



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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PUBLIC SESSION MINUTES

AUGUST 17, 1993

All the Commissioners, senior staff, and Director of Public Financing Nedda Gold Massar were present. Counsel Farrell was absent.

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 10:00 a.m. at the Monmouth County Library, Manalapan, New Jersey.

1. Approval of Public Session Minutes of July 20, 1993

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission approved the Public Session Minutes of July 20, 1993.

2. Executive Director's Report

A. National Ethics News

Executive Director Herrmann announced that Graham Johnson, longtime director of the Washington Public Disclosure Commission and a founding member of the Council on Governmental Ethics Laws (COGEL), has retired after 19 years of service.

The Executive Director reported that Steven and Barbara Salmore's new book New Jersey Politics and Government makes great use of ELEC's white papers and analytical press releases in its treatment of campaign spending and lobbying issues.

Executive Director Herrmann informed the Commission that the federal Budget Reconciliation Act recently adjusted the Presidential Election Fund taxpayer check-off from \$1 to \$3 assuring the solvency of the fund for the near future.

The Executive Director added that ELEC recommended in 1992 to increase the New Jersey Taxpayer check-off from \$1 to \$2.

B. Ethics Filing Update

Executive Director Herrmann advised the Commissioners that if any of them had received a "clarifying" mailing from the Executive Commission on Ethical Standards about the Business Entity Disclosure Form and have any questions they should call the Executive Commission at (609) 292-1892.

C. Staff News

Executive Director Herrmann reported that Public Information Sessions for the 1993 general election will be held on September 9 and 15 in Trenton.

The Executive Director indicated that staff will attempt to hire into five auditing and clerical positions before the election and at least two positions after the election depending on the mid-fiscal year budget situation. Executive Director Herrmann said that ELEC needs to make immediate additional staff hirings to answer candidate questions and process information requests during the general election cycle.

Executive Director Herrmann reported that a new candidate R-1 form and a compliance manual of over 50 pages will be ready for candidate use in the general election. He said that the "Fact Sheet" has also been revised. Executive Director Herrmann noted that Director of Compliance and Information Evelyn Ford and her special project staff did an absolutely amazing job in a very complicated area in a very short period of time. The Executive Director stated that the revised materials conform to the changes in the new Campaign Act and are much more user-friendly.

Executive Director Herrmann announced that ELEC has secured permission from the New Jersey Bar Association to use a video of the joint training session held on April 14, 1993. He indicated that the video will be used as a training tool both for in-house and off-site viewing.

D. NORCOL Conference

Executive Director Herrmann advised the members of the Commission that Legal Director Nagy, Deputy Director Brindle, and he went to Stamford, Connecticut on August 10, 1993 for NORCOL's annual meeting. He said that the meeting was held in conjunction with the Eastern Regional Conference of the Council of State Governments (CSG). The Executive Director said that together with sister agencies in the Northeast, updates were provided with respect to recent developments in lobbying law and litigation.

The Executive Director informed the Commission that a guest speaker from National Common Cause discussed a new federal lobbying bill.

Common Cause National praised the states, including New Jersey, for being "way out in front of the federal government in this area."

Executive Director Herrmann added that the current federal law is so weak according to the speaker that Common Cause is at the top of the list in lobbying expenditures.

The Executive Director reported that the bill does the following:

- requires a twice-a-year activities/financial report from lobbyists, a feature that is similar to ELEC's call for combined quarterly filings;
- covers "grass roots" lobbying which ELEC has proposed for New Jersey; and,
- creates a new office of Lobbying and Public Disclosure with a staff of 75 and a \$7 million budget, which demonstrates that Congress has recognized the importance of adequate resources for an ethics agency.

Executive Director Herrmann said that Congress is also considering an amendment to ban all lobbyist benefit passing. ELEC has never taken such a position but it may be an issue for possible future review.

Executive Director Herrmann apprised the Commission of the fact that at the annual business meeting of NORCOL, he was elected Chairperson for the 1993-95 term and John O'Donnell, the Executive Director of the Maryland State Ethics Commission, was elected Chairperson-Elect for 1995-97. He said that both Mr. O'Donnell and he had each served a previous term as Chairperson.

