



State of New Jersey

**ELECTION LAW ENFORCEMENT COMMISSION**

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COUNSEL

PUBLIC SESSION MINUTES

SEPTEMBER 26, 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 11:00 a.m. at the Nutley Town Hall, Nutley, New Jersey.

1. Approval of Public Session Minutes of August 15, 1989

On a motion by Vice Chairman McNany, seconded by Commissioner Linett and passed by a vote of 4-0, the Commission approved the Public Session Minutes of August 15, 1989.

2. Approval of Public Session Minutes for Telephone Meeting of September 12, 1989

On a motion by Commissioner Linett, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission approved the Public Session Minutes of the telephone meeting of September 12, 1989.

3. Approval of Public Session Minutes for Telephone Meeting of September 19, 1989

On a motion by Commissioner Linett, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission approved the Public Session Minutes of the telephone meeting of September 19, 1989.

Commissioner Linett praised the quality of the Minutes, stating that they are most thorough and complete, whereby Executive Director Herrmann thanked Deputy Director Brindle for his efforts in recording ELEC's deliberations.

4. Executive Directors' Report

A. White Paper Number Three

Executive Director Herrmann said that the White Paper series has been praised throughout the nation. He said that the Alaska Public Offices Commission, for example, is so impressed by the White Paper series that it has started to produce White Papers of its own.

Executive Director Herrmann noted that the latest White Paper, which is an analysis of legislative public financing, has been praised by such experts as Dr. Herbert E. Alexander of the Citizens' Research Foundation, Los Angeles, California, who wrote that it was "a very good job of pulling together information on the financing of legislative campaigns." The Executive Director also reported that Assemblyman William Schluter called it "an excellent job [that] will set the stage for objective consideration of legislative public financing."

Executive Director Herrmann disclosed to the Commission that the first draft of White Paper Number Four, about alternate funding sources for the New Jersey Election Law Enforcement Commission (ELEC), has been completed. He said that the draft is excellent (about 50 pages long). Executive Director Herrmann said that the concept of alternate funding sources has already generated interest among the media and various Legislators.

The Executive Director announced that White Paper Number Five is in the planning stage. He said that this White Paper, to be completed in the spring of 1990, would be about lobbying and lobbying reform. Executive Director Herrmann indicated that ELEC's last study of lobbying was done seven years ago and that it was again time to highlight the major loopholes in the law.

B. Office Space

Executive Director Herrmann said that approval for ELEC to take over the 13th floor has been granted and that ELEC will make its major move after the general election. He said that the added space is needed to remove the fire hazard that exists as the result of boxes located in the hallway. He said that it is also needed to ease the overcrowding that presently confronts ELEC staff. He said that numerous staff people, for instance, have their work stations in the hallway. Executive Director Herrmann said that the 13th floor is contiguous with the 12th floor so that computers may be hooked up and staff can be together again.

C. Personnel Changes

Executive Director Herrmann reported that, as the result of resignations, the Commission has been able to make two internal promotions. He noted that Carol Neiman is being promoted to Assistant Compliance Officer and that Kim Rivera-Key is being promoted to Assistant Report Examiner.

D. Staff Activities

Executive Director Herrmann reported that he was a speaker at the Council on Governmental Ethics Laws, National Association of Secretaries of State, and Council of State Governments (COGEL/NASS/CSG) Campaign Finance National Conference in Washington, D.C., on September 25, 1989. The Executive Director said that he served on a panel chaired by Frank Reiche, former Chairman of the Federal Election Commission (FEC) and of ELEC. Robert Huckshorn, Chairman of the Florida Election Commission was the other panelist. Executive Director Herrmann said that he spoke about the role of State Election Commissions and the need for reforming campaign finance laws. The Executive Director added that he emphasized the need for adequate funding of ethics agencies, a point that was well received. Executive Director Herrmann indicated that as part of the exchange of ideas, National Common Cause praised the gubernatorial public financing program in New Jersey. In addition, he said, Alaska's Executive Director praised the White Papers as well as the Investigative Manuals produced by ELEC. She referred to them as a "treasure trove" of information.

