



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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PUBLIC SESSION MINUTES

FEBRUARY 21, 1989

All of the Commissioners and senior staff were present.

Chairman Bedford 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 10:20 a.m. at the State House Annex, Room 407. Notice of "Change of Location" was posted. The change was necessitated because elevator service to the Commission's offices on the 12th floor broke down a few hours before the meeting.

1. **Approval of Public Session Minutes of January 17, 1989**

The Public Session Minutes were adopted as amended by Commissioner Linett. The Minutes were amended on Page 18, Paragraph Number two to read: "Commissioner Linett said that the Commission could adopt summarily regulations and that he believes it should do so." The word "summarily" was substituted for "summary."

Executive Director Herrmann distributed copies of the COGEL Newsletter, the COGEL Bluebook and the ELEC Newsletter.

2. **Executive Director's Report**

A. **Staff Activities**

Executive Director Herrmann said that on January 19, 1989 he spoke at the Maplewood Lions Club. Vice Chairman McNany said that the Executive Director did a fine job.

The Executive Director indicated that on February 10, 1989 he addressed the New Jersey Society of Association Executives on PAC and Lobbying reporting with ELEC. He reported that Assemblyman William Schluter and Assemblyman Skip Cimino also addressed the group.

Executive Director Herrmann also said that on February 24, 1989 ELEC will be holding a County and Municipal Clerks Information Session. He said that 94 people have signed up to attend. Executive Director Herrmann said that this is a new ELEC initiative and that all counties, except Warren, Salem, and Sussex, are represented. He praised Director of Compliance and Information Evelyn Ford for developing the program.

He said that on March 10, 1989, Director Ford will be teaching a "Local Election Administration" class at Rutgers University on ELEC procedures pursuant to local candidates.

Executive Director Herrmann announced that the Winter 1989 ELEC Report is published and available. Also, the Executive Director reported that the staff, under the direction of Review & Investigation Director Elizabeth Ryan, has just completed an Investigative Manual. He said that this represented the culmination of a major project; one which provides an outline of investigative procedures for internal use. He said that the manual would be shared with sister agencies. Executive Director Herrmann suggested that the report review manual further professionalizes ELEC's operations and thanked Director Ryan for a job well done.

B. Legislation

As reported by the Executive Director, the Public Financing Law was signed on January 21, 1989 by Governor Thomas Kean.

Executive Director Herrmann indicated that a quote about ELEC appeared in the February 1989 edition of the New Jersey Reporter that was highly laudatory. The Executive Director read the quote as follows: "The best thing to come out of the [Public Financing] negotiations may be the provision that allows ELEC to make the necessary adjustments in the law from now on. The Commission has consistently called for the change and has developed a cost of campaigning index to come up with the numbers."

Finally, the Executive Director reported that on January 19, 1989, the Assembly State Government Committee again discussed three contribution limit bills: A-2581 (Martin), A-2529 (Schluter), and A-1413 (Randall).

C. Greetings

Executive Director Herrmann said that Attorney General Perretti extended his greetings to Commissioner Axtell. He said that former Commissioner Alex Waugh extended his greetings to all members of the Commission and that Judge Debevoise extended his greetings to Judge Bedford.

D. Future Meetings

Executive Director Herrmann said that the Commission would be required to meet on March 2, 1989 to consider an Advisory Opinion Request from the Democratic State Committee and to certify public funds. He said that Assemblyman Chuck Hardwick had just submitted for public funds this morning. He said that others may follow today. The Commission determined that this special meeting will be held at 9:30 a.m. in Trenton. Executive Director Herrmann said that the next regular meeting will be held on March 21, 1989 at the Commission Offices in Trenton.

3. Gubernatorial Public Financing Regulations

Legal Director Nagy circulated a draft of proposed changes to the primary election gubernatorial public financing regulations.

Legal Director Nagy suggested that the Commission begin by discussing the strategy for adopting these regulations. He said that the staff suggested that the Commission approve the regulations for immediate adoption on an emergency basis and concurrently initiate the process for permanently adopting the regulations.

