



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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Public Session Minutes

April 24, 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 9:40 a.m. at the Nutley Town Hall, Nutley, New Jersey.

1. Approval of Public Session Minutes of March 19, 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 March 19, 1991.

2. Executive Director's Report

A. Ethics Form Reminder

Executive Director Herrmann advised the commissioners that their ethics forms are required to be filed with the Executive Commission on Ethical Standards by May 15, 1991. He said that two copies are to be filed with the Ethical Standards Commission and one with the Governor's Office. The Executive Director informed the Commissioners that the Ethical Standards Commission has changed page three of the memorandum to require income information as it pertains to the 1990 tax year and not to the 16 months preceding filing of the report. Executive Director Herrmann stated that all copies must be notarized and contain original signatures. He also urged the commissioners to get receipts and suggested that the commissioners could file their reports when they are in Trenton at the May 15th meeting.

B. Staff Activities

Executive Director Herrmann reported that Fiscal Officer Elaine Salit is still on sick leave due to a serious back injury. The Executive Director commended Director of Administration Barbra Fasanella for assuming much of the fiscal work. He said that Director Fasanella has been assisted by Personnel Officer Donna Margetts. The Executive Director reported that

Director Fasanella took the initiative also of asking for help from the Attorney General. Executive Director Herrmann said that the section was already short an Administrative Assistant and needs a Budget Officer.

Executive Director Herrmann reported that as part of the state lease, painting and recarpeting on the 12th floor have been completed at no cost to the Commission.

The Executive Director said that new computer equipment has been purchased for linkage to the Office of Legislative Services' (OLS) bill tracking system.

Executive Director Herrmann informed the Commission that on April 9, 1991, he taught a Political Science course at Rutgers University, Newark, regarding campaign financing and ELEC. He said that he was invited by Professor Kenneth Miller and that he recruited at least one free summer intern.

Executive Director Herrmann reported that on April 11, 1991, ELEC employees staffed a table at the Offices of the Division of Elections of the Department of State. He said that as nominating petitions were submitted to the Division of Elections, staff distributed compliance manuals to candidates. Executive Director Herrmann said that Virginia Wilkes, Acting Director of Compliance and Information, Carol Neiman, Assistant Compliance Officer, and Susan Williams, Associate Examiner, staffed the ELEC table.

Executive Director Herrmann advised the Commission that Legal Director Nagy and he attended the annual seminar of the Arthur J. Holland Program on Ethics in Government. He told the Commission that the topic was local government ethics, and that the session also included a discussion of the issue of campaign contributions. Executive Director Herrmann said that nationally famous ethicist Michael Josephson was the main speaker along with Dr. Alan Rosenthal.

C. Annual Report Approval

Executive Director Herrmann noted that the Commission's Annual Report had been included in the Commissioner's meeting packet. In discussing the report, the Executive Director said that it contained one new recommendation. He said that the report recommended that Personal Financial Disclosure (PFD) forms be due 20 days after nominating petitions are filed, not 10 days as is the case under current law. Executive Director Herrmann said that now that petitions are filed 54 days before the primary instead of 40 days prior to the primary as they used to be, there is no reason not to extend the PFD period, thus establishing a more realistic time frame for the Commission to process reminder packets to candidates and thereby enhance the possibility that candidates will file the forms on a more timely basis.

On a motion by Chairman McNany, seconded by Commissioner Bedford and passed by a vote of 3-0, the Commission approved the draft subject to any technical amendments made by the Commissioners in the remaining days prior to May 1, 1991.

D. Next Meeting

The Commission rescheduled its May 15th meeting for May 22, 1991, in Trenton, and scheduled the following one for June 19, 1991, in Keyport.

E. Legislation

Executive Director Herrmann advised the Commission that on April 22, 1991, he testified before the Assembly State Government Committee on bills A-4617 (Spadoro & Kronick) and A-4618 (Villapiano & Baer). He indicated A-4617 was amended to clarify that the "expressly" loophole would be eliminated. He said that A-4618 was amended to shift AG lobbying regulation to ELEC. He noted that the Committee was responsive to the Commission's proposals in eliminating the loophole and transferring lobbying regulation to ELEC.

