



State of New Jersey

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PUBLIC SESSION MINUTES

SEPTEMBER 14, 1993

All the Commissioners, Counsel Farrell, senior staff, and Director of Public Financing Nedda Gold Massar 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 9:30 a.m. at the Berkeley Heights Municipal Building, Berkeley Heights.

1. Approval of Public Session Minutes of August 17 and August 24, 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 August 17 and August 24, 1993.

2. Complaints of People for Whitman (Fortunato and Cruz)

For further information please see the Public Session Minutes of August 17, 1993, August 24, 1993, and September 8, 1993, and the correspondences cited therein.

Peter Verniero, Esq., Counsel to the Whitman campaign, urged the Commission to agree to acceleration on the Fortunato complaint and to refer the Cruz matter to the Office of Administrative Law (OAL). He also urged the Commission to agree to acceleration on the Cruz complaint.

Counsel Farrell said that the policy of the Commission has been to allow transfer to the OAL. He said that the request for acceleration was basically a formality. Counsel Farrell said that his recommendation would be to agree to acceleration on both matters and vote to refer the Cruz matter to the OAL.

Commissioner Linett said that all the Commission would be doing in terms of agreeing to acceleration would be consenting to rendering a Final Decision with 15 days of the OAL initial decision.

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission voted to refer the Cruz matter to the OAL.

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission voted to consent to making a Final Decision within 15 days of the OAL Initial Decision in the Fortunato and Cruz matters.

3. Advisory Opinion No. 07-1993

This advisory opinion request was submitted by Edward Gross, Esq., General Counsel, New Jersey Republican State Committee (RSC). The request and a draft response prepared by staff were circulated to the Commissioners.

The request states that the RSC proposes to conduct a media direct mail campaign during the 1993 general election cycle on behalf of specific legislative candidates in which the name of the incumbent Governor, the Office of the Governor, or an unambiguous reference to the incumbent may be made.

Mr. Gross asked for an advisory opinion from the Commission that such a reference shall not be allocable to the Republican nominee for Governor on the basis that it meets the criteria set forth in N.J.A.C. 19:25-15.9(b) through (d), which stipulates that such references are excluded from allocation because they are insubstantial.

Legal Director Nagy summarized the draft response which said that "the costs of the direct mail campaign contemplated by the RSC would constitute a non-monetary or "in-kind" contribution by the RSC to the gubernatorial candidate of the Republican party in the 1993 general election."

The draft response maintains that the role of the State political party committees in the gubernatorial election is strictly limited. The response cites the statute in stipulating that "no State committee may make any contribution or contributions in aid of the candidacy of or in behalf of such candidate of monies not deposited in a bank account pursuant to this section...." The draft notes that Mr. Gross's letter makes no mention of an account established by the banks for the purpose of raising and expending funds on behalf of the gubernatorial candidate.

The draft response reiterates Advisory Opinion No. 02-1993 and Advisory Opinion No. 04-1993 in stipulating that after the date of the gubernatorial primary election, the State committee is no longer free to undertake expenditures referring to an opposing party gubernatorial candidate without coming under the scope of the "political communication" requirements set forth in N.J.A.C. 19:25-11.10(b). Finally, the draft opinion states that the Commission cannot agree with the proposition made by Mr. Gross that the "coordinated expenditures" regulation at N.J.A.C. 19:25-15.29 is applicable to an opposing party gubernatorial candidate in the general election. The response states that the intent of the regulation was to permit insubstantial reference to the party's own candidate.

In conclusion, the draft opinion held that should the RSC incur or make expenditures for the direct mail media campaign, the expenditures can only be paid for by contributions which comply with the provisions of N.J.S.A. 19:44A-29d. Further, the expenditures must be counted toward the publicly-financed gubernatorial candidate expenditure limit.