E. Fine Collection

Executive Director Herrmann reported that staff has been looking into obtaining the services of an outside agency to collect fines. He said that the Commission will attempt to become part of the Department of Treasury's collection proposal for the Department of Insurance.

F. Future Meetings

Executive Director Herrmann noted that the next regular meeting of the Commission is scheduled for October 17, 1989 in Trenton at 9:30 a.m. The Commission also tentatively scheduled telephone meetings for October 4, 1989 at 9:30 a.m. and October 10, 1989 at 4:00 p.m.

5. Certification of Public Financing Funds

Director of Public Financing Nedda G. Massar reviewed the applications for public matching funds. She said that on September 25, 1989, the Commission received a submission from Candidate Courter. Director Massar said that the staff would recommend the application of the automatic 80 percent certification process, approved by the Commission on June 1, 1989, to the submission filed by the Courter campaign. She said that the 80 percent process is applied to second and subsequent submissions of qualifying gubernatorial general election candidates.

The net amount submitted by Candidate Courter for match was \$346,142. This submission was Candidate Courter's second in the general election.

Applying the 80 percent automatic approval rate to the submission, a net amount of \$276,913.60 was deemed to be eligible for match. Therefore, staff recommends that, at a 2:1 match, a total of \$553,827.20 in public funds is eligible to be disbursed to Candidate Courter. Upon completion of

the review of Candidate Courter's second submission the balance of public funds will be certified at the October 4, 1989 Commission meeting.

On a motion by Vice Chairman McNany, seconded by Commissioner Linett and passed by a vote of 4-0, the Commission certified \$553,827.20 in matching funds to Candidate Jim Courter.

6. Advisory Opinion No. 21-1989

The Commission considered the draft of Advisory Opinion No. 21 as submitted by Legal Director Gregory E. Nagy.

For details see Advisory Opinion No. 21, dated September 26, 1989, from Legal Director Gregory E. Nagy to Peter Verniero, Esq., Executive Director of the New Jersey Republican State Committee (RSC). Also see the advisory opinion request, including script, dated September 18, 1989 from Peter Verniero to Frederick M. Herrmann, Executive Director of the Commission, and the Public Session Minutes of September 19, 1989.

On a motion by Commissioner Linett, seconded by Commissioner Mayo and passed by a vote of 4-0, the Commission approved the draft of the advisory opinion as technically amended. The word "that" was added after "concludes" and "constitute" was changed to "constitutes" in the last sentence of the second paragraph on page two.

7. Adoption of a Permanent Policy on Releasing Advisory Opinions

Counsel Farrell summarized the proposed policy by stating that the Commission is of the view that as materials are submitted regarding advisory opinions they should be released immediately to the public. He said, however, that the ten-day period allowed to the Commission for acting on the advisory opinion request does not begin until all pertinent scripts of the request are received. In terms of advisory opinion requests involving generic advertising, Counsel Farrell added that a request would not be considered complete until a script or scripts are submitted to the Commission.

Vice Chairman McNany proposed a motion to the effect that the Commission's policy regarding release of advisory opinion requests would be as follows:

1. that all documents would be made public as soon as they are submitted to the Commission; and
2. that the ten-day statutory time period given the Commission to consider advisory opinion requests would not begin until the request is complete. In the case of generic advertising, the request would not be considered complete until the script or scripts are submitted to the Commission.

On a motion by Vice Chairman McNany, seconded by Commissioner Linett and passed by a vote of 4-0, the Commission adopted the policy on releasing advisory opinions to the public.

8. Amendments to Coordinated Expenditures Regulation  
N.J.A.C. 19:25-15.29

The Commission considered the permanent adoption of the proposed amendments to the Coordinated Expenditure Regulation, adopted on an emergency basis on August 3, 1989.

These amendments permit certain expenditures which are made by non-gubernatorial candidates and political parties and which benefit and are coordinated with a gubernatorial candidate to be excluded from the \$5 million expenditure limit of that candidate. These amendments established exemptions for coordinated expenditures made for "direct mail" and for "phone banks."

