



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

NATIONAL STATE BANK BLDG., 12th FLOOR
28 W. STATE STREET, CN 185
TRENTON, NEW JERSEY 08625-0185
(609) 292-8700

OWEN V. McNANY, III
CHAIRMAN

STANLEY G. BEDFORD
COMMISSIONER

DAVID LINETT
COMMISSIONER

FREDERICK M. HERRMANN, PH.D.
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JEFFREY M. BRINDLE
DEPUTY DIRECTOR

GREGORY E. NAGY
LEGAL DIRECTOR

EDWARD J. FARRELL
COUNSEL

PUBLIC SESSION MINUTES

JUNE 19, 1991

All the Commissioners and senior staff were present.

Chairman McNany called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-6 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 9:50 a.m. at the Commission offices, 28 West State Street, Trenton, New Jersey.

1. Approval of Public Session Minutes of May 22, 1991

On a motion by Commissioner Linett, seconded by Commissioner Bedford and passed by a vote of 3-0, the Commission approved the Public Session Minutes of May 22, 1991.

2. Executive Director's Report

A. More Praise for Staff

Executive Director Herrmann reported that a researcher for the Bergen Record praised ELEC's receptionists Debbie Kostival and Irene Comiso, stating that the pair is legendary at the newspaper for their courtesy and efficiency of service.

B. COGEL Conference

The Executive Director announced that the annual COGEL conference will be held in South Carolina from September 22 to 25. He said that he reserved a spot on an "Expenditures Limits" panel in the event that any Commissioners are going and would like to be involved. Executive Director Herrmann said that no funding for staff travel is available and no out-of-state travel is permitted.

Chairman McNany said that he may attend the conference, and, if so, would be interested in serving on the panel.

C. Legislative News

Executive Director Herrmann advised the Commission that he testified before the Assembly State Government Committee on May 30, 1991, concerning a three-bill ethics package.

The Executive Director said that A-4617 (Spadoro/Kronick) is a lobbying reform bill which removes "expressly" from the statute, covers executive branch lobbying, includes legislative staff lobbying, and establishes new lobbyist identification procedures.

Executive Director Herrmann reported that A-4618 (Villapiano/Baer) moves lobbying regulation functions of the Attorney General to ELEC.

He concluded that A-4619 (Ford/Cohen) establishes a new system for ELEC to regulate charitable fundraising by candidates and public officials. Executive Director Herrmann indicated that certain problems existed in the bill and that he pointed out these deficiencies to the members of the Committee.

He said that no definition of charity was included in the legislation, and that no appropriation was provided. Executive Director Herrmann noted that the bill did not require reporting for a fund that did not bear a candidate's name even though the fund is controlled by that candidate. The Executive Director added that the reporting scheme needed improvement because it was based on the campaign schedule and not on a quarterly schedule.

Executive Director Herrmann said that all three bills were released from the Committee but that only the lobbying bills passed the full Assembly. He noted that A-4617 passed 75-0 and that A-4618 passed 79-0. Executive Director Herrmann advised the Commission that the bills were being considered in the Senate State Government Committee on June 20, 1991, and that he planned to be present to answer any questions the Committee members might ask. The Executive Director also noted that S-3578 (Stockman), which is the same as A-4617, and S-3568 (Dalton), which is the same as A-4618, would also be considered in committee.

The Commissioners unanimously asked the Executive Director to write to Governor Florio's office to request that they be included in any bill signing ceremony that may occur in relation to the enactment of any of the major lobbying reform bills being considered. They are proud of the role ELEC has played in the reform process along with the Governor and the Legislature and want to be part of the celebration.

D. FY-92 Budget

Executive Director Herrmann reported to the Commission that ELEC has been charged a \$61,000 "interdepartmental assessment" on the next fiscal year's budget. The Executive Director said that Deputy Director Brindle, Legal Director Nagy, Director of Administration Barbra Fasanella and he met with members of the Attorney General's administrative staff on June 5, 1991, to discuss the cut. Executive Director Herrmann said that the Attorney General's staff recommended sending a letter to the Office of Management and Budget (OMB) Director Richard Keevey to appeal the assessment. He said that it was also suggested that the letter refer to the Commission's alternate funding ideas and in so doing submit a draft resolution to allow ELEC to collect filing fees immediately if pending legislation is enacted.

Executive Director Herrmann indicated that while the appeal to allow ELEC to retain the \$61,000 was rejected, the OMB Director did commit his support for including the resolution language in the budget.

Executive Director Herrmann told the Commission that staff will present the Commission with a set of proposals for dealing with the newest budget cut at the July meeting. The Executive Director, reminding the Commissioners that the times are extremely difficult, remarked that ELEC's FY-92 budget, even with the \$61,000 included, would be less than the budget in FY-87. Executive Director Herrmann said that ELEC's budget will be about 1/2 of what is needed to provide services at the level of five years ago.

Commissioner Linett asked: Will the Commission get money for undertaking additional duties in the area of lobbying?

Executive Director Herrmann said that the Commission would be permitted to collect filing fees from lobbyists under the proposed legislation.

