



## State of New Jersey

### ELECTION LAW ENFORCEMENT COMMISSION

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#### NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

#### PUBLIC SESSION MINUTES

MAY 17, 1988

All of the Commission members and senior staff were present, except Vice Chairman Owen V. McNany, III.

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 10:12 a.m. at Somerset County Courthouse, Somerville, New Jersey.

#### 1. Executive Director's Report

##### A. Staff Activities

Executive Director Herrmann reported that on May 4, 1988, he attended a meeting of the New Jersey Election Advisory Council to hear a talk by Vermont Secretary of State James Douglas on general election issues.

Executive Director Herrmann said that on May 13, 1988, Legal Director Nagy and he met with members of the N.J. League of Women Voters to discuss campaign finance issues.

Finally, he said that Legal Director Nagy and he would attend a dinner that evening in Washington, D.C., hosted by the Citizens' Research Foundation. He said that the dinner commemorated the 30th anniversary of the Foundation, which does research into the uses of political money.

##### B. Cost Analysis Report

Executive Director Herrmann said that the Gubernatorial Cost Analysis Report drafted by Deputy Director Brindle was on schedule. He said that the report was due to be distributed to the Legislature on June 1, 1988. Executive Director Herrmann said that the report was a major study of how and why campaign costs are rising. He said that it should not only have an impact in New Jersey but on the national level

as well. Executive Director Herrmann said that the report is a unique study; and one that is needed.

C. Campaign Finance Legislation

Executive Director Herrmann said that he attended a meeting of the Assembly State Government Committee on April 28, 1988 to testify on A-2493 (Martin), a bill to enhance disclosure, and A-2532 (Schluter), a bill to form a Campaign Finance Study Commission.

Executive Director Herrmann said that the Martin bill closes the surplus funds loophole and deals with the issue of name identification of PACs. He said that it tightens the personal financial disclosure (PFD) filing requirements and requires that campaign reports list the occupation and employer of each contributor over \$100.

Executive Director Herrmann said that the bill gives ELEC jurisdiction over prohibited contributions and campaign advertising identification. He said that the bill, however, appropriates no money to ELEC to implement these proposed reforms.

Executive Director Herrmann reported that gubernatorial public financing bills were scheduled to be discussed at a meeting of the Senate State Government Committee on May 19, 1988. He said that the bills were S-187 (Zimmer) and S-2488 (Van Wagner). Executive Director Herrmann said that both bills were acceptable variations of the public financing reform advocated by the Commission. He said that he understands that amendments to the Van Wagner bill would be announced at the meeting. Executive Director Herrmann said that he was unaware of what those amendments were, however.

D. Administrative News

Executive Director Herrmann reported that three major, longstanding goals have been achieved by staff in recent days. He said that the Commission passed the Office of Legislative Services' fiscal audit with flying colors recently. He said that the auditors indicated that ELEC was one of the best run agencies within the Department of Law and Public Safety. Executive Director Herrmann indicated that investigations were all caught up to within six months. Four years ago when he became ELEC's director, cases had been backed up for years. Finally, Executive Director Herrmann said that the new word processing system was fully operational and that personnel has been trained to use it.

E. Summer Conferences

Executive Director Herrmann said that he planned to attend the following conferences during the summer: meeting of the COGEL Steering Committee, June 26, 1988; the Canadian Election Officials Conference (in his capacity as COGEL Chairperson), starting July 25, 1988; and the Eastern Regional Conference of the Council of State Governments, starting August 22, 1988. Executive Director Herrmann noted that the Northeastern Regional Conference on Lobbying (NORCOL) Conference, hosted by ELEC, is scheduled for August 8, 1988.

F. Meeting Schedule

Executive Director Herrmann noted that meetings of the Commission are scheduled for June 21, 1988, July 19, 1988 and August 16, 1988.

2. Approval of Public Session Minutes of May 9, 1988

On a motion by Commissioner Linett, seconded by Commissioner Axtell and a vote of 3-0, the Commission approved the Public Session Minutes of May 9, 1988 as amended. The Commission amended the first paragraph of page 19 by inserting the words "at least" in front of the words "15 members." The paragraph now reads "After limited discussion, the Commission agreed to clarify the regulation by amending the language of the phrase to read "is a bona fide political entity consisting of at least 15 members not created to circumvent the contribution limit contained in the act."