The emergency adoption will expire October 2, 1989. The proposal to adopt the amendments permanently was published concurrent with the emergency proposal. The period for the public to submit written comments expired on September 20, 1989, and the period for legislative review will expire on October 2, 1989. Upon approval by the Commission, the permanent adoption of these amendments will be filed on October 2, 1989 with the Office of Administrative Law (OAL), and will be effective on that date.

On a motion by Commissioner Linett, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission adopted the amendments to the Coordinated Expenditures Regulation N.J.A.C. 19:25-15.9, and directed staff to file the adoption notice with OAL.

Regarding the suggestion by staff (contained in the memorandum attached to the regulation) that it draft further amendments to the Coordinated Expenditures Regulation to resolve a textual discrepancy in the Regulation, Commissioner Linett said that he believed further amendments were unnecessary.

9. Advisory Opinion No. 22-1989

This advisory opinion request was submitted by Ms. Mary Annie Harper on behalf of Assemblyman Frank A. LoBiondo.

Attached to the request are two press releases, dated September 14, 1989, which announced Assemblyman LoBiondo's appointment to the Chairmanship of the Economic Growth, Agriculture and Tourism Committee of the General Assembly.

The request indicates that the Assemblyman plans to notify about 1,000 of his constituents of the appointment, including members of the Southern Shore Region Tourism Council, all elected officials in the district, and members of various Chambers of Commerce.

Ms. Harper's request asks if such a mailing would count as an in-kind contribution from the State of New Jersey since Assemblyman LoBiondo is campaigning for reelection this year.

In his draft response, Legal Director Nagy noted that case law precedent in New Jersey upheld the position that the costs of a communication promoting a candidate to voters prior to election can be deemed subject to campaign reporting even if there is no direct exhortation to vote for that candidate. The draft notes that in In re Dawes, 156 N.J. Super. 195 (App. Div. 1978) the costs of a communication about a legislator paid for by a local utility authority were deemed to be reportable as a contribution from the authority. Additionally, the draft notes that newsletter costs containing favorable biographies of three school board candidates distributed prior to the school board election were determined to be reportable as campaign contributions from the school board; ELEC v. Brown, 206 N.J. Super. 206 (App. Div. 1985).

In the draft response, Legal Director Nagy also outlined the three criteria for deeming a communication "political" promulgated by the Commission in N.J.A.C. 19:25-11.10(b). These criteria are:

- 1) the communication is circulated to 10 or more persons and contains a statement or reference concerning the governmental or political objectives or achievements of a candidate in an upcoming election;
- 2) the communication is circulated to an audience that is comprised substantially of persons eligible to vote for the public office being elected in the upcoming election; and
- 3) the communication is circulated fewer than 60 days before the date of any election in which the candidate referred to seeking elected office ....

Based on the representation made by Ms. Harper that the communication will reach some 1,000 persons who are constituents of Assemblyman LoBiondo, and based on the fact that the texts set forth the governmental objectives and achievements of Assemblyman LoBiondo, and that the communication will occur within 60 days of the date of November 7, 1989 general election, the draft response concludes that the costs associated with the communication would be subject to campaign reporting."

Commissioner Linett suggested that the paragraph asterisked at the end of the advisory opinion be highlighted and included in the body of the opinion. The asterisked material addresses the question of district office use. It reads: "The Commission makes no determination as to whether State funds provided to a Legislator for district office use may be appropriately applied for this purpose. The Commission has jurisdiction to issue advisory opinions limited to the provisions of The Reporting Act; see N.J.S.A. 19:44A-6(f). Therefore, we refer you to the administrative offices of the General Assembly for further guidance."

On a motion by Vice Chairman McNany, seconded by Commissioner Linett and passed by a vote of 4-0, the Commission approved the advisory opinion as amended by Commissioner Linett.

10. Advisory Opinion No. 23-1989

This advisory opinion, submitted by Jeffrey T. Michaels, Executive Director of "Bob Franks Victory Fund," inquires as to whether the statutory \$1,500 limitation on contributions to a gubernatorial candidate would preclude maximum \$1,500 contributions from both the "Bob Franks Victory Fund" and "Citizens to Re-Elect Bob Franks" to one gubernatorial candidate.