Commissioner Linett said that he spoke with Legal Director Nagy briefly prior to the meeting, discussing the procedural aspect of the adoption. He suggested the Commission could adopt on an emergency basis without seeking approval from the Governor. He said that he was particularly concerned that, while the statute authorizes emergency adoption of the regulations, the public was not going to be given an adequate opportunity to comment on them. He suggested that it would be best to provide that opportunity early on in the event that the Commission decides to amend the proposals on the basis of public input.

Legal Director Nagy said that under the suggested approach, a public hearing would be held relative to the permanent adoption of these regulations on April 18, 1989.

Commissioner Linett suggested that a public hearing be set in March and a second one in April. He said that these regulations are non-controversial and should be adopted as quickly as possible, but that the need for public comment was paramount.

Chairman Bedford said that the regulations will be temporarily in place and will be formally adopted before the emergency ends. He said that in his opinion, the suggested procedure is appropriate.

Commissioner Linett said that he believed that a public hearing should be held as early as possible in the event the candidates propose any changes.

On the recommendation of Commissioner Linett, the Commission scheduled public hearings for March 21, 1989 and April 18, 1989, which dates are regularly scheduled meeting dates.

On a motion by Vice Chairman McNary, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved the concurrent schedule for adopting the regulations on both an emergency and permanent basis.

Legal Director Nagy reviewed the text of the draft regulations as follows:

19:25-16.7 - Candidates Deemed Non-participating

This proposed amendment to the regulations establishes the last day for filing petitions to nominate candidates in the primary election for Governor as the deadline by which a candidate must meet certain criteria in order to be qualified to receive matching funds.

19:25-16.18 - Matching of Funds

This amendment specifies the actions which a candidate must have completed by the primary election petition filing deadline in order to qualify for receipt of public funds. Subsection(j) is a new provision to effectuate the portion of the law requiring that each submission for public matching funds being submitted by a candidate contain a minimum of \$12,500 of contributions eligible for match.

Executive Director Herrmann said that the changes in the above amendments were necessitated by the debate provision in the new law. He said that in the statute there is a requirement that only viable candidates should participate in the debates. Executive Director Herrmann said that these regulations are designed to insure that only candidates who have qualified for public funds or who could meet the qualification threshold of \$150,000 as of the deadline for filing nominating petitions should be allowed in the debate.

Commissioner Linett asked what section of the statute authorized the \$12,500 threshold for subsequent submissions.

Public Financing Director Nedda Massar noted that the amendment to N.J.S.A. 19:44A-33 was the appropriate section. She said that this regulation is authorized by the statute.

Commissioner Linett asked what part of the \$150,000 is matched. Public Financing Director Massar said that \$100,000 of it is matched. She said that only \$50,000 of it is unmatchable.

Legal Director Nagy said that the following proposals are new sections:

19:25-16.3 - Definitions

This proposal involves additions to existing definitions as well as new definitions. The proposed regulation expands the existing definition of "qualified candidate" to include the new debate participation requirement and to reflect the deadline for notifying the Commission of intent to participate in public financing. Definitions for "Debate Sponsor" and "Interactive Primary Election Debate" attempt to provide uniformity in discussing the new debate requirement and the definition for "Statement of Agreement" describes the agreement to debate which must be signed by a candidate who wishes to receive matching funds.

Chairman Bedford suggested that a reference to having arranged for television to be part of the debate should be added to the definition of "debate sponsor". The Commission agreed that reference to television should be included in the definition of "debate sponsor" and dropped from the definition of "interactive primary election debate." The amended definitions read:

"Interactive primary election debate" means the moderated reciprocal discussion of issues among the candidates of a political party which involves responses by the candidates to questions posed by the representative or representatives of the sponsor organization, and "debate sponsor" means the private organization or organizations to which the Commission has delegated the responsibility for conducting one or more of the televised interactive primary election debates.