Chairman McNany suggested that the Commission go beyond the efforts it has made so far and write a letter to the Chairman of the Assembly State Government Committee expressing its appreciation for working with ELEC staff and applauding its (the Committee's) reform efforts. He suggested that in addition to demonstrating support for the proposals, the letter should urge that the process move forward.

On a motion by Commissioner Bedford, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission directed staff to prepare a letter of support to be addressed to Chairman Byron Baer of the Assembly State Government Committee.

3. Advisory Opinion No. 02-1991

This advisory opinion request was submitted by Michael E. Hubner, Morris County Special Counsel. This request concerned possible reporting obligations by an incumbent freeholder candidate in the 1991 primary election who has appeared on cable television news programs partially funded by Morris County.

According to Mr. Hubner, the County of Morris funds a public information program entitled "Debate the Press" which is shown on two local cable television stations. Mr. Hubner related the fact that in the past the

program consisted of monthly one-half hour press interviews, a format that has recently been changed to a weekly fifteen-minute program. He also said that an employee of Morris County is involved in producing the show.

Mr. Hubner noted that county freeholders are often guests on the programs and that four freeholders will be guests on the next two programs. The programs will be about the county budget, salary increases, and the proposed jail location. Mr. Hubner said that one of the freeholders participating in the programs is a candidate in the 1991 primary election, which election will be contested.

The advisory opinion request queries whether a freeholder candidate must report his participation in the news interview program.

Pertinent to this advisory opinion is the fact that the freeholder candidate, Freeholder Director John O'Keefe, on whose behalf the inquiry is being made, is one of six candidates in the contested Republican Party primary election. None of the other candidates, though two are incumbents, are scheduled to appear on the programs being broadcast prior to the election.

In a memorandum reviewing the issue and a possible response, staff outlined the standards set forth in N.J.A.C. 19:25-11.10, which were adopted by the Commission to determine whether or not a communication shall be deemed as a political communication and therefore subject to campaign reporting under the Act.

Basically, a communication is considered to be political if it contains a direct appeal for votes. Under Commission regulations a communication, even if it does not contain a direct appeal for votes, is, nevertheless, still considered a political communication and subject to reporting if it meets all of the following criteria: 1) the communication is circulated to ten or more persons and contains a statement or reference about the governmental or political objectives or achievements of a candidate, 2) the audience is comprised substantially of the incumbent's constituents, and 3) the communication is made within the 60-day period immediately preceding the primary or general election.

Staff circulated a memorandum which recommended that the Commission require reporting of the value of the county's contribution to the production of the program as an in-kind contribution.

Commissioner Bedford moved for adoption of the staff's recommendation. Commissioner Linett seconded the motion.

Legal Director Nagy indicated that the issues involved in the advisory opinion request are important, and that the Commission will probably revisit them frequently in the future. He also noted that the Commission has

proposed amendments to its political communications regulation that will be published in the New Jersey Register in May.

Commissioner Bedford asked why the Legal Director believed the issue would be revisited in the future.

Legal Director Nagy cited recent inquiries, and the use of cable television by incumbent officeholders as one example of communications that have generated interest.

He said that this request required balancing of competing interests: the interest of an incumbent officeholder to communicate with constituents, and the interest of a non-incumbent challenger and the electorate to have information about all sources of contributions to the incumbent. He noted that in this request it is the county employee who apparently decides which freeholders will appear on any particular program, and there is no representation that any non-incumbent will be extended the opportunity to appear. The inquiry also raises First Amendment issues concerning broadcast of news events, and the need of officeholders to keep constituents informed.

Commissioner Linett said that the Commission, through its regulations, is not prohibiting communication, but rather only requiring reporting.

Commissioner Bedford said that Morris County, which, as noted above, partly subsidizes the program, has two options. He said that the programming could be postponed until after the primary election, or the candidate could reimburse the County for the cost of producing it.

Chairman McNany asked: what is the value of the County's participation in the programming?

