes § 9-236 against electioneering within 75' of a polling place.

4. The investigation here also reviewed whether said flyer complied with the attribution requirements in General Statutes § 9-621.

LAW

5. General Statutes § 9-236 enumerates certain prohibitions on electioneering in and around a polling place, and reads, in pertinent part:

(a) On the day of any primary, referendum or election, *no person shall solicit on behalf of or in opposition to the candidacy of another or himself or on behalf of or in opposition to any question being submitted at the election or referendum, or loiter or peddle or offer any advertising matter, ballot or circular to another person within a radius of seventy-five feet of any outside entrance in use as an entry to any polling place or in any corridor, passageway or other approach leading from any such outside entrance to such polling place or in any room opening upon any such corridor, passageway or approach.* Nothing contained in this section shall be construed to prohibit (1) parent-teacher associations or parent-teacher organizations from holding bake sales or other fund-raising activities on the day of any primary, referendum or election in any school used as a polling place, provided such sales or activities shall not be held in the room in which the election booths are located, (2) the registrars of voters from directing the officials at a primary, referendum or election to distribute, within the restricted area, adhesive labels on which are imprinted the words "I Voted Today", or (3) the registrars of voters in a primary, election or referendum from jointly permitting nonpartisan activities to be conducted in a room other than the room in which the election booths are located. The registrars may jointly impose such conditions and limitations on such nonpartisan activity as deemed necessary to ensure the orderly process of voting. The moderator shall evict any person who in any way interferes with the orderly process of voting. . . . (Emphasis added.)

6. General Statutes § 9-621 (c) enumerates the requirements for attributing any electioneering communication advocating for or against a result in a pending referendum, and reads, in pertinent part:

(c) No business entity, organization, association, committee, or group of two or more individuals who have joined solely to promote the success or defeat of a referendum question shall make or incur any expenditure for any written, typed or other printed communication which promotes the success or defeat of any referendum question unless such communication bears upon its face, as a disclaimer, the words "paid for by" and the following: (1) In the case of a business entity, organization or association, the name of the business entity, organization or association and the name of its chief executive officer or equivalent, and in the case such communication is made during the ninety-day period immediately prior to the referendum, such communication shall also bear on its face the names of the five persons who made the five largest aggregate covered transfers to such business entity, organization or association during the twelve-month period immediately prior to such referendum. The communication shall also state that additional information about the business entity, organization or association making such communication may be found on the State Elections Enforcement Commission's Internet web site; (2) in the case of a political committee, the name of the committee and the name of its treasurer; (3) in the case of a party committee, the name of the committee; or (4) in the case of such a group of two or more individuals, the name of the group and the name and address of its agent.

"Pending" Analysis

7. The allegations here implicate the above provisions of General Statutes §§ 236 and 621 in association with a referendum. Such provisions are not effective unless the referendum is "pending." The Commission has held that a referendum is legally pending when all of the necessary legal conditions have been satisfied to require that a referendum be held. *In the Matter of a Complaint by Roger Wise, et al, New Fairfield*, File No. 2009-003.
8. Here, the Wilton Charter requires a town meeting and a referendum to be held after the Board of Selectmen propose an issuance of bonds.

9. The records of the Town of Wilton reflect that the Board of Selectmen voted on the proposed issuance of bonds on September 2, 2014, which is the relevant “pending” date in this matter. The referendum at issue here was held on September 23 & 27, 2014.

COUNT ONE: Attribution of an Electioneering Communication

10. The Complainant alleges that while the referendum on the bond issuance was “pending,” flyers advocating a “no” vote were distributed at the September 23, 2014 Town Meeting and referendum. He alleges that he believes that the group “Sensible Wilton” paid for the flyers.
11. As an initial matter, “Sensible Wilton” was a referendum committee formed for the purpose of opposing the bonding referendum. Alex Ruskewich and Odgen C. Noel were its chair and treasurer, respectively.
12. The flyer itself, entitled “Bad things happen to good people who do not vote,” is indisputably a piece of advocacy. The author enumerates a number of issues with the bonding referendum and at the end of the double-sided document, urges the reader to “Vote NO.” “Sensible Wilton” is enumerated below the title, but in no other way does the flyer identify and/or attribute who authored and/or paid for the flyer. While the Complainant did not identify a particular basis for his allegation that “Sensible Wilton” produced the flyer, it appears that this identification of the group on the flyer was his basis.
13. The Wilton Town Clerk confirmed that no committees other than “Sensible Wilton” registered to make expenditures related to the referendum in this case.
14. Mr. Ruskewich, on behalf of “Sensible Wilton,” generally denied any association with the flyer at issue. Mr. Ruskewich was very cooperative with the investigation and provided copies of all electioneering communications produced and paid for by “Sensible Wilton.” Mr. Ruskewich asserted that “Sensible Wilton,” formed solely for the purpose of opposing the bonding referendum, had no prior existence as a membership association. However, Mr. Ruskewich also stated that there were a number of individuals in town who supported its aims and helped Commission staff identify the actual author of the flyer, Edward Papp.
15. As an initial matter, the Commission found no evidence supporting the allegation that “Sensible Wilton” paid for the flyer at issue. While the flyer contained the name of the group, there was no other credible evidence supporting an allegation that the group paid for the flyers either directly or indirectly. As such, Count One is dismissed as to them.

