

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

PUBLIC SESSION MINUTES

JUNE 25, 1985

PRESENT:

Andrew C. Axtell, Chairman  
Alexander P. Waugh, Jr., Vice Chairman  
Haydn Proctor, Member  
Owen V. McNany, Member  
Frederick M. Herrmann, Executive Director  
Jeffrey M. Brindle, Deputy Director  
Edward J. Farrell, General Counsel  
Gregory E. Nagy, Staff Counsel  
Peter D. Nichols, Director of Public Financing\*

\* Attended the public session only

Chairman Axtell called the meeting to order and announced that pursuant to the "Open Public Meetings Act," P.L. 1974, c. 231, annual notice of the meeting of the Commission has been filed with the Secretary of State's office and distributed to the entire State House press corps.

The meeting convened at 10:00 a.m. at the office of the Commission, 28 West State Street, Trenton, New Jersey.

1. Approval of Public Session Minutes of June 12, 1985

On a motion by Commissioner Proctor, seconded by Commissioner McNany and a vote of 4-0, the Commission approved the public session minutes of June 12, 1985.

2. Advisory Opinion Request to Rescind Opinion 33-1981, Question 4

The usual order of business was changed to allow a review of Advisory Opinion 33-1981, Question 4, at the beginning of the meeting.

William F. Dowd, an attorney representing 13th District Republican Assembly candidates Joseph Azzolina and Joan Smith, asked that A.O. 33-1981, Question 4, be revised or completely rescinded. This opinion states that combined advertisements on behalf of candidates for local and State offices and their party's gubernatorial nominee be allocated against the expenditure limit of the gubernatorial nominee. The allocation would be in an amount not less than 25% of the cost of the advertisement.

Mr. Dowd said that the practical effect of this opinion is that it prevents candidates from mentioning the name of their Party's gubernatorial nominee, even in news releases and during political rallies. He further stated that in this particular year, this ruling gives a distinct advantage to Democratic legislative candidates over their Republican opponents. According to Mr. Dowd, this situation exists because of two reasons: (1) Democratic candidates can criticize the incumbent Republican Governor while Republican candidates cannot respond to that criticism without fear that their rejoinder will be allocated against the Governor's campaign; and (2) in an ironic twist, Democratic legislative candidates can promote their candidacies by picturing themselves in their advertisements with the popular

incumbent GOP Governor, while Republican candidates are prohibited from doing so because of the allocation rule.

Mr. Dowd said that while it is perhaps a laudable goal to prevent Gubernatorial candidates from exceeding their spending limits, this rule goes way beyond the intent of the statutes. He said that it has a chilling effect on First Amendment rights and serves to weaken the party system. He stated that while egregious situations may sometimes occur (with candidates deliberately evading spending limits), the occasional infraction is incidental and inconsequential in comparison to the chilling effect this rule has on candidates who fear that they will run afoul of election laws by mentioning the gubernatorial candidate in their advertisements.

Mr. Dowd said that no legislator would have voted for this law if he knew of the restrictions that would be imposed as a result of it. He urged the Commission to either rescind the opinion, suspend it for the 1985 general election, or modify it immediately.

At this point Bradley S. Brewster, Executive Director of the Assembly Republican staff, supported Mr. Dowd's position and urged the revision of AO 33-1981 by the Commission.

Edward J. Farrell, General Counsel for the Commission, indicated that the Commission recognizes the concern voiced by Mr. Dowd and Mr. Brewster. He said, however, that the concern arises out of the expenditure limit, which the Commission has historically opposed. He said that given the current law, the Commission had to enact guidelines like the one contained in question 4 of AO 33-1981. Without these guidelines, it would be difficult to enforce the statute.

Mr. Farrell stated that in the two elections in which the public financing program existed, there was never any litigation which challenged the constitutionality of the opinion. Rather, the litigation dealt with the allocation being too high. He said that the issues are: (1) whether the requirements are reasonable for the purposes of carrying out the Act, (2) whether the requirements are unduly restrictive and an infringement of free speech, and (3) whether the requirements give equal protection to all parties.

With respect to the equal protection issue, Mr. Farrell stated that the standard must be: is a candidate in a particular situation treated the same as another candidate in that same situation? In other words, is the Governor and his Party treated the same in one given year as another Party's Governor and Party is treated in another given year? Mr. Farrell said that it is not that the rule does not have a chilling effect, it does. He said that the Commission works in that context, however, and has to be concerned with the integrity of the process. Mr. Farrell said that he believes the AO is authorized under Buckley-Valeo and ought to stand.

