



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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PUBLIC SESSION MINUTES

DECEMBER 18, 1991

All the Commissioners and senior staff were present. Commissioner-designate Joseph J. Mania, III was also in attendance.

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 9:35 a.m. at the Commission offices, 28 W. State Street, Trenton, New Jersey.

1. Approval of Public Session Minutes of November 20, 1991

On a motion by Commissioner Bedford, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission approved the Public Session Minutes of November 20, 1991.

2. Executive Director's Report

A. New Book

Executive Director Herrmann discussed Dr. Herbert E. Alexander's new book entitled Reform and Reality: The Financing of State and Local Campaigns. The Executive Director noted that this work is the first to concentrate on campaign financing at the state and local levels. He said that previous studies have always emphasized federal campaign financial activity at the expense of state and/or local activity.

Executive Director Herrmann advised the Commission that the book refers to ELEC and California's Fair Political Practices Commission (FPPC) as the "best of the bunch among U.S. election commissions." The Executive Director pointed out that the FPPC has over five times the Commission's budget. He said that the California Commission's budget was \$4.6 million in FY-1989. Executive Director Herrmann said that the book cites various ELEC White Papers and gubernatorial election studies stating "ELEC ... has examined not only where the money comes from but where it goes" The Executive Director indicated that Dr. Alexander uses ELEC's budgetary problems as an example of how an election enforcement agency can be

"hamstrung by a lack of ... money." Executive Director Herrmann noted that the study concludes by stating that "there is an inherent conflict of interest in an election commission depending on the generosity of the people whom they regulate," and "there is a case to be made for providing election agencies with a source of funding independent of the normal legislative appropriations process."

B. Staff Activities

Executive Director Herrmann reported that the 20-day postelection reports were released to the press and public on December 4, 1991. The Executive Director praised Director of Compliance and Information Evelyn Ford and her compliance staff for timely processing all G-91 reports.

Executive Director Herrmann reported that on December 10, 1991, he addressed a meeting of the Chemical Industry Council on the new lobbying regulations. The Executive Director further reported that on December 11, 1991, he attended the Eagleton Institute's Roundtable Discussion on the 1991 Legislative Elections. Executive Director Herrmann mentioned that on December 16, 1991, he was a guest on Bob Aronson's radio show on WCTC, New Brunswick. He said that he discussed PACs in New Jersey.

C. Budget

Executive Director Herrmann advised the Commission that Chairman McNany and he met with Governor Florio's Deputy Chief of Staff Sam Crane to discuss ELEC's budget. The Executive Director noted that the Deputy Chief of Staff asked the Commission for a memorandum on ELEC's filing fee proposal and maximum needs for FY93. Executive Director Herrmann indicated that his memorandum stated that \$1.5 million was the minimum needed to support basic ELEC services in the new fiscal year. He said that ELEC's current budget has declined to \$965,000. Executive Director Herrmann reported that Mr. Crane promised to review seriously ELEC's situation and recommended solution.

Executive Director Herrmann made the Commission aware that on December 10, 1991, the Office of Management and Budget (OMB) in the Department of Treasury took \$74,000 out of ELEC's equipment account. He said that this was a Statewide procedure that affected all State agencies. He noted, however, that the money could have been used for desperately needed items such as a new telephone system, photocopiers, and filing cabinets.

D. Legislation

Executive Director Herrmann announced that on November 25, 1991, he testified before the Assembly State Government Committee on A-4978 (Martin/Russo). The bill is designed to strengthen ELEC's autonomy. He said that the bill provides for the Commissioners to serve two six-year terms. The Executive Director said that it also provides that the chairpersons of the State party committees nominate three persons for

consideration by the Governor to fill a vacancy. Executive Director Herrmann said that the chairpersons have 60 days to submit nominees to the Governor and the Governor has 30 days to submit a choice to the Senate.

Executive Director Herrmann said that the bill calls for the Commission to select annually a Chair and a Vice-Chair from opposite parties. The Executive Director added that the bill places restrictions on pre- and post employment of ELEC staff. He said that newly hired staff are not allowed to have been participants in campaigns for a period of one year prior to employment. He said that ELEC staff is also prohibited from paid or unpaid campaign involvement for a period of two years following their departure from ELEC.

Executive Director Herrmann said that he testified that ELEC generally supports the concept of increased autonomy. He said that White Paper Number Six on Autonomy and Jurisdiction specifically supported longer terms. Executive Director Herrmann said that he testified that the Commission has not considered the other particular provisions of this legislation.

Executive Director Herrmann said that as part of his testimony he also suggested two technical amendments. He said that he suggested that the bill language be clarified to stipulate that current commissioners could be nominated for the new six-year terms for two terms more. He said that he also suggested that the ban on staff campaign employment be limited to only activities directly regulated by ELEC. Executive Director Herrmann said that the committee accepted the first amendment and agreed to reduce the two-year post employment ban to one year.

