

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Deputy Director
Re: *Membership and Organization of County Committees as discussed in Hartman v. Covert*, 303 N.J. Super. 326 (Law Div. 1997) and *Central Jersey Progressive Democrats v. Flynn*, MER L 000732-19 (Law Div. Sep. 02, 2020).
Date: January 11, 2021

MEMORANDUM

Executive Summary

The requirements that the election of county committee members and the selection of the committee chair and vice-chair be based upon gender are embedded in New Jersey's election statute.¹ Historically, these requirements were added to the statute to "...equalize opportunity between the genders in the political forum and to encourage women's involvement in politics."² In recent years, the efficacy of these provisions has been called into question by those seeking political office.

In *Hartman v. Covert*, a candidate for the political party committee chair position challenged the election of the chair and vice-chair that resulted in two women filling those positions.³ The trial court determined that the state statute restricting positions of political party committee chair and vice-chair to persons of opposite genders, N.J.S. 19:5-3, was unconstitutional because it burdened the associational rights of parties and their members.⁴

Twenty-three years after the *Hartman* decision, the constitutionality of N.J.S. 19:5-3 was questioned again. In *Central Jersey Progressive Democrats v. Flynn*, the Plaintiffs sought to compel the Middlesex County Clerk to prepare primary ballots that called for the election of two "committeepersons" rather than distinguish the candidates based upon their gender.⁵ Finding that the current statute violates the freedom of association and impermissibly discriminates on the basis of gender the trial court determined that all future ballots, in Middlesex County, are to be prepared without regard to gender.⁶

The decisions in *Hartman* and *Central Jersey Progressive Democrats* point out that in the absence of a binding, statewide legal precedent that finds the current statute unconstitutional, or a statutory amendment, each County Clerk is constrained to follow the language set forth in the statute even if the results might be contrary to the intent of the statute.

¹ N.J. STAT. ANN. § 19:5-3 (West 2020).

² *Hartman v. Covert*, 303 N.J. Super. 326 (Law. Div. 1997).

³ *Id.*

⁴ *Id.*

⁵ *Central Jersey Progressive Democrats v. Flynn*, MER L 000732-19, slip op. at 2 (Law Div. Sep. 02, 2020).

⁶ *Id.* at 7.

Relevant Statute

The membership and organization of county committees is set forth in **N.J.S. 19:5-3**, and provides, in relevant part:

[...] The county committee shall consist of one male and one female member from each unit of representation in the county. The male receiving the highest number of votes among the male candidates and the female receiving the highest number of votes among the female candidates shall be declared elected [...]

[...] The members shall also elect a vice-chairperson of the opposite sex of the chairperson to hold office for 1 year or until a successor is elected and the vice-chairperson shall perform all duties required by law and the constitution and bylaws of such committee[....]

Background

As originally enacted in 1930, each county committee was required to consist of one male and one female member from each unit of representation in the county.⁷ This requirement has remained unchanged for almost 100 years.⁸ The 1930 statute, did not, however, contain a reference to the gender of the committee chair or vice-chair.⁹ Rather, the statute made reference to a “chairman” who would preside over the meetings of the committee.¹⁰ The title “chairman” ostensibly required to the selection of a man to fill this role. It was another quarter of a century before the first reference to the gender of the committee leadership would appear in the statute.¹¹

In 1955, N.J.S. 19:5-3 was amended to provide for the election of women to a leadership roles within each county committee.¹² Although women were not statutorily eligible to serve as the leader of the committee, the members were required to elect a “vice-chairlady” to hold office for a period of one year.¹³ The vice-chairlady was required to “perform all duties required of her by law and the constitution and by-laws of such committee.”¹⁴ For the next decade, the statute would continue to reference the position and responsibilities of the vice-chairlady.¹⁵

The requirement that a county committee consist of a “chairman” and “vice-chairlady” would cease to exist in 1964.¹⁶ By way of a legislative amendment, reference to a male chair and a female vice-chair were removed from the statute. The statute instead required that the chair and vice-chair positions be filled by individuals of the opposite gender.¹⁷ In the years that followed,

⁷ L. 1930, c. 187, ¶46, p. 690.