19:25-16.37 - Candidate Statement of Qualification to Participate in Public Financing

Chairman Bedford said that the words "before participating" should be substituted for "to participate" in the heading: "Candidate statement of qualifications to participate in public financing." The new heading reads: "Candidate statement of qualifications before participating in public financing."

This proposal describes the report of \$150,000 of contributions received and expenditures made which must be filed no later than the petition filing deadline by a candidate who intends to apply for public funds.

Chairman Bedford asked if authorization for this regulation is contained in the statute because "these regulations are pretty drastic."

Legal Director Nagy answered in the affirmative.

19:25-16.38 - Statement of Candidates Electing to Participate in Debates

This proposed regulation describes the prerequisites which must be met by a non-publicly financed candidate who wishes to qualify to participate in the primary election debates.

19:25-16.39 - Application to Sponsor Debates

This proposed regulation lists and clarifies the newly enacted statutory criteria for debate sponsor applicants and requires written applications to be filed by March 15, 1989 by private organizations that will be considered by the Commission to sponsor one or more of the primary election debates.

Commissioner Linett asked if subsection(a) is rooted in the statute. Counsel Farrell said that it is and suggested that the Commission adhere to this proposed regulatory language. Subsection(a) sets forth the criteria for eligibility to apply for debate sponsorship.

Legal Director Nagy said that subsection(b), sets forth the statutory deadline of March 15th for organizations to apply for sponsorship.

Commissioner Linett suggested that this proposal, concerning the application of the statute relative to choosing debate sponsors, would be a good place to include the language requiring a sponsor to have plans for television and media coverage. The recommended language reads: "The application shall set forth plans for television and media coverage" and should be added to subsection(b). The amended subsection(b) reads: "Written applications by organizations to sponsor a gubernatorial primary election debate or debates shall be submitted to the Commission on a form provided by the Commission not later than March 15 of any year in which a primary election is held to nominate candidates for the office of Governor. The written application shall set forth plans of the applicant for television and media coverage."

Vice Chairman McNamy asked if the Commission would solicit input from the Democratic State Committee and the Republican State Committee and other organizations that have run debates as to what organizations should be selected to sponsor the debates.

Counsel Farrell said that as a practical matter he would not suggest that this be done. He said that he sees this function of the Commission to be similar to the function of a judge. "In the context of needing to make a fast decision, this recommendation to seek input from outside groups would delay the process," he said.

Chairman Bedford said that he is inclined to adhere to the process as currently recommended, and not involve the Democratic State Committee, the

Republican State Committee, or any other outside group in the selection process.

Executive Director Herrmann suggested that notice of the sponsor selection should be sent to the state party entities relative to the March 21, 1989 meeting inviting them to attend the meeting and to provide all input they deem necessary vis-a-vis the selection of debate sponsors.

The Commission agreed with the Executive Director's suggestion.

19:25-16.40 - Selection of Debate Sponsor

This proposed regulation reiterates the statutory deadline for Commission selection of debate sponsors and explains the Commission's power to assign debate responsibilities.

19:25-16.41 - Dates, Times, and Location of Debates

Legal Director Nagy noted that the subsection(a) has been changed from the draft sent to the Commissioners. He said that the changes were made for clarification purposes.

This proposed regulation requires debate sponsors to provide written notice of debate details and schedules to the Commission and to agree not to endorse candidates in the pending election.

Relative to subsection(d), which deals with the Commission's review and approval of debate calendars, Commissioner Linett proposed that the words "and time" be deleted. The Commission agreed. The new subsection(d) now reads: "The Commission shall review and approve the debate calendars submitted by the debate sponsoring organizations pursuant to (a) above prior to the occurrence of any primary election debate and shall create a master debate calendar which ensures compliance with the date requirement of (b) above and ensures that no two or more debates are scheduled for the same date.

Commissioner Linett asked if the statute gave the Commission authority to get so involved in supervising the sponsors of the debates.

Legal Director Nagy said that while this supervisory responsibility is not spelled out in the law, it is his belief that it is implicit in the statute.