E. Future Meetings

The Commission will meet on September 14, 1993 in Berkeley Heights at 9:30 a.m. and on October 19, 1993 in Trenton. The Commission will also meet periodically on the telephone for the purpose of certifying public funds. The Commission also set a meeting for August 24, 1993 at 9:00 a.m. in New Providence.

3. Regulatory Amendments Public Hearing - 10:00 A.M

For further information please see memorandum from Gregory E. Nagy, Legal Director, to Frederick M. Herrmann, Ph.D., Executive Director, dated June 10, 1993 and entitled "Regulatory Amendments."

Also see the Public Session Minutes of June 18, 1993.

The Commission conducted a public hearing on the proposed amendments to ELEC's regulations of Subchapters one through eight. A court reporter was present to record the proceedings. No one appeared to testify.

4. Approval of Public Financing Funds

Jim Florio/Submission 01

Director Massar reported that staff had completed its review of the July 26, 1993 first submission for general election public matching funds of Candidate Jim Florio which contained \$1,559,375.11 in contributions submitted for match. A complete staff review found that contributions totaling \$1,517,193.07 were eligible for match and that 36 contribution items representing \$42,182.04 were ineligible for match at this time. The ineligibility of 36 items submitted for match results in an ineligibility rate of 1.44 percent. After subtraction of the \$50,000 of contributions which is not matched, it was determined that \$1,458,193.07 was eligible to be matched at the 2:1 ratio.

In addition, Candidate Florio has filed a signed Statement of Agreement to participate in 1993 gubernatorial general election debates and has provided documentation that at least \$177,000 has been spent or irrevocably committed for the 1993 gubernatorial general election.

Christine Todd Whitman/Submission 01

The July 26, 1993 first submission of Candidate Whitman contained \$515,552.01 in contributions submitted for match. A complete review of all items found that contributions totaling \$475,378.01 were eligible for match and that 75 contribution items representing \$40,174 were ineligible for match at this time. The ineligibility of 75 items submitted for match resulted in an ineligibility rate of 4.54 percent. After subtraction of the \$59,000 of contributions which is not matched, it was determined that \$416,378.01 was eligible to be matched at a 2:1 ratio.

Candidate Whitman filed a signed Statement of Agreement to participate in 1993 gubernatorial general election debates and has provided documentation that at least \$177,000 has been spent or irrevocably committed for the 1993 gubernatorial general election.

Director Massar reported that staff has reviewed the initial submission of the Florio and Whitman campaigns to evaluate compliance with the requirement to report the occupation and employer of each individual contributor whose aggregate contributions exceed \$200.00. The Florio campaign demonstrated a 93.8 percent compliance rate and the Whitman campaign demonstrated a compliance rate of 88.9 percent. Both the Florio and Whitman campaigns have stated that where occupation or employer information is not provided on the submission documents, their "good faith" efforts to obtain the information have included both written and verbal contacts with the contributors.

Staff recommends that these rates of compliance coupled with the "good faith" efforts of the campaigns are sufficient to recommend that public funds for the 1993 general election be awarded to the two campaigns.

On the basis of its review, staff recommended that Candidates Florio and Whitman be determined to be qualified to receive public funds in the 1993 general election and the Commission certify \$2,916,386.14 to Candidate Florio and \$832,756.02 to Candidate Whitman.

On a motion by Commissioner Eldridge, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission approved \$2,916,386.14 in public funds to Candidate Florio and \$832,756.02 in public funds to Candidate Whitman.

Percentage Certification Process and Commission Meeting Schedule for the 1993 General Election

Please see memorandum from Nedda Gold Massar, Director of Public Financing to Frederick M. Herrmann, Ph.D., Executive Director, dated August 13, 1993 and entitled "Percentage Certification Process and Commission Meeting Schedule for the 1993 General Election."

