



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

OWEN V. McNANY, III
CHAIRMAN

DAVID LINETT
COMMISSIONER

WILLIAM H. ELDRIDGE
COMMISSIONER

NATIONAL STATE BANK BLDG., 12th FLOOR
28 W. STATE STREET, CN 185
TRENTON, NEW JERSEY 08625-0185
(609) 292-8700

FREDERICK M. HERRMANN, PH.D.
EXECUTIVE DIRECTOR

JEFFREY M. BRINDLE
DEPUTY DIRECTOR

GREGORY E. NAGY
LEGAL DIRECTOR

EDWARD J. FARRELL
COUNSEL

PUBLIC SESSION MINUTES

OCTOBER 26, 1993

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

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission authorized the conduct of a public meeting notwithstanding inability to provide adequate notice. Chairman McNany noted that notice of the meeting was filed with the Secretary of State's Office and distributed to the State House press corps on October 25, 1993 advising that the meeting originally scheduled for October 25, 1993 would be conducted this evening (October 26, 1993) at 9:30 p.m. at the Berkeley Heights Municipal Building. He said that tonight's meeting is needed in order for the Commission to take action of such urgency and importance that a delay for the purpose of providing adequate notice would be likely to result in substantial harm to the public interest. Referring to the gubernatorial cases on the agenda, he noted that the gubernatorial candidates should know as soon as possible what charges will be made against their respective expenditure limits.

The meeting convened at 9:30 p.m. at the Berkeley Heights Municipal Building, Berkeley Heights, New Jersey.

1. Executive Session

The Commission announced it would convene into Executive Session to consider procedural issues and subsequently reconvened into Public Session.

2. People for Whitman Committee v. Florio '93, Inc., PF 03-93(G)
(Public service announcement)

Upon reconvening the public session, the Commission reviewed the Initial Decision and Exhibits in People for Whitman Committee v. Florio '93, Inc., PF 03-93(G). The Commission also had available for consultation the Office of Administrative Law (OAL) file containing the Verified Complaint, briefs, original exhibits, and other hearing documents. The attorney for the complainant was Peter G. Verniero, Esq., and for the respondent, Angelo J. Genova, Esq., and Peter G. Stewart, Esq. The Initial Decision was rendered by Judge Beatrice S. Tylutki, ALJ, on October 22, 1993.

In this verified complaint, the People for Whitman Committee alleges that a television message by Governor James J. Florio, which was broadcast on Channel 10, WCAU-TV (CBS), a major Philadelphia station, constitutes a political communication as defined by N.J.A.C. 19:25-11.10(b). The complaint alleges that seven Public Service Announcements (PSA's) occurred after the primary election. The complainant also alleges that since the Florio message is a political communication, the entire cost for producing and airing the message must be allocated against the expenditure limit for the democratic gubernatorial candidate pursuant to the provisions of N.J.A.C. 19:25-11.11, and the New Jersey Campaign Contributions and Expenditures Reporting Act N.J.S.A. 19:44A-1, et seq.

The respondent, Florio '93, Inc., denies the allegations and among its affirmative defenses states that the Florio message does not constitute a political communication pursuant to N.J.A.C. 19:25-11.10(b) and that N.J.A.C. 11.10(b) is unconstitutional since it is an infringement on the executive powers, and violates the Governor's freedom of speech rights under the State and Federal Constitutions.

On the issue that the message was a political communication because it is presumed that the message was broadcast to an audience substantially comprised of people eligible to vote, Judge Tylutki concluded that the complainant did not present such evidence. She concluded that the complainant has not shown that the message meets that part of the test set forth in N.J.A.C. 19:25-11.10(b)(2).

On the issue that the message referred to the governmental or political objectives or achievements of Governor Florio by discussing the prevention of child abuse, Judge Tylutki concluded that the complainant has not shown that the Florio message meets that part of the test as set forth in N.J.A.C. 19:25-11.10(b)(3).

In conclusion, Judge Tylutki granted the respondent's motion to dismiss with prejudice; see Initial Decision.

The Commission heard oral arguments from Mr. Verniero and Mr. Genova, and the proceedings were recorded by a certified shorthand reporter. A transcript of the proceedings is available for public inspection.

On a motion by Commissioner Eldridge, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission adopted the Initial Decision as **its Final Decision in the case.** Commissioner David Linett disagreed with the conclusion in the Initial Decision that the Complainant has not shown that the Florio message meets that part of the test set forth in N.J.A.C. 19:25-11.10(b)2 (see pp. 8 - 11 of the Initial Decision). However, Commissioner Linett agreed with the Initial Decision in all other respects.

3. People for Whitman Committee, v. Florio '93, Inc., PF 05-93(G) (Primary Election Expenditures)

The Commission reviewed the Initial Decision and Exhibits in People for Whitman Committee v. Florio '93, Inc., PF 05-93(G), issued by Judge Tylutki, ALJ, October 25, 1993. The Commission also had available for consultation the Office of Administrative Law case file containing the Verified Complaint, Answer, transcript of the OAL hearing, exhibits, and other hearing documents.

The attorney for the complainant was Peter G. Verniero, Esq., and the attorney for the respondent was Angelo J. Genova, Esq. Stephen J. Edelstein, Esq. represented the Intervenor, Democratic Finance '93, Inc.

