



## State of New Jersey

### ELECTION LAW ENFORCEMENT COMMISSION

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#### NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

#### PUBLIC SESSION MINUTES

APRIL 19, 1988

All of the Commission members and senior staff were present, except Counsel Edward J. Farrell.

Chairman Bedford called the meeting to order and announced that pursuant to the "Open Public Meetings Act," P.L. 1974, c.231, special notice of the meeting of the Commission had been filed with the Secretary of State's office and distributed to the entire State House Press Corps.

The meeting convened at 10:20 a.m. at the Commission's offices at 28 West State Street, Trenton, New Jersey.

#### 1. Approval of Public Session Minutes of March 9, 1988

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and a vote of 4-0, the Commission approved the Public Session Minutes of March 9, 1988 as amended.

#### 2. Executive Directors' Report

##### A. Personnel

Executive Director Herrmann reported that Barbara Fasanella and Shreve Marshall were hired recently as Report Examiners. He said that the Review and Investigation Section's monthly production was not affected and that the transition period went very smoothly, with employee training completed expeditiously.

##### B. Staff Activities

Executive Director Herrmann said that staff recently completed five Public Information Sessions for the primary election. He said that the sessions, which provide candidates and treasurers with information about their filing responsibilities, were held at locations throughout the State.

Commissioner Linett indicated that he would like to be advised of any future sessions so that he could plan to attend one.

Executive Director Herrmann reported that he recently spoke to the Belle Mead Rotary Club on April 6, 1988. He said that he also spoke at the Morris County Young Republican's campaign college on April 9, 1988.

Executive Director Herrmann also noted that Deputy Director Brindle and he attended the Political Finance Forum in Washington, D.C. (April 13, 1988). He said that the discussion involved the role of PACs in federal campaigns.

Executive Director Herrmann said that he would be speaking to students at Rutgers Newark on Tuesday April 26, 1988. Finally, Executive Director Herrmann reported that an article by him, "Campaign Finance: What Kind of Reform?" has been published in the April 1988 edition of State Government News.

C. NORCOL Conference

Executive Director Herrmann said that planning for the NORCOL Conference of August 8, 1988 was progressing very smoothly. He said that Deputy Director Brindle is coordinating the conference. He added that Attorney General Cary Edwards has been invited to be the luncheon speaker and that he would inform the Commission in May as to whether he would be able to attend the conference.

Executive Director Herrmann indicated that Chairman Bedford would provide the greeting on behalf of the Commission and the State. He said also that any Commissioner who desired to do so could serve as a panel moderator.

Commissioner Linett said that he would be willing to help out in any way that he could.

D. Campaign Cost Report

Executive Director Herrmann cited the Gubernatorial Cost Analysis Report contained in the Commissioner's packets. He said that the study, principally written by Deputy Director Brindle, edited by himself, and approved by nationally renowned public financing scholar, Dr. Herbert E. Alexander, contained much analysis about the cost of running gubernatorial elections in New Jersey.

He asked that the members of the Commission review the work and return it to him by April 28, 1988.

E. Recognition for ELEC

Executive Director Herrmann reported that Professor Frank J. Sorauf, author of Money in American Elections (1988), cites ELEC as one of two agencies providing campaign finance data "far above the average in quality." He said that the California Fair Campaign Practices Commission is the other agency mentioned. Executive Director Herrmann said that the California agency has a budget  $3\frac{1}{2}$  times the Commission's. He said that the same book also cites ELEC as one of four governmental ethics agencies with strong enforcement records.

F. Meeting Dates

Executive Director Herrmann noted that the next Commission meeting was scheduled for May 17, 1988 at the Somerset County Court House, 10:00 a.m.

The Commission decided also to have a meeting on May 9, 1988 in Trenton to discuss the public financing regulations. The meeting will commence at 9:30 a.m.

At this juncture, Chairman Bedford noted that there appears to be some activity in the Legislature vis-a-vis campaign finance issues. He asked if, for instance, it would be inappropriate for the Commission to take the position that surplus funds should not go to charity. He said that he feels very strongly about this issue. Chairman Bedford said that transferring the funds to other candidates, to political parties, and to future campaigns should be permissible. He also indicated that having surplus funds escheat to the State would be acceptable; but contributor money should not be made available to charity. Chairman Bedford said that contributors do not give to candidates with the idea that these candidates would donate leftover funds to charity.

Executive Director Herrmann said that it would not be inappropriate to give the sense of the Commission on this issue.

