



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

RALPH V. MARTIN
Chair

DAVID LINETT
Vice Chair

PAULA A. FRANZESE
Commissioner

Respond to:
CN-185

Trenton, New Jersey 08625-0185
(609) 292-8700

FREDERICK M. HERRMANN, Ph.D.
Executive Director

JEFFREY M. BRINDLE
Deputy Director

GREGORY E. NAGY
Legal Director

JAMES P. WYSE
Counsel

October 23, 1996

The Honorable Joseph V. Doria, Jr.
Assemblyman, 31st District
235 Broadway
Bayonne, New Jersey 07002

Advisory Opinion No. 04-1996

Dear Assemblyman Doria:

The Commission has considered your request for an advisory opinion, and has directed me to issue the following response. You have asked several questions concerning the possibility that you may either explore the feasibility of or undertake a candidacy for State Senate. Among the questions you have asked the Commission to consider is whether or not you may transfer campaign funds remaining unexpended in your 1995 Assembly general election account to an account you may establish for a future State Senate candidacy. Such a transfer of funds from a prior candidacy to a subsequent one is commonly referred to as a "rollover" of campaign funds.

Attached to this letter for your reference is a copy of Advisory Opinion 06-1995, in which the Commission held that a former Assemblyman who was appointed to fill a vacant Senate seat was permitted to rollover his Assembly account into a Senate candidacy account.

Please note that in responding to your request the Commission has reordered your questions in order to respond more concisely.

Submitted Fact Record

You write that you currently maintain an election fund account, "Election Fund for Assemblyman Joseph V. Doria, Jr." (hereafter referred to as 1995 Assembly general election account), and you may seek election to the State Senate in a future election. Our records indicate that the most recent report of this entity was filed on October 15, 1996, and reported a closing balance of \$4,620.53. Because it was filed on a form intended for continuing political committees (Form R-3) rather than the applicable form for a candidate committee (Form R-1), there is no indication of the election to which it pertains. However, since prior reports filed by this candidate committee on the appropriate Form R-1 have all been designated for your 1995 general election candidacy for Assembly, the Commission assumes that your intent is that this report is also intended for that 1995 general election

candidacy. Because the reports are designated for the 1995 general election and not for an upcoming election, contributions received into that account are still subject to the contribution limits applicable to that past election. Accordingly, a contributor who has given the maximum per election contribution to your 1995 Assembly general election candidacy cannot make any further contributions to this account until it is designated for some future candidacy.

Although your letter does not specify in which election you may choose to become a candidate for State Senate, for purposes of this request, the Commission presumes that you are referring to the next Senate primary election in 1997.

Question 1. At what point is an Assembly member considered a Senate candidate?

Commission Response: The term "candidate" is defined in paragraph (1) of N.J.S.A. 19:44A-3c to mean, in pertinent part, an individual seeking election to a public office. In terms of acquiring candidate status for the purpose of the Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Act), the receipt of an initial contribution or the making of an initial expenditure to aid or promote a candidacy for an elected public office would give rise to the requirement to establish a candidate committee for reporting and other purposes; see N.J.S.A. 19:44A-9a.

You currently hold candidate status under the Act for the 1995 general election for the office of member of the Assembly because you established a candidate committee, "Election Fund for Assemblyman Joseph V. Doria, Jr.," which continues to receive contributions and make expenditures, and continues to be designated for the 1995 Assembly general election; see paragraph (2) of the definition of "candidate," which is defined to include an individual who has been elected to an office, and who receives contributions and makes expenditures for permissible campaign and officeholding purposes pursuant to N.J.S.A. 19:44A-11.2..

Therefore, if you were to receive a contribution or make an expenditure to seek election to another office, such as presumably the 1997 primary election for State Senate, and you continued to maintain your 1995 Assembly general election account, you would become a candidate in relation to two or more public offices in separate elections (that is, you would remain a candidate-officeholder for State Assembly in the 1995 general election and you would become a candidate for State Senate in the 1997 primary election). You would therefore be required to establish a separate candidate committee and/or joint candidates committee for those contributions received for your nomination for election to the State Senate in the 1997 primary election; see N.J.S.A. 19:44A-9g and N.J.A.C. 19:25-4.3.

Question 2: Can a current Assembly committee be designated as a Senate account? If yes, what steps must be taken, and are all funds in the Assembly account transferable to the Senate account?

