

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

PUBLIC SESSION MINUTES

JULY 10, 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
Peter D. Nichols, Director of Public Financing

ABSENT:

Gregory E. Nagy, Staff Counsel

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 25, 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 25, 1985.

2. Executive Session

On a motion by Vice Chairman Waugh, 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.

3. Readoption of subchapters

On a motion by Commissioner Proctor, seconded by Commissioner McNany, the Commission voted 4-0 to readopt subchapters 1, 7, and 11 of the Commission's regulations without change. The Commission authorized the Executive Director to execute the appropriate adoption notice for publication in the New Jersey Register.

4. Public Financing Report

Director of Public Financing, Peter Nichols, reported that his staff had reviewed the most recent applications for public matching funds made by Robert J. Del Tufo and Mayor Kenneth A. Gibson and that summaries of findings were contained within the folders that had been distributed to the Commissioners.

Mr. Nichols stated that he had been in contact with each of the campaigns and explained the Commission's position of cessation of further certification of public matching funds until such time as need is demonstrated.

Mr. Nichols noted that each campaign had expressed concern and that each stated that they may have a need for additional public funds. Mr. Nichols stated that the Del Tufo campaign has qualified for an additional \$9,890.00 in public matching funds, while the Gibson campaign has qualified for an additional \$42,162.74; enough to reach the maximum.

Mr. Nichols further stated that these sums could be certified when need is demonstrated by the campaign, and recommended that the Commission continue its policy to cease further certification of additional public funds until such time that each campaign can demonstrate a need for additional funding.

On a motion by Vice-Chairman Waugh, seconded by Commissioner Proctor and a vote of 4-0, the recommendation to continue the policy of cessation of certification of additional sums of public matching until need is demonstrated was approved.

Mr. Nichols reported that he had been in contact with representatives from the Division of Purchase and Property and that the initial steps of going to bid to secure independent auditing services for purposes of auditing the publicly funded gubernatorial candidates' campaign accounts were being taken.

He stated that he was in the process of developing a scope of services with the representatives from Purchase and Property and that he would make the scope available for Commission review in the near future. Mr. Nichols noted that the representatives from Purchase and Property hope to have an initial mailing to potential audit firms completed early next week.

5. Executive Director's Report

Executive Director Frederick Herrmann reported that the Governor signed the budget and that it contains the Commissioner's per diem and the money for the microfilm project. He said that the supplemental, containing \$60,000 for the Commission, has not yet been signed.

Executive Director Herrmann said that it does not appear that any action will be taken in 1985 on the compromise bill for public financing. He said that Governor Kean is accepting public financing.

Executive Director Herrmann noted that S-2900 (O'Connor), prohibiting unopposed candidates from accepting public funds in a gubernatorial primary, was approved by the Senate on June 28, 1985. He said that an amendment to the bill offered by Senator Haines, which would have eliminated public funding, was defeated 21 to 17. He said that the vote was along party lines, with Republicans voting to end public financing. The reason given by

Senator Haines for sponsoring his amendment was that low voter turnout in the primary demonstrates a flaw in the program.

Executive Director Herrmann noted that, an article published in the most recent edition of the New Jersey Reporter extolls the public financing program and the New Jersey Election Law Enforcement Commission.

Executive Director Herrmann next mentioned that Cheryl Clarke and he will be attending the Council of State Governments Conference in Maine next week. There will be a session on lobbying, which Mr. Herrmann initiated.

Executive Director Herrmann concluded his report by noting that the Commission's July 23, 1985 meeting is cancelled and that the next meeting will be held on August 20, 1985 in Asbury Park. He said that beginning on September 4th, all meetings through October will be held weekly.

6. Advisory Opinion 10-1985

Present for the discussion of Advisory Opinion 10-1985 were: Bill Dowd, attorney for Azzolina and Smith, District 14 Republican candidates; Larry Marinari, 1985 Democratic Legislative Campaign Committee; Frank Robinson, Assembly State Government Committee; John Sheridan, Friends of Governor Tom Kean; Bill Palatucci, Friends of Governor Tom Kean; Evan Fenton, Friends of Governor Tom Kean; Angelo J. Genova, Shapiro '85 Committee Treasurer; and Stephen J. Edelstein, Shapiro '85 Committee counsel.

Immediately preceding the discussion, Vice Chairman Waugh noted that Mr. Sheridan is a partner in the law firm in which his father is associated. Mr. Waugh said that this fact would not prejudice his decision in this matter. Mr. Sheridan stated that he was not representing Friends of Tom Kean on behalf of his law firm.