Mr. Gross was recognized by Chairman McNany to speak about the advisory opinion request. Mr. Gross said that he was not seeking a major change in the coordinated expenditures regulation, only a modest extension of it, or even just a clarification of it. He suggested that the insubstantial reference of the coordinated expenditure rule should include reference to either gubernatorial candidate. Mr. Gross added that he was not suggesting that the RSC would be undertaking a direct mail campaign that promotes the candidacy of a gubernatorial candidate but rather a campaign to promote legislative and other non-gubernatorial candidates. Mr. Gross asserted that the principle of party-building activity is to promote candidates. He suggested that his party cannot discharge its duty of party-building this year without mentioning the current Administration.

Mr. Gross indicated that it was his belief that the standard of "insubstantial reference" contained in the regulations does apply to the mention of an opposition candidate for Governor. He said, however, that if the Commission does not interpret the regulation in this manner, then he would seek a modest expansion of the coordinated expenditure rule.

Mr. Gross argued that the regulatory process as it involves the public financing program is an evolving one. He also said that he recognized that it may not be the best time to introduce this topic but that his request is one that in the long run will affect both parties equally. Mr. Gross concluded that the heart of his request involves the question: What is appropriate activity for a party organization? He said that in his opinion a party should be permitted to undertake modest efforts that are not directly related to gubernatorial candidates.

Commissioner Linett asked: "Are you suggesting that a party is independent of the gubernatorial candidate?"

Mr. Gross replied that he was not suggesting that. However, he noted, there would be no coordination between Mrs. Whitman and the direct mail campaign.

Commissioner Linett noted that Mr. Gross used the word "insubstantial." He asked: "Is direct criticism of an opposition candidate insubstantial?"

Mr. Gross replied that according to the standard set forth in the regulations for insubstantiality, the activity contemplated by the RSC would be insubstantial.

Commissioner Linett said that the issue is who is paying for the direct mail. If the legislative candidate pays for the advertising it is different than if the State party pays for the advertising. He said that the State

party in a general election cannot be separated from its gubernatorial candidate.

Mr. Gross conceded that Commissioner Linett made a good point. He said, however, that his contention was that the State party has an obligation and duty to support legislative candidates. He said that if a candidate can do the type of direct mail campaign for themselves, why can't the party assume that responsibility.

Mr. Gross added that for the record he had no objection to the Counsel for the Democratic State Committee (DSC) being heard on the issue even though there may be a question of standing.

Chairman McNany recognized Stephen J. Edelstein, Esq., Counsel to the DSC, which had submitted a statement in opposition to the RSC request.

Mr. Edelstein said that there is no prohibition against party-building. He said, however, that parties are prohibited from doing certain things during the general election cycle. Moreover, continued Mr. Edelstein, it was his belief that there is a difference between expenditures by the party and by candidates. He noted that historically the Commission has made certain assumptions about the relationship between the gubernatorial candidate and his or her party. Mr. Edelstein asserted that there is a difference between a reference by the party to its own candidate and a negative reference to the opposing candidate. He said that this type of reference could not be deemed insubstantial. Mr. Edelstein suggested that an attack on an opponent rises to a different level than an insubstantial positive reference.

In referring to staff's response to the request, Mr. Edelstein expressed the point of view that it was "right on the money."

Legal Director Nagy noted that the regulatory history contained a statement that the coordinated expenditure exemption was only intended to apply to the party's own candidate, and cited the statement in the draft response.

Commissioner Linett said that historically the Commission, in enforcing the gubernatorial public financing program, has attempted to provide for a level playing field. He added that if the Commission were to accept the proposition of the Republican party than the expenditure limit would be undermined.

Chairman McNany added that if the Commission were to accede to the RSC's wishes in this matter then it might constantly be called on to determine allocation questions.

Commissioner Linett commended staff on the advisory opinion draft, stating that it was well written.

Commissioner Eldridge proceeded to make a motion that the staff draft response be approved. Seconded by Commissioner Linett and passed by a vote of

3-0, the Commission approved the text of the staff response on Advisory Opinion No. 07-1993.

4. Public Service Announcement Complaint

Legal Director Nagy said that a letter of representation on behalf of Florio '93, Inc., has been filed and that an answer is due on September 20, 1993.