Vice Chairman McNany said that he too objects to a situation where an individual who is not running for office again contributes his or her surplus funds to charity.

Commissioner Linett added that "what we are really talking about is big chunks of money going to charity. We're not talking about [a limited amount of] leftover funds going toward purchasing tickets to a charitable event."

Chairman Bedford indicated that Commissioner Linett's point was correct.

Commissioner Axtell indicated that he believed that leftover funds should not go to charity either.

Chairman Bedford suggested that it was the consensus of the Commission that the Legislature should not permit surplus campaign funds to be used for charity.

Commissioner Axtell interjected that he recently attended a non-political special event, where he encountered Assembly Speaker Chuck Hardwick. Commissioner Axtell said that the Speaker praised the Commission and the work of Executive Director Herrmann.

2. Advisory Opinion No. 4-1988

Commissioner Linett said that he had only received Counsel Farrell's material on Saturday, just prior to the Tuesday meeting. He said that this is not enough time for the Commissioners to study the material. Commissioner

Linett indicated that he had intended to discuss this matter with Counsel Farrell at today's meeting.

Chairman Bedford stated that he had spoken to Counsel Farrell about this matter privately. He said that it is important for the Counsel to provide meeting material to Commission and staff at least one week in advance of the Commission meeting.

Commissioner Linett next spoke to the merits of Counsel Farrell's response to Advisory Opinion No. 4-1988. Advisory Opinion No. 4-1988 was submitted by Donald T. Jenkins, Vice President of New Jersey Financial Services Association. The request asks for information about the association forming a PAC and about the ability of the PAC to accept contributions from all of the association's members. The association has a diversified membership. Members range from independent operators that are in the finance and second-mortgage business to national and international lenders with offices throughout the country. Some of the biggest member companies have holdings that may include banks and insurance companies.

Commissioner Linett stated that the first paragraph of Counsel Farrell's draft letter to the Attorney General was inaccurate. He said that Mr. Jenkins did not ask that the Commission seek an opinion from the Attorney General. Commissioner Linett said that Mr. Jenkins was looking for information from the Commission about creating a PAC; looking more for administrative help from the staff than a formal opinion from the Attorney General

Commissioner Linett suggested that the Commission should invite representatives of the New Jersey Financial Services Association to its offices to discuss the questions raised in the advisory opinion request.

Commissioner Linett said that the main question raised by the advisory opinion concerned the solicitation of political contributions from national entities that own or have an interest in lending institutions or insurance companies in other states. He said that this part of the inquiry should be referred to the Attorney General.

Legal Director Nagy remarked that an opinion by the Attorney General in 1983 addressed this issue.

Commissioner Linett suggested that the response of the Commission to New Jersey Financial Services Association should contain a copy of the Attorney General's Formal Opinion No. 4-1983 and an invitation to the Association to contact staff for any further questions regarding the formulation of a PAC.

Commissioner Linett made a motion to this effect, seconded by Commissioner Axtell. By a vote of 4-0 the Commission directed Legal Director Nagy to respond to Mr. Jenkins request in the manner cited above.

3. Advisory Opinion Request No. 5-1988

This advisory opinion involves a request from Assemblyman Frank A. LoBiondo, (R) Cape May, for an opinion as to whether funds from his "Friends of" account can be used to support a legislative district office.

Specifically, the Assemblyman asks whether signs for the office can be paid for out of this account and whether the expenses for a grand opening of the office can be assumed by the "Friends of Frank A. LoBiondo" committee.

Legal Director Nagy suggested that language from the surplus funds regulation be cited in Counsel Farrell's draft response to Assemblyman LoBiondo. He said that the language in question states directly that the Commission has no jurisdiction over the issue of whether or not campaign funds can be used to support district offices. He said that this language was added as an amendment to the surplus funds regulations after much deliberation by the Commission in January, 1987.

Legal Director Nagy concluded by saying that Assemblyman LoBiondo should be referred to the Joint Legislative Committee on Ethical Standards.

Chairman Bedford said that it would be sensible to include this reference to the amendatory language.

Chairman Bedford asked for a motion to reject Counsel Farrell's draft response and approve Legal Director Nagy's suggested response. Vice Chairman McNany moved the proposal and Commissioner Linett seconded it. By a vote of 4-0, the Commission approved Legal Director Nagy's recommended response to AO-5-1988. The Commission directed Legal Director Nagy to prepare a draft response for the next meeting.