3. Proposed Amendments to the Public Financing Regulations

See text of proposed amendments to Public Financing (Primary Election) May 17, 1988.

On a motion by Commissioner Linett, seconded by Chairman Bedford and a vote of 3-0, the Commission approved a technical amendment of N.J.A.C. 19:25-16.4. The technical amendment combined Section 16.5(a) (Appointment of treasurer and depositories) with Section 16.4 (Designation of principal campaign committee).

The Commission considered proposed amendments to N.J.A.C. 19:25-16.5, the regulation which deals with testing the waters.

The amendment, as drafted, requires an individual, or a committee on behalf of an individual, to file a form with the Commission when funds are being raised to test the waters on behalf of a potential candidacy for governor by that individual. The proposal also limits to \$50,000 the receipts that may be deposited into such an account before an individual automatically becomes a candidate for governor.

Legal Director Nagy said that staff wanted to raise the question of whether or not the Commission had the jurisdiction to impose these requirements on a person who is not a declared candidate. He said that currently full disclosure of all testing the waters activity is required once the individual becomes a candidate. Legal Director Nagy said that the case of Buckley v. Valeo raises an issue as to whether there is any State interest in protecting against electoral corruption at a time when a person is not a candidate. He said that the Commission was proposing a departure from past policy by requiring reporting before an individual becomes a candidate.

Counsel Farrell said that in his opinion, the Commission would not encounter any problems with respect to requiring record keeping during testing the waters activity. He said that because the Commission had the authority to match these testing funds with public dollars, it had the right to instruct potential candidates to place these funds in a designated bank depository. Counsel Farrell stated that the above represented the Commission's existing regulatory posture. He said that the question before the Commission is: to what extent can the Commission require disclosure by a committee that is raising funds for testing activity?

Counsel Farrell said that an argument could be made that a \$50,000 threshold, after which an individual becomes a candidate, is high enough and acceptable under the statute in the sense that it is the obligation of the Commission to prevent fraud. He said that in protecting disclosure, the Commission would be protecting a legitimate interest.

Counsel Farrell said that an argument could be made, however, that the Commission was overstepping its statutory authority by not allowing a candidate to be free to make up his or her mind as to when is the most propitious time to become a candidate.

Commissioner Linett commented that Legal Director Nagy's remarks indicated second thoughts by the staff about the testing the waters proposals.

He said: Is it in the public interest to have these amendments or not? He said that it could be argued that no public interest is served if the individual does not become a candidate.

Executive Director Herrmann commented that the concern of the staff was whether or not the Commission had the statutory authority to require reporting during the testing phase of a campaign. The staff's focus was not on the public interest question but on the limits of ELEC's jurisdiction. The problem of potential non-candidate fraud in fund-raising might be best addressed by the Attorney General or a county prosecutor.

Commissioner Linett stated that lots of money could be lost without requiring pre-candidacy disclosure. He said that while he is not sold on the \$50,000 threshold proposal, it is important for the Commission to find a way to get disclosure of testing the waters activity without being too onerous about it.

Commissioner Linett said that perhaps a better way to accomplish this would be to require testing committees to file a designation of depository and treasurer and then to require them to file reports quarterly, on the same dates that continuing political committee (CPCs) report.

Commissioner Linett said that the notion of testing the waters is unrealistic. He said that if someone is raising money they are running for office.

Counsel Farrell said that the Commission's existing approach may be the best one. He said that presently an individual does not report until he or she becomes a candidate. He said that the fund must be purified if money in it is to be matched with public funds. Counsel Farrell said that the existing approach might not meet all of Commissioner Linett's concerns but that it should be recognized that there may be constitutional questions involved in going beyond it.

Commissioner Linett said that it is basically a policy question: should fund-raising go on without any public disclosure?

Chairman Bedford said: What does the Commission care if the person does not become a candidate?

Counsel Farrell said that the Commission can require record keeping. But to tell an individual when he or she must become a candidate is another matter, he said.

