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ELECTION LAW ENFORCEMENT COMMISSION NATIONAL STATE BANK BLOG., SUITE 1114 28 W. STATE STREET, CN-148

TRENTON, NEW JERSEY 00608 (609) 202-8700

SCOTT A WEINER EXECUTIVE DIRECTOR

EDWARD J. FARRELL COUNSEL

September 23, 1983

Hershel Kozlov, Esq. Counsel, Republican State Committee 1110 Wynwood Avenue Cherry Hill, N.J. 08002

ADVISORY OPINION NO.12-1983

Dear Mr. Kozlov:

Your letter to the Election Law Enforcement Commission requesting an advisory opinion has been considered by the Commission and I have been directed to issue this response. You have asked whether any portiou of the cost of a media campaigu to be paid for by the New Jersey Republican State Committee would be allocable to e potential re-election campaign by Covernor Kean pursuant to recently enacted "testing the waters" regulations. N.J.A.C. 19:25-3.1 et sag. For the reasons stated herein, the Commission finds that the contemplated medie campaign as described in your letter request of September 15, 1983, ere not expenditures subject to the "tasting the watera" reporting raquirements.

· You have written the Commission that the Republican State Committee anricipates purchasing television or other media advertising for use during the 1983 legislative election mampaign. The adverrising will consist of e video featuring Governor Kean, together with an audio delineating pledges made by the Governor and Republican legisletors generally, followed by a recitation of the Governor's and Republican legislators' efforts to carry out those pledges. At rhe conclusion of the advertisement, there will be remarks by the Governor requesting voter participation via support of Republican legislative candidates in the November 8,1983 general election.

At the Commission meeting conducted on September 19, 1983, Frank B. Holman, Cheirmen of the Republican State Committee, and yourself appeared personally to further amplify the circumstancee surrounding the campaign. You indicated that no specific legisletive candidate will he identified by name, by picture, or by any other means.

The Commission has recently promulgated regulations governing pre-candidacy or "testing the waters" activity, 15.N.J.R.1182(e), July 18, 1983. Under those regulations, any individual, or any committee acting on the behalf of an individuel , that receives funds or makes payments solely for the purpose of determining whether that individual should become a candidate for public elective office in this State is subject to certain record keeping and reporting requirements. If the individual does become a "candidate," within the meaning of that term as defined in N.J.S.A.19:44A-3(c), the funds received and the peyments made become became "contributions" and "expenditures" subject to

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the limitations, prohibitions and requirements of the Reporting Act. N.J.A.C.19:25-3.1. In a gubernatorial election, funds expended for "testing the waters" activity on behalf of an individual who becomes a candidate are included in determining the total amount the gubernatorial candidate is permitted to expend on behalf of the gubernatorial candidacy. N.J.A.C. 19:25-16.9(a)(3); 19:25-15.11(a)(3).

In Advisory Opinion 33-1981 the Commission considered a related issue whether a State political party committee may allocate the cost of institutional advertising to non-gubernatorial candidates when such advertising occurs during the course of a gubernatorial campaign. While the opinion is not directly applicable to the question presented today, Advisory Opinion 33-1981 continues to provide guidence with respect to the allocation of expenditures in the context of a gubernatorial campaign.

Essential to the determination of the issue presented today is whether the advertisement in question could be seid to have been made, et least in part, on behalf of a gubernatorial candidate or in furtherance of en assessment by an individual who is considering the initiation of a candidacy for the office of Governor. Among the many factors that are relevant to the determination of this issue are: The timing of the advertisement in relation to a gubernatorial election; whether an advertisement can be said to contain an unambiguous reference to Governor Kean as a candidate or a potential candidate for the office of Governor; the individual or organization which is sponsoring or underwriting the cost of the advertisement; whether the advertisement arises in the context of an election in which the individual in question can be expected to play a role independent of n potential gubernatorial candidacy; whether the thrust of the advertisement is to promote the institutional interests of a state political party committee or, in contrast, the personal views of a candidate or potential candidate for the office of Governor.

In the case at hand, the Commission is of the opinion that none of the cost of the advertising described in the request would be allocable to a future candidacy of Governor Kenn for re-election. The advertisements are being produced and paid for by the Republican State Committee in furtherance of its institutional function to promote the election of Republican candidates. The advertisements will appear in the context of a biennial legislative campaign, two years prior to the general election in which the office of Governor will be contested. Moreover, Governor Kean's participation in these ads can properly be described as being in furtheranne of his responsibilities as a leader of the Republican party in New Jereey.

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The "testing the waters" regulations recently enacted by the Commission were not intended to restrict public figures from actively participating in legislative elections where, as here, the expenditures are being made by a State political party committee, in the course of the legislative campaign, and the description of the proposed text* does not indicate the presence of an unambiguous reference in furtherance of a candidacy or can be said to be part of an assessment of a potential candidacy.

There is no way to escape the fact that incumhent office holders or other public figures obtain some colleteral benefits to a potential guhernatorial campaign when they engage in activities directly related to their other public and political responsibilities. It is when the timing, context and other circumstance of the expenditure can be reasonably said to have been made on behalf of a candidate or as part of an assessment of a potential candidacy that an allocation must occur.

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

By:

GREGORY E. NAGY Staff Counsel

GN/ck c/Frank B. Holman, Chairman N.J. Republican State Committee

*This opinion is based soley upon information contained in Mr. Kozlov's letter and statements made at the Commission meeting. The Commission declined the opportunity to review the text in print because of the request of the Republican State Committee that the text remain confidential until the siring of the advertisements. The ultimate application of this opinion is therefore dependent on the rext conforming to the description and understandings expressed in the Opinion.