In sum, the memorandum contains a proposal for the implementation of automatic percentage certification procedures for the approval of general election gubernatorial public matching funds as well as a prospective schedule of Commission telephone meeting dates for the certification of such funds. The automatic percentage certification rate would be 80 percent in September for candidates with a "track record" of ineligibility rates below 20 percent. The certification rate in September would be 75 percent for candidates with a consistent ineligibility rate of between 20 and 25 percent. The automatic certification rate would also increase to 90 percent in October if ineligibility rates diminish.

The automatic certification procedures would be used only if complete review of a submission, other than an initial submission, could not be completed during a one-week public funds submission cycle.

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission approved the proposed automatic certification procedure and the meeting schedule.

5. Complaint of People for Whitman (Fortunato Letter)

Executive Director Herrmann recused himself and was not present for the discussion of this matter.

For detailed information please see the letter from Peter Verniero, Esq., Counsel, to Frederick M. Herrmann, Ph.D., Executive Director, dated June 30, 1993, and memorandum, dated July 9, 1993, by Legal Director Gregory E. Nagy.

Also see the Public Session Minutes of July 20, 1993 and the verified complaint, dated July 29, 1993 entitled People for Whitman Committee, Complainant v. Florio '93, Inc., Respondent.

In summary, the complaint alleges that a letter from Samuel F. Fortunato, Commissioner of the Department of Insurance and Rehabilitator of the Mutual Benefit Life Insurance Company (MBL), to policyholders of Mutual Benefit Life constitutes a political communication as defined by N.J.A.C. 19:25-11.10(b). The complaint maintains that this letter was sent after the gubernatorial primary election to an audience of individuals eligible to vote in the gubernatorial general election. It also alleges that the letter expressly states the political achievements and objectives of Governor James J. Florio regarding the rehabilitation of MBL and was coordinated with the campaign of Governor Florio because a member of his cabinet signed the letter. The complaint maintains that as a political communication the entire cost of the Fortunato letter must be allocated against the gubernatorial expenditure limit of the Respondent pursuant to N.J.A.C. 19:25-11.11 and N.J.S.A. 19:44A-1 et seq. It also maintains that the Florio campaign should immediately reimburse the State Treasury for the cost of producing and distributing the letter.

At its July 20, 1993 meeting the Commission directed the Whitman Campaign to file a complaint with the Commission in proper form for referral to the Office of Administrative Law (OAL).

Legal Director Nagy indicated that upon receipt of an Answer and with the approval of the Commission the complaint would be referred to the OAL on August 20, 1993. He also noted that the transcript of the July 20, 1993 Commission meeting supplied by Mr. Verniero incorrectly identified Executive Director Herrmann as a speaker on pages 15 and 16, but the speaker was Commissioner Eldridge. Dr. Herrmann was not present for that discussion.

Mr. Paul Josephson, Esq., substituting for Angelo Genova, Esq., Counsel to Florio '93, Inc. and Kathleen Connelly, Esq., also Counsel to Florio, '93, Inc., asked to speak on procedural matters related to the complaint.

Mr. Josephson said that at this point the timeframe for the Florio campaign to respond to the complaint has not expired. He indicated that as such the Florio campaign has not yet entered its response to the complaint. Mr. Josephson said that in the view of the Florio campaign it would not be appropriate for the Commission to refer the complaint to the OAL at this time because the 20-day response period is not up. He said that because the campaign has not responded it is not clear that it is a contested case.

Mr. Josephson said also that it was his belief that the Commission should conduct a preliminary investigation before it decides to refer the matter to the OAL. He indicated that such a process would be consistent with the approach taken by other agencies in the State and would protect campaigns from complaints filed as a matter of nuisance.

Mr. Josephson said also that he questioned the Commission's rules regarding complaints. Specifically, he cited N.J.A.C. 19:25-15.65, asking if there was cause for speculation about a violation of the expenditure limit so early in the campaign.

Finally, Mr. Josephson, citing N.J.S.A. 19:25-17.2, stated that the Florio campaign did not believe that this matter was ripe for consideration. He said that the appropriate time for consideration of this complaint would be after October 4, 1993, the due date of the 29-day preelection report.