19:25-16.42 - Rules for Conduct of Debates

This proposed regulation repeats the statutory one-hour debate length provision, provides rules for conduct of debate, and outlines procedures for debate sponsors to promulgate and circulate rules to the Chairpersons of the Republican State and Democratic State Committees for consultation. Also

provision is made in this proposed regulation for distribution of any changes made to the rules.

Legal Director Nagy said that subsection(a) and (b) are in the statute but that (c) is not in the statute. He said, however, that subsection(c) requiring sponsors to circulate debate rules within a certain period of time is a critical procedural step. Legal Director Nagy said that subsection(d) also is not listed specifically in the statute, but is an important step to be included procedurally. Subsection(a) stipulates that each debate must be at least one hour long and subsection(b) gives the responsibility for promulgating rules of conduct for each debate to the sponsor. Subsection(c) provides time guidelines vis-a-vis a sponsor providing the rules of conduct in writing to the Commission. Subsection(d) provides for the candidates to be notified in writing of any changes in the debate rules of conduct.

19:25-16.43 - Complaint Alleging Failure to Participate in Debate

Legal Director Nagy said that this proposed regulation is an attempt by the Commission to provide guidance in the procedural aspects of the debate hearing provision. This proposed regulation explains the process which will occur if a complaint is filed alleging failure of a primary election candidate to participate in a primary debate. Specifically, the contents and service requirements for a complaint alleging failure to participate in a primary election debate are described.

With respect to subsection(a) 1, Chairman Bedford said that the word "certified" should be changed to "verified" to bring it in to compliance with accepted legal wording. It now reads: (a) 1. Be in writing and verified. He suggested that throughout the text all such uses of the word "certified" should be changed, with the word "verified" substituted for it.

Commissioner Linett asked if the Commission had the authority to bring a complaint against a candidate who did not appear at a debate.

He said that the present situation creates problems. He said that the practical problem is: who will prosecute the case? Will it be another candidate who will file the complaint? He said that this places an enormous burden on a fellow gubernatorial candidate.

Chairman Bedford said that with regard to the Commission making a complaint, most courts wait for someone else to make a complaint. Therefore, he said, the proposed regulatory process for bringing a complaint is permissible and should be acceptable.

Legal Director Nagy said that it was the intent of the regulation to set forth all the information that should be included in the complaint. He added that a citizen could bring a complaint, not just a candidate.

Commissioner Linett said that normally a staff counsel will bring a complaint. He asked, "Who is going to bring a complaint?" He reiterated that this is a heavy burden to place on a citizen or a candidate.

Legal Director Nagy said that his view of the statute is that it envisions the process to be adversarial, with the Commission's role being judicial.

Counsel Farrell said that the statute gives the Commission power to hold a hearing, not to prosecute.

Chairman Bedford suggested that subsection(b) be changed to read: "Service of a complaint alleging failure to participate in a primary election debate shall be made by the complainant in person or by certified mail, return receipt requested upon the respondent candidate, the Commission, the debate sponsor, and any person named in the complaint." Subsection(b) originally read as follows: "Service of a complaint alleging failure to participate in a primary election debate shall be made by the complainant in person or by certified mail, return receipt requested upon the respondent candidate, the Commission, the debate sponsor, and upon any other party or parties having a specific or direct interest in the matter."

Commissioner Linett said that this language improves the text because he does not believe that so much of a burden should be placed on a citizen to bring a complaint. He said that the process should be as simple as possible.

19:25-16.44 - Temporary Cessation of Distribution of Public Funds

This proposed regulation describes the Commission's power to hear complaints for failure to participate in a debate or debates.

Chairman Bedford asked if it was the Commission or the Office of Administrative Law in the Department of State, (OAL), that would schedule a hearing as per subsection (b) 2. This subsection (b) 2 reads: "Schedule a hearing on the complaint to determine whether the respondent candidate has failed to participate in a debate as alleged."

Legal Director Nagy said that this subsection refers to the Commission as scheduling a hearing, but that the Commission has an option to refer the matter to the OAL. He said that this power is prescribed in 19:25-16.46 (f).