Commissioner Linett asked further: Will ELEC obtain any staff from the Attorney General when it assumes responsibility for lobbying registration and quarterly reporting?

Deputy Director Brindle said that if the consolidation of lobbying were effected under a "Reorganization Act" executive order, as was discussed at a previous meeting, the Commission would acquire additional resources from the Attorney General. If it acquires the responsibility through legislation, he said, the Commission would not obtain additional resources from the Department.

E. Summer Meetings

The Commission determined that its next meeting will be held on August 2, 1991, in Keyport, New Jersey.

F. ELEC Picnic

Executive Director Herrmann announced that ELEC's annual picnic will be held at Camp Nagy on July 26, 1991.

3. Public Hearing on Violations and Political Communications Regulations

Chairman McNany noted for the record that proper public notice of the public hearing was given by the Commission. He noted further that no members of the public attended the meeting to be heard on the proposals although written commentary was received from Assemblymen Chuck Haytaian and Patrick Roma and Bergen County Republican Organization Chairman John A. Schepisi.

Because of the lack of public attendance, the Commission excused the court reporter at 10:30 a.m. and proceeded to discuss the regulatory proposals.

Regarding the proposed regulation concerning violations, at N.J.A.C. 19:25-17.2, please see memorandum from Gregory E. Nagy, Legal Director, to Frederick M. Herrmann, Ph.D., Executive Director, entitled "Consideration of Regulation Proposals Concerning Violations and Political Communications" and dated June 12, 1991. Also see the memorandum, entitled "Comments of Bergen County Republican Organization (etc.)," dated June 18, 1991, circulated to the Commission at the meeting.

According to Legal Director Nagy, the proposed new rule would establish the principle that each omitted, incorrect, or late reporting transaction constitutes a separate violation of the Reporting Act. Legal Director Nagy added that each recordkeeping transaction that is not made or retained in the manner prescribed by the Act or regulations constitutes a separate violation of the Act subject to penalties.

Legal Director Nagy said staff recommended that the Commission adopt the proposed regulation, without change. He noted the comments had been received from the Bergen County Republican Organization to the effect that a reporting entity with a high volume of relatively smaller contributions faces a greater political exposure than an entity with a relatively small number of large contributions. However, the Commission has discretion under

the Act to set a penalty that reflects the amount of a contribution, and if the cumulative impact of multiple violations appears out of proportion to the total amount raised, the Commission may reduce or waive some of the penalties.

On a motion by Commissioner Linett, seconded by Commissioner Bedford and passed by a vote of 3-0, the Commission adopted the proposed regulation, without change, and directed staff to prepare and file the Certificate of Adoption and supporting documents with the Office of Administrative Law (OAL).

In regards to the proposed amendments to the regulation involving political communications, at N.J.A.C. 19:25-11.10, the proposed amendments clarify the circumstances under which an expenditure for a communication by a person or an entity becomes subject to campaign reporting. The amendments to subsection (a) deal with "express advocacy" communications and make the regulation more closely conform to court opinions concerning undue infringement of free speech in the context of campaign reporting. Subsection (b) addresses those communications that do not contain "express advocacy" language but are nevertheless subject to campaign reporting. A communication is considered political if: (1) it is circulated or broadcast within 90 days of the election; (2) it is circulated or broadcast to an audience substantially comprised of persons eligible to vote for the candidate; (3) it contains a statement or reference concerning the governmental or political achievements of a candidate; and, (4) the candidate has consented in the production, circulation, or broadcast of the communication.

Legal Director Nagy said that based on the comments from Assemblyman Haytaian, Assemblyman Roma, and the Bergen County Republican Organization, staff is recommending that technical and substantive changes be made to the text of the proposed amendments, and a copy of a draft text of modifications was circulated. The modifications provide that candidates in the primary election are included in the scope of the rule, that candidates in an uncontested primary election may be exempted from subsection (b), and that communications made in direct response to constituents are not subject to reporting if they do not contain "express advocacy" language. He said that he checked with the Office of Administrative Law (OAL) as to whether the modifications would require reproposal, and the OAL indicated that the modifications were not so substantial that they would require reproposal. Therefore, the proposal text as modified, was ripe for adoption.

A technical modification to subsection (b)(1) states that the regulation is applicable to a candidate who is seeking nomination in a primary election as well as seeking elected office. The purpose of this

change is to remove any possible ambiguity concerning the applicability of the guidelines to primary elections. Further, a substantive change in (c) clarifies that the regulation is not applicable to communications made by officeholders in response to constituent mail. Also, a new subsection (d) was added to exempt a candidate in an uncontested primary election from reporting under subsection (b).

He noted further that changes had been made to subsection (c) for clarification, replacing the words "within a specified time period" with "before the date of the upcoming election." The words "within a specified time period" did not clearly convey that the applications or other actions referred to in the text must be required before the upcoming election.

Legal Director Nagy said that the changes reflect some of the comments from Assemblymen Haytaian and Roma and from the Bergen County Republican Organization, and they were crafted to balance the interest of promoting constituent communication against the interest of disclosing use of public funds for political purposes.