In her draft response, Director of Public Financing Nedda Massar states that the Commission assumes that the "Citizens to Re-Elect Bob Franks" has filed a Designation of Campaign Treasurer and Depository (Form D-2) for the 1989 general election campaign committee. It also states that the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-29, provides that individuals, political committees, and continuing political committees, may all contribute the maximum \$1,500 contribution to a single gubernatorial candidate. The draft suggests that the Commission interprets this statute to require that a continuing political committee and political committee be unaffiliated if each expects to make a separate maximum \$1,500 contribution to a single candidate. The draft holds that if a substantial identity exists between a continuing political committee and a political committee, then the statutory contribution limit of N.J.S.A. 19:44A-29 is violated when the committees make contributions that in the aggregate exceed \$1,500.

In the draft opinion, Director Massar suggests that the criteria applicable may be contained in N.J.A.C. 19:25-15.12(c). These criteria, which constitute the test for affiliation between corporate or union contributors, include:

- 1) the degree of control which one entity exerts over the other;
- 2) the source and control of the funds used for the contemplated gubernatorial contributions; and
- 3) the degree to which the decisions whether to contribute, to which candidate, and in what amount are independent decisions.

The draft opinion concludes that based on these criteria the "Bob Franks Victory Fund," and the "Citizens to Re-Elect Bob Franks," may each make a maximum \$1,500 contribution to a 1989 gubernatorial candidate.

The draft response states that if the relationship of these two committees changes, the two committees could be restricted to contributions totaling only \$1,500.

Commissioner Linnett asked how the Commission could determine the degree of control by one individual or the other.

Director Massar responded that in a telephone conversation with Mr. Michaels it was disclosed that both Mr. Michaels and Assemblyman Franks jointly make decisions about the use of funds from "The Bob Franks Victory Fund." He said that Assemblyman Franks makes all the decisions regarding the "Citizens to Re-Elect Bob Franks."

Commissioner Linett said that he is concerned that the facts are too sketchy regarding this advisory opinion. He suggested that consideration of this advisory opinion should be postponed until staff is able to obtain more factual information.

Counsel Farrell said that while he did not have a problem with the analysis set forth in the opinion, he did have difficulty with the limited facts presented to the Commission by the individual making the advisory opinion request. Counsel Farrell said that the analysis is solid but that without further facts, the Commission would be unable to answer the question.

Chairman Bedford asked if Mr. Michaels worked for Assemblyman Franks.

Director Massar said that she would determine the answer to that question during a follow-up call to Mr. Michael.

Counsel Farrell said that he had problems with the notion that there is no commonality of control between committees, when in fact, there is indeed commonality of control.

Commissioner Linett recommended that staff send a letter to Mr. Michaels containing questions that needed answers before the Commission could render an advisory opinion. He suggested that, pursuant to any additional facts, the advisory opinion be rewritten for consideration at the next meeting.

Counsel Farrell asked: "when does the clock start running on this request?"

Commissioner Linett said that once the additional information is received the request will be considered complete and the clock will start ticking.

Vice Chairman McNany suggested that staff review the receipts and disbursements of both committees.

Chairman Bedford suggested that staff telephone Mr. Michaels and follow-up the telephone call with a letter.

Legal Director Nagy said that staff will point out in the letter that the ten-day period for advisory opinion review will not start until all information is received from Mr. Michaels.

The Commission carried the matter over to the next meeting.

11. Resolution To Go Into Executive Session

On a resolution by Commissioner Linett, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission resolved to go into closed, Executive Session to discuss the following matters which will become public as follows:

1. Executive Session Minutes of August 15, 1989, which minutes will only become public if various matters discussed or acted upon become public;
2. Final Decisions recommendations in violation proceedings which will not become public. However, the Final Decisions resulting from those recommendations will become public 15 days after mailing; and
3. Investigative Reports of possible violations, which reports will not become public. However, any Complaint generated as the result of an Investigative Report will become public 30 days after mailing.

12. Adjournment

On a motion by Vice Chairman McNany, seconded by Commissioner Linett 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.