16. However, the Commission continued the investigation and named Mr. Papp as a respondent, as the flyers contained no attribution, as required in certain circumstances by General Statutes § 9-621 (c), above.
17. The main question here is whether a “group of two or more individuals who have joined solely to promote the success or defeat of a referendum question” incurred the expenditure for the flyers here, such that an attribution was required.
18. It is well established that Pursuant to § 9-621, individuals who are not a “group of two or more individuals who have joined solely to promote the success or defeat of a referendum question” are not required to include attributions on advocacy communications concerning referenda, as mandated by the Supreme Court’s ruling in *McIntyre v. Ohio Elections Commission*, 541 U.S. 334 (1995). See also *In the Matter of a Complaint by Alex Ruskewich, Wilton*, File No. 2014-118A; *In the Matter of a Complaint by Lynn Brewer, Winsted*, File No. 2012-133; *In the Matter of a Complaint of M. Kirk Carr, Jr., Clinton*, File No. 2012-083; *In the Matter of a Complaint of Amy Primorac, Monroe*, File No. 2009-064; *In the Matter of a Complaint of Arthur R. Thompson, Deep River*, File No. 2007-380; *In the Matter of a Complaint of Pamela Lang, Middlefield*, File No. 2006-168; *In the Matter of a Complaint of Tony Palermo, Westbrook*, File No. 2003-186; and *In the Matter of a Complaint by Old Saybrook Town Clerk Sarah Becker*, File No. 2001-191.
19. In response to staff inquiries during the investigation of this matter, Mr. Papp took full responsibility for authoring, distributing, and bearing the costs of the flyer at issue here. He asserts that he originally intended to submit the content of the flyer to the Wilton Bulletin, a local newspaper, but missed the publishing deadline. As such, he determined that he would photocopy the flyer and hand it out on the day of the Town Meeting. While Mr. Papp was unable to produce exact records, he estimates that he produced approximately 200-300 copies at a cost of approximately \$10-15.
20. Importantly here, Mr. Papp insists that he produced and distributed the flyers on his own initiative and effort and that while he was sympathetic to the positions of “Sensible Wilton,” that group was not a material part of this specific effort.
21. Considering the aforesaid, the Commission concludes that evidence here does not support a conclusion that a “group of two or more individuals” incurred the expenditure for the flyer. As such, Mr. Papp was not required to put an attribution on it. Count One should also be dismissed as to Mr. Papp.

COUNT TWO: Electioneering w/in 75' of Polling Place

22. In this Count, the Commission turns to the question of whether Mr. Papp's distribution of the flyers complied with the restrictions on electioneering activity in General Statutes § 9-236 (c).
23. The allegations here concern the night of September 23, 2014, the day of the Town Meeting, as well as the first of two days of voting on the referendum. Per the Wilton charter, September 23, 2014 was to start with the Town Meeting. The moderator of the Town Meeting closes the meeting, at which point voting immediately commences.
24. The Town Meeting itself took place inside the Clune Auditorium at Wilton High School. The voting on the referendum took place in a different nearby area within the building, but outside of the auditorium. The Town Meeting itself, which by its nature was a meeting of the citizens of the Town of Wilton, took over 2 hours, at which point the meeting was closed and the voting was opened in the other room.
25. Importantly, General Statutes § 9-236 only applies *during the hours of voting*. That is, any individual engaging in the electioneering activities enumerated in the statute, is not prohibited by the statute from doing so outside of the open and close of polls.
26. This distinction is important where, as here, the allegation is that Mr. Papp distributed the flyer at issue at the entrance during the Town Meeting and not during the referendum. So, as an initial matter, the Commission concludes that any distribution of the flyer that occurred prior to the call of the vote did not violate General Statutes § 9-236.
27. However, the investigation revealed that Mr. Papp, by his own admission, did distribute some of the flyers during the hours of voting.
28. More specifically, Mr. Papp asserts that he began distributing flyers outside of the high school prior to the Town Meeting to individuals entering the building. Once the meeting commenced, he attended the meeting with the community. Mr. Papp asserts that community comments were cut off just prior to his turn to speak, at which point he asked the moderator if he could distribute his flyers within the auditorium. He asserts that the moderator allowed this so long as he did not distribute the flyers outside of the auditorium or near where the voting was taking place in the lobby outside. Mr. Papp estimates that he distributed approximately 15-20 flyers, all inside the auditorium, after the voting commenced outside in the other room.

