



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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Legal Director

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Compliance Director

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Legal Counsel

PUBLIC SESSION MINUTES

December 21, 2010

Chairman DeFilippis, Vice Chairman Timpone, Commissioner English, Commissioner Saunders, and senior staff were present. Report Review Officer Lovinsky Joseph was present for the purpose of recording the minutes.

The Public Session Minutes will be available online in the Commission's website at: <http://www.elec.state.nj.us>.

The meeting convened at 11:00 a.m. in Trenton.

1. Open Public Meetings Statement

Chairman DeFilippis called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-6 et seq., adequate 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. It was also posted on the Commission's website.

2. Approval of Public Session Minutes of November 16, 2010

On a motion by Vice Chairman Timpone, seconded by Commissioner Saunders and passed by a vote of 4-0, the Commission approved the Public Session Minutes of November 16, 2010.

3. Executive Director's Report

A. Budget

Executive Director Brindle informed the Commissioners of the "fishbowl" meeting that Director of Finance and Administration Steven Dodson and he had with the Office of Management and Budget concerning the budget for Fiscal Year 2012.

The Executive Director reported that the final projection was that \$4.281 million would be available for Fiscal Year 2012, including \$90,000 to pay for scheduled salary increases.

B. Meeting With Criminal Justice Staff

Executive Director Brindle reported on the recent meeting between Compliance Director Amy Davis, Legal Director Carol Hoekje, and the Criminal Justice staff. He noted that the meeting had been initiated by the Criminal Justice staff in order to further discuss cooperative investigative efforts.

C. Treasurer Training

The Executive Director informed the Commissioners that 22 seminars were planned for 2011, an increase necessitated by upcoming legislative elections. He reported that the Commission would offer treasurer training, political party and PAC training, and electronic filing training.

Executive Director Brindle announced that the Commission was beginning a new initiative to provide online training using new software and video technology. He noted that Compliance Director Amy Davis would guide this program.

Compliance Director Davis reported that the new training program would utilize the latest technology incorporating video and audio media and allow treasurers and other campaign officials to engage in treasurer training anywhere.

D. Analytical Press Releases

Executive Director Brindle announced that the Commission had issued an analytical press release relevant to 20-day postelection report data for special legislative, county, and local elections.

The Executive Director reported that \$2.6 million had been spent on special legislative elections in the 5th, 14th, and 31st districts. He noted that the race in the 14th District was the most competitive, with \$1.7 million raised and spent.

Executive Director Brindle reported that the election for County Executive in Bergen County also drew significant funding, with \$1.5 million raised and spent.

E. Cao v. Federal Election Commission (FEC)

Executive Director Brindle informed the Commissioners of the background, status, and implications of this ongoing litigation at the U.S. Supreme Court.

The Executive Director reported that this case involved Congressman Joseph Cao of Louisiana and the Republican National Committee attempting to end FEC restrictions on coordinated expenditures by political parties. He added that currently parties can contribute up to \$5,000 and make coordinated expenditures of up to \$42,000. Executive Director Brindle noted the plaintiffs' claim that such restrictions place them at a disadvantage compared to independent groups.

The Executive Director further reported that the case may also address the soft money ban in reference to contributors in the McCain-Feingold legislation.

The Chairman asked for definitions of “coordinated expenditures” and “soft money.”

Executive Director Brindle replied that coordinated expenditures consisted of campaign activity on behalf of a candidate paid for by political parties with the consent of the candidate.

The Executive Director stated that soft money consists of campaign contributions made to a political party containing no limits in terms of the amount of the contribution.

F. Legislation

Executive Director Brindle informed the Commissioners of pending legislation relevant to the Commission’s jurisdiction.

The Executive Director reported on the status of the “pay-to-play” legislation sponsored by Senator Loretta Weinberg. He stated that the bill would ban party transfers, a practice known as “wheeling,” and establish tiered contribution limits of \$300 for individuals, \$1,000 for businesses, and \$5,000 for state contractors. The Executive Director added that the bill would also require disclosure from contractors with more than \$50,000 in statewide business, eliminate the “fair and open” exemption, and create one uniform statewide law.

Executive Director Brindle stated that the bill as a whole was similar to the Commission’s legislative recommendation, but differed in having a complete ban on party transfers instead of a limit, a tiered contribution instead of a single limit for all entities, and a \$50,000 disclosure threshold for business entities with statewide contracts instead of a prohibition on certain political donations for business entities with county or municipal contracts larger than \$17,500 during the term of contract.

The Executive Director reported that Governor Christie’s proposals closely mirror the Commission’s legislative recommendations for “pay-to-play” reform.

G. Federal Corruption Trial

Executive Director Brindle recognized Senior Compliance Officer Kim Key for her excellent performance as an expert witness in the federal corruption trial of former Assemblyman L. Harvey Smith.

