

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

PUBLIC SESSION MINUTES

MAY 11, 1983

PRESENT

Andrew C. Axtell, Chairman
M. Robert DeCotiis, Member
Haydn Proctor, Member
Alexander P. Waugh, Jr., Member
Scott A. Weiner, Executive Director
William R. Schmidt, Asst. Executive Director
Gregory E. Nagy, Staff Counsel
Edward J. Farrell, Counsel
Sidney Goldmann, Consultant

Chairman Axtell called the meeting to order and announced that pursuant to the Open Public Meetings Law, P.L. 1975, c.231, 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 10:10 a.m. at the office of the Commission, Trenton, New Jersey.

Commissioner Waugh did not attend the Public Session but did participate in the Executive Session by conference telephone.

1. Public Hearing on Pre-candidacy Activity "Testing the Waters"

The Chairman opened the Public Hearing. A verbatim transcript of the hearing, as transcribed by a court stenographer, will be prepared and on file.

Executive Director Weiner distributed written comments from the Honorable Dean A. Gallo, Assembly Minority Leader, as set forth in a May 3, 1983 two-page letter and from the Honorable Frank P. Reiche, Commissioner, Federal Election Commission, as set forth in a May 6, 1983 two-page letter accompanied by Commissioner Reiche's May 2, 1983 three-page dissent to Advisory Opinion 1983-9 of the Federal Election Commission.

Minority Leader Gallo suggested that the Commission define the "testing the waters" period with some time limit, at least six months but no more than eighteen months prior to the primary election date. Minority Leader Gallo also suggested that the Commission's regulations clearly permit already elected officials to make mailings, pollings and the like within the geographic boundaries of their existing constituency without having such activities under the "testing the waters" definition. Finally, Assembly Minority Leader Gallo questioned the need for a separate bank account for the sole purpose of "testing the waters".

Federal Election Commissioner Reiche argued that contributions to and expenditures by individuals for "testing the waters" as potential

gubernatorial candidates should be subject to the same ground rules as are applied to campaigns, particularly with respect to contribution limitations and prohibitions.

The first person to testify in person was Neil Upmeyer, former Director of the Election Division, Department of State, and former Director of Public Financing, Election Law Enforcement Commission. Mr. Upmeyer expressed his disagreement with the provision of the proposed regulation which presumes that money raised is not involved with the candidacy until there is a subsequent occurrence of candidacy. Mr. Upmeyer argued that the presumption should be that the individual is a candidate and the proposed regulations should be amended to make them more restrictive as they apply, particularly, to potential gubernatorial candidates. Mr. Upmeyer cited as an example the lead time needed to work a list of potential contributors so the list becomes a valid fund raising tool; Mr. Upmeyer estimated that it takes at least two years of working a list of contributors. Mr. Upmeyer argued that if such contributions are going to be matched then the restrictions on the amount of such contributions should apply from the beginning.

The second person to testify was Steven Edelstein, Esq., Counsel for Friends of Peter Shapiro. Mr. Edelstein said that he would be submitting written comments to the Commission by May 18, 1983. He first expressed his disagreement with the proposal set forth by Mr. Upmeyer. Mr. Edelstein asked when does an individual become a candidate. He observed that the mere filing of a petition is not necessarily the point of candidacy nor is the date an individual announces his or her candidacy necessarily the point a candidacy begins. Mr. Edelstein suggested that it is an individual's overall conduct which defines "candidacy". Mr. Edelstein observed that an individual's "candidacy" is something most would know when they see it. Mr. Edelstein asked who decides when an individual is a candidate and he suggested the answer is the candidate himself or herself and then the Commission.

Mr. Edelstein suggested that Assembly Minority Leader Gallo's proposal that there be some time limitation is a good idea.

Mr. Edelstein said the Commission's examples in N.J.A.C. 19:24-3.3 are good (i.e. conducting a poll, telephone calls and travel to determine whether an individual should become a candidate). He observed that some activities may be a combination of "testing the waters" and other, nonreportable activities. He said there will thus be certain types of expenditures which must be allocated between "testing the waters" and other campaign or nonpolitical activities.

Commissioner DeCotiis asked what adverse impact would occur from Mr. Upmeyer's proposal. Mr. Edelstein first observed that the imposition of the expenditure limit on "testing the waters" activities creates a certain amount of uncertainty for the candidate and his or

her staff. However, if the candidate cannot know ahead of time what spending will be within and outside of the expenditure limit, then the candidate will tend to error on the side of caution. Mr. Edelstein also observed that the proposed regulations, regardless of Mr. Upmeyer's proposal, will impose major bookkeeping requirements on gubernatorial candidates.

Mr. Edelstein observed that it is much more difficult to define the relationship of certain activities to a potential gubernatorial candidacy the farther away the activity is from the actual election. He observed that self-regulation by candidates has pluses and minuses.

Mr. Edelstein took exception to a provision in the proposed regulations; he found the phrase "general public political advertising" too vague and in need of clarification. He said it was wise of the Commission to exclude funds spent in amassing contributions from the expenditure limit.

Mr. Edelstein said there is one issue not addressed in the proposed regulations, namely expenditures by the Democratic and Republican State Committees, for example a poll of potential candidates or a poll as part of the 1983 legislative races. General Legal Counsel Farrell observed that both examples would be subject to review on the facts, for example what use was made of the poll and what was the intent of the committee in conducting the poll. He observed that these were somewhat similar to the issues the Commission faced in the Kramer case concerning "testing the waters" expenditures for the 1981 gubernatorial primary wherein a poll was conducted in December 1979. In that case, the Commission reviewed the poll itself along with its timing and the timing of raising the money for the poll as compared to the timing of raising money for the campaign itself.

Executive Director Weiner observed that it is extremely difficult for the Commission to be more specific on the question of when candidacy occurs since the issue depends upon the specific facts surrounding a specific individual's candidacy.

Following additional discussion by the Commission members, on a motion by Commissioner DeCotiis, seconded by Commissioner Proctor and a vote of 3-0, the Commission closed the Public Hearing at 11:05 a.m.

2. Executive Session

Commissioner Waugh began his participation in the meeting at this point by means of conference telephone.

On a motion by Commissioner DeCotiis, seconded by Commissioner Waugh and a vote of 4-0, the Commission voted to resolve to go into Executive Session to discuss an investigation, the results of which will be made public at its conclusion.

3. Joel L. Shain Civic Association--Info. 59-83

After returning from Executive Session, the Commission invited to the Public Session Jeffrey Simms, Esq., Joel Shain and Marguerite Schaffer, Esq., who had attended a portion of the Executive Session.

General Legal Counsel Farrell, at the request of Vice Chairman DeCotiis, summarized the Commission's decision on the issue of the possible Form D-1 filing requirements of the Joel Shain Civic Association for the 1983 primary election. First, the Commission decided that the matter should not go to hearing. Second, the Commission considered a final action of admonishing the Civic Association for the possible violation of failing to timely file Form D-1 prior to raising and spending money for the preparation of proofs for bumper stickers which were delivered to the printer on March 14. The motion required three votes; the motion received two votes and thus the motion failed and the Commission took no action.

4. Adjournment

On a motion by Commissioner DeCotiis, seconded by Commissioner Proctor and a vote of 4-0, the Commission decided to adjourn.

Respectfully submitted,

SCOTT A. WEINER
Executive Director