



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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PUBLIC SESSION MINUTES

JULY 20, 1993

Commissioners Linett and Eldridge, senior staff, and Director of Public Financing Nedda Gold Massar were present. Chairman McNany participated by telephone. Counsel Farrell was absent.

Commissioner Linett, who chaired the meeting, 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 9:30 a.m. at the Commission offices, 28 W. State Street, Trenton, New Jersey.

1. Approval of Public Session Minutes of June 18, 1993

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission approved the Public Session Minutes of June 18, 1993.

2. Executive Director's Report

A. Staff News

Executive Director Herrmann introduced Andrew Mersel, who has served in the capacity of summer intern and will be entering law school this fall. The Executive Director said that Mr. Mersel has done a great job.

Executive Director Herrmann reported that Data Entry Operator Patricia Martin has left the public financing staff for a permanent position in the private sector.

The Executive Director announced that candidate forms are being redone for the general election. He said that Director of Compliance and Information Evelyn Ford is serving as project director of the summer form redesign project. The Executive Director noted that staff from all sections have been working with Director Ford. He said that the new forms will embrace the changes in the new law as well as incorporate suggested changes from

candidates, the media, and staff. According to Executive Director Herrmann, the new forms will be clearer and more user-friendly than ever before. Executive Director Herrmann mentioned that following the general election, staff will again review the forms for further adjustments so that by campaign '94 all forms will be completely revised.

B. National Ethics News

Executive Director Herrmann said that a new report published by the Center for Responsive Politics (CRP) entitled Enforcing the Campaign Financing Laws: An Agency Model states that "a widespread concern expressed repeatedly by campaign enforcement agency personnel was the lack of sufficient resources." He informed the Commission that the report makes two recommendations: 1) a base budget adjusted annually for inflation and periodically for additional responsibilities; and 2) the submission of ethics agency budgets to the Legislature without executive branch review or approval. Executive Director Herrmann said that the study concludes that ethics agencies need not only the mandate but also the means to do their jobs.

Commissioner Eldridge commended Executive Director Herrmann and the staff on their efforts to make the forms user-friendly. He also expressed support for the proposal by the CRP that ethics agencies should have a guaranteed base budget and not be budgetarily under the control of those individuals who are regulated by the Commission. He said that New Jersey should follow the lead of California and move toward a guaranteed base budget arrangement.

Commissioner Linett said that various white papers of the Commission have made that proposal.

C. Budget

Executive Director Herrmann said that the State budget passed the Legislature on June 21, 1993, and was signed by the Governor on June 29, 1993. He hailed the fact that for the first time since fiscal year 1989, ELEC's budget has been increased, not decreased. Executive Director Herrmann said that for FY-94, the budget will be \$1.2 million (\$1,213,000) plus \$565,000 to administer the public financing program. He said that the combined budget is about \$1.8 million (\$1,778,000). Executive Director Herrmann said that one-third of the budget is earmarked for administering the public financing program. The remaining portion constitutes the Commission's regular budget. Executive Director Herrmann said that the non-public financing budget was increased by \$300,000 over that of FY-93. The Executive Director, in a cautionary tone, added that staff is anticipating an interdepartmental salary assessment to reduce this figure and possible other cuts if the economy does not improve. He said that, nonetheless, this is the best budget news the Commission has received in the past half-decade.

D. FY-93 Fine Collections

Executive Director Herrmann reported on the successful fine collection efforts undertaken by the enforcement staff in FY-93. He told the Commission that \$37,808 in fines was collected in FY-93, a figure that is almost double

the target for the year and 30 percent higher than in FY-92. Executive Director Herrmann congratulated ELEC's sole auditor/investigator Shreve Marshall, as well as Legal staff members Gregory Nagy, Nedda Gold Massar and Lisa Fagan. He said that it was an extraordinary effort under very trying budgetary constraints.

