



## State of New Jersey

### ELECTION LAW ENFORCEMENT COMMISSION

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#### PUBLIC SESSION MINUTES

DECEMBER 20, 1988

All of the Commission members and senior staff were present. Chairman Bedford participated by telephone.

Vice Chairman McNany presided at the meeting.

Vice Chairman McNany called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-8 et seq., 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 10:02 a.m. at the Commission offices at 28 West State Street, Trenton, New Jersey.

#### 1. Approval of Public Session Minutes of November 15, 1988

On a motion by Commissioner Linett, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved the Public Session Minutes of November 15, 1988.

#### 2. Executive Director's Report

##### A. COGEL Conference

Executive Director Herrmann reported that the recent COGEL Conference was highly successful. He said that over 300 people registered for the conference, held in Orlando, Florida, December 4-7, 1988.

The executive director stated that COGEL was comprised of more than 200 members and that membership in the organization has increased five-fold in five years.

Executive Director Herrmann said that Commissioner Linett served as a panelist on an Agency Media Panel; that Deputy Director Brindle led a Breakfast Table Topic discussion on "Educating candidates in Election Laws;"

and that he, as Chairman of COGEL, undertook various responsibilities during the conference.

In addition, the Executive Director said that New Jersey was very well represented at the conference. Executive Director Herrmann said that Chairman Bedford and Vice Chairman McNany attended the conference. Moreover, he added, New Jersey was represented by Senator Paul Contillo, Assemblyman Robert Franks, Assemblyman William Schluter, Ethical Standards Director John Donnelly, Assembly Democratic Executive Director Richard Coffee, and former ELEC Chairman Frank Reiche. In all, Executive Director Herrmann noted that 17 New Jerseyans were present at the conference.

#### B. Staff News

Executive Director Herrmann introduced three newly hired members of the Public Financing Staff. They were: Gail Schneier, Public Financing Analyst; Kap Chul Sin, Public Financing Analyst; and Pamela Powell, Data Entry Operator.

The Executive Director reported that on November 16, 1988, the staff discussed the Commission's operations with the Society of Professional Journalists. This session took place at the Commission's offices. Executive Director Herrmann stated that on D11Hal Director Gregory Nagy addressed the League of Women Voters about campaign financing. Speaking along with Mr. Nagy were Assemblyman Robert Martin, Senate Majority Staffer David Rousseau, and Legislative Agent Thomas O'Neill.

Executive Director Herrmann also announced that on February 24, 1989, the Compliance staff would conduct a county and municipal clerk's information session at the Forrestal Center in Princeton, New Jersey.

#### C. Gubernatorial Public Financing News

Executive Director Herrmann reported that the latest version of public finance reform to have a chance of gaining enactment is an Assembly substitute bill for A-1705/A-2250 (Martin, Cimino, Baer). He said that he testified before the Assembly State Government Committee on December 12 on this legislation. Executive Director Herrmann indicated that the bill had ELEC administering primary and general election debates. In addition, he said, the bill contained dual contribution limits: lower for non-publicly funded candidates and higher for publicly-funded ones. Executive Director Herrmann said that the bill contained no appropriation for implementation of computer software changes and no campaign inflation index. Executive Director Herrmann said that he told the Committee that ELEC was neutral on the debates but concerned about the lack of money and time needed to implement any changes to the software necessitated by any reform of the law. He added that this bill does allow the Commission to designate a non-partisan entity like the League of Women Voters to organize and conduct the debates.

Executive Director Herrmann reported also that he testified in the Senate State Government Committee on December 19, 1988 on this assembly bill.

He said that as a result of his testimony and others, the Senate Committee amended the bill to eliminate the dual contribution limits, which the Executive Director indicated might face a constitutional challenge, and to add an inflation index. Executive Director Herrmann said that he also had worked to relieve ELEC of the responsibility for administering the debates, primarily because ELEC was given no money to do so. In the Senate version, ELEC must simply select a non-partisan private organization or organizations to administer the debates.

Following his summary of the current status of public financing reform, Executive Director Herrmann outlined for the Commission problem areas relative to the gubernatorial program wrought by the budget climate, the continuing uncertainty of public financing reform, and preparations for upgrading the Commission's computer capacity.

The Executive Director reported that the sudden and unexpected hiring freeze recently imposed by the Governor had left the public financing staff short three analysts and four data entry operators. He said that the agency applied for exemptions and as of this date, regained two analysts and one data entry operator. Executive Director Herrmann said, therefore, that the status of the one remaining analyst and three data entry operators is still in limbo. He said that failure by the committee to grant exemptions for these positions would have dire consequences for the public financing program.