Commissioner Linett asked for a description of what is reported relative to testing the waters.

Counsel Farrell said that once an individual becomes a candidate all receipts and expenditures from day one are reported. He said that additionally, if the campaign wants to receive matching funds, the testing the waters fund must be purified.

Commissioner Linett asked: what expenditures can be made for testing?

Legal Director Nagy said that money can be spent for travel and polling, for example. He said, however, that if money is spent for campaign advertising, the individual becomes a candidate.

Counsel Farrell said that all activity must be reported once an individual becomes a candidate.

Commissioner Axtell asked about what happens to leftover money if an individual does not become a candidate.

Counsel Farrell said that this issue is not the concern of the Commission.

Commissioner Linett commented that there may be a public interest in knowing what happens to these funds.

Commissioner Axtell indicated that he believed the public had an interest in this subject.

Chairman Bedford asked staff what the experience was (regarding testing the waters) in previous elections.

Executive Director Herrmann said that the Commission has experienced no problems relative to testing the waters in previous campaigns.

Commissioner Linett said that even though the Commission has not as yet experienced any problems with the existing approach to testing the waters, it, nevertheless, had an obligation to consider the issue further.

Chairman Bedford asked if it would be acceptable to the Commission to adopt the proposed amendments which would require filing and trigger a candidacy after raising \$50,000, and then hold a public hearing on them. He said that by doing this the Commission would merely be raising a talking point but by no means officially adopting the new policy.

Commissioner Linett said that he was not in favor of the \$50,000 threshold. He said that he would like to see this proposal dropped. He suggested that the Commission also drop consideration of setting forth a date after which all testing the waters individuals become candidates. The staff had been instructed to give consideration to this provision as well.

Commissioner Linett said that he would like to see the Commission propose that individuals, and committees on behalf of individuals, who are testing the waters be required to file a form with the Commission specifying such activity. Further, he said that he would like the Commission to propose that quarterly reports by these entities be required during the testing the waters period.

Chairman Bedford turned to Counsel Farrell, asking if this action would be legal.

Counsel Farrell said that he could find arguments for or against such a policy.

Chairman Bedford asked for a motion on Commissioner Linett's proposed amendments. Commissioner Linett moved the proposals which were seconded by Commissioner Axtell. On a vote of 3-0 the motion carried. This proposal had the effect of eliminating the \$50,000 threshold provision.

Commissioner Linett said that he would also like to add the language "which account shall be controlled by a political committee subject to the reporting requirements of N.J.A.C. 19:25-16.5(b)," which under the proposal would become subsection (a). This subsection would then read: "All funds received by an individual, or a committee in his or her behalf, solely for the purpose of determining whether that individual should become a candidate (for example 'testing the waters') shall be deposited in a separate depository established solely for that purpose, which account shall be controlled by a political committee subject to the reporting requirements of N.J.A.C. (citation to quarterly reporting)."

Commissioner Linett said that the only way to deal with disclosure of testing the waters activity is to treat these fund-raising entities as political committees.

Executive Director Herrmann commented that it might be argued that such entities did not meet the statutory definition of a political committee, that is they are not campaign vehicles if they exist only during the testing phase of a campaign.

Legal Director Nagy asked Commissioner Linett: if an individual spends his or her own money should that be reported?

Commissioner Linett responded in the negative because his concern is with money that is raised from others.

Chairman Bedford asked if there was a motion to amend the new subsection (a), adding to it the language suggested by Commissioner Linett.

Commissioner Linett made a motion to that effect, which was seconded by Commissioner Axtell. On a vote of 3-0 the motion carried.

The Commission next considered a proposal to amend N.J.A.C. 19:25-16.6. The proposal would prohibit minors under the age of 18 from contributing to gubernatorial candidates.

Commissioner Linett said that while he understood Vice Chairman McNany's desire to close a possible loophole in the law, he is not sure that it would be constitutional to prohibit minors from making political donations.

Legal Director Nagy suggested that the Commission's argument might be that since the voting age can be established at 18 there cannot be a constitutional impediment to limiting political contributions to that age.