E. Future Meetings

The Commission will meet on Tuesday, August 17, 1993 in Manalapan; Tuesday, September 14, 1993, in Berkeley Heights; and Tuesday, October 19, 1993 in Trenton. Executive Director Herrmann added that telephone meetings may be required in late August or September for the purpose of approval of general election public funds.

Public Matching Funds

Candidate Jim Wallwork/Submission No. 09 (P93)

Staff review of the 1993 primary election reports filed by Candidate Jim Wallwork establishes that the campaign has demonstrated a need for additional public funds in the postelection setting which may be used to pay for appropriate unpaid obligations and to reimburse the non-public funds account.

An amended 20-day postelection report, filed on July 6, 1993, showed outstanding campaign obligations in the amount of \$182,994.83 and a balance of \$76,418.50 cash on hand. Staff estimates that \$82,630.34 of the outstanding obligations are appropriate public fund expenditures. Moreover, campaign expenditures in excess of \$150,000 could have been paid with public funds but were paid for by the campaign with non-public fund money and are reimbursable with public funds.

Staff completed a review of Candidate Jim Wallwork's ninth submission for 1993 gubernatorial primary election matching funds. The June 28, 1993 submission included a net amount of \$21,767.00 in contributions eligible for match at the 2:1 ratio including resubmitted items. Staff, therefore, recommended certification of \$43,534 in primary election matching funds.

On a motion by Chairman McNany, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission approved the certification of \$43,534 in primary election matching funds to Candidate Wallwork.

4. 1993 Gubernatorial General Election Debate Sponsor Selection

For detailed information please see the applications for sponsorship of the two 1993 gubernatorial general election debates.

Also please see memorandum from Nedda Gold Massar, Director of Public Financing, to the Commissioners, dated July 7, 1993 and entitled 1993 Gubernatorial General Election Debate Sponsor Selection.

The sponsor applicants are: WWOR-TV and the Asbury Park Press; The League of Women Voters of New Jersey Education Fund; and the New Jersey State

Chamber of Commerce, New Jersey Network, WCAU-TV (Philadelphia), and WCBS-TV (New York).

The statutory deadline for selection of the general election debate sponsors is August 2, 1993.

Commissioner Linett asked each one of the sponsor applicants to present their respective applications to the Commission.

Ms. Penny Pinsker, Director of Community Affairs and Special Projects, and Gary Deckelnick, Associate Editor/Legal and Public Affairs of The Asbury Park Press, summarized their application for the Commission.

Ms. Pinsker said that WWOR/Asbury Park Press has the capacity to bring New Jersey broadcasters to the table, meaning that it will organize a debate that will be viewed on all VHS and UHF stations in New Jersey as well as heard on radio stations throughout the State. She also mentioned that the same sponsors held the debate in 1989 and that it was well received.

Mr. Deckelnick added that the Asbury Park Press has a lot of experience in sponsoring debates. He noted that WKYW in Philadelphia, CBS radio New York, and cable stations will cover the debates.

Mr. Phil Roberts, President of the New Jersey Broadcasters Association, addressed the Commission stating that 23 radio stations, all commercial television stations in New Jersey, and some radio affiliates outside the State will carry the debate live. He said that it would be the most listened to and viewed debate in State history.

At this juncture, Mr. Jerry Grant, an independent candidate for Governor, expressed the view that all candidates for Governor should be permitted to participate in the debate.

Director of Public Financing Nedda Gold Massar said that the statute sets forth criteria for who is eligible to participate in these debates.

Ms. Cynthia Berchtold, representing the League of Women Voters and Ms. Linda Munich, representing WPVI-TV/Philadelphia presented the application by the League of Women Voters.

Ms. Berchtold said that the League is non-partisan and has consistently sponsored debates. She said that the League has done televised debates since 1981. She indicated that the group is very experienced in sponsoring debates.

Ms. Munich said that WPVI and its affiliate in New York, WABC, would cover the debate live and in prime time. She said that there would be terrific saturation in New Jersey.