Executive Director Herrmann also reported that the Commission was still awaiting the installation of its computer upgrade, which is necessary to insure the efficient functioning of its in-house computer system, upon the activation of the public financing program. He said that this process was slowed somewhat because Treasury misrouted the paperwork. He said that the good detective work by ELEC staff members resulted in this delay being eliminated. Executive Director Herrmann said that the computer upgrade was scheduled by Prime to be installed by December 22, 1988 or earlier.

In summary, Executive Director Herrmann said that, in particular, the hiring freeze and the uncertainty over the fate of public financing reform presented the Commission with very real and difficult problems. Therefore, he suggested that the most responsible course of action for the Commission to take at this juncture was to approve a resolution which would ask Governor Kean to grant approval of an ELEC emergency regulation that would roll back the first public financing submission date from January 3, 1989 to January 23, 1989, and waive the hiring freeze for the public financing program. A text of a proposed resolution was circulated.

Executive Director Herrmann said that such action would permit the Governor and the Legislature to iron out a compromise and not embroil the program in a potential legal morass. He said that legal difficulties could

arise if a candidate qualifies on January 3rd under existing rules and other candidates are then required to qualify under altered rules following a subsequent change to the program.

Executive Director Herrmann, referring to the draft resolution before the Commissioners, said that the requests contained in it were very carefully drafted and represented the most responsible and practical course for the Commission to follow.

Vice Chairman McNany suggested that the resolution be accompanied by a description of the positions yet required and the costs thereto.

Commissioner Linett asked if leadership of the Legislature could call a special session to deal with the crisis in public financing.

Executive Director Herrmann said that this tactic was possible but he was not aware of it being seriously discussed.

Commissioner Linett asked: "What are the possibilities of the Senate posting the bill on January 12, 1989?" Executive Director Herrmann said there is a good possibility that a bill will be posted by January 12, 1989.

Commissioner Linett asked for clarification on the legal procedure for instituting an emergency regulation.

Executive Director Herrmann said that the Commission would have to petition the Governor to use his emergency powers to suspend the normal procedures relative to adopting regulations. He said that this petition would be on the grounds of imminent peril to the public welfare if an emergency measure was not adopted. Executive Director Herrmann said that if the Governor agrees then the emergency regulations would be in effect for 60 days.

Commissioner Linett asked: "Has this been suggested to anyone outside of the Commission?"

Executive Director Herrmann reported that he had held discussions with the Governor's staff as well as legislative staff. He said that the proposed action was received positively.

Commissioner Linett said that he was very concerned about the Commission getting involved in the political maneuverings surrounding this issue. He said that Senator Russo would be involved in this as Acting Governor and that it could be construed as acting politically. He said that he also was concerned that the public did not have a chance to comment when the process is suspended as recommended herein.

Executive Director Herrmann responded that this recommendation is being made on the basis of what is best for the program and how to best administer it. He said that if the Commission did not recommend this course of action, it could create legal problems for itself.

Commissioner Linett asked if anyone's campaign could be adversely affected by the delay.

Executive Director Herrmann responded that there was certainly that possibility. On the other hand, he said the uncertainty of whether the program could change could have a negative impact on all of those already "testing the waters."

Commissioner Linett asked what is so magical about January 23rd.

Executive Director Herrmann said that the 23rd was the second submission date under the current submission calendar. He said that it was also nine days after the Senate Session, giving the Governor and the Assembly ample time to address any amendments.

Vice Chairman McNany said that to him the recommendation to ask the Governor for an emergency suspension of the regulatory process was the only solution to a bad problem.

Chairman Bedford said that he favored the resolution as drafted. He said that the Commission has done everything conceivable to persuade the powers that be to amend the law. He said that in light of the legislative maneuvering taking place, it was best for the Commission to go forward with this resolution.

On a motion by Commissioner Axtell, seconded by Commissioner Linett and passed by a vote of 4-0, the Commission approved the regulation requesting the Governor to grant an emergency regulation amending N.J.A.C. 19:25-16.19 and extending the first public financing submission date to January 23, 1989 and to waive the hiring freeze for the gubernatorial public financing program.

Commissioner Linett said that he voted for the resolution because it is the only reasonable solution. He said that he would like to see some notice to the public.

Executive Director Herrmann said that a press advisory would be distributed today. He also said that advisory letters to potential candidates would be mailed before the end of the day.

Executive Director Herrmann reported that relative to the public financing program, staff conducted a training program on December 14 and 15, 1988, that was successful and 21 campaign representatives attended. He said that Nedda Massar did a great job.

Commissioner Linett said a legal acquaintance of his attended one of the sessions, and was very impressed with the results.

D. Support for ELEC

Executive Director Herrmann said that during testimony before the Assembly State Government Committee, the League of Women Voters commended ELEC "on its excellent work and it's excellent publications."