Commissioner Bedford said that he did not see the point of a ban on pre- and post employment of staff.

Commissioner Linett agreed and then went on to discuss the provision of the State Chairmen selecting Commissioners. Commissioner Linett commented that it was his belief that many of the distinguished people who have served on the Commission would never have been appointed if the State Chairmen had been involved in the nominating process.

Chairman McNany said that the bill would only formalize a process that in practice already exists. He said that as a practical matter, the Governor consults with the State Chairmen on these appointments. He said that he did not see how this new procedure would change things that much.

Commissioner Linett suggested that if this new procedure is adopted it should be modified to allow the Governor to make all reappointments to the Commission alone.

Executive Director Herrmann said that on December 5, 1991, he testified before the Senate State Government Committee on S-3475 (Ewing) which is designed to extend the time-period candidates have to file their personal financial disclosure statements (PFD's). He indicated that the

bill provides that the PFD filing date be changed from 10 to 20 days after the nominating petition filing date. Executive Director Herrmann said that the bill also authorizes the use of postmarks as proof of timely filing.

Executive Director Herrmann advised the Commission that in his testimony he said that ELEC's most recent annual report supports the shift to 20 days as giving candidates a reasonable timeframe to file while not hurting the disclosure process. The Executive Director said, however, that he testified that ELEC has had a longstanding opposition to using a postmark as indicating timely filing because of the need for adequate preelection disclosure. He testified that a "check is in the mail" explanation is not acceptable. Executive Director Herrmann said that the committee agreed with both of ELEC's points. He noted that the bill passed the Senate 33-0 on Monday, December 16, 1991.

E. Future Meetings

The Commission will meet on January 15, 1992, at 9:30 a.m., in Trenton; on February 19, 1992 in Trenton, at 9:30 a.m.; and on March 18, 1992, at 9:30 a.m. in Trenton.

3. Adoption of Lobbying Regulations

The Executive Director complimented Legal Director Nagy on an outstanding job in drafting the regulations. All of the Commissioners agreed.

For background information please see the Commission's transcript of the November 20, 1991 public hearing. The transcript is entitled Public Hearing on Proposed Lobbyist and Legislative Agent Regulations. For additional information please see "Lobbying Regulations Draft of Summary of Comments and Agency Responses and Proposed Text," prepared by Legal Director Nagy and dated December 18, 1991.

Legal Director Nagy provided a summary of changes to the proposed regulations as well as an overview of the agency's responses to the commentary about the proposed text.

Following the Legal Director's summary, the Commission discussed the proposed lobbying regulations at N.J.A.C. 19:25-20, et al.

Commissioner Bedford indicated that he concurred with the agency initiated change at N.J.A.C. 19:25-20.2 defining "legislative agent," which removed the reference to "one percent" as a determinant in classifying an individual as a legislative agent. He said that a regulation that just established 20 hours of lobbying activity in a calendar year as the threshold for determining whether a person must register as a legislative agent is sufficient. Commissioner Bedford said that this threshold is a good measure for distinguishing isolated activity from more substantial lobbying activity.

Commissioner Linett asked if the new forms had been developed, suggesting that the Commission should be shown them prior to their utilization.

Executive Director Herrmann said that the staff was busy working on the new forms and that staff would be happy to show the new forms to the Commission. Executive Director Herrmann asked Director of Compliance and Information Evelyn Ford, who is drafting the new forms, to comment upon their progress.

Director Ford said that Notice of Representation forms and Quarterly Report forms will be ready by January. She noted that developing these forms has been relatively easy because only a slight modification was required. Director Ford said, however, that she would be taking more time with the annual report forms because of the fact that the reforms to the law primarily affect annual financial reporting, not quarterly reporting or the Notice of Representation. She said also that annual report forms need not be distributed until late 1992 because reports filed under the new law are not required until February, 1993. Director Ford mentioned that she was planning to hold a seminar to obtain input on the forms from lobbyists.

Commissioner Bedford, in reference to his comment in support of the 20-hour threshold for determining whether an individual is a lobbyist, asked if the 20 hours also applied to support personnel.

Legal Director Nagy responded that the 20-hour threshold applied to direct lobbying and not to work done by support staff. He said that a 450-hour threshold applied to staff doing support work.

Counsel Farrell said that the bright line test of reasonableness is relevant to direct lobbying or direct communication with legislators. He said that if an individual directly communicates, the 20-hour threshold is applicable whereas, if there is no direct communication, the threshold is 450 hours.

Commissioner Linett added that even though the Commission sets forth a policy in its rules, a lobbyist still has a right to challenge the policy in the courts. Acknowledging that fact, said the Commissioner, he was prepared to support the 20-hour threshold knowing fully that there is much opposition to this threshold within the lobbying community.