⁸ See N.J. STAT. ANN. § 19:5-3 (West 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ N.J.S. 19:5-3, L.1955, c.236, p. 904, sec. 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ N.J.S. 19:5-3, L.1964, c.23, sec. 1.

¹⁷ *Id.*

the county committee statute were modified another twelve times.¹⁸ The gender requirements regarding the chair and the vice-chair, however, remained unchanged until New Jersey’s judiciary intervened.

Analysis

• *Hartman v. Covert*

In 1997, Francis Hartman (“Hartman” or “Plaintiff”) ran as a candidate for the Chair position of the Burlington County Democratic Committee (“Committee”).¹⁹ Ultimately, Lee O’Toole and Alice Furia, both women, won the election and were named as Chair and Vice-Chair of the Committee.²⁰ Hartman questioned whether the Chair-elect could be elected along with a Vice-Chair who was also a woman.²¹ He contended that such a result was “...in derogation of the apparent dictate of N.J.S. 19:5-3.”²² Thus, the issue that confronted the *Hartman* Court was the constitutionality of a statute that prohibited an individual from holding a leadership position on a county committee based solely on gender²³

The *Hartman* Court relied on the United States Supreme Court decision in *Eu v. San Francisco Cnty. Democratic Cent. Comm.*²⁴ At issue in *Eu* was a California law that restricted the organization and composition of local governing bodies by limiting the term of office for the central committee chair and requiring that the chair rotate between the residences of northern and southern California.²⁵ The *Eu* Court determined that these laws “prevent political parties from governing themselves with the structure that they think is best.”²⁶ The Court concluded that “the challenged portions of the law did burden the rights protected by the First and Fourteenth Amendments [and ...] that a State cannot justify regulating a party’s internal affairs without showing that such regulation is necessary to ensure an election is orderly and fair.”²⁷

In the *Hartman* case, the Court noted that “[a] political party’s determination of the structure which best allows it to pursue its political goals, is protected by the Constitution and that

¹⁸ See L.1965, c. 4, § 3; L.1966, c. 19, § 2; L.1967, c. 7, § 2; L.1967, c. 26, § 2, eff. April 21, 1967; L.1968, c. 292, § 2, eff. Sept. 6, 1968; L.1978, c. 29, § 1, eff. June 7, 1978; L.1979, c. 458, § 2, eff. Feb. 27, 1980; L.1980, c. 105, § 3, eff. Sept. 11, 1980; L.2009, c. 135, § 2, eff. Oct. 2, 2009; L.2011, c. 180, § 1, eff. Jan. 17, 2012.

¹⁹ *Hartman v. Covert*, 303 N.J. Super. 326, 328-329 (Law Div. 1997).

²⁰ *Id.* at 329.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989). Also, at issue in *Eu* was a California statute that prohibited political parties from endorsing candidates in primary elections. *Id.* at 224 (citations omitted). This statute was struck down by the *Eu* court because it burdened party officials’ freedom of speech, as well as their freedom of association rights to identify people who constitute the association and to select a standard bearer who best represents the party’s ideologies and preferences. *Id.*

²⁵ *Id.* at 230.