Moreover, the Executive Director said that the Executive Director of L.E.G.A.L. said at the same meeting: "In order to ensure that any campaign financing reform is enforced, LEGAL strongly recommends increasing the ELEC budget. All campaign financing reform is meaningless without strong enforcement to monitor adequately the process."

E. 1989 Meeting Schedule and January Meeting

On a motion by Commissioner Linett, seconded by Chairman Bedford and passed by a vote of 4-0, the Commission approved a circulated meeting schedule for 1989, and directed it be posted in compliance with the Open Public Meetings Act.

The January meeting will be held on January 17, 1989 at 10:00 a.m. at the Commission offices, 28 W. State Street, Trenton, New Jersey.

F. Dr. Herbert T. Alexander

Executive Director Herrmann extended holiday greetings to the Commissioners from Dr. Alexander.

3. Adoption of Amendments Proposed for Gubernatorial General Election Regulations

Staff circulated the text of the proposed amendments to regulations for public financing of the general election for Governor (see 20 N.J.R. 2642(a) and written comments received from Assemblyman Anthony J. "Skip" Cimino, received November 29, 1988. Assemblyman Cimino objected to N.J.A.C. 19:25-15.20(d) as proposed because reports of disbursements from the gubernatorial public funds account would not become available to the public until 29 days prior to the primary or general election.

Legal Director Nagy said that staff recommended denying the change recommended by Assemblyman Cimino, which was to make public the reporting of disbursements out of the public funds account. He said that staff agreed with a comment by Senator Richard Van Wagner made in regard to the proposed amendments to the primary election that creating additional public disclosure requirements would place publicly financed candidates at a strategic disadvantage vis-a-vis non-participating candidates. Legal Director Nagy said that these reports would be available to the public at the customary 29-day preelection reporting date. He also said a response would be sent to Assemblyman Cimino explaining the Commission's reasoning.

Commissioner Linett moved the final adoption of the proposed gubernatorial public financing general election amendments as published in the New Jersey Register. Chairman Bedford seconded the motion and it was passed on a vote of 4-0.

4. 1989 Public Financing Program

Executive Director Herrmann summarized his December 12, 1988 memorandum circulated to the Commissioners which outlined activities undertaken to fulfill the mandate of the public financing program.

Executive Director Herrmann indicated that staff was proposing one change in procedures from the gubernatorial election of 1985. Specifically, he said, the memo asks that in order to certify public matching fund amounts to the Department of Treasury as quickly as possible, and therefore, to provide public fund checks to candidates, staff requests that the Commission specifically authorize it to certify public funds amounts to the Department of Treasury upon completion of its review of a submission. Executive Director Herrmann said that the certification process is a routine one and can be handled administratively.

Commissioner Linett said that while he has complete confidence in staff, he questions whether the Commission would be surrendering its authority.

Executive Director Herrmann said that the recommendation calls for the certification process to be handled administratively if business is running in a routine way. He said that on all policy questions the Chairman would be consulted and would then determine whether a meeting of the Commission would be required.

Vice Chairman McNany said that there are two new Commissioners that have been appointed to the Commission since the 1985 elections. As such, he continued, to some extent, they should go through the process. Vice Chairman McNany said that it is a good educational process. He said that it would be premature to change at this point.

Counsel Farrell said that he has some doubts about the wisdom of changing from what was done in the past. He said that while he is not sure that it would be an abdication of the Commission's authority, he does see certain wisdom in the Commission providing a summary review of the public funds submissions. He said that he is not suggesting extending the Commission's review of the process over what it did in 1985, but merely keeping it the same. In addition, said Counsel Farrell, summary review by the Commission was good in terms of establishing an error rate by which future checks could then be automatically issued.

Vice Chairman McNany suggested possible telephonic meeting for the purposes of taking care of this business.

Chairman Bedford indicated that he believed it was a good idea for the Commission to maintain its procedures in this area.

The Commission agreed to continue giving summary review to the certification process. Also, the Commission directed staff to prepare an augmented schedule of meeting dates so that submissions can be timely reviewed and put to a vote.

5. Possible Regulation Concerning Preelection Communications

Legal Director Nagy said that the memorandum included in the agenda material entitled "Reporting of Political Communications," dated December 13, 1988, Gregory Nagy to Frederick M. Herrmann, was for informational purposes. He said that a regulation would be prepared for the January meeting based on the criteria contained therein if approved by the Commission.

The issue in question is when paid advertisements, or other communications, can be regarded as a candidate campaign expenditures subject to reporting, particularly when there is no obvious and specific election advocacy.