Chairman Bedford said that reference to the OAL should be deleted because the statute calls for the Commission to hold this hearing. He recommended, moreover, that the words, "before it" be included in the text between the words "hearing" and "on" to clarify that this regulation is talking about a hearing before the Commission.

The Commission agreed to the technical change to 19:25-16.44(b) 2 as recommended by Chairman Bedford. The subsection now reads: "Schedule a hearing before it on the complaint to determine whether the respondent candidate has failed to participate in a debate as alleged."

19:25-16.45 - Response to a Complaint For Failure to Participate in a Debate or Debates

This proposed regulation lists the time in which a complaint for failure to participate in a debate must be answered and describes the required contents of the response. Service requirements are also listed.

19:25-16.46 - Conduct of Hearing

This proposed regulation outlines the procedures and rules of evidence which will apply in any hearing for failure to participate in any debate.

Chairman Bedford suggested that subsection (a) should be modified to give the Commission the discretion to determine who shall give testimony other than the respondent and the complainant. The modified language reads: "The complainant and respondent candidate shall and other interested persons may at the discretion of the Commission appear at the hearing scheduled pursuant to N.J.A.C. 19:25-16.42(b) 2 either pro se or by their legal representatives." Originally subsection (a) read: "The parties shall appear at the hearing scheduled pursuant to N.J.A.C. 19:25-16.44(b) 2 either pro se or by their legal representatives."

The Commission also changed subsection(c) to read: "The complainant shall have the burden of proving non-participation by a preponderance of the credible evidence, and the respondent candidate charged with the failure to participate in a debate shall have the burden of proving justification or excuse by a preponderance of the credible evidence." Subsection(c) initially read: "The respondent candidate charged with the failure to participate in a debate shall have the burden of showing justification or excuse."

Moreover, the Commission changed subsection(d) to read: "The complainant, the respondent candidate and interested persons permitted by the Commission to appear shall have the right to present evidence and cross-examine witnesses at the hearing." Subsection(d) had read: "The parties shall have the right to present evidence and cross-examine witnesses at the hearing."

Commissioner Linett also suggested that subsection(e) should be rewritten to read: "At the request of the complainant or respondent candidate, the Commission shall issue subpoenas to compel the attendance of witnesses to testify at the hearing held to determine a candidate's failure to participate in a debate." This subsection(e) had read: "The Commission shall have the power to issue subpoenas to compel the attendance of

witnesses to testify at the hearing held to determine a candidate's failure to participate in a debate."

The Commission decided to leave subsection(f) in the text. Earlier, Chairman Bedford suggested that reference to the OAL be deleted. This subsection gives the Commission the right to refer these matters to the OAL.

Upon the suggestion of Chairman Bedford, subsection(g) is changed to read: "The Commission shall have the authority to assess the costs associated with a hearing held pursuant to this section against any complainant, respondent candidate or interested person permitted to appear." Subsection(g) originally read: "The Commission shall have the authority to assess the costs associated with a hearing held pursuant to this section against any party.

19:25-16.47 - Final Decision of Non-participation

This proposed regulation explains the process by which the Commission renders a decision of non-participation and notifies the parties of its decision.

Chairman Bedford suggested that subsection(b) be modified to read: "The Commission shall serve its written decision upon the participants or upon their legal representatives as soon as practicable." Subsection(b) originally read: "The Commission shall serve its written decision upon the parties or upon their legal representatives as soon as practicable."

19:25-16.30 - Coordinated expenditures

Legal Director Nagy said that this proposed regulation is in response to the Supreme Court decision in the Friends of Governor Tom Kean v. New Jersey Election Law Enforcement Commission, N.J. (1989). The proposed regulation would clarify how the cost of a gubernatorial coordinated political communication by a legislative or local candidate would be allocated against the expenditure limit of a gubernatorial candidate.

Chairman Bedford said that allocation on a percentage basis is arbitrary. Commissioner Linett agreed that the 15 percent allocation amount is, indeed, arbitrary, but suggested that there is no easy way to address the problem.