The presentation in behalf of the New Jersey Chamber of Commerce was made by William F. Faherty, Jr., President, and William R. Healey, Assistant Vice President Government Relations. Also represented with respect to this application were: Dan Noonan, Executive Producer for Public Affairs of New

Jersey Network; Ren Scott of WCBS-TV (New York); and Aretha Marshall and Terry Ruggles of WCAU-TV (Philadelphia).

Mr. Faherty said that the Chamber debate would build upon the primary debate sponsored by the Chamber. He said that the Chamber has a thirty-year history of bringing candidates before the public in debate format. He indicated that between 750-1000 people would attend the debate at the Birchwood Manor in addition to television viewers, and radio listeners.

Mr. Healey noted that the Chamber has recently sponsored a debate in the gubernatorial primary and that it would be proposing a similar format. He said that New Jersey Network (NJN), one of the principals involved, would have Kent Manahan as the primary host of the debate and that Michael Aaron of NJN, Mr. Scott of WCBS-TV and Mr. Ruggles of WCAU-TV will be questioners.

At this juncture, Mr. Michael Fuscaldo lauded NJN for its coverage on NJN News and expressed the point of view that independent candidates for Governor should be permitted to participate in the debates. Mr. Fuscaldo is an Independent Candidate for Governor.

Commissioner Linett asked if the sponsor applicants had any further comments to make.

Ms. Pinsker presented Mr. Will Wright for the purpose of discussing WWOR's proposed format for the debate.

Mr. Wright said that WWOR would be reaching out to the people of New Jersey to obtain questions for the debate. He said that in reaching out to individuals who are impacted by the process for participation in the debate, WWOR would present the debate in a unique format. He said that moderators will guide "people in the street" who will ask the questions.

Ms. Berchtold of the League of Women Voters indicated that the League is concerned about the youth vote and as such will be reaching out to high schools for the purpose of having the youth rate the debate.

Commissioner Linett thanked all the applicants, stating that they were all performing an important public service. He said that the Commission had to make a very difficult decision in that all three applicants are highly qualified.

Chairman McNany indicated that in the past the Commission was able to bring sponsors together for the purpose of co-sponsorship. He asked if there would be any interest in this approach.

None of the applicants expressed any interest in co-sponsorship.

Commissioner Eldridge made a motion that the League of Women Voters and the Chamber of Commerce be granted sponsorship of the debates. Chairman McNany seconded the motion. On a vote of 3-0, the motion was approved.

5. Advisory Opinion No. 06-1993

This advisory opinion request was submitted by James A. Gotti, publisher of The Citizen, a bi-weekly newspaper located in South Amboy, New Jersey.

Mr. Gotti stated that John Wisniewski, a Democratic candidate for General Assembly, and Stephen Mikulak, a Republican candidate for General Assembly, write columns and editorials for the newspaper. He stated that an independent candidate for the General Assembly has accused The Citizen of making unreported "in-kind" campaign contributions to these candidates.

Mr. Gotti maintained that the independent candidate is incorrect, that N.J.A.C. 19:25-1.7 excludes from the definition of expenditures "any cost incurred in...carrying...[an] editorial by any...newspaper." He asked for an advisory opinion as to whether the columns and editorials constitute an "in-kind" contribution to the campaigns of Mr. Wisniewski and Mr. Mikulak.

In reviewing the draft response to the advisory opinion request which had been circulated to the Commissioners, Director of Public Financing Nedda Massar stated that the First Amendment protection of free speech and commentary by the press extends to publication of the two columns in The Citizen and precludes the application of campaign reporting requirements under the New Jersey Campaign Contributions and Expenditures Reporting Act. She explained the view of staff that bona fide news organizations are guaranteed this protection under the First Amendment and under Commission regulation N.J.A.C. 19:25-1.7. This regulation excludes from the definition of "expenditure": "Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication...unless the facility is owned or controlled by any continuing political committee, political committee, or candidate...."