Chairman Bedford reminded the Commissioners that if they voted for the provision they would not be adopting it, but would be only proposing the under 18 years of age restriction on political donations. He said that for this reason he would like to move Vice Chairman McNany's proposed change.

Commissioner Linett said that he did not think that it was a good idea but that since he was only voting to propose a change in the regulation he would vote yes.

Commissioner Axtell seconded Chairman Bedford's motion. On a vote of 3-0 the motion carried.

The Commission discussed the proposed amendment to N.J.A.C. 19:25-16.11, which deals with contributions eligible for match.

Legal Director Nagy remarked that under the proposed regulation only money deposited in a testing the waters account or a principal campaign account would be eligible for match.

Legal Director Nagy, by way of background information, noted that this proposed regulation would not affect Advisory Opinion No. 03 issued in 1983. In that advisory opinion, the Commission allowed funds raised by a "draft" committee established to urge then Essex County Executive Peter Shapiro to run for governor to be matched with public funds. This committee eventually became Mr. Shapiro's principal campaign account.

This proposal, approved at the last meeting, remained unchanged and did not require any further vote by the Commission.

The Commission considered the proposed amendment to N.J.A.C. 19:25-16.11(e), or the anti-proliferation amendment.

This proposed amendment was changed from its original form by placing the burden on the corporate or labor contributor to certify that the contribution was made in compliance with the anti-proliferation regulation. The initial proposal placed the burden of certification on the campaign treasurer.

On a motion by Commissioner Linett, seconded by Commissioner Axtell and a vote of 3-0, the Commission approved the motion proposing the amendment to N.J.A.C. 19:25-16.11(e), which would require certification by corporate and labor contributors that contributions were made in compliance with the anti-proliferation regulation.

The Commission considered N.J.A.C. 19:25-16.11(f), which permits matching of contributions received from persons or entities who are also contributing to PACs with at least 15 contributing members. The revision to the original proposal involved clarifying that to be a bona fide political entity, the entity must contain "at least" 15 members.

On a motion by Commissioner Linett, seconded by Commissioner Axtell and a vote of 3-0, the Commission approved the motion dealing with contributions eligible for match.

Regarding N.J.A.C. 19:25-16.14, which involves determining that the purchase price of a fund-raising event or lottery shall be deemed the amount of a contribution made to a gubernatorial candidate, the Commission, on a motion by Commissioner Linett, seconded by Commissioner Axtell and a vote of 3-0, moved the proposal. The Commission made a technical amendment to the original proposal by eliminating the words "provided that," ending the first sentence after the words "such candidate," beginning the next sentence with "The tickets," and adding the word "must" between "materials" and "state." The proposal now reads: "The purchase price paid to a candidate for a fund-raising event or lottery shall be deemed the amount of the contribution made to such a candidate. The tickets for such an event or lottery and the promotional materials must state that the purchase price represents a political contribution to the candidate."

The Commission considered N.J.A.C. 19:25-16.20 (b) and (c). The only change was stipulating that the filing dates coincide with the submission dates for public funds.

Commissioner Axtell moved the proposal, which was seconded by Commissioner Linett. On a vote of 3-0, the Commission approved the motion.

The Commission next considered proposed changes to N.J.A.C. 19:25-16.27 and 16.33, which exempts election night expenses from the expenditure limit and limits expenditures by publicly funded candidates on election night parties to the night of the election.

Commissioner Linett moved the proposals to amend N.J.A.C. 19:25-16.27 and 16.33(b). The motion was seconded by Commissioner Axtell. On a vote of 3-0, the motion carried.

Chairman Bedford moved the proposal to amend N.J.A.C. 19:25-16.33(c), which was seconded by Commissioner Linett. On a vote of 2-1, the motion carried. Commissioner Axtell opposed the motion, which involved election night parties.

Finally, Commissioner Linett made a motion to direct Counsel Farrell to review the proposals to render an opinion as to whether or not any of them have overstepped the Commission's statutory authority. He said that this should be done in consultation with Legal Director Nagy. Commissioner Axtell seconded the motion and on a vote of 3-0, it was approved.