Counsel Farrell said that he had some concern about legislators holding up responses to constituents for two years, and then sending out a mailing immediately prior to an election.

Commissioner Linett said that the problem, in his opinion, was not compelling enough to hold up the adoption of the regulation.

On a motion by Commissioner Linett, seconded by Chairman McNany and passed by a vote of 3-0, the Commission approved the text of the changes for subsection (b), (c), and (d), as drafted by staff and circulated as an attachment to the June 18, 1991 memorandum, re: "Comments of Bergen County Republican Organization (etc.)."

On a motion by Commissioner Bedford, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission adopted the proposed text of N.J.A.C. 19:25-11.10 with substantive and technical changes, and directed staff to prepare and file the Certificate of Adoption and supporting documents with the Office of Administrative Law (OAL).

4. Reproposal of Regulation on "Pay-per-call" Telephone Solicitations

For detailed information, please see the memorandum from Gregory E. Nagy, Legal Director, to Frederick M. Herrmann, Ph.D., Executive Director, entitled Reproposal of Regulation Concerning "Pay-per-call" Telephone

Solicitations, dated June 10, 1991. For further information on this issue please see the Public Session Minutes of May 22, 1991.

Basically, the reproposal eliminates the \$20 contribution limitation based on the "public solicitation" statutory language and increases the recordkeeping and reporting requirements for fundraising undertaken through the use of "900" telephone lines. The reproposal, based on comments received from the State Attorney General, requires the same reporting for "900 line" fundraising as for all other fundraising endeavors.

Commissioner Linett said rhetorically: In this reproposal, the \$20 public solicitation language was dropped.

Legal Director Nagy affirmed Commissioner Linett's comments. He said that staff met with Sarah E. McCandless, Special Assistant to the Attorney General, after the May Commission meeting, and she found that the removal of the "public solicitation" language, including the \$20.00 limit, met her objectives.

Commissioner Linett asked: Aren't we, as a practical matter, prohibiting this activity?

He said that he was reluctant to support the reproposal because it would discourage small contributions, the very type the Commission sought to encourage by its \$20 language. Commissioner Linett said that he believed action should be deferred until legislation is passed dealing with the consumer protection concerns with "900 lines."

Chairman McNany said that the Commission could propose the regulation and then defer action on it.

Counsel Farrell said that perhaps the Commission could put the \$20 language back in the regulation at a later time and avoid being subject to reproposal delays.

Legal Director Nagy said that he was not sure this could be accomplished because the Commission would be making a substantive change that would probably require reproposal.

Commissioner Linett suggested that both proposals be kept on the table.

Legal Director Nagy said that he would counsel against this course of action because an agency must give some indication to the public as to the policy it desires to pursue when proposing regulations.

Counsel Farrell said that while the reproposal is consistent with the Federal Election Commission (FEC) approach and what the Attorney General wants, the down side is that it is not consistent with the "public solicitation" direction in which the Commission desires to move.

Commissioner Bedford said rhetorically that the reproposal did not have the \$20 solicitation language in it.

Legal Director Nagy said that Commissioner Bedford's comments were correct, stating that the Attorney General opposes the relaxation of recordkeeping and reporting inherent in the "public solicitation" statute.

Counsel Farrell said that while it is good to listen to the views of the Attorney General and others, the Commission must keep in mind that it decides these matters, not the Attorney General. He said that the Commission was set up in an independent fashion for the purpose of deciding campaign finance issues and should not automatically pursue policies of the FEC, the Attorney General or any other public or private entity.

Commissioner Linett said that he believed there was a public benefit to encouraging small contributions. He urged that a public hearing be established for September to discuss the issue. In the meantime, he said, the Commission should not propose this regulation and thereby eliminate the "\$20 public solicitation" regulation now on the table.

Executive Director Hermmann recommended that the hearing be postponed until after the election because of the Commission's heavy workload and the fact that no entities had created or were contemplating the use of 900 numbers at this time.

On a motion by Commissioner Linett, seconded by Commissioner Bedford and passed by a vote of 3-0, the Commission directed staff to arrange a public hearing for November 20, 1991 at 10:00 a.m. in Trenton, N.J.

5. Advisory Opinion No. 04-1991

This advisory opinion was submitted by Mrs. Georgene Granholm on behalf of the Berkeley Heights Republican Club. Mrs. Granholm asked whether the Berkeley Heights Republican Club must file campaign reports as a "political committee" under the Campaign Act by virtue of the fact that one of the club's newsletters listed the names of the Republican Party municipal candidates in the 1991 primary election.

Legal Director Nagy circulated a draft response that stipulated that the club did not acquire reporting obligations in the 1991 primary election on the basis of the facts that were submitted.

On a motion by Commissioner Bedford, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission approved the advisory opinion.

6. Resolution to go into Executive Session

On a resolution by Commissioner Bedford, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission resolved to go into closed Executive Session to discuss the following matters which will become public as follows:

1. Final Decision 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,
2. 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.

5. Adjournment

On a motion by Commissioner Linett, seconded by Commissioner Bedford and passed by a vote of 3-0 the Commission voted to adjourn at 12:15 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.