The draft response concluded that when an article or item appears in an bona fide news outlet and when that news outlet is not controlled by a candidate or other entity required to report under the Campaign Reporting Act, expenditures relating to the article or item cannot be characterized as an "in-kind" contribution subject to reporting.

Commissioner Linett asked about the question of issuing an advisory opinion on activity already undertaken.

Legal Director Nagy said that because the issue was raised by an independent candidate in the general election, the Commission is not ruling on what occurred in the primary but on what is about to happen in the general election.

Commissioner Linett noted that the articles are written by the candidates themselves.

Director of Public Financing Nedda Massar said that when a bona fide news organization in exercising news judgment, it has the protection of the First Amendment.

Commissioner Eldridge asked: What if only one viewpoint is represented instead of both sides?

Director Massar said that it would make no difference. She indicated that as a bona fide news organization, the newspaper is permitted to exercise its independent judgment as to inclusion of news items.

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

6. Request for People for Whitman Committee

The Commission reviewed a request from Peter Verniero, Esq., Counsel for the People for Whitman Committee (PFW) for a ruling on whether the State should be reimbursed for the cost of a letter addressed to New Jersey policyholders of Mutual Benefit Life (MBL) from Commissioner of Insurance Samuel F. Fortunato and mentioning Governor Jim Florio should be reimbursed by the Florio 1993 gubernatorial campaign. It further asks whether the expenditure should be allocated against said campaign.

For detailed information please see the letter from Peter Verniero, Esq., Counsel, to Frederick M. Herrmann, Ph.D., Executive Director, dated June 30, 1993, and memorandum, dated July 9, 1993, by Legal Director Gregory E. Nagy.

Executive Director Herrmann has recused himself from any involvement in this matter because his wife is a policyholder of MBL.

In his letter, Mr. Verniero states that the letter from Insurance Commissioner Fortunato meets the four-part test for a political communication as contained in N.J.A.C. 19:25-11.10.

Mr. Verniero alleges in his request for a ruling that the letter was circulated after the primary election to an audience substantially comprised of eligible voters and contained a statement concerning the governmental or political objectives or achievements of the candidate. He also alleged that the letter was produced or circulated in whole or in part, "with the cooperation of, prior consent of, in consultation with, or at the request or suggestion of the candidate."

In his letter, Mr. Verniero argued that although the Florio Committee will not file its first campaign report until 29 days before the election, on October 4, 1993, the matter is ripe for an ELEC ruling because of N.J.A.C. 19:25-16.29(c), which recognizes the importance of immediate reimbursement of government expenditures by campaigns by requiring the cost of using government-owned vehicles for campaign travel to be "reimbursed immediately" from campaign funds to the appropriate government agency. Mr. Verniero argued that because the letter is on official government stationary and falls within the criteria of the political communication regulation, the State should be reimbursed immediately for its incurred cost. He urged ELEC not to wait until 29 days before the election to decide the matter.

In his response to the Whitman Committee, Legal Director Nagy noted that procedurally, staff suggests that this request be viewed by the Commission as a complaint alleging a possible violation of the expenditure limit for gubernatorial candidates receiving public funds. Following precedent, the staff recommended that the matter is not ripe for consideration until the 29-day preelection report is due from Florio '93, Inc. Staff suggested that at that time the complaint may be renewed by the PFW Committee. In his response, Legal Director Nagy noted that if the report filed on behalf of Governor Florio at that time reflects an allocation for the cost of Commissioner Fortunato's letter, the complaint presumably will be moot. Legal Director Nagy said that if no allocation is made, the PFW could submit a complaint in accordance with N.J.A.C. 19:25-16.65, and a hearing could be conducted.

Mr. Verniero summarized the request for a ruling on the question of whether an expenditure for a letter sent by Insurance Commissioner Fortunato to policyholders of MBL should be allocated against the Florio campaign.