Commission Response: You may redesignate your existing 1995 Assembly general election account as your account for a candidacy for nomination for election in the 1997 Senate primary election. You may

accomplish this by filing a Form D-1 redesignating the 1995 Assembly general election account as your 1997 Senate primary election account. All funds in the existing account may be transferred, except that any contributions received after the close of your 20-day postelection report for the Assembly 1995 general election must be counted against the 1997 Senate primary election contribution limit of that contributor unless the contribution is specifically expended to retire 1995 Assembly general election net outstanding obligations existing as of the date of the close of that 20-day postelection reporting period (that date being November 24, 1995), and is applied to meet net outstanding obligations that exceed the available candidate committee assets as of the date of the close of the 20-day postelection report period (i.e., November 24, 1995).

Discussion: For the reasons discussed below, the Commission finds that a candidate may rollover unspent funds to a future election candidacy without regard to whether or not the future candidacy is for a different office. However, in order to insure that contribution limits are not circumvented, in all cases of rollover (whether for a same office or different office candidacy) restrictions are needed so that only those funds received for the former candidacy are eligible for rollover treatment. Therefore, contributions received after the termination of the 20-day postelection reporting period of the former candidacy, and not used to meet net outstanding obligations existing at the close of the 20-day postelection report period of the former candidacy, must be counted as contributions for the new candidacy.

As noted earlier, the Commission established precedent in Advisory Opinion 06-1995 for the rollover of campaign funds from an Assembly candidacy to a candidacy for State Senate. The officeholder in that case had resigned his Assembly seat and was appointed to fill a vacant Senate seat. Under those circumstances, the former Assemblyman was permitted to transfer contributions received for his abandoned 1995 primary election Assembly race to his 1995 special primary election Senate candidacy. The facts submitted by you in this request differ only in the respect that you continue to hold your Assembly seat, and you are not currently a member of the Senate. However, the Commission finds that your continuation in office as a member of the Assembly does not present any grounds under the Act for denying you the option to rollover your candidate committee account funds for a future Senate campaign.

The 1993 amendments to the Act (see P.L. 1993, c. 65, approved March 8, 1993, effective April 7, 1993) established contribution limits for all candidates, and made other statutory changes to implement uniform application of those limits. In Advisory Opinion 06-1995, the Commission examined two of the statutory provisions that were enacted as part of the 1993 amendments: restrictions on the permissible uses of campaign funds (see N.J.S.A. 19:44A-11.2, hereafter Section 11.2), and restrictions on transfers of funds between accounts established for separate, concurrent candidacies (N.J.S.A. 19:44A-9g, hereafter Section 9g). The Commission concluded that neither of them prohibited the rollover sought in that opinion, and the Commission finds that neither precludes the rollover proposed in this request.

In regard to permissible use restrictions, the Commission ruled that nothing in Section 11.2 prohibited a candidate from exercising a rollover. Specifically, the statutory text in subsection a(1) to the effect that campaign contributions be used for "the payment of campaign expenses" was

construed to mean that contributions could be used for any election candidacy of the candidate arising under the Act, not solely the specific candidacy for which the contributions were received. As the Commission noted, it did not construe the statutory text from prohibiting a candidate winning nomination in a primary election from using unspent contribution proceeds for his or her subsequent general election candidacy; Advisory Opinion 06-1995, page 3. Therefore, the permissible use statute was construed to permit transfer or rollover from one candidacy to another.

Section 9g, enacted as part of the 1993 amendments, provides in pertinent part as follows:

An individual who is a candidate for two or more public offices in an election or in separate elections shall establish separate candidate committees or separate joint candidates committees or both for each office contested.

As noted in Advisory Opinion 06-1995, Section 9g was enacted to promote uniform application of contribution limits, specifically to prevent a candidate for two or more offices from commingling contributions given for separate offices. For example, a candidate who has received a maximum contribution from a contributor for a State legislative race may receive another maximum contribution from the same contributor for a contemporaneous candidacy for a local office provided that each contribution is deposited in the account established for the specific candidacy. While the statutory text does not explicitly so state, it is apparent that during the pendency of the two candidacies, funds cannot be transferred from one candidate committee account to another. This prohibition must be inferred because if the candidate were to make unrestricted transfers, the candidate could conceivably have the benefit of two maximum contributions from a single contributor for one of the races. However, in Advisory Opinion 06-1995, the Commission held that the rollover could be made because at no point were simultaneous candidacies for two different offices being conducted: Senator Bryant had resigned his Assembly seat and anticipated conducting only a candidacy for the State Senate. The Commission therefore concluded that Section 9g is not applicable.

