



State of New Jersey

**ELECTION LAW ENFORCEMENT COMMISSION**

RALPH V. MARTIN  
Chair  
DAVID LINETT  
Vice Chair  
PAULA A. FRANZESE  
Commissioner

Respond to:  
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FREDERICK M. HERRMANN, Ph.D.  
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Counsel

PUBLIC SESSION MINUTES

NOVEMBER 19, 1996

Chair Martin, Vice Chair Linett, Senior Staff, and Deputy Legal Director Nedda Gold Massar were present. Commissioner Franzese participated by phone.

1. Open Public Meetings Statement

Chair Martin 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 10:30 a.m. in Trenton, New Jersey.

2. Approval of Public Session Minutes of October 22, 1996

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 3-0, the Commission approved the Public Session Minutes of October 22, 1996.

3. Executive Director's Report

A. Lynnan B. Ware's Nomination

Executive Director Herrmann announced that Governor Christine Todd Whitman has nominated Lynnan B. Ware of Moorestown to replace former Commissioner William H. Eldridge on the Commission.

B. Staff Activities

Executive Director Herrmann reported that Systems Administrator Carol Neiman is again leading ELEC's efforts in the Employees Annual Charitable Campaign. He added that this year, Barbara Counts of the Data Entry Staff will be assisting her. According to the Executive Director, Carol has helped ELEC win three platinum awards, two gold awards, and one silver award. He said that staff participation in this worthwhile program has been significant.

Executive Director Herrmann advised the Commission that Systems Administrator Neiman is attending a training program this week to learn how to run the data-base operating software on our new computer system.

The Executive Director mentioned that Director of Compliance & Information Evelyn Ford has developed a new report coding system that has greatly simplified and accelerated ELEC's most basic operation -- identifying 25,000 reports a year.

According to Executive Director Herrmann, computer-generated labels have replaced tedious manual coding and all reports are identified by a 12 or 14 digit code so that they can be readily accessed.

Executive Director Herrmann said that the new system will decrease the drudgery experienced by staff in coding reports and will accelerate ELEC's ability to make reports available to the public and media in a more timely fashion.

Executive Director Herrmann said that this procedural change produced by Director Ford is a major contribution to the work of the Commission.

Executive Director Herrmann said that staff technological innovation is also improving the quality of ELEC's work product in the Review and Investigation Section.

Executive Director Herrmann noted that the Review and Investigation Section is using computer-generated diagrams to assist in their prosecutorial efforts. He said that Associate Report Examiner Brett Mead used this tool for the first time in a recent case.

According to Executive Director Herrmann, over the course of the next year, staff will be making use of other technological innovations to improve the efficiency and productivity of its workload. He said that he will be keeping the Commissioners informed of the changes.

C. Legislative Developments

Executive Director Herrmann said that on November 18, 1996, A-1222 (Augustine/Russo), which extends the PFD filing date from April 21 (the 10th day following the petition filing deadline) to May 15, was released by the Senate State Government Committee. He noted that this change, recommended by ELEC, still allows adequate time for preelection disclosure while it allows ELEC enough time to receive candidate names from the Secretary of State and then mail out the forms.

Executive Director Herrmann said that the bill permits candidates enough time to receive their forms and send them back to ELEC.

The Executive Director said that consequently, a 10-day window is extended to over a month with no harm to disclosure.

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Executive Director Herrmann advised the Commissioners that the Senate State Government Committee substitute for S-615 (Schluter), which adds a third debate to the gubernatorial primary and general elections, was reviewed by the Senate Budget and Appropriations Committee on November 18, 1996. He mentioned that this bill was based on an ELEC recommendation and that he testified in support of it.

Executive Director Herrmann said that besides adding the additional debates, the bill eliminates the prior debate sponsorship requirement and clarifies that cable TV stations may be chosen as sponsors. He added that it also mandates that a majority vote of ELEC's authorized membership is needed to select a sponsor and requires ELEC to consider conflicts of interest before making a choice.

According to Executive Director Herrmann, Senator Bernard F. Kenny, Jr. proposed two amendments:

1. to provide that an unopposed candidate in the primary election could not receive public dollars; and,
2. to require five debates instead of three in the general election.

He said that in the end, the Committee voted not to release the bill.

D. Future Schedule of Meetings

The Commission will hold its next meeting on December 17, 1996, at 11:00 a.m. in Trenton.

E. 1997 Schedule Approval

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by vote of 3-0, the Commission approved the 1997 meeting schedule.