The verified complaint filed by the People for Whitman Committee alleges that Florio '93, Inc., the respondent, expended 1993 general election funds prior to the date of the primary election in violation of N.J.S.A. 19:44A-32(c) and N.J.A.C. 19:25-15.7. The complainant also alleges that the respondent failed to disclose adequately its expenditures in violation of N.J.S.A. 19:44A-16, since it transferred monies to Democratic Finance, '93, Inc. In addition, the complainant alleges that Democratic Finance '93, Inc., is related to the New Jersey Democratic State Committee (DSC) and that the money transferred by the respondent to Democratic Finance '93, Inc., was commingled with DSC money in violation of N.J.A.C. 19:25-15.33. The complainant seeks the imposition of penalties and requests the Election Law Enforcement Commission (ELEC) order the respondent to return to the State Treasury any public matching funds obtained in violation of the Act. It seeks other equitable relief.

The respondent denied the alleged violations of the Act and regulations set forth in the verified complaint.

With respect to the allegation that Florio '93, Inc. expended money prior to the primary election Judge Tylutki, concluded:

1. That eleven expenditures were for ordinary expenses (rental of headquarters, computer, photocopier, etc.) and should be categorized as technical violations for which no penalty or other relief should be assessed by ELEC;
2. That four transfers from Florio '93, Inc. to Democratic Finance '93 Inc., amounting to \$170,000, made before the primary were "clearly in violation of the provisions of N.J.S.A. 19:44A-32(c) and N.J.A.C. 19:25-15.7 and are substantive violations for which a penalty should be imposed"; and,
3. That a February 19, 1993 expenditure and other similar expenditures do not constitute separate violations but represent how the Democratic Finance '93, Inc. used the general election money transferred to it before the primary election.

With respect to the issue of commingling of monies Judge Tylutki concluded the following: that the complainant has failed to meet its burden of proving that Democratic Finance '93, Inc. could not legally function in accordance with the joint venture agreement (R-1), provided it complies with the Act and regulations, and therefore dismissed the issue.

In regard to the issue of whether there was full disclosure by Florio '93, Inc. of its transfers and expenditures, the Judge concluded that the complainant has not shown that the respondent has failed to make full disclosure in the reports filed with ELEC. Judge Tylutki suggested that ELEC consider adopting a regulation to clarify what has to be in the reports filed by the joint venture.

Finally, Judge Tylutki addressed the issues of penalties and other relief. Judge Tylutki reiterated that there are four violations of N.J.S.A. 19:44A-32(c) and N.J.A.C. 19:25-15.7, which warranted the imposition of a penalty. The Judge said that the statute provides a penalty of up to \$3,000 for the first offense and up to \$6,000 for second and subsequent offenses. Judge Tylutki wrote that based on the language used, the Legislature clearly intended that the maximum penalty not be imposed in all cases, but did not establish any criteria to be considered in determining the specific amount of penalty.

Judge Tylutki concluded that the appropriate penalty is \$1,500 for the first violation and \$3,000 for each subsequent violation, for a total of \$10,500.00.

Judge Tylutki decided that as to the other relief, there is no specific statutory authority which allows ELEC to order the respondent to return any public funds.

Please see Initial Decision OAL Dkt. No. ELE 9767-93, Agency Dkt. No. PF 05-93(G).

Written exceptions to the Initial Decision were submitted by Angelo J. Genova, Counsel for Florio '93, Inc. and Peter G. Verniero, Counsel for People for Whitman. Please see communication dated October 26, 1993 from Angelo J. Genova, Counsel, to Dr. Frederick M. Herrmann, Executive Director and entitled Exceptions re: People for Whitman Committee v. Florio '93, Inc., ELEC Dkt. No. PF 05-93(G), OAL Dkt. No. ELE 9767-93. Also see communication from Peter G. Verniero, Counsel to Gregory E. Nagy, Legal Counsel dated October 26, 1993 re: People for Whitman Committee v. Florio '93, Inc., ELEC Dkt. No. PF 05-93(G).

The Commission heard oral arguments from Mr. Verniero and Mr. Genova, and the proceedings were recorded by a certified shorthand reporter. A transcript of the proceedings is available for public inspection.

Michael Rubin, Esq., of the law firm of Schwartz Simon Edelstein Celso and Kessler, representing Intervenor Democratic Finance '93, asked to be heard by the Commission. Mr. Verniero objected because no written exceptions had been filed by the Intervenor. Chairman McNany indicated that the Commission

had already heard arguments from each side in excess of its five minute rule and that no further oral argument would be considered.

4. Executive Session

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and adopted by a vote of 3-0, the Commission recessed to go into Executive Session and announced it would reconvene to act on the Initial Decision in People for Whitman v. Florio '93, Inc., PF 05-93(G).

5. Resumption of Public Session

Upon the conclusion of a recess for an Executive Session deliberation, and upon reconvening the public meeting, on a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission voted to adopt the Initial Decision as its Final Decision in People for Whitman v. Florio '93, Inc., PF 05-93(G) except that the penalty was modified to a single \$2,500 penalty to be imposed on Florio '93, Inc. for the four violations cited in the Initial Decision; see discussion of Penalties and Other Relief on pages 18 through 21. The four violations were merged into one penalty. The Commission stated that it was modifying Judge Tylutki's penalty because of practical difficulties and inconsistencies in the statute, and a lack of bad faith on the part of the respondent. The Commission also noted that the Florio '93, Inc. committee did not ask for an advisory opinion.

3. 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 12:26 a.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.

FMH/jah