Chairman Axtell asked Mr. Dowd to begin the discussion with any comments that he might want to make. Mr. Dowd stated that he had little to add to his comments of the previous meeting, except that he believed that a recommendation made by the Commission in its 1981 report on public financing underscored his point. Mr. Dowd referred to a section recommending the elimination of expenditure limits. In this section, it was pointed out that one of the side effects of expenditure limits is to constrain local and legislative candidates from using the name of their party's gubernatorial candidate. He reiterated that this situation is very unfortunate.

At this point Vice Chairman Waugh stated that while it is true that the Commission opposes expenditure limits, the legislature and Governor have not acted to remove them. Therefore, said Mr. Waugh, expenditure limits are still the law of the State and the Commission has an obligation to uphold them. The allocation method is a proven way to do this.

Chairman Axtell next called upon Stephen J. Edelstein, Shapiro '85 Committee counsel, for his comments.

Mr. Edelstein stated that he would speak in opposition to the Dowd letter. He stated that he believed that Mr. Dowd sought the elimination of the allocation principle in total, and that this action would represent a departure from the spirit of the law vis-a-vis the expenditure limit and public financing.

Mr. Edelstein stated that the allocation of expenditures to gubernatorial campaigns in a reasonable manner is what the Commission has sought to accomplish through the years. He said that the 25/75 percent standard has been demonstrated to be a workable standard and that the Commission's policy strikes a balance between the right of a candidate to speak out and the preservation of the expenditure and contribution limits.

Mr. Edelstein added that the allocation policy affects the gubernatorial candidate and not the legislative candidate. Both Shapiro and Kean have chosen to abide by the expenditure limit, and in no instance is a legislative candidate prohibited from invoking the name of his or her party's gubernatorial candidate. Mr. Edelstein said that if the regulation is lifted, we would be faced with a situation of unlimited spending by gubernatorial candidates. He said that the case before the Commission illustrates that proposition, given the fact that the request represents a coordinated, collaborative effort made on behalf of all Republican Assembly candidates.

Mr. Edelstein said that the rule as it exists is workable, practical and consistent with the spirit of the law. He said that it has worked for eight years, diminishing the potential for abuse. He said that the legislative intent of public financing would be violated if the allocation rule is lifted.

Commissioner Proctor asked what would be the policy if a legislative candidate placed the name of his party's gubernatorial candidate on a campaign brochure.

Mr. Edelstein responded by stating that he presumed there would be an allocation of at least 25 percent of the brochure's cost to the gubernatorial candidate's campaign.

Commissioner Proctor then asked whether a candidate invoking the name of the gubernatorial nominee in a speech would be allocable.

Mr. Edelstein responded that it would not be allocable, noting that the use of a gubernatorial candidate's name in paid media versus the mention of it in a speech is the distinguishing factor.

Commissioner Proctor stated that it seems as if it is a very difficult rule to police. Mr. Edelstein stated that the practical difficulty presented by the rule is outweighed by the necessity of preserving the expenditure limit. He reiterated that in the absence of allocation, expenditure limits don't exist.

Vice Chairman Waugh stated that the allocation rule helps the Commission avoid reviewing every case before the campaign starts. He said that the formula gives certainty and guidance to treasurers.

Commissioner McNany then asked the participants their opinion on reducing the allocation floor from 25 percent to 20 percent or lower.

Mr. Edelstein stated that he agreed with the 25 percent floor.

Mr. Dowd said that the 25 percent rule flatly contradicts the Commission's own regulation. He said that it does not fairly reflect the relative value of the expenditure to each candidate involved. Mr. Dowd said that the 25 percent floor is arbitrary. He said that the 25 percent floor is the easiest thing to do from an administrative point of view.

Vice Chairman Waugh stated that it really doesn't violate our own regulation because the Advisory Opinion allows for a candidate to argue for less of an allocation.

Mr. Dowd agreed, but stated that the practical effect is that candidates adhere to the 25 percent standard.

Mr. Edelstein stated that the 25 percent standard did not arise in a vacuum. It wasn't picked out of the air. It was chosen as a number that related to the relative value to a campaign of the expenditure.

At this point, Chairman Axtell called upon Mr. Sheridan to comment. Mr. Sheridan stated that he has a slightly different view of the issue. He stated that the question really is: is the campaign activity coordinated or uncoordinated? He said that if the activity is coordinated it is properly allocated. If it is not, it is not properly allocated.