29. A review of a contemporaneous video taken in the auditorium generally confirms Mr. Papps assertions of fact.
30. Turning to the unique and unusual question here, the Commission must answer first whether it was permissible to distribute the flyers at the above location and time. Under a plain reading of General Statutes § 9-236, none of the activity enumerated in the statute was permitted to occur within a radius of seventy-five feet of any outside entrance in use as an entry to the polling place or in any corridor, passageway or other approach leading from any outside entrance to the polling place or in any room opening upon any such corridor, passageway or approach once the hours for casting ballots commenced. This included the auditorium in which Mr. Papp was distributing his flyers. As such, the Commission concludes that the Responded violated General Statutes § 9-236 by distributing the flyers once the referendum had commenced.
31. Pursuant to Regulations of Connecticut State Agencies § 9-7b-48, in determining whether a civil penalty will be assessed, and if so, the amount of such civil penalty, the Commission shall consider, among other mitigating and aggravating factors:
 - (1) the gravity of the act or omission;
 - (2) the amount necessary to insure immediate and continued compliance;
 - (3) the previous history of similar acts or omissions; and
 - (4) whether the person has shown good faith in attempting to comply with the applicable provisions of the General Statutes.
32. As noted the Commission recognizes that the circumstances in this case are fairly unusual. Indeed, this appears to be a question of first impression. Past matters involving 75' line questions and an adjourned referendum have involved referendum votes that occurred on a day separate from that on which the Town Meeting occurred. Here, the vote to adjourn the Town Meeting triggered an immediate referendum, voting for which, in this case, took place in a room within the same building as the Town Meeting. By a declaration of the moderator of the Town Meeting, the auditorium that just a minute before had been a forum for significant legal electioneering activity immediately transitioned into a zone protected by the proscriptions of § 9-236.
33. Moreover, Mr. Papp asked and received explicit and public permission to distribute the flyers in that location from the moderator of the Town Meeting. While the moderator of the Town Meeting had no role in the referendum—the town registrars served as the referendum moderators—and could not have legally waived Mr. Papp's liability, it was not unreasonable for Mr. Papp to have relied on this representation.

34. Considering the totality of the circumstances here, the Commission concludes that while the statute did not allow for the distribution of the flyers in the auditorium once the referendum commenced, the unique circumstances of this case do not warrant punitive action by the Commission. The Commission does not believe that Mr. Papp would act similarly in the future, whether or not the Commission issued a civil penalty in this instance. Accordingly, the Commission concludes and the parties agree that the appropriate remedy herein is a consent agreement in which the Respondent agrees to henceforth strictly comply with General Statutes § 9-236 in the future.
35. The Commission will also send notice of this matter to the registrars of voters in Wilton, so that they may better inform future Town Meetings should this situation occur in the future. The Commission will take no further action on this matter.
36. The Respondent admits all jurisdictional facts and agrees that this Agreement and Order shall have the same force and effect as a final decision and Order entered after a full hearing and shall become final when adopted by the Commission. The Respondent shall receive a copy hereof as provided in Section 9-7b-56 of the Regulations of Connecticut State Agencies.
37. The Respondent waives:
 - a. Any further procedural steps;
 - b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, separately stated; and
 - c. All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered into pursuant to this Agreement.
38. It is understood and agreed that this Agreement will be submitted to the Commission for consideration at its next meeting and, if the Commission does not accept it, it is withdrawn and may not be used as an admission by the Respondent in any subsequent hearing, if the same becomes necessary
39. Upon the Respondent's compliance with the Order hereinafter stated, the Commission shall not initiate any further proceedings pertaining to these matters and this Respondent.

ORDER

IT IS FURTHER ORDERED THAT that Respondent Edward Papp will henceforth strictly comply with the requirements of General Statutes § 9-236.

The Respondent:



Edward Papp
Wilton, CT

For the State of Connecticut:

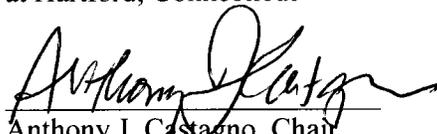
BY: 

Michael J. Brandi, Esq.
Executive Director and General Counsel and
Authorized Representative of the
State Elections Enforcement Commission
20 Trinity St., Suite 101
Hartford, CT

Dated: 8/22/15

Dated: 9/2/15

Adopted this 15 day of SEPT of 2015 at Hartford, Connecticut



Anthony J. Castagno, Chair
By Order of the Commission