5. Joseph Marion Complaint

In the matter of Joseph J. Marion Election Committee v. Florio '93, Inc., Legal Director Nagy said that no letter of representation has been filed to date. He said that an answer is due on September 29, 1993.

Mr. Angelo Genova, Esq., Counsel to Florio '93 Committee, asked the Commission if it is willing to make available any information it may have acquired during any investigation it may have undertaken in regard to the complaints. Mr. Genova asked also if the Commission would be participating in the OAL proceedings.

Counsel Farrell said that he was not aware of any investigation conducted by the Commission. Counsel Farrell said that the question, therefore, might be moot. He said, however, that in any event, that is a decision best left to the OAL. Counsel Farrell added that in regard to the question about the Commission's possible participation, it is his opinion that the Commission should not participate. He based this recommendation on the fact that the Commission will render final decisions on these matters and that it should not compromise that role by becoming a participant in the hearing process.

The Commission concurred with Counsel Farrell's advice.

6. Adoption of Regulatory Amendments

For detailed information please see the memorandum from Gregory E. Nagy, Legal Director, to Frederick M. Herrmann, Ph.D., Executive Director, dated September 8, 1993 and entitled Adoption of Regulatory Amendments.

Proposed amendments, repeals and new rules comprising subchapters 1 through 8 of the Commission's regulations were considered for adoption. They were proposed in the New Jersey Register at 25 N.J.R. 3429 (August 2, 1993).

Legal Director Nagy circulated written comments received from UJB Financial Corp. (UJB). One of them was substantive in nature and would require the reproposal of the regulations. UJB urged the Commission to amend the definition of the term "contribution" which appears in N.J.A.C. 19:25-1.7 to exclude from its scope a loan made from a financial institution that assures repayment. In other words, UJB suggested that a commercial loan should be excluded from the definition of a contribution. Legal Director Nagy recommended that the Commission proceed to adopt the regulations as written,

with the suggestion to consider the issue raised by UJB at a later date for the purpose of possible amending the regulation to reflect the corporation's concern.

Counsel Farrell concurred with this recommendation

Legal Director Nagy summarized several technical amendments to the proposed regulations. They were:

- At the suggestion of UJB, changing the references in subsection 5.3 from "depository" to "depository account" in order to distinguish a banking institution from a campaign banking account;
- Providing in subsection 6.5(a)(5) that the pro-rata repayment does not have to be extended to contributors of "\$200.00 or less", rather than contributors of "less than \$200.00" as was proposed;
- Adding to subsection 8.4(c) date or dates of receipt as information to be disclosed in regard to a contribution or aggregate contributions in excess of \$200.00; and,
- Adding in subsections 8.6(a) and 8.9(a) the phrase "or any aggregate contributions from a contributor which totals in excess of \$500.00" in order to clarify that these subsections are applicable to aggregate contributions collectively totaling more than \$500.00.

Commissioner Linett queried as to when the amendments would become effective.

Legal Director Nagy said that the regulations, if adopted, will become effective on October 18, 1993.

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission adopted the proposed amendments, repeals, and new rules comprising subchapters 1 through 8 with substantive changes not requiring additional public comment, and directed staff to prepare and file the adoption notice and supporting documents with the OAL.

7. Communication from Walter Perry

Mr. Walter Perry, who maintains that he is a write-candidate for Governor, was recognized by the Commission.

Mr. Perry stated that he is a candidate for Governor as defined in N.J.S.A. 19:25-15.3 and is therefore entitled to a ballot statement pursuant to section 15.44.

Mr. Perry, acknowledging the fact that the Commission in its regulations had set forth August 16, 1993 as the deadline for submitting statements to the Commission, stated that, because of the county clerks' law suit, his statement, for practical purposes, would be filed on a timely basis.

He asked the Commission for special dispensation to file a camera-ready ballot statement for inclusion on the sample ballot.

Counsel Farrell said that there are procedures for getting on the ballot and that the Commission could presume that the ballot statement program is based on those procedures.