Mr. Sheridan, who represented Friends of Governor Tom Kean, stated that he believed that what Mr. Dowd was really looking for was a clarification of the coordination issue. He stated that it is absurd for this body (the Commission) to chill the right of Assembly candidates to speak out in behalf of their party's gubernatorial candidate. He said that the Federal Election Commission has taken an entirely different approach with respect to federal elections. He said that if Assembly candidates are using their own money and there is no coordination with the gubernatorial campaign, applying the allocation principal is a violation of First Amendment rights. Mr. Sheridan said that expenditures should not be allocated unless approved in advance by the gubernatorial candidate. He said that several FEC opinions seem to be consistent with this opinion. Mr. Sheridan reiterated that the line of demarcation should be coordination and nothing more. He said that a gubernatorial campaign is in a difficult position trying to control what a legislative candidate says. Mr. Sheridan added that the gubernatorial candidate should not have to exercise this sort of control anyway, because the legislative candidate should have the fundamental right to get his or her message across to the public.

Vice Chairman Waugh asked Mr. Sheridan whether he could see any significance in the fact that the Commission has practiced this policy for eight years and the fact that it was brought to the attention of the Legislature (in relation to the expenditure limit) and the Legislature failed to act.

Mr. Sheridan said that he did not see any significance in this fact.

Chairman Axtell asked Mr. Sheridan whether he believed that any part of the cost of a billboard should be allocated to the Governor if the Governor's name appears on it, along with other Republican candidates.

Mr. Sheridan said that unless the billboard was coordinated with the gubernatorial campaign, no portion of the cost should be allocated.

At this point Mr. Dowd added that in the absence of a statute authorizing the Advisory Opinion 33-1981, the Advisory Opinion is susceptible to challenge in the court. He added that even if statutory authorization existed, the statute would be susceptible to challenge.

Mr. Edelstein stated that what Mr. Sheridan suggests would spell the end of the expenditure limit.

At this juncture, Edward J. Farrell, General Counsel to the Commission, referred to his memorandum relating to the Dowd opinion (Advisory Opinion 10-1985). Briefly, Mr. Farrell summarized the points he made in his memorandum. He stated that the Commission had the authority to issue Advisory Opinion 33-1981. He said that the limitations imposed by Advisory Opinion 33-1981 do not appear to be barred by either the United States Constitution or the Constitution of the State of New Jersey. He said that while the policy has a chilling effect on First Amendment Rights, it is allowable because it protects the integrity of the contribution and expenditure limits. He said that the Commission has an obligation to enforce these limits. He said that the policy pursued by the Commission is one method of fulfilling its obligations under the law.

Mr. Farrell stated that while the Commission's policy is constitutional, the Commission has the right to change that policy. He then mentioned certain policy considerations and alternatives for discussion (refer to Farrell's memorandum).

At this juncture, Chairman Axtell ended discussion of this matter by the public and stated that the Commission would decide the question next week. The Chairman then called a meeting of the Commission for Wednesday, July 17, 1985 at 10:00 a.m. in Trenton. This meeting was previously unscheduled.

At this point, the public representatives left the meeting. The Commission remained in public session for further discussion of the matter.

Vice Chairman Waugh asked if the Commission could extend its advisory opinion to include negative comments by legislative candidates against the

gubernatorial candidate of the opposite party. In other words, if a Democratic legislator criticizes the Republican gubernatorial candidate in his literature, can the cost be allocated against the Democratic gubernatorial candidates' campaign?

Mr. Farrell stated that he was not sure whether the Commission could expand the Advisory Opinion in this way. This is a matter for the Commission to consider carefully.

Mr. Waugh stated that he is troubled by the fact that we would change rules in the middle of the game. He stated that he felt that the approach should not contain any major change. Rather, the Commission should clarify Advisory Opinion 33-1981, delineating certain activities that are allocable, and certain activities that are not. He suggested that Mr. Farrell provide this type of list to the Commission before the next meeting.

Mr. Farrell agreed to do so.

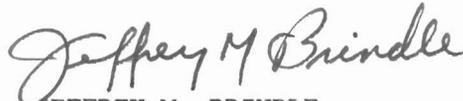
Mr. McNany suggested that the Commission should consider reducing the allocation floor to 20 or 15 percent. This would be a more reasonable allocation because of inflation, etc.

Mr. Farrell stated that lowering the allocation floor is also an alternative for the Commission to consider.

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,



JEFFREY M. BRINDLE
Deputy Director