The criteria cited are:

1. does the text contain clearly political statements, such as promotion of past achievements of an officeholder or candidate, or political or governmental objectives;
2. was the communication circulated at a time reasonably close to the election, and was it a one-time occurrence or part of a series of earlier and interrelated communications;
3. was the audience for the communication the same as or similar to the electorate;
4. did the candidate or officeholder pay for the communication; or exercise control over the entity that did pay for it?

Commissioner Linett suggested that with respect to this issue the Commission was dealing with two separate topics; gubernatorial elections and all other ones. He said that as such it was impossible to have only one regulation. Commissioner Linett suggested that staff draft two separate regulations. He said that only in gubernatorial elections are there expenditure limits to deal with.

Commissioner Linett said that the only possible way to regulate this issue is through the introduction of a fixed time cut-off, after which expenditures would be deemed to be in support of a candidacy. He said that expenditures tied to any other political activity should not be part of this activity. Commissioner Linett said that in a situation when expenditures are connected with other political activity the Commission simply would not be able to tie the expenditure to a possible future candidacy.

Chairman Bedford said that he was inclined to agree with Commissioner Linett.

Counsel Farrell suggested that analogous to this problem is the congressional franking privilege problem. He said that the Commissioners could use information related to that to aid their thinking. He said that he would provide some material on this subject.

Commissioner Linett suggested that draft regulations be provided at the next meeting.

Vice Chairman McNany agreed. He said that there should be a separate regulation for gubernatorial candidates because of the expenditure limit.

Executive Director Herrmann agreed that providing two separate regulations was a good idea.

6. Notice of School Board Candidates

Legal Director Nagy said that pursuant to memorandum dated December 12, 1988, "Notice to School Board Candidates," Gregory Nagy to Frederick M. Herrmann, the Commission is doing a very thorough job relative to informing these candidates of their filing obligations.

He said that staff was suggesting that as part of its legislative program, it propose that the law be amended to require notice of filing obligations on petitions for school boards.

On a motion by Commissioner Linett, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved this proposal to become part of its legislative program.

7. Resolution Honoring Executive Director Herrmann

At this juncture, Commissioner Linett introduced a resolution commending Executive Director Herrmann for the fine job that he did as Chairman of the COGEL Steering Committee during the past year. Commissioner Linett said that COGEL is an important organization and the Executive Director Herrmann's service to it has brought honor and credit to the Election Law Enforcement Commission. He urged the Commissioners to approve this resolution and suggested that it be sent to Governor Kean. He also suggested that a copy of the resolution be attached to the minutes.

Vice Chairman McNany said that he supported this resolution, stating that the Commission was proud of the service of Executive Director Herrmann.

On a motion by Commissioner Linett, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved the resolution commending Executive Director Herrmann for his service as COGEL Chairman.

Executive Director Herrmann thanked the Commissioners for their kindness in adopting this regulation. He also thanked them and the staff for supporting his efforts during the past year and for supporting COGEL. Finally, he especially thanked Counsel Farrell for his early encouragement of his participation with COGEL.

8. Advisory Opinion No. 16-1988

This advisory opinion was from Arthur R. Kobin, Esq., of Scerbo, Kobin, Litwin and Wolff. The advisory opinion request involves the question of whether or not the prohibition in N.J.S.A. 19:34-45, prohibiting certain corporations from making campaign contributions is applicable to a public utility engaged in the solid waste industry.

The draft response circulated by Legal Director Nagy states that the Commission does not have jurisdiction over the above-cited statutory prohibition, and as asked by Mr. Kobin, would have to be referred to the Attorney General.

The response states, however, that the inquiry does not provide the identity of the company on whose behalf the request is made, and that the facts have not been presented concerning activities by the client company that might bring it under the statutory prohibition. The response states that nothing under N.J.S.A. 19:34-45 specifically addresses public utilities, or the solid waste industry. Therefore, it states, it is unclear what activity the unidentified client is conducting that would bring it under the terms of the statute.

The response states that the Commission will not refer the matter to the Attorney General until more facts are presented.

On a motion by Commissioner Axtell, seconded by Chairman Bedford and passed by a vote of 4-0, the Commission approved the response to the advisory opinion.

9. Advisory Opinion No. 17-1988

This advisory opinion request is from Mr. Peter J. McDonough. The request involves the question of whether a Political Action Committee (PAC) may expend funds for the purpose of making a contribution to a charitable organization.

The draft response circulated by Legal Director Nagy states that Midlantic State Political Action Committee, on whose behalf the request was made, may use its PAC money for charitable purposes.

It cites N.J.A.C. 19:25-7.4 as expressly allowing surplus campaign funds to be used to make donations to a charitable organization.

On a motion by Commissioner Axtell, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved the advisory opinion.

10. Executive Session

On a motion by Commissioner Linett, seconded by Commissioner Axtell and passed by 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.

11. Adjournment

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission voted to adjourn at 12:20 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.

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