He said, however, that he could not speculate as to whether a Court would define Mr. Perry as a candidate for the purposes of the ballot statement program.

Commissioner Linett said that in the absence of an opinion from Counsel it would behoove the Commission to reject Mr. Perry's argument. He said that while Mr. Perry might maintain that there are no logistical problems with his ballot statement getting on the ballot, indeed there are. He said that the Commission must review the statements, get them translated, and then transfer them to the county clerks. He said that the deadline is set so that the clerks can have an idea as to the number of ballot statements that need to be printed.

Counsel Farrell said that he could see how allowing a write-in candidate to have a ballot statement submitted could open up the flood gates in terms of this type of activity.

Commissioner Eldridge said that while he sympathizes with Mr. Perry's desire to communicate with the voters, he had to reject his argument.

On a motion by Commissioner Eldridge, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission denied Mr. Perry's request for a ballot statement.

8. Executive Director's Report

A. Staff Activities

Executive Director Herrmann said that on August 25, 1993, he attended the swearing-in ceremony of Fred DeVesa as Acting Attorney General. He reported that Attorney General DeVesa was a big help to ELEC a couple of years ago in facilitating the movement of the quarterly lobbying reporting system to the Commission.

Executive Director Herrmann announced that thanks to the fine work of Director Ford and her special project staff, new compliance manuals, forms, and fact sheets were mailed to all general election candidates prior to Labor Day.

The Executive Director said that two Statewide candidates information seminars were scheduled for the election by Director Ford and the Compliance and Information staff. He said that one was held on September 9, 1993, and the other will be held on September 15, 1993.

Executive Director Herrmann noted also that Director Massar and Assistant Director of Compliance and Information Virginia Wilkes-Tesser did a seminar in Bergen County on September 8, 1993.

Executive Director Herrmann informed the Commission that Director of Administration Barbra Fasanella is having the GOVMAIL telephone answering system installed to upgrade ELEC's current telephone equipment. He said that this system acts as a sophisticated answering machine and will help ELEC with its overall call processing.

B. National Governmental Ethics News

Executive Director Herrmann advised the Commission that the Omnibus Budget Reconciliation Act signed by President Clinton on August 10, 1993, increases the federal taxpayer check-off from \$1 to \$3. He noted that this was the first increase since the program's inception in 1973. He said that in contrast, public funding grants have been increased in every presidential election cycle. The Executive Director commented that the presidential election campaign fund was being drained of its resources. Executive Director Herrmann maintained that this increase in the check-off is an inflationary adjustment.

Executive Director Herrmann reminded the Commission that ELEC has recommended increasing New Jersey's check-off from \$1 to \$2 for the same reasons.

Executive Director Herrmann mentioned that he will be attending the 15th Annual Council on Governmental Ethics Laws (COGEL) Conference in St. Paul, Minnesota next week. He said that he will be participating in various parts of the program including leading two breakfast seminars on COGEL's role in promoting the "empowerment" of ethics agencies and chairing a panel entitled "What Price Regulation?"

C. Future Meeting Schedule

The Commission will hold a meeting on October 19, 1993, in Trenton at 10:00 a.m. The Commission also scheduled a telephonic meeting for the purpose of approving public funds for Wednesday September 22, 1993, at 9:00 a.m.

On suggestions from Mr. Edelstein, Mr. Verniero, and Executive Director Herrmann, the Commission agreed to call additional meetings between now and election day to discuss matters of an emergent nature.

9. Gubernatorial Complaints

Executive Director Herrmann asked the Commission to consider granting staff administrative authority to transfer all contested gubernatorial complaints automatically to the OAL for hearings. He also asked the Commission to grant authority to staff to agree to acceleration in these matters.

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission granted authority to staff to transfer complaints for hearings to the OAL and agree to acceleration.

10. 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.
3. A report on written requests for investigations of possible violations, which report will not become public. However, any complaint which may be generated as a result of a request for an investigation will become public 30 days after mailing.

9. Adjournment

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