With respect to the definition of "regulation" at N.J.A.C. 19:25-20.2, Commissioner Linett said that he believed the issue of whether or not rate making activity is reportable to be very important. He suggested that because of the importance of the issue the fact that the Commission is not requiring ratemaking activity to be reported should be set forth clearly in the regulations.

Commissioner Linett said that reference to the fact should not just be enunciated in the comments. The Commissioner asserted that the rules should specifically state that ratemaking is not covered by the law.

Commissioner Bedford said that he agreed that clarification of the ratemaking issue needed to be set forth clearly in the regulations. He asked Commissioner Linett if he agreed with the conclusion that ratemaking should not be covered by the regulation.

Commissioner Linett said that he agreed with this interpretation but simply believes it should be set forth clearly in the regulations so as to provide guidance to lobbyists. He said this is a major area of concern and that the Commission should address it clearly.

Commissioner Bedford queried how the Commission would support the view that the statute does not cover ratemaking.

Legal Director Nagy said that a distinction is drawn in the statute between a rule or regulation and an order. He said that a rule or regulation, has general applicability to an entire class as opposed to specific applicability to an individual petitioner. Legal Director Nagy said that an order affects an individual petitioner. According to the Legal Director, who consulted with the Office of Administrative Law, ratemaking is considered an order, which under the statute is excluded from reporting.

At this juncture, the Legal Director quoted from a treatise entitled State Administrative Rulemaking by Arthur Earl Bonfield. The treatise suggests that a rule is directed at a class rather than specified individuals, whereas an order constitutes an agency action of particular application that determines the rights of specific persons.

Counsel Farrell noted that the policy decision for the Commission is whether ratemaking is in or out in terms of reporting. Counsel Farrell stated that in any event, the Commission should make its position known very clearly. He suggested that it was difficult seeing any ratesetting matter as a rule in today's world.

Commissioner Linett said that the Commission should exclude all ratesetting. He suggested that all activity related to ratesetting was subject to disclosure in another forum anyway. He believes that activity concerning ratesetting did not have the same compelling need to be disclosed as activity aimed at regulations of general applicability.

Commissioner Bedford said that ratemaking should be excluded from disclosure.

Legal Director Nagy said that the text of the "regulation" definition will be amended to delete ratemaking activity that has particular applicability on named or specified petitioners or parties.

Counsel Farrell suggested that the Commission specify that ratemaking is not covered but that it refrain from suggesting that it is being excluded for a constitutional reason. Counsel Farrell indicated that this type of approach would allow the Commission to modify its regulation at

a future time, if, for instance, it determined that any form of ratesetting was of general applicability and therefore covered.

Commissioner Linett referred to the comment by a member of the public suggesting that exemptions as set forth in N.J.A.C. 19:25-20.3(a)2 be expanded to encompass any activity undertaken by a law firm, or a similar entity, to educate its clients in regard to proposed legislation or a proposed regulation.

Commissioner Linett said that the response was unclear because it could be interpreted as saying that educational seminars are not exempted. Commissioner Linett said that the draft regulation begged the question as to whether or not a lobbyist could undertake this activity. He suggested that the language be made more precise. Commissioner Linett said that he would say that "generally education seminars are exempted," leaving the possibility that the activity, in certain cases, can be open to interpretation through an advisory opinion. Commissioner Linett said that the Commission should provide, however, strong guidance to lobbyists in terms of advising them that educational seminars generally are not subject to disclosure.

Commissioner Linett, in making a general comment about the regulation, said that he believed that the regulations were too open-ended. He said that the Commission has an obligation to the public to clarify the regulations as much as possible. Commissioner Linett suggested that vagueness would lead to many requests for advisory opinions.

Counsel Farrell suggested that the Commission has never taken the position that it had the authority to require disclosure of what employers and employees do among themselves. He said that in this regard, for example, the 450-hour threshold for support personnel would only kick in when work was done in connection with direct lobbying efforts and not in conjunction with educational seminars. Counsel Farrell said that on the face of it, in-house activity would not be of interest to the Commission.

Legal Director Nagy asked: suppose there is a specific bill in mind, and the legislative agent utilizes a seminar to solicit business from specific clients?

Counsel Farrell expressed doubt that the Commission would win in court on that issue. He said that activity to directly influence legislation, not other clients or people, is required to be disclosed under the statute.

Counsel Farrell suggested that the regulation stipulate that this matter is subject to a case-by-case determination.

The Commission amended the commentary to specify that educational seminars are not generally subject to disclosure, but that a definition of what activity can be characterized as "educational" must be determined on a case-by-case factual basis.