4. Public Hearing Concerning Proposed Amendments to Commission Regulations Concerning "Street Money" and Contributions by Limited Liability Companies and Limited Liability Partnerships.

A public hearing began at 10:30 a.m. on the Commission's proposed regulation concerning the prohibition on contributions from limited liability companies, limited liability partnerships, and other similar entities. Testimony was given by Ron Ladell, Esq. concerning contributions from limited liability entities. Also, a public hearing on the "street money" reporting proposal was conducted at that time. No persons testified concerning the proposed "street money" regulation. Please see copies of the respective Proposal Notices which appeared in the August 19, 1996 (limited liability entities) and October 21, 1996 ("street money") editions of the New Jersey Register.

A Court Reporter recorded the public hearing. Transcripts of the public hearing will be made available upon request.

5. Adoption of Proposed Cost Index Regulations

For detailed information, please see the memorandum from Nedda G. Massar, Deputy Legal Director to Frederick M. Herrmann, Ph.D., Executive Director, dated November 19, 1996 and entitled, "Adoption of Proposed Cost Index Regulations." The Commission's proposed regulations to implement the statutorily-required quadrennial campaign cost adjustments for gubernatorial and non-gubernatorial candidates and committees are ripe for adoption, and staff recommended that they be adopted by the Commission at its November 19, 1996 meeting. The proposed regulations also affect public financing of general elections for Governor. The determination of the proposed campaign cost index adjustments is required by N.J.S.A. 19:44A-7.1 for gubernatorial candidates and by N.J.S.A. 19:44A-7.2 for non-gubernatorial candidates and committees.

After secondary notice was distributed, a public hearing was conducted on October 22, 1996, and testimony was given by the following five individuals: Dorothy Dunfee, Campaign Finance Reform Specialist, League of Women Voters of New Jersey; Honorable Reed Gusciora, Assemblyman, 15th Legislative District; Curtis Fisher, Program Director, New Jersey Public Interest Research Group; Dennis Jaffe, Executive Director, New Jersey Common Cause; and, Thomas Byrne, Chairman, New Jersey Democratic State Committee.

At the October 22, 1996 Commission meeting, the Commission voted to conform the text of the gubernatorial corporate affiliation regulations (N.J.A.C. 19:25-15.12 and 16.10) with the text of the newly-proposed corporate affiliation regulation for non-gubernatorial candidates and committees. Because the revised corporate affiliation text includes additional categories of parties which may be affected by the change and which are not named in the pending proposal, staff believes that the additional text will be considered by the Office of Administrative Law as a substantive change requiring reproposal. Staff therefore recommended that the changes to the gubernatorial corporate affiliation tests in N.J.A.C. 19:25-15.12 and 16.10 be made in a new proposal which will be presented to the Commission in December.

Staff recommended that the campaign cost index adjustments relevant to gubernatorial candidates become effective upon publication in the New Jersey Register in December. Staff recommended further that the adjustments relevant to non-gubernatorial candidates and committees become effective on January 1, 1997, because the contribution limits applicable to continuing political committees, political party committees, and legislative leadership committees are calculated on a per-calendar-year basis.

Vice Chair Linett said that he reluctantly would move the adoption of the threshold and limit adjustments. He said that he believes they are too high and that it should be emphasized that the Commission is bound by the statute to make the adjustments.

Chair Martin emphasized that the Commission is bound by the statute to adjust the limits and thresholds for inflation in the manner that it did.

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 3-0, the Commission adopted the Cost Adjustment Regulations for gubernatorial and non-gubernatorial candidates and committees and the regulations concerning gubernatorial primary and general elections, and directed staff to file the adoptions with the Office of Administrative Law.

6. Cost Index Report

Please see the 1997 Cost Index Report, dated December, 1996, written and prepared by Nedda G. Massar, Deputy Legal Director and Director of Gubernatorial Public Financing.

The report provides the adjusted threshold and limit amounts as well as an explanation as to how these adjusted amounts were derived.

The report also made four recommendations for modifying the cost adjustment procedure and for reforms to the Campaign Act.

The recommendations were:

1. Any changes to the campaign cost index process for the 2001 elections should be implemented by the end of 1999 to provide adequate time for evaluation and public response.

2. The statutory rounding process as applied to limits and thresholds in the Act of \$1,000 or less should be modified to require adjustment only where the increment exceeds \$50.