Legal Director Nagy outlined the schedule for adopting the proposals. He said that by May 23, 1988, staff will redraft and file the proposals with the Office of Administrative Law in the Department of State for publication in the New Jersey Register. He said that the public would have until July 20, 1988 to submit written comments on them and would be availed the opportunity of a public hearing on July 19, 1988. Legal Director Nagy said that the Commission could adopt them at its meeting on August 16, 1988 and therefore they could become effective on September 19, 1988, the projected date of publication of the adoption notice.

4. Advisory Opinion No. 06-1988

Advisory opinion request No. 06-1988 was submitted by Hersh Kozlov, General Counsel of the New Jersey Republican State Committee. In this advisory opinion request Mr. Kozlov outlined a hypothetical situation whereby a group of people join together to raise funds for the possible candidacy of "John Doe." This "Friends of John Doe" committee would not be established by John Doe but by a group of friends that would like to see him run for governor. This advisory opinion request is similar in content to advisory opinion No. 03-1983, when the Commission permitted a group of people to raise money to urge Mr. Peter Shapiro to run for governor. Essentially, Mr. Kozlov asks several hypothetical questions concerning the establishment of a committee to test the waters on behalf of an unnamed individual regarding a potential run for governor.

Legal Director Nagy presented a draft response to this request for consideration by the Commission. In his draft response, Mr. Nagy stated that the Commission cannot answer the request because the questions are hypothetical and anonymous. He said that the Commission has traditionally refrained from issuing advisory opinions on questions that are hypothetical and for persons who remain anonymous.

Commissioner Linett said that he did not differ with the substance of the response but with how it was worded.

Commissioner Linett suggested that the advisory opinion response state that the Commission is in the process of amending its public financing regulations and invite Mr. Kozlov to make public comment regarding them. He suggested that the last paragraph of Legal Director Nagy's draft response would suffice. He said that a memorandum relative to the Commission's policy of not responding to hypothetical questions could be attached.

Chairman Bedford asked if there was a motion to adopt Commissioner Linett's suggested response. Commissioner Linett made a motion to that effect, which was seconded by Commissioner Axtell. On a vote of 3-0, the motion carried, and Legal Director Nagy was authorized to rewrite and send out the opinion letter.

5. Code of Ethics

The Commissioners considered a proposed amendment to its Code of Ethics which would permit them to contribute to federal candidates and federal political party committees.

On a motion by Commissioner Axtell, seconded by Commissioner Linett and a vote of 3-0, the Commission adopted the motion which proposes to amend its Code of Ethics to allow contributions by the Commissioners to federal candidates and federal political party committees. Staff is not affected by this change.

The proposal will be forwarded by Legal Director Nagy to the Attorney General and the Executive Commission on Ethical Standards for approval.

6. Public Disclosure

The Commission considered revisions to the public disclosure policies as directed at the April 19, 1988 meeting of the Commission.

The revisions are: 1. that "no action" or exoneration letters not be released to the public unless such release is specifically requested by the recipient; and 2. that the Chairman be added to the list of persons who collectively may authorize release of documents in circumstances where an emergent decision is required. Legal Director Nagy said he slightly altered the language of the second provision to read that the Chairman, in consultation with staff, is authorized to release documents in emergent circumstances.

Commissioner Axtell moved the revisions to the public disclosure policies. Seconded by Commissioner Linett, the Commission adopted the revisions by a vote of 3-0.

Commissioner Linett said that he wanted to emphasize that the issue of the Commission assuming jurisdiction over identification of advertising on political advertising pieces is very important. He suggested that anything that can be done to promote this change beyond what we have already done would be helpful.

Chairman Bedford indicated that the Commission needed an index of Advisory Opinions.

Counsel Farrell was directed by the Commission to undertake the task of compiling advisory opinions that have not been superceded by changes of the law or regulations, and preparing an index by subject matter.

7. Executive Session

On a motion by Commissioner Linett, seconded by Commissioner Axtell and a vote of 3-0, 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.

8. Adjournment

On a motion by Commissioner Axtell, seconded by Commissioner Linett and a vote of 3-0, the Commission voted to adjourn at 1:10 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, Ph.D.