

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION
FINDINGS AND CONCLUSIONS

In the Matter of a Complaint by Timothy E. O'Brien, Jr.,
New Britain

File No. 2015-120

The Complainant filed this complaint with the Commission pursuant to General Statutes § 9-7b alleging that various communications critical of Complainant's tenure as Mayor of New Britain that appeared in a local weekly circular were directly opposed his reelection and resulted in prohibited expenditures and contributions pertaining to the dissemination of that circular that were violations of the campaign finance laws pursuant to Chapter 155, Title 9, General Statutes¹. After an investigation of the complaint, the Commission makes the following findings and conclusions:

1. Complainant alleged an illegal coordination between Selim Zherka and Timothy Stewart to oppose his Mayoral campaign against Erin Stewart at the November 5, 2013 City of New Britain municipal election through use of the publication *New Britain City Journal* ("NBCJ").
2. Further, Complainant alleged that the mass mailing of a newspaper that contained political advertising resulted in an "expenditure" outside of the press exemption.
3. Specifically, Complainant alleged that his opponent's father, Timothy Stewart, as an agent for his daughter's mayoral campaign illegally coordinated with Mr. Zherka to cause mass mailings of the *NBCJ*.
4. Complainant alleged that a "mass mailing" of newspapers that contained advertisements critical of his tenure as New Britain mayor and his mayoral candidacy for reelection amounted to campaign expenditures that were outside the statutory exemption to the "expenditure" definition for media pursuant to § 9-601b (b) (5).²
5. While Complainant's allegations contend that the mass mailings of the *NBCJ*, because of its partisan editorials and advertisements, override applicable exceptions in the campaign finance statutes, he does *not* challenge or dispute that *the NBCJ is a newspaper or media source*.

¹ Any allegation not specifically addressed herein, either failed to allege a violation within the Commission's jurisdiction, or such conduct, even if true, would not have amounted to a violation if Connecticut's election laws, and therefore is deemed outside the jurisdictional parameters of General Statutes § 9-7b and is not treated by the Commission in its resolution of this matter.

² The Commission declines to address Complainant's question and contention regarding the definition of expenditure pursuant to General Statutes § 9-601b, in this disposition, as it was not necessary to the resolution of this matter and such questions of law would be more appropriately addressed by the Commission in response to either a Declaratory Ruling or Opinion of Counsel based on Complainant's request for the same.

6. General Statutes § 9-601b, provides in pertinent part:
 - (a) As used in this chapter and chapter 157, the term “expenditure” means:
 - (1) Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, when made to promote the success or defeat of any candidate seeking 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 the success or defeat 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;
7. Pursuant to General Statutes § 9-601b (b) (5) the term “expenditure” does not mean “[a]ny 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.”
8. The Commission has consistently applied this “press exemption” to the definition of expenditure using commonly accepted standards. The test of whether an expenditure is exempt pursuant to § 9-601b (b) (5) is a three-part examination. See *Complaint by Roger J. Kern*, Essex, File No. 2010-004 (finding that the press exemption applied to *The Valley Courier*). Further, if the Commission determines the *press exemption* applies to a communication there can be no further inquiry pertaining to Complainant’ allegations regarding the same. See *FEC v. Reader’s Digest Ass’n*, 509 F. Supp. 1210 (S.D.N.Y. 1981); FEC Advisory Opinion 2008-14 and *Kern*.
9. The Commission has reaffirmed the adoption and application of the FEC’s press exemption standard, as used in *Kern*, in like cases where allegations give rise to the need to determine whether an entity’s communications are exempt from the “expenditure” definition and the application of Connecticut’s campaign finance regime. See *Complaint by Carol Renza*, Southbury, File No. 2011-093 (finding the press exemption applied to *Shipping News*).
10. In order for *press exemption* to apply, the Commission must find the following: (1) that the entity engaging in the activity is a press or media entity; (2) that the entity is not owned or controlled by a political party, political committee, or candidate; and (3) that the entity is acting as a press entity in conducting the activity at issue (i.e., that the press entity is acting in its “legitimate press function”). Additionally, if the above three criteria are met, the exemption applies and the inquiry ends. See *Kern*.

11. The Commission finds, consistent with FEC 2008-14 and *FEC v. Reader's Digest*, that when the press exemption standard is applied the government does "...not investigate an entity's viewpoint in determining whether, it qualifies as a 'press entity' under the press exemption." Further, the FEC has noted that "... an entity otherwise eligible for the press exception would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial expressly advocates for the election or defeat of a clearly identified candidate ... for office." See FEC Advisory Opinion 2008-14.
12. The Commission finds that the earliest version of the *NBCJ* dates back to the fall of 2009 and the "*Hardware City Journal*." That publication, ultimately renamed the *NBCJ*, was being published and disseminated in New Britain five years prior to the November 5, 2013 election.
13. The Commission finds, after investigation, that the *NBCJ* was (and remains) printed on newsprint, was copyrighted and included under its masthead information identifying its editor, publisher and address. The *NBCJ* also delineated its "letter to the editor" submission and publication guidelines. More specifically, it indicates:

Please put your name, address and phone number. We will only print your name and city. We may call you to verify your information. Limit letters to under 300 words. If it is too long we may either cut it or not use it at all.

The Commission finds, after review of past *NBCJ* editions, that it has published as Commentary or Letters to the Editors letters from *both* Complainant and Mr. Stewart.
14. The Commission finds that the *NBCJ* was distributed free of charge through newspaper boxes located throughout New Britain and via mail by subscription.
15. The Commission finds, on balance and after thorough investigation, that *NBCJ* was a press entity for purposes of applying its standard for the "press exemption" consistent with General Statutes § 9-601b (b) (5) and Commission precedent.
16. Consequently, the Commission is precluded from further investigation of the underlying allegations in this matter as they relate to the *NBCJ* and the *press exemption* standard and the Commission's application of General Statutes § 9-601b (b) (5). See *FEC v. Reader's Digest*; FEC Advisory Opinion 2008-14 and *Kern*.
17. Additionally, after investigation, the Commission finds a lack of evidence to support the finding that either Mr. Zherka or Mr. Stewart exercises either ownership or control over the *NBCJ* and therefore exercised control over the number of units issued or the timing of its distribution.


18. Furthermore, Complainant's allegations that Mr. Stewart, as an agent for his daughter's mayoral campaign, illegally coordinated with Mr. Zherka to make expenditures to distribute the *NBCJ* prior to the November 5, 2013 City of New Britain municipal election were not supported by the facts after investigation. More specifically, such allegations were denied by Respondents, as well as third party witnesses, and/or remained uncorroborated.
19. The Commission after application of the press exemption to these narrow and specific facts and circumstances, as detailed herein, dismisses this matter with no further action.

ORDER

The following is ordered on the basis of the aforementioned findings:

That no further action is taken in this matter and the matter is dismissed.

Adopted this 18th day of October of 2017 at Hartford, Connecticut.


Anthony J. Castagno, Chairman
By Order of the Commission