3. As described in detail in the Commission's July, 1996 White Paper, the Legislature should consider reducing the maximum contribution permitted to the legislative leadership committees from \$25,000 to \$10,000 to be adjusted by the campaign cost index in the future, and should also consider adjustment of the limit to the State Party Committees from \$25,000 to \$15,000; and,

4. All the contribution limits currently in effect should be reviewed by the Legislature prior to the 1999 elections to determine whether or not the present limits could be lowered without harming the balance between protecting the government from the potential of corruption and maintaining First Amendment rights of free speech. Because of recent actions by the court system, it may be necessary to provide public financing to reduce significantly the current limits.

Vice Chair Linett said that he was delighted that the Commission would recommend a modification of the rounding formula. He said, however, that he believed the amounts should be rounded to the nearest \$50 regardless of the level and that this suggestion should not just apply to the limits and thresholds under \$1,000. He said that he recognizes that the Commission has always supported inflationary adjustments and that he still supports this

concept. He said, however, that the rounding formula results in thresholds and limits that are adjusted way beyond inflation.

Deputy Legal Director Massar suggested that the Commission leave the recommendation vis-a-vis thresholds and limits under \$1,000. She suggested, however, that the Commission could recommend that the Legislature study rounding for other thresholds and limits. The Commission agreed.

Vice Chair Linett suggested that the Commission recommend that the Legislature provide a separate formula for adjusting limits and thresholds for the governor's race from that for all other races.

Deputy Legal Director Massar reviewed the recommendations and noted that the Report does include responses to public comments made at the public hearing on this subject. She suggested that the Report recommend that the Legislature may wish to examine whether or not a different campaign cost index be established for non-gubernatorial adjustments.

On a motion by Commissioner Franzese, seconded by Vice Chair Linett and passed by a vote of 3-0, the Commission approved the Cost Index Report with modifications to the recommendations as noted above.

#### 7. Issue Advocacy Communications

Please see the memorandum from Gregory E. Nagy, Legal Director to Frederick M. Herrmann, Ph.D., Executive Director, dated For November, 1996 agenda, and titled "Issue Advocacy Communications." In reviewing the issue, Legal Director Nagy said that the recent Presidential and Congressional elections have generated a number of news reports concerning "issue advocacy" communications. These are typically broadcast or print advertisements that are paid for by a corporation, union, or other association and express opinions about candidates or their voting records, but stop short of expressing any specific exhortation to vote for or against any candidate. While these communications imply that they seek to influence the viewer or reader to take some voting action, the absence of express words to that effect puts them beyond the reach of federal campaign finance reporting and other requirements.

Legal Director Nagy said that the memorandum briefly reviews federal case law on the First Amendment considerations applicable to "issue advocacy" communications and discusses recent Federal Election Commission (FEC) regulations promulgated to extend the scope of communications covered by the Federal Election Campaign Act (FECA). He said that the purpose is to acquaint the Commission with the constitutional difficulties inherent in regulation of "issue advocacy" speech, and to explore the possibility that the Commission may wish to consider regulatory initiatives similar to those undertaken by the FEC in anticipation of such advertising occurring in the 1997 gubernatorial and legislative elections.

The central case on the constitutional parameters of campaign finance regulation is Buckley v. Valeo. That opinion established a bright line test for determining whether or not moneys spent by a corporation, union, or other association for communications to the public constituted a regulated

expenditure under the Federal Election Campaign Act (FECA). The Supreme Court suggested that to pass Constitutional muster the standards used by regulating government authorities must be precisely defined and as objective as possible so that they can be clearly understood and uniformly applied. Accordingly, the Supreme Court held that the FECA must be construed to mean that a regulated expenditure was only one that was for "...communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." This approach has been followed in other decisions of the Supreme Court and federal district courts, except in one case.

Despite these precedents set by the federal courts, the FEC has undertaken two recent regulatory initiatives to expand the scope of the FECA to reach communications that do not contain specific "election advocacy" words. On October 5, 1995, the FEC promulgated a rule that defines an "express advocacy" communication and sets forth a "reasonable minds" test.

This regulation, paraphrases the wording of the one opinion in which the scope of the "express advocacy" standard was extended, FEC v. Furgatch. In rejecting the bright line approach which limited "express advocacy" to the "magic words" given as examples in Buckley, the Ninth Circuit found that the entire context of the communication must be considered. Therefore, even if the speech is not presented in explicit terms, it is "express" if its message is "...unmistakable and unambiguous, suggestive of only one plausible meaning."

The FEC's "reasonable minds" regulation has already been overturned in Maine Right to Life Committee v. FEC however.