Commissioner Linett asked Mr. Josephson if the Florio campaign expected to file an Answer to the complaint.

Mr. Josephson responded in the affirmative.

Commissioner Linett asked: Is it your position that the complaint should not be referred to the OAL?

Mr. Josephson said that it was the campaign's contention that it should not be referred at this time because it has not been contested yet and that it is not ripe for consideration.

Commissioner Linett said that it must be pointed out that this is not the Commission's complaint. He said that it was merely the Commission's problem to determine how to resolve it.

Mr. Josephson said that it was the contention of the Florio campaign that the complaint should be considered by the Commission and not referred to the OAL.

Legal Director Nagy asked: Mr. Josephson, do you agree that it is within the Commission's discretion to either refer the complaint or hear it itself?

Mr. Josephson agreed.

Mr. Nagy said that the ripeness issue could be addressed by the OAL

Mr. Josephson said that the Florio campaign would raise the ripeness issue with the OAL as well as the procedural issue.

Mr. Nagy said that what is motivating the Commission in referring the complaint at this time is the interest of both campaigns to resolve the issue before election day.

Commissioner Linett asked: No matter what course the Commission takes there is an appeal process.

Chairman McNany said that the Commission would like to resolve this matter before the election.

Mr. Peter Verniero, Counsel to People for Whitman Committee, summarized the history of the complaint, stating that the matter was first brought to the attention of the Commission on June 30, 1993. He said that there has been a thorough discussion of this issue on July 20, 1993, and that it is time for the Commission to act and refer this matter to the OAL. He noted that there

is an urgency in getting this matter resolved because it involves the repayment of taxpayer money by the Florio campaign.

Mr. Verniero said that Mr. Linett is correct in stating that the matter has to be resolved and not deferred indefinitely.

Mr. Verniero said that he followed N.J.A.C. 19:25-15.65, which governs the procedures for filing complaints. He urged the Commission to refer the matter to the OAL immediately.

Mr. Verniero said that the Florio campaign has had two months to argue this matter and that to further delay action on the matter would be unfair to the public. He said that improper expenditures have been made by the campaign from public funds and that the Treasury should be reimbursed and the expenditures allocated against the expenditure limit of the candidate.

Commissioner Linett noted that what is being suggested by the Florio people is that the Commission should conduct a hearing on this matter. He added, however, that the Commission has a long tradition of referring complaints to the OAL.

Mr. Verniero said that the complaint is now in the system and that there should be no further delays in acting upon it. Mr. Verniero said that there has been plenty of time for the Governor to respond.

Mr. Nagy asked: Mr. Verniero, is it necessary for the Commission to wait for an Answer before deciding to refer the complaint for a hearing?

Mr. Verniero responded that he did not agree that it is appropriate for the Commission to wait until an official response is filed before deciding to refer a contested complaint to the OAL.

Legal Director Nagy said that he saw no legal difficulty for the Commission, in anticipation of a contested complaint, authorizing staff to refer the matter to the OAL upon the submission of the Florio response.

Legal Director Nagy asked Mr. Verniero: If the Florio campaign reports the allocation, would the complaint be moot?

Mr. Verniero said that there is no indication by the Florio campaign of any intention to allocate the cost of the letter against its expenditure limit.

Legal Director Nagy added: But until October 4, 1993, there is really no way for the Commission to know what the Florio campaign will do.

Mr. Verniero asserted that the intention of the Florio camp is clear. He further stated that the other issue of reimbursement of taxpayer funds for the costs of the communication makes it urgent for the Commission to act.

Legal Director Nagy asked whether the Commission had jurisdiction over the use of and reimbursement of State funds.

Mr. Verniero responded that the Commission has a regulation about the reimbursement of travel.

Commissioner Linett noted that the Commission determined at its last meeting that the theory of the travel regulation is not applicable to this complaint. He said that the Commission has taken the position many times that the issue of the use of State funds is outside of its jurisdiction.

Legal Director Nagy said that he believed that the Commission, in anticipation of a response, can indicate that it intends to refer the complaint if contested.