H. White Paper No. 21 – School Elections Campaign Financing: An Update

Deputy Director Donohue informed the Commissioners of the background and conclusions of the latest White Paper, which studied contributions and expenditures in school board elections. He noted that since the last study on school board elections had been ten years ago, there was much accumulated data with which to conduct analysis.

The Deputy Director reported that overall spending in school board elections was generally not large, but was increasing at a rapid pace, increasing 125 percent from \$4.3 million spent in the 1990s to \$9.6 million today. He noted that annual spending between 2000 and 2009 averaged \$1 million a year, compared to an average of \$427,000 from 1990 to 1999. The Deputy Director further noted that the top three years for school board spending have been in the past five years.

Deputy Director Donohue informed the Commissioners that in the 1990s, the New Jersey Education Association (NJEA) became a bigger player in school board elections. He reported that NJEA spent \$3.7 million on school board elections during the past decade, and its expenditures constituted 36 percent of all spending on local school board elections in this period.

The Deputy Director reported that division of expenses remained consistent, with direct mail remaining the single largest purpose. He noted that although spending in other elections had decreased recently, spending on school board elections was still increasing. Deputy Director Donohue further noted that although local school boards were permitted to enact their own “pay-to-play” restrictions for public contractors, few have done so.

Vice Chairman Timpone asked what goals the Commission was seeking to achieve with the White Paper series.

Executive Director Brindle stated that the purpose was to inform the public to previously underreported activity at the local level.

The Deputy Director added that the White Papers would also inform local policymakers and provide them with better context for decisions. He noted that school boards were included in Governor Christie’s “pay-to-play” proposal.

Commissioner English suggested a correlation between the number of public contracts available and the potential for “pay-to-play” activity.

Deputy Director Donohue noted that approximately 4,700 school board positions were contested annually.

I. Winter Meeting Schedule

- January 18, 2011 at 10:00 a.m. in Trenton;
- February 15, 2011 at 10:00 a.m. in Trenton; and,
- March 15, 2011 at 10:00 a.m. in Trenton.

Commissioner English recused herself from the meeting at this juncture. She did not participate in and was not present during the advisory opinion discussion or vote.

4. Advisory Opinion Request No. 02-2010

The Commission received a request for an Advisory Opinion from Hugh E. DeFazio, Jr., Esq., on behalf of two single candidate committees of Michael Luther, a candidate for Mayor in Parsippany-Troy Hills Township (Morris County) in the 2005 and 2009 general elections. Mr. DeFazio requested a determination concerning a proposed resolution of outstanding obligations incurred for legal fees in connection with a recount of election results.

Legal Director Carol Hoekje provided a background summary of the Advisory Opinion Request. She stated that the Advisory Opinion Request concerns settlement of outstanding obligations for less than the reported amount which would ordinarily result in a reportable contribution. At this point the Chairman recognized Mr. DeFazio, who was present, along with his client, to address the Commission.

Mr. DeFazio introduced himself and stated that the candidate committee of Michael Luther wished to settle outstanding debt and have the procedure authorized by the Commission.

Mr. DeFazio informed the Commission of the background events. He reported that Candidate Luther had won a close election in 2005 for Mayor in Parsippany-Troy Hills Township (Morris County). Mr. DeFazio noted that the Morris County Clerk certified the election, but opposing candidate Rosemarie Agostini invoked her right to contest the election and initiated legal action.

Mr. DeFazio detailed the progress of the case through the Division of Law, Appellate Division, Supreme Court, and return to the Division of Law, where Candidate Luther's election was upheld in 2008. Legal fees accrued in excess of \$200,000. He stated that he believed that this did not constitute a traditional campaign expense, since the election had already been concluded, but that Candidate Luther was compelled to respond to the challenge by Candidate Agostini.

Mr. DeFazio stated his belief that the subject was an open question. He noted that resolution of outstanding campaign debt was available in Gubernatorial and Federal elections.

Mr. DeFazio reiterated that the legal fees incurred were to defend the office of a sitting mayor, not electioneering. He reported that \$120,000 had originally been paid to the firm of Genova, Burns, and Giantomasi, with approximately \$90,000 remaining in outstanding obligations.

Mr. DeFazio reported that the firm initiated a civil action against the candidate committee to obtain the balance of outstanding obligations, but the parties eventually agreed to a confidential settlement agreement, establishing a revised balance of \$43,000 and dismissal of civil action. He stated that he needed the Commission's authority to move forward towards a resolution.

Vice Chairman Timpone asked how this use of campaign funds was substantially different than using them for criminal defense.

Mr. DeFazio replied that his scenario was different and more salient as the certification of elected officials was central to the effective administration of government.