Legal Director Nagy said that although it presumably remains in effect outside of Maine, its prospects in light of the prevailing case law insistence on a bright line standard is open to question. He said that there is no case law precedent in the Third Circuit, and therefore the enactment in New Jersey of a regulation similar to the one promulgated by the FEC is not foreclosed.

A second regulatory initiative undertaken recently by the FEC seeks to require reporting of corporate and union communications in which there is no express advocacy speech, but there is contact between the corporation or union and the candidate discussed in the communication concerning the preparation of the communication. For example, a union or corporation may distribute a communication concerning the voting record of a Congressperson without incurring any reporting responsibility under federal law provided that there has been no contact with the candidate. However, one federal district court has already held that the FEC's prohibition against contact between the corporation or union and the candidate is not sustainable in the absence of express advocacy terminology.

Legal Director Nagy asked for direction from the Commission as to how to approach this issue in New Jersey.

Vice Chair Linett said that the staff should draft a regulation along the lines of the FEC for discussion purposes.

Chair Martin said that it would be preferable to proceed slowly and monitor developments in the federal courts. He said that it did not make sense to formulate a regulation only to find that the Court was moving in the opposite direction.

Legal Director Nagy said that there will probably be more cases to come.

Executive Director Herrmann said that in the absence of regulations, there may be "campaigning" with no financial disclosure nor labeling in the future.

The Commission directed staff to draft regulations similar to those enacted by the FEC for discussion purposes.

8. Contributions from Children Regulatory Discussion

Counsel Wyse reviewed his research on the issue of campaign contributions from minors. According to Counsel Wyse, the topic of campaign contributions by minors was the subject of a very recent television documentary on **Inside Edition**. The program was based on research done by **Mother Jones** magazine into federal campaign contribution reports, and revealed that substantial contributions have been made to both parties by the minor children of significant contributors, in some cases by newborn infants.

Counsel Wyse said that the Commission's existing regulations govern eligibility for public matching funds of contributions made by minors to a gubernatorial campaign. The general election regulation, N.J.A.C. 19:25-15.15(d) provides as follows:

- (d) Contributions by children under the age of 18 shall be attributed to the parent who is responsible for the contribution and not to the child unless:
  - 1. The child is 14 years of age or older and a signed statement from the child and the child's parent or guardian is submitted to the Commission that the decision to contribute was solely that of the child and the funds used to make the contribution were legally and beneficially controlled by the child and are not the proceeds of a gift made for the purpose of the contribution; or
  - 2. The child is 11 years old or older and, in addition to the signed statements set forth in (d) above, evidence is submitted satisfactory to the Commission that the child acted independently and with full knowledge of the contribution.

Counsel Wyse said that in reconsidering this issue, one approach would be for the Commission to refuse to recognize for contribution limit purposes any contributions by persons under age 18, on the grounds that such gifts are not legally enforceable and therefore not valid, and that the temporary nature of a campaign fund effectively eliminates, or at least drastically curtails, the ability of the minor to exercise his or her right of repudiation at a future time.



Counsel Wyse said that another approach, which may be more responsive to this situation, would be to focus both on the age of the contributor and on the actual source of the funds used in making the gift; specifically, to differentiate between contributions made out of a child's own earned income, as opposed to unearned income. He said that this approach is the one that he recommends. He suggested that although many permutations are possible, he would suggest that all contributions from persons below age 18 be attributed to the child's parents or guardian, except for contributions by a child age 14 or older made from the child's own earned income.

Counsel Wyse then reviewed regulations and laws enacted by the FEC and a number of states.

Chair Martin directed that Counsel Wyse conduct additional research on First Amendment issues related to contributions from children and that the matter be placed on the agenda for a future meeting.

Dennis Jaffe, Executive Director of New Jersey Common Cause, asked whether or not the Commission had a sense of where the Supreme Court would eventually go regarding this issue of independent expenditures for issue advocacy. He also complimented the Commission for conducting an enlightening discussion.

9. Resolution to Go Into Executive Session

On a motion by Vice Chair Linett, seconded by Commissioner Franzese 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. 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 no later than 50 days after mailing.
2. A report on written requests for investigations of possible violations, which report will not become public. However, any complaint which may be generated as a result of a request for an investigation will become public no later than 50 days after mailing.

10. Return to Public Session:

On a motion by Commissioner Franzese, seconded by Vice Chair Linett and passed by a vote of 3-0, the Commission voted to return to public session.

11. Adjournment

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 3-0, the Commission voted to adjourn at 1:00 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.