In this question, the submitted facts are that you are contemplating transferring the funds in your Assembly candidate account to a Senate candidacy by redesignation of the account. Therefore you will not have two separate candidate accounts open at any given point in time and, as was the case in Advisory Opinion 06-1995, the possibility of commingling funds contributed to separate candidacies being conducted at the same time does not exist. Consequently, the Commission concludes that, consistent with the result reached in Advisory Opinion 06-1995, you are permitted to make the proposed rollover subject to the conditions set forth above.

Question 3. How does a current member of the Assembly, who maintains an Assembly election account and who is "exploring" a State Senate candidacy handle contributions and expenditures up until a formal declaration of a Senate bid is made?

Commission Response: You may establish an exploratory or "testing-the-waters" committee for the office of member of the State Senate pursuant to

N.J.S.A. 19:44A-11.1 (hereafter, Section 11.1) and N.J.A.C. 19:25-3. In the event that you ultimately become a candidate for Senate, you would however be required to treat all funds received as contributions subject to the limits in the Act, and any funds received in excess of those limits would be subject to refund procedures set forth in N.J.A.C. 19:25-11.8.

Discussion: Section 11.1 provides a procedure under which an individual may receive and expend funds without being subject to any reporting or contribution limit requirements of the Act if the sole purpose of the funds is to determine whether or not that individual should become a candidate for elected office. Activities that may be conducted include conducting a poll and financing telephone and travel expenses pertinent to exploration of the viability of a possible candidacy. However, activities such as undertaking public political advertising, or amassing campaign funds, are specifically prohibited. If the individual does undertake a candidacy, the funds received and payments made become retroactively subject to reporting and contribution limits.

The 1993 amendments added the following sentence to Section 11.1:

The provisions of this section shall not apply to any candidate who has established and is maintaining a candidate committee or a joint candidates committee pursuant to N.J.S.A. 19:44A-9.

The Commission construes this provision consistent with a legislative intent to protect contribution limits by prohibiting a candidate from conducting "testing" activity for the same office the candidate is seeking or holding. Logically, an individual cannot both be exploring a possible candidacy for an office and conducting a candidacy for that office at the same time. As noted in the discussion of Question 1, the statutory definition of a "candidate" includes an individual who has been elected to office and continues to maintain a candidate committee account; see N.J.S.A. 19:44A-3c(2). In your case, you were elected to the Assembly in the 1995 general election and you continue to maintain a candidate committee account for that office. Until such time as you choose to redesignate that account for some other office, it remains an account for an Assembly candidacy, and you are barred by the above-quoted statute from establishing a "testing" account for a future possible Assembly reelection candidacy.

However, even assuming that you maintain your existing Assembly candidate account, no apparent contribution limit consideration appears that would preclude you from establishing a "testing" account for a future possible Senate candidacy. The funds in the "testing" account can only be spent for exploring the viability of a possible future Senate candidacy and cannot be commingled with funds received and spent for an existing Assembly reelection candidacy.

In conclusion, the Commission notes that it was common campaign finance practice prior to the enactment of the 1993 amendments for a candidate holding one office to conduct "testing" activity for another. For example, several elected legislators in the past have received and expended "exploratory" funds for possible gubernatorial candidacies while maintaining

existing reelection candidate accounts as legislators. There is nothing in the statutory history of the 1993 amendments indicating any legislative intent to alter that practice. With that historical perspective, the Commission finds that the word "candidate" in Section 11.1 can only mean an individual who has "candidate" status under the Act. Accordingly, you have "candidate" status specifically in regard to the candidate committee maintained for election to the Assembly. However, as to exploratory activity for a possible future Senate candidacy, you are not yet a "candidate" subject to the Act. Therefore, Section 11.1 permits you to conduct exploratory activities for a possible future Senate candidacy until such time as you become a candidate for Senate.

Thank you for submitting this request.

Very truly yours,

ELECTION LAW ENFORCEMENT COMMISSION

By: _____
GREGORY E. NAGY

attachment

A0049.LTR