²⁶ *Id.*

²⁷ *Id.* at 230, 233.

freedom of association encompasses a political party's decision [about][sic] the identity of, and the process for, electing its leaders.”²⁸

The positions of chair and vice-chair, as set forth in N.J.S. 19:5-3, are restricted to individuals of opposite genders. This statute, as in *Eu*, “limits New Jersey political parties’ discretion in how to organize themselves and select their leaders, thus burdening the associational rights of the parties and their members.”²⁹

A state may, under limited circumstances, enact a statute that interferes with internal party affairs.³⁰ Such a statutory restriction, however, is only permissible when it is “necessary to [effectuate] the successful completion of a party’s external responsibilities in ensuring the order and fairness of elections.”³¹ The requirement that one man and one woman serve as chair or vice chair does not ensure an “orderly and fair” election process and is therefore unconstitutional and invalid.³²

- *Central Jersey Progressive Democrats v. Flynn*

In April of 2019, Doreen Bailey, Margaret D. Ball, Staci Berger, Quiyana Butler, Laura Jill Leibowitz, Roshanna Malone and Kamuela N. Tilman (collectively, the “Plaintiffs”), each of whom ran for Middlesex County Democratic Committee, filed a Verified Complaint and Order to Show Cause in the Superior Court of Mercer County.³³

The Plaintiffs alleged that N.J.S. 19:5-3 violated their federal and state constitutional rights to equal protection, the right to vote, and their freedom of association because it mandated that county committees “consist of one male and one female member from each unit of representation in the county”³⁴ The Plaintiffs sought to compel the County Clerk to “...provide nominating petitions and prepare ballots for county committee elections that list candidates irrespective of sex or gender and permit candidates to run on the same slogan as another person of the same gender, such that ballot draws do not distinguish between candidates on the basis of sex or gender.”³⁵

Although ballot design was not at issue in *Hartman*, the Court noted that the Plaintiffs’ request was for ballots that did not effectuate the statute found to be unconstitutional in that case.³⁶ While acknowledging that the trial court decision in *Hartman* decision was not binding, the Court nevertheless chose to adopt the *Hartman* court’s decision. In doing so, the Court opined that, “...the purpose of N.J.S. 19:5-3 has largely been subsumed by federal and state laws against gender

²⁸ *Hartman*, 303 N.J. Super. at 332 quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (internal citations omitted).

²⁹ *Hartman*, 303 N.J. Super. at 334.

³⁰ *Id.* at 333 quoting *Eu*, 489 U.S. at 233.

³¹ *Id.* quoting *Eu*, 489 U.S. at 231-32.

³² *Id.*

³³ *Central Jersey Progressive Democrats v. Flynn*, MER L 000732-19, slip op. at 2 (Law Div. Sep. 02, 2020). By June of 2019, only seven of the plaintiff’s remained in the action each of whom intended to run on the Central Jersey Progressive Democrats slate in the future.

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.* at 6.

discrimination³⁷, [the] New Jersey Law Against Discrimination³⁸, as well as the by dramatic cultural change and a broad acceptance of women in politics that has occurred since gender references first inserted into N.J.S.A. 19:5-3 in 1955.”³⁹

The Court determined that N.J.S. 19:5-3 was unconstitutional and invalid for several reasons. First, the statute burdens the freedom of association by preventing candidates of the same sex from running on the same slate or from obtaining office within the same election district.⁴⁰ Next, the Court found that the statute “...discriminates on the basis of sex or gender....” reasoning that “...under the statute, some candidates will lose to those who received fewer votes, solely because of the genders of the candidates.”⁴¹ Finally, the Court held that “[t]he text of the statute also effectively bars non-binary candidates from running for or obtaining office.”⁴² Accordingly, all “...future ballots must be prepared and drawn by the Middlesex County Clerk in a non-discriminatory manner, without regard to the sex or gender of candidates.”⁴³

Conclusion

Staff seeks authorization to conduct additional research and outreach to ascertain whether the State interest in elections would be furthered by the elimination of the statutory references to the sex or gender of candidates for public office found in N.J.S. 19:5-3.

³⁷ See *Frank v. Ivy Club*, 120 N.J. 73 (1990); *Fuchilla v. Layman*, 109, N.J. 319, 334 (1988).

³⁸ N.J. STAT. ANN. §10:5-1 to -42 (West, 2020).

³⁹ *Central Jersey Progressive Democrats*, slip op. at 6.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 7.