Legal Director Nagy next explained why rulemaking lobbying activity is included in the quarterly reporting requirement of legislative agents, although rulemaking lobbying is not specifically required in the language of N.J.S.A 52:13C-22. He explained that the statutory structure of the Legislative Activities Disclosure Act contemplates that such information be included in legislative agent quarterly reports since the information was specifically required by the 1991 amendments to be included in the Notice of Representation. Legal Director Nagy said the Commission might invoke the doctrine of legislative oversight to support its requirement that rulemaking lobbying be included in the quarterly reports. The Commission concurred that regulatory lobbying activity must be disclosed on quarterly reports because the legislation requires such disclosure for the Notice of Representation.

Legal Director Nagy explained that the Commission has no statutory authority to lengthen the period of activity in N.J.A.C 19:25-20.5(d) which is covered by the final legislative agent quarterly report at the close of each two-year legislative session. This change had been suggested by one commenter.

In response to another commenter, Legal Director Nagy discussed "contact reporting." He said that nothing in the Legislative Activities Disclosure Act or in the 1991 amendments specifically requires that legislative agents disclose on their quarterly reports face-to-face contact with legislators and regulators. Therefore, staff has not extended the quarterly reporting requirement to such contacts.

Legal Director Nagy said that several commenters expressed concern about reporting of communication expenditures pursuant to N.J.A.C. 19:25-20.11, and suggested that a test of "initial intent" be applied to each communication. Counsel Farrell suggested that the nature of a piece of literature, such as an annual report, can change depending upon its use and distribution. The Commission agreed with Director Nagy and Counsel Farrell that it is inappropriate to use "initial intent" as the test of whether a communication is reportable as related to lobbying or rulemaking activity.

Commissioner Bedford suggested that the word "invoice" be substituted for the word "bill" on page 23 of the draft text in the example of a "communication not intended to influence legislation, or regulation."

In regard to the record retention exclusionary threshold at N.J.A.C. 19:25-20.14(b), which was lowered from \$25.00 to \$5.00, Commissioner Linett said that he agreed with the conclusion, but not for the reasons set forth in the response. Commissioner Linett suggested that the Commission's policy should be that complete and accurate records be kept by lobbyists. He said that a lot of \$5.00 expenditures might not add up, but a lot of \$25 expenditures would.

Commissioner Linett suggested the following language:

"Permitting a record pertinent to a transaction as high as \$25.00 to be undocumented would contravene the public purpose of comprehensive record keeping."

Commissioner Linett asked if the "50 percent" language used in N.J.A.C. 19:25-20.10, Receipts, and N.J.A.C. 19:25-20.11, Expenditures, is statutory.

Legal Director Nagy responded that the "50 percent" threshold in regard to a trade association reporting membership dues paid to it is not statutory. He said, however, that this language has been carried over from the old regulations in regard to annual financial reporting.

Commissioner Linett asked if there were any comments about this provision.

Legal Director Nagy said that one commenter addressed it.

Counsel Farrell added that the comment was not made with respect to the requirement but with respect to the difficulty that a trade association has in reporting.

Commissioner Bedford said that he agreed with Commissioner Linett that the provision is unusual. He suggested that just because the Commission has had this regulation on the book, does not mean that it should not be re-examined.

Commissioner Linett said that the "50 percent" threshold could constitute quite a bit of lobbying for a trade association.

Legal Director Nagy said that there is no question that a trade association is required to file an annual report if it expends more than \$2,500 on lobbying. He said that the regulation is intended only to determine whether a dues payment made by a lobbyist organization to a trade association becomes a reportable lobbying expenditure of the lobbyist. Most dues paid to trade associations are usually not treated as lobbying expenditures, unless the trade association spends more than one-half of its expenditures for lobbying activity.

Commissioner Linett said that the public has a right to know who is behind the trade association lobbying.

Legal Director Nagy suggested that the proposed regulations be adopted, but that the Commission revisit this issue in the future.

Commissioner Linett asked that the issue be put on the agenda in the spring. He said that he was unsure that a percent test made sense.

Commissioner Bedford moved that the proposed regulations be adopted, including the changes made at today's meeting. Commissioner Linett seconded the motion.

Chairman McNany asked for further discussion, recognizing New Jersey Common Cause Director Ed McCool.

Mr. McCool complimented the Commission, stating that he had nothing but praise for the direction the Commission is going in with the regulations. He said that he was particularly impressed with how "user friendly" the responses to the comments were, stating that this is not the case with all agencies.

Mr. McCool indicated that he believed that the forms developed by the Commission could take care of some of the problems with respect to reporting communications. He said that the forms could perhaps make a distinction between communication expenditures for such things as annual reports and communication expenditures specifically directed toward lobbying legislators and regulators.

4. Resolution To Go Into Executive Session

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

5. Adjournment

On a motion by Commissioner Linett, seconded by Commissioner Bedford and passed by a vote of 3-0, the Commission voted to adjourn at 12:30 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.