Mr. Verniero said that the question centers around whether the Florio campaign should reimburse the State and/or MBL for the cost of the mailing and whether the expenditure should be allocated against the expenditure limit of the Florio campaign. He said that the Whitman position is not intended as a statement in favor of the amendment which was the subject of the letter from Commissioner Fortunato. Mr. Verniero said that as a matter of fact, Mrs. Whitman is opposed to the amendment and in favor of the policyholders.

Mr. Verniero commented that in reviewing ten years of case law and Commission advisory opinions he notes that the Commission has always adhered to a strict definition of whether something is a political communication. He maintained that the Commission has applied the regulation quite strictly in terms of newsletters, etc. He said that the Commission has been consistent with respect to determining that the cost of such communications are reportable events and that allocation of costs should follow.

He said that the same standards should apply to an incumbent Governor as to an incumbent Freeholder. He maintained that all four parts of the test are satisfied, ie., the timing, audience, policy objectives, and coordination and consultation.

Mr. Angelo Genova, Counsel for the Florio campaign responded to Mr. Verniero's statement. Mr. Genova said that the issue is not ripe for consideration until the time of the 29-day report. He added, however, that in any event the letter does indeed speak for itself. Mr. Genova argued that the letter is a communication by a corporation to its stockholders, an act that the statute expressly permits. Mr. Genova maintained that Commissioner Fortunato, as the Rehabilitator, was merely exercising his authority to communicate with stockholders of the corporation. He noted that this communication was strictly a corporate communication, protected by the statute.

Commissioner Linett said that the Commission deals with these matters in two ways, either as an advisory opinion or as a complaint. He maintained that this matter is in the nature of a complaint and as such, may be referred to the Office of Administrative Law (OAL) when it is in its proper form.

Commissioner Eldridge recommended that the Commission not take any action pending the filing of a complaint.

Commissioner Linett said that a complaint should first be filed with the Commission and then it will be referred to the OAL.

Mr. Verniero said that he hoped that the complaint, which he said would be filed, will be acted upon on an emergent basis. He asserted that it involves a threshold issue of whether the document is a political communication.

Commissioner Linett said that one of the problems may be that the matter is not ripe because the 29-day report has not been filed.

Mr. Genova said that the Florio campaign would take the position that the matter is not ripe for consideration.

Mr. Verniero said that for the Commission to wait to take action until October would be counter to the regulations.

On a motion by Commissioner Eldridge, seconded by Chairman McNany and passed by a vote of 3-0, the Commission voted to withhold action on the matter pending the filing of an official complaint.

7. Stephen J. Edelstein, Esq., Letter

For detailed information please see letter from Stephen J. Edelstein, Esq., to the Commission dated July 14, 1993, and the draft response from Gregory E. Nagy, Esq., Legal Director dated July 20, 1993.

In his letter, Mr. Edelstein, Counsel to the Democratic State Committee (DSC), asserts that Campaign '93, a bank account established by the DSC, will file on a campaign cycle as a political committee.

In his draft response, Director Nagy states that the plain language of the Campaign Reporting Act holds that depositories of a State political party committee must collectively report on a quarterly basis. He states that this requirement has become particularly important in light of the new law and the contribution limit contained in it.

Legal Director Nagy added that the Commission would entertain a request for an advisory opinion upon receiving an amplified fact record.

Mr. Bob Long, a representative of the Florio campaign, asked about the reporting requirements for Campaign '93.

Commissioner Linett said that Campaign '93 must file on a quarterly basis.

8. Commission Vacancy

Chairman McNany suggested that the Commission again express its concern about the Republican vacancy and the holdover position on the Commission and the need to have a full complement of Commissioners on the Commission during this important election period. The Chairman suggested that staff draft a letter referring to actions taken by the Commission over the past couple of years regarding the vacancy. He said that the letter should be considered at the next meeting. He suggested that the letter be sent to the Governor and legislative leaders.

9. Resolution To Go Into Executive Session

On a resolution by Commissioner Linett, seconded by Commissioner Eldridge 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.
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.

10. Adjournment

On a motion by Chairman McNany, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission voted to adjourn at 12:05 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.

FMH/jah