Counsel Farrell said that the rationale behind the 15 percent was to provide a floor for allocating expenses. Executive Director Herrmann remarked on the history of the provision. Its origins lay in a recommendation made by the parties requesting Advisory Opinion 33-1981.

Commissioner Linett suggested that Counsel Farrell and Legal Director Nagy consult further, and prepare a new proposal for the next meeting. He said that he does not feel comfortable with adopting this arbitrary standard. Counsel Farrell suggested the Commission proceed to propose this

regulation, but exclude it from the emergency adoption. The Commission concurred.

19:25-11.9 - Political Communications

This proposed regulation describes criteria to determine which communications will, under all circumstances, be regarded as political and therefore subject to reporting.

19:25-11.10 - Reporting of Political Communication Costs

This proposed regulation explains the reporting of communications determined to be political pursuant to new Section 11.9.

Regulations Reflecting Revised Thresholds and Limits

Legal Director Nagy directed the Commission's attention to a separate text circulated which included proposed regulations changing the limits and thresholds throughout the public financing regulations in Subchapter 16 to reflect the changes in the new law.

Commissioner Linett moved the adoption of the proposed regulations and amendments, excepting 19:25-16.30, Coordinated expenditures, pursuant to the emergency adoption procedure. The same motion called for proposal proceedings to be initiated pursuant to adopting all of the regulations, including 19:25-16.30, on a permanent basis.

Seconded by Vice Chairman McNary, the Commission approved the motion by a vote of 4-0.

4. Advisory Opinion No.03-1989

This advisory opinion request from Ms. Jean L. DuBois, treasurer for Friends of Stephen Salvatore, asks if funds from this account can be used to purchase membership for Mr. Salvatore in organizations such as a Lions or Rotary Club. The draft advisory opinion circulated by Legal Director Nagy responded that the purchase of such memberships in private fraternal associations, in the absence of clear campaign purposes or objectives not evident in the inquiry, cannot be undertaken from funds contributed to this entity.

On a motion by Vice Chairman McNary, seconded by Chairman Bedford and passed by a vote of 4-0, the Commission approved the advisory opinion response as drafted by the staff.

5. Advisory Opinion No.04-1981

Legal Director Nagy said that this advisory opinion was initially considered at the Commission's December 20, 1988 meeting. At that time, he said, the Commission wrote to Mr. Kobin stating that it needed more facts in order to render an opinion, and would not issue an opinion on an anonymous basis.

The advisory opinion request, as resubmitted by Mr. Arthur R. Kobin, Esq., identified the party seeking the opinion as Browning-Ferris Industries (BFI) and asks if Browning-Ferris Industries, a solid waste utility, is prohibited from making political contributions directly or through political action committees formed by BFI. BFI includes Browning-Ferris Industries of Elizabeth, New Jersey Inc., Browning-Ferris Industries of North Jersey, Inc., Browning-Ferris Industries of Patterson, New Jersey, Inc., and Browning-Ferris Industries of South Jersey, Inc.

Because prohibited contributions are subject to N.J.S.A. 19:34-45 which is beyond the jurisdiction of the Commission, the staff recommended that the Commission refer this advisory opinion request to the Attorney General.

On a motion by Commissioner Axtell, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission approved the staff's recommendation to refer the advisory opinion request to the Attorney General.

6. Advisory Opinion No. 05-1989

Counsel Farrell said that a draft is being prepared for consideration at the next meeting (March 2, 1989). This advisory opinion request from the Democratic State Committee asks if party-building activities such as voter registration drives and get-out-the-vote efforts financed by them would be counted against their gubernatorial contribution limit or the expenditure limit of a gubernatorial candidate. The activities also include research that would be turned over to Democratic candidates, including the Democratic candidate for Governor.

7

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.

8. Adjournment

On a motion by Commissioner Axtell, seconded by Vice Chairman McNary and passed by a vote of 4-0, the Commission voted to adjourn at 1:20 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.

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