4. Code of Ethics

Chairman Bedford inquired as to whether the members of the Commission had reviewed Deputy Director Brindle's memorandum on codes of ethics in other states and Legal Director Nagy's proposed amendment to the Commission's own code. This proposed amendment would free commissioner and staff spouses from regulations prohibiting political contributions. Chairman Bedford said that the amendment being considered by the Commission is contained in Section 8(c) of Section IV of the Code of Ethics. The amendment reads:

A political contribution made by the spouse of a Commission member or employee shall be permitted under this Code of Ethics provided that the funds used to make such a contribution are derived from separate assets of the spouse neither controlled by nor owned in whole or in part by the Commission member or employee.

Chairman Bedford said that the memorandum done by Deputy Director Brindle indicates that the Commission's Code of Ethics is the toughest in the nation. It states that none of the agencies surveyed prohibit political contributions by spouses of commissioners and staff. It further indicates that most states allow commissioners to make contributions to federal candidates.

At this point, Mr. Edward McCool, Executive Director of New Jersey Common Cause asked to be recognized. He said that he was concerned about the appearance of conflict of interest that might accompany the Commission's easing of its rules of conduct.

Chairman Bedford said that he believed that it was unconstitutional for the Commission to prohibit spouses from making political contributions.

On a motion by Commissioner Linett, seconded by Commissioner Axtell and a vote of 4-0, the Commission adopted the amendment to Section 8(c) of Section IV of its Code of Ethics, which permits spouses of commissioners and staff to make political contributions.

This change in the Ethics Code must be approved by the Attorney General and the Executive Commission on Ethical Standards.

Chairman Bedford inquired as to whether or not the Commission desired to consider the question of whether or not Commissioners should be able to contribute to federal candidates.

Commissioner Linett said that it was important for the Commission to be perceived as impartial. At the same time, he noted that the Commission was bipartisan and designed not to favor one party over the other.

Commissioner Linett said that constitutionally each citizen has a right to participate in the political process, except, perhaps in truly unusual circumstances. He said that even the federal Hatch Act has been modified to allow federal employees to participate in the process.

Commissioner Linett said that if the Commission continued its ban on federal giving it should nevertheless permit contributions to political parties.

Chairman Bedford suggested that the Commission take more time to consider this particular issue. He suggested postponing action on the question until the May 17, 1988 meeting.

Commissioner Axtell stated that he was prepared to vote and did not need more time for reflection.

He said that he favored Commissioners making contributions to national parties and federal candidates.

Commissioner Linett indicated that he would like more time to think about the issue.

Common Cause Director McCool asked to be recognized. He said that once again the Commission should consider the question of it avoiding any appearance of conflict of interest.

Chairman Bedford said that it was essential for public agencies to keep the trust of the people they serve but that he felt that this question of appearance of conflict of interest is overdone.

Mr. McCool responded that he did not think, looking at government, that you can ever overdo it.

The Commission agreed to postpone a decision on this matter until the May 17, 1988 meeting. It directed staff to draft a proposed amendment to the Code of Ethics for consideration at that meeting.

#### 5. Disclosure of Executive Session Minutes

The Commission reviewed an April 7, 1988 letter and attachments from Legal Director Nagy to Commissioner Linett.

The letter concludes that the Commission could stop routinely releasing the "no action" letters and substantially extend the time frame for releasing the pertinent executive minutes. The letter states that the executive session minutes pertinent to a "no action" investigation do appear to be subject to public release at some point of time determined by the Commission; see N.J.S.A. 10:4-13.

Chairman Bedford suggested that the members of the press corps may take an interest in this issue. He said that the crux of the matter is that if there is no basis for a complaint and an exoneration letter is released to the public, it could, nevertheless, do harm to the person who was the subject of the investigation.

Executive Director Herrmann remarked it might also be argued that if a person is cleared of an alleged violation then it would be important to release that information so as to allow the subject of an investigation to get out from under a cloud of suspicion.

Commissioner Linett said that in the political arena it is very easy to damage a candidate's reputation by making wild accusations. He said that for this reason he did not believe that the Commission should release exoneration letters to the public. He said that the only time that the Commission should do so is in a situation when a matter becomes public by some other means.

Vice Chairman McNany made a motion to the effect that the Commission, as a general policy, should not release exoneration letters, but rather leave the

release of such material to the individual receiving the letter. Commissioner Axtell seconded the motion and on a vote of 4-0 the motion carried.