Mr. Dowd responded by stating that Mr. Farrell's argument translates to: it all evens out in the wash, so therefore the opinion is sound. Mr. Dowd

said that he did not think that this is a constitutional standard. He said that a better standard would be: if a law or opinion in a given case works unfairly, it is a bad law or bad opinion. It does not matter if something may equal out four years from now. If it is a bad opinion, it is bad. According to Mr. Dowd, this type of reasoning should be the standard.

Vice Chairman Waugh stated that the Advisory Opinion, as written, adds certainty to the situation. Candidates are aware of the guidelines and aware of the consequences if they violate them. The opinion helps the Commission to enforce the law. Mr. Waugh suggested that the appropriate action would be to encourage the Legislature to eliminate the spending limit, leaving only the less complicated area of contribution limits with which to deal.

Mr. Dowd responded by saying that the Commission did more than establish certainty, it created a prohibition that deprives candidates of First Amendment rights.

At this point, Mr. Dowd, at Vice Chairman Waugh's request, suggested ways to modify the opinion provided the Commission could not see fit to rescind it altogether. While qualifying his suggestions by stating that they were extemporaneous, Mr. Dowd suggested that the Commission draft two lists: one for prohibited activities and one for non-prohibited activities. Mr. Dowd said that prohibited activities could include combined advertising on billboards, T.V., radio, and brochures. He said that non-prohibited activities could include such things as press releases.

Chairman Axtell asked Mr. Dowd to provide the Commissioners with a letter outlining his recommendations. Mr. Dowd responded affirmatively. Mr. Axtell then polled the Commissioner's to determine if they agreed that the final decision should be postponed until the next meeting on July 10, 1985, at which time the matter would be discussed further. The Commission voted unanimously to postpone final resolution of the matter until the July 10, 1985 Commission meeting.

The Commission, at the suggestion of Vice Chairman Waugh, also directed staff to solicit the opinions of the Gubernatorial candidates and the Assembly Democrats.

### 3. Executive Director's Report

Executive Director Herrmann reported that articles about the Public Financing Program will appear in the July issue of N.J. Reporter and a fall issue of Garden State Report. He said that he was interviewed for these articles and spoke of the Commission's recommendations vis-a-vis the Public Financing Program.

Mr. Herrmann said that he learned recently that the Office of Legislative Services is drafting legislation based upon recommendations contained in the Commission's Annual Report. He surmised that the mailing

of the reports to both the Senate and Assembly partisan staffs of both parties was the catalyst.

With respect to the compromise bill on public funding, Mr. Herrmann reported that the Kean and Shapiro campaigns have met but did not reach a decision. He emphasized the need for a compromise before the fall so that the Commission would not face grave administrative problems created by eleventh hour alterations to the program.

Mr. Herrmann reported that A-3434 (Baer), "The Open Public Debate Act," passed the General Assembly on June 17, 1985. He said that a companion bill in the Senate, S-2833 (Dumont) was released on June 20, 1985 from the Senate State Government Committee. He said that both contain the Commission's amendment to use public funds for administrative costs.

Mr. Herrmann also reported that S-183 (Costa) was released at the same time from that committee. He said that this bill excludes money allocated for incidental references to Gubernatorial candidates from the expenditure limit. Mr. Herrmann indicated that he suggested successful technical amendments to the bill.

Mr. Herrmann discussed as well S-2900 (O'Connor), which prohibits granting of public funds to unopposed primary candidates. He said that a serious problem lies in defining unopposed. S-2900 also was released by the above committee on June 20. He said too that S-2124 (Russo), setting uniform dates for fire district elections, was on the board list on June 24, 1985.

With respect to the Supplemental Appropriation Bill, S-3002 (Weiss), Mr. Herrmann reported that it passed the Senate 37-2 on June 24, 1985. He said that his intense lobbying effort was probably helpful in having the Commission's \$60,000 budget request included in it.

In regard to conference calls, Mr. Herrmann said that they can be arranged through AT&T, as per Commissioner McNany's suggestion at the last meeting.