Legal Director Hoekje stated that the Reporting Act does not provide for explicit debt settlement authorization as with the FEC Act. She noted, however, that Section A-16 of the Reporting Act provides that the Commission may provide for dissolution of a committee post-election. Legal Director Hoekje added that the provision in Section A-16, covering post-election resolution of debt, predates contribution limits. She advised the Commissioners to take care in crafting an exemption, as it may create a precedent for the future.

The Legal Director reported that the gubernatorial regulations were different as debt resolution cannot be initiated until seven years have passed from the date of the election. She added that publicly financed gubernatorial committees also cannot transfer outstanding obligations to another election.

Legal Director Hoekje stated that the two central issues of this matter were approval of the procedure outlined in the Advisory Opinion Request, and the amount of the settlement. The Legal Director advised that the amount be determined by the campaign, not the Commission, for the Commission has traditionally advised the campaign to determine fair market value of goods and services.

Mr. DeFazio informed the Commissioners of the details of the settlement agreement. He reported that the candidate committee had agreed to pay approximately \$40,000 after settlement arbitration. He added that the settlement would clear the court docket, and unlike a vendor, the firm was looking for payment of services, not goods.

Chairman DeFilippis asked if the legal fees had been accrued during 2007.

Mr. DeFazio replied in the affirmative.

The Chairman asked if there had been an engagement letter between the firm and the candidate committee.

Mr. DeFazio replied in the affirmative.

Chairman DeFilippis noted that the next election was in 2009. He asked if there had been any attempt to raise money to pay legal fees in the two-year interim.

Mr. DeFazio reported that the committee had made a payment during litigation and held a fundraiser after judgment.

The Chairman asked if there was any data available on fundraising attempts.

Legal Director Hoekje reported that funds had been received by the committee in 2006, 2007, and 2008.

Chairman DeFilippis agreed that an effort had been made.

Mr. DeFazio stated that a fundraiser was held after the final decision was rendered.

Vice Chairman Timpone stated that he had some sympathy for the candidate, but expressed concern about the Commission establishing a precedent that would allow any candidate dissatisfied with an election result to use campaign funds to mount a legal challenge.

Mr. DeFazio replied that he understood the Vice Chairman's concerns about unforeseen consequences, but reiterated that the election had been certified by the Morris County Clerk.

The Chairman stated that he did not object to the use of funds, but was concerned about circumventing the regulations. He asked if it were possible to craft a response applicable only in this case.

Legal Counsel Wyse stated that such a response would be possible without establishing a problematic precedent. He noted that contribution limits were not being subverted, and that Candidate Luther's actions were a response to an unexpected action forced upon him. Legal Counsel Wyse further stated that there was no way for Candidate Luther to anticipate this action, negating the possibility of a pre-arranged scheme. He proposed that the Commission could and ought to craft a response specially tailored for this case.

Chairman DeFilippis expressed concern that the response could be used as a precedent to allow contributions sub rosa from business associates.

Commissioner Saunders stated that the case had very specific established facts that would prevent such a precedent: It was initiated postelection, which removed any concern about vendor abuse, and the action was not initiated by the campaign, but thrust upon it. He noted that an elected official would have no choice but to defend the position. The Commissioner asked if the Commission could craft such a narrow response.

Legal Director Hoekje replied that crafting a narrow response covering that specific set of circumstances was possible.

Legal Counsel Wyse agreed with the Legal Director.

Vice Chairman Timpone stated that he understood Mr. DeFazio's point that Candidate Luther was forced to defend election results certified by the Morris County Board of Elections. He noted that it seemed unfair for a candidate to spend resources to defend a result administered by a different entity.

On a motion by Commissioner Saunders, seconded by Vice Chairman Timpone and passed by a vote of 3-0, the Commission approved the Advisory Opinion Request submitted by Hugh E. DeFazio, Jr., Esq, with a narrow interpretation applicable only to a debt settlement for outstanding obligations incurred postelection for the purpose of defending a certified election result.

Commissioner English returned to the meeting at this point.

5. Resolution to go into Executive Session

On a motion by Vice Chairman Timpone, seconded by Commissioner Saunders and passed by a vote of 4-0, the Commission resolved to go into Executive Session to discuss anticipated litigation, which will become public as follows:

- A. Final Decision Recommendations in violation proceedings which will not become public. However, the Final Decisions resulting from those recommendations will become public not later than seven business days after mailing to the named respondents.
- B. 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 not later than seven business days after mailing to the named respondents.

6. Adjournment

On a motion by Vice Chairman Timpone, seconded by Commissioner Saunders and passed by a vote of 4-0, the Commission resolved to adjourn at 1:40 p.m.

Respectfully submitted as true
and correct,

Jeffrey M. Brindle
Executive Director

JMB/elz