With respect to the "Public Record Status of Commission Documents" prepared on April 6, 1988 by Legal Director Nagy, the Commission directed that the Chairman's name be added to the paragraph entitled "Commission Release Policy" of the section "Document: Miscellaneous Correspondence."

Commissioner Linett suggested that the language be revised to reflect this change. He asked that the matter be considered at the May 17, 1988 meeting.

#### 6. Public Financing Regulations

The Commission agreed to discuss possible amendments to its public financing regulations at the special Commission meeting scheduled for May 9, 1988.

A brief preliminary discussion did occur, however, which dealt with the concept of "testing the waters" by potential gubernatorial candidates.

Under most circumstances, an individual becomes a candidate when announcing his or her candidacy or when filing a nominating petition with the Secretary of State. Prior to this time he or she may be considered to be "testing the waters." "Testing the waters" financial activity is not reportable under the law unless the individual becomes a candidate for governor. If this occurs, then all activity by the candidate which took place while he or she was "testing the waters" becomes reportable. "Testing the waters" is a state-of-the-art term used by politicians, academics and the courts and means activity intended to determine if an individual can be a viable candidate; see N.J.A.C. 19:25-3.1.

Commissioner Linett indicated that he was concerned about the "testing the waters" concept. He said that great sums of money could be raised and spent by a potential candidate that would never be subject to either the expenditure or contribution limits. He said that potential candidates could circumvent those limits by waiting until the last minute to declare their candidacies. He said that there should be some standard established - besides the individual declaring his or her candidacy or submitting a nominating petition - by which an individual would be deemed a gubernatorial candidate. Commissioner Linett suggested that perhaps the concept of "testing the waters" should be eliminated altogether.

Executive Director Herrmann suggested that the standard Commissioner Linett was looking for might possibly be the public financing program's qualification threshold. He said that by using this standard an individual could automatically become a candidate for governor after raising and spending \$50,000 in "testing the waters" activity.

Commissioner Linett queried whether or not the public financing law precluded individuals from raising money prior to a year before the gubernatorial general election.

Legal Director Nagy indicated that public funds could not be distributed prior to January 1st of the year in which a gubernatorial election occurs, but money could and has been raised earlier.

At this point, the Commission prepared to enter into executive session.

Common Cause Executive Director Edward McCool asked to be recognized prior to the Commission convening its executive session.

Mr. McCool requested that the Commission mention in its agenda when it intends to endorse legislation. He said that he is making this request because he wants to have input into these policy decisions. Mr. McCool said that the Commission, for instance, recently endorsed the Martin campaign finance bill but not the Schluter bill. Mr. McCool suggested that the formal endorsement of legislation by ELEC is a major policy decision and is subject to the Open Public Meetings Act. He said that the public should have the right to be heard before a Commission such as ELEC takes a position on a bill. He said that these decisions should not be made in a vacuum.

Executive Director Herrmann said that as a practical matter, one cannot predict when a committee meeting will be scheduled and a bill affecting ELEC considered. He said that if he knows of such an event prior to a Commission meeting, he always discusses the situation with the members at the meeting of the Commission. On the other hand, he added, when a bill is heard by a legislative committee prior to a Commission meeting, he always discusses his activity with the Commissioners at their next meeting. He said that staff needs that kind of flexibility to function efficiently and effectively. Moreover, even when he is able to discuss a bill with the Commission before a committee meeting, changes may occur in the legislation before and even during that committee meeting to which he must respond.

Executive Director Herrmann said that the Commission extended its support to the Martin bill because in large part it is based on recommendations made by ELEC in numerous annual reports and press releases. He said that its stance on these provisions has been a matter of public record for a number of years. How could the Commission not be in favor of its own suggestions? Also, he stated that the Commission had endorsed many of the major provisions of the Schluter bill but had remained neutral on certain major policy innovations beyond the Commission's current jurisdiction.

Mr. McCool stated that his concern involved the Commission violating the "Sunshine Law." He said that he could point to at least two instances where the Commission violated the Sunshine Law at today's meeting.

Chairman Bedford said that the members would take Mr. McCool's concerns under advisement and asked Mr. McCool to put his concerns in writing to the Commission.

6. Executive Session

On a motion by Commissioner Axtell, seconded by Commissioner Linett and a vote of 4-0, the Commission voted to go into Executive Session to discuss investigative and enforcement matters, the results of which will be made public at their conclusion.

7. Adjournment

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and a vote of 4-0, the Commission voted to adjourn at 1:21 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, Ph.D.

FMH/ck