Legal Director Nagy said that the staff's reading of N.J.A.C. 19:25-11.11 is that the portion of the salary of the employee involved with producing the program could be viewed as an in-kind contribution, but apparently there are no other expenses that have been incurred by the county.

Counsel Farrell said that he agreed with the position in staff's memorandum that the TV station's involvement in producing and airing the program would not be considered a contribution to the campaign. He said that the TV station would not have an obligation to file with the Commission. Counsel Farrell said that the key question centers around the fact that the selection of participants in the program is done by an employee of the freeholder board. Tangential to this issue is the fact that if the Commission deems part of the employee's salary to be an in-kind contribution, then it is stipulating that the freeholder board is the

contributor. He said that as Commissioner Bedford had stated, the program can either be postponed or the candidate can pay back Morris County. In either situation, Morris County would avoid being considered the contributor, he added.

Chairman McNany said that no matter what option is taken, the fact still remains that the incumbent freeholder received exposure not accorded to the other candidates in the race. He said that the situation would result in the playing field not being level.

Counsel Farrell further noted that the set of circumstances makes this particular news program somewhat peculiar. He said that Morris County has a hand in producing it and an element of control over the selection of program participants. In this case, he said, the same freeholder will be appearing at least twice. Counsel Farrell said that none of his opponents will have the same opportunity. He said that a key element is control.

Legal Director Nagy said that one of the stations apparently is a "community access" station and therefore the opponents might be entitled to equal time. However, "equal time" requirements and the "news" exemption are questions for the Federal Communications Commission (FCC) to decide. Legal Director Nagy said that unless a broadcast is news, his understanding of FCC rules is that equal time must be granted by the station.

Commissioner Linett said that the Commission should limit the advisory opinion to the conclusion that Morris County's participation is an in-kind contribution to Freeholder O'Keefe and should be reported as such. He said that the Commission should not delve into the valuation issue.

Counsel Farrell concurred, stating that the Commission does not have at its disposal enough facts to resolve the valuation question.

Counsel Farrell reiterated that the Commission, by accepting reimbursement of the County by the candidate as appropriate, can also help to reduce the possibility of the County making a contribution and thereby creating a misuse of public funds issue.

Legal Director Nagy asked if this meant that the candidate could avoid reporting a contribution. He said a non-incumbent opponent and the electorate might be disadvantaged if the incumbent could avoid reporting receipt of any contribution.

Counsel Farrell said that the expenditure by the county would be reported by the candidate, but as a reimbursement not as a contribution.

Commissioner Linett moved that the motion be amended to have the opinion simply state that the County's investment in the programming would constitute an in-kind contribution, but not address issues of valuation.

Chairman McNany asked: can the Commission add the qualification that if the County is reimbursed, the expenditure of money would not be considered an in-kind contribution?

Commissioner Bedford agreed with Chairman McNany but added that the Commission can decide at a later date as to whether the reported value of the in-kind contribution is fair.

Counsel Farrell reiterated that the cable station has no reporting obligation. He said that the program can be classified as a public interest program and as such would have First Amendment protections.

The Commission agreed to amend the original motion by Commissioner Bedford and limit the advisory opinion to requiring only that the County's expense in the production of the program be reported as a contribution, but not to address valuation. On a vote of 3-0, the motion carried.

4. N.J. Republican State Committee v. Del Tufo

Counsel Farrell reported that the complaint by the Republican State Committee was amended to include N.J.S.A. 19:44A-11 which is administered by the Commission, and therefore the Commission was added as a party defendant. This suit challenged the constitutionality of those portions of the election law that prohibit political party committees from endorsing and contributing to primary election candidates.

Counsel Farrell said that he would ask the Commission to ratify the Consent Order declaring those prohibitions to be unconstitutional.

On a motion by Commissioner Linett, seconded by Commissioner Bedford and passed by a vote of 3-0, the Commission ratified the Consent Order.

5. 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.

6. Adjournment

On a motion by Commissioner Linett, seconded by Commissioner Bedford and passe3-0 the Commission voted to adjourn at 11:40 a.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.

FMH/ck