Mr. Herrmann outlined the summer meeting schedule. The schedule is: July 10 (Trenton), July 23 (Trenton) and August 20, (Interlaken). The July 23 meeting will probably be cancelled at the July 10 meeting.

#### 4. Advisory Opinion Relating to Political Contributions

A memorandum from Kraft & Hughes, Attorneys at Law, June 14, 1985, requesting an advisory opinion vis-a-vis the campaign finance and reporting ramifications of a documentary film on the civil rights record of Governor Kean, was discussed. The film is to be made by a group of minority businessmen.

Basically, the advisory opinion request asks four questions: will the group constitute a political committee, would individuals be prohibited from participating by virtue of their political affiliation, to what extent would

this film constitute a political contribution, and to what extent would an expenditure for the film be allocated against the Governor's campaign expenditure limit?

The request states that the project will be taken without any cooperation or consultation with the Governor's campaign.

In his draft of Advisory Opinion No. 11-1985, General Counsel Farrell wrote that non-partisan efforts at educating the public with respect to candidates, and which are carried out without the prior cooperation or consent of the candidates, are not regarded as activities on behalf of a candidate. Mr. Farrell cautioned, however, that the question of independence is a question of fact, and that a definitive answer to the Advisory Opinion of this group could not be provided until more facts were ascertained or until the project is completed.

Staff Counsel Nagy said that without express advocacy the Commission could not compel reporting. He cited the Long Island Taxpayers Association case. He said that implicit advocacy could not be controlled by the Commission.

Mr. Farrell recommended that the Commission express no opinion because the facts do not permit the Commission to do so.

With minor amendatory language, the Commission, on a motion by Justice Proctor seconded by Vice Chairman Waugh, voted unanimously (4-0) to render no opinion at this time on this AO request and apprise Kraft & Hughes of this decision.

#### 5. Public Financing Report

Director of Public Financing, Peter Nichols, circulated a memorandum concerning the further certification of public matching funds to candidates that qualified for additional funds. Mr. Nichols noted that neither of the two candidates who qualified for additional public funds, Robert J. Del Tufo and Mayor Kenneth A. Gibson, demonstrated a need for additional funding on their 20-day postelection reports. Mr. Nichols stated that both campaigns reported surplus balances for closing cash-on-hand on their postelection reports and, therefore, recommended that the Commission cease certification of additional public matching funds until such time that the candidates demonstrate a need for such funds.

On a motion by Commissioner Proctor seconded by Commissioner Waugh, the Commission approved by a vote of 4-0 the recommendation that the certification of additional sums of public matching funds be discontinued until demonstration of need is shown.

Mr. Nichols requested the Commission's direction with respect to securing an independent auditing service to conduct the audit of the campaign bank accounts of gubernatorial primary candidates participating in the Public Financing Program. Mr. Nichols stated that in 1981 the

Commission had contracted for independent auditing services to review the records of the public funds account for each of the candidates participating in the Program. He noted that in 1977 the audit was done internally by the Commission. In 1981, however, it bid for independent services, presumably because of the number of participating candidates and the burden such an audit would impose upon the staff. Mr. Nichols said that he believed that the independent audit was more desirable than an in-house audit because an audit by a firm that is trained in the field of accounting will be produced more accurately and more quickly.

Further, Mr. Nichols suggested that the audit of the gubernatorial campaigns not be limited to only the public funds bank account, but rather should include all of the campaign bank accounts. Mr. Nichols based his suggestion on the fact that the State has a claim on all surplus campaign funds, not just surplus public funds, and therefore should audit all accounts in order to determine if the State is due reimbursement and in what amount. Mr. Nichols further stated that he had been in contact with the Division of Purchase and Property in the Department of the Treasury and that he was in the process of arranging for a meeting to discuss the more complete details of going to bid for securing of auditing services.

The Commission concurred with Mr. Nichols' reasoning concerning the independent and complete audit of all campaign accounts and directed him to make the arrangements to secure an independent auditing firm.

Mr. Nichols stated that in review of the 20-day postelection reports it had been noted that the Friends of Governor Tom Kean had refunded an additional \$76,000 to contributors prior to the date of the election, thus bringing the total of unrequired reimbursement to approximately \$211,000.

6. Executive Session

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

7. Adjournment

On a motion by Commissioner McNany seconded by Commissioner Proctor and a vote of 4-0, the Commission voted to adjourn.

Respectfully submitted,



FREDERICK M. HERRMANN