Commissioner Linett asked the Counsel for the Florio campaign: Will the complaint be contested on a factual or legal basis?

Ms. Connelly responded that the complaint may possibly be contested on both factual and legal grounds.

Commissioner Linett said that Legal Director Nagy is suggesting that if the complaint is contested then there is no harm in anticipating a referral to the OAL. He said that conversely, if the complaint is not contested, then there is no need to refer the matter to the OAL.

Mr. Josephson said that he nevertheless believed that the Commission should grant the Florio campaign the full period of 20 days to respond to the complaint before taking action.

Legal Director Nagy said that he believed that under the Administrative Procedures Act the Commission had the right to refer these matters. He said that it would be following the same type of procedure as the Secretary of State does in petition contest matters. Legal Director Nagy indicated that the Secretary of State does not investigate before referring petition contests for hearing. He also said that the Commission must balance ripeness concerns against the urgency of concluding the hearing process before the date of the election.

Commissioner Linett said that the "premature" issue could be easily dealt with by simply having the Commission wait until next week to decide whether or not to refer the matter to the OAL.

At this juncture, Mr. Verniero reiterated his desire that the Commission delay no longer in referring the matter to the OAL.

Mr. Josephson said that it was the Florio campaign's belief that the matter should again be considered at the next meeting.

Chairman McNany said: At the last meeting the Commission decided to refer the matter to the OAL if the matter is contested. Why would it conduct another hearing?

Mr. Josephson responded that it is not appropriate for the Commission to refer the matter to the OAL until it receives a response from the Florio campaign.

Legal Director Nagy said that if the Commission wants to avail itself of the option of referring the complaint for a hearing under the Administrative Procedures Act then the Commission can authorize staff to refer the matter to the OAL pending receipt of an Answer, making it a contested case.

Commissioner Eldridge suggested that the Commission refer the matter to the OAL. He said that if there is something in the response that changes the situation, then the Commission can always withdraw the complaint. Commissioner Eldridge noted that Counsel is anticipating that part of the complaint will be contested and that therefore, for convenience sake, referral to the OAL should be authorized.

Commissioner Linett suggested that the Commission await a response and then decide on its course of action.

The Commission determined that it would meet at 9:00 a.m. on August 24, 1993, in New Providence for the purpose of determining whether the complaint should be referred to the OAL.

6. People for Whitman Committee Complaint (Cruz Letter)

Executive Director Herrmann returned to the meeting.

For detailed information please see the correspondence from Peter G. Verniero, Legal Counsel for People for Whitman to Honorable Frederick M. Herrmann, Ph.D., Executive Director, dated August 9, 1993 and regarding the People for Whitman Committee v. Florio '93, Inc. Also see the verified complaint of People for Whitman Committee, Complainant v. Florio '93, Inc., Respondent.

In sum, the complaint seeks a judgment with respect to a letter dated July 22, 1993 written by the Honorable Felix M. Cruz, Director of the Office of Minority Affairs, to leaders in the Cuban community.

The complaint alleges a violation of the political communication regulation at N.J.A.C. 19:25-11.10 and maintains that the cost of the mailing should be allocated against the expenditure limit of Florio '93, Inc. and that the Florio campaign should immediately reimburse the State of New Jersey for the cost of the letter.

Legal Director Nagy submitted the complaint to the Commission for its review. He advised that Angelo Genova, Esq., has submitted a letter of

representation on behalf of Florio '93, Inc., and the Answer was due on September 1, 1993.

7. Letter to the Governor and Senate Leadership

On a motion by Commissioner Eldridge, seconded by Chairman McNany and passed by a vote of 2-0, the Commission directed staff to send a letter to the Governor and Senate Leadership regarding the Republican vacancy on the Commission and the Democratic seat now in hold-over status. ,

Commissioner Linett abstained from the vote and decided not to sign the letter.

8. Resolution To Go Into Executive Session

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

9. Adjournment

On a motion by Chairman McNany, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission voted to adjourn at 12:10 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.