



*State of New Jersey*

**ELECTION LAW ENFORCEMENT COMMISSION**

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PUBLIC SESSION MINUTES

October 3, 1997

Chair Martin, Vice Chair Linett, Commissioner Franzese, Senior Staff, and Deputy Legal Director Nedda Gold Massar were present. Commissioner Ware participated by telephone.

1. Open Public Meetings Statement

Chair Martin called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-6 et seq., adequate 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 3:30 p.m. in Trenton, New Jersey.

2. Advisory Opinion Request No. 07-1997 (Republican State Committee)

This advisory opinion request was made by Peter G. Sheridan, Esq., on behalf of the New Jersey Republican State Committee. This request for an advisory opinion asked whether or not the costs of a proposed television advertisement would be allocable to the publicly financed gubernatorial candidacy of Governor Christine Whitman, the gubernatorial candidate of the Republican Party in the 1997 general election. Mr. Sheridan included the script, and a video copy of the commercial advertising.

Mr. Sheridan alleged that the advertisement is intended to be "generic advocacy support" for all Republican Party candidates in the 1997 general election. He described the advertisement in the following way:

The "Hands" advertisement is a television spot visually composed of a clock with its hands moving backward. At one point a storefront with "closed" on its windows is shown followed by a burnt-out warehouse. Also, an excerpt from a newspaper article is super-imposed on the screen. The headline reads: "Florio

Tax Shocker" and includes his picture. Florio is a former congressman and governor (of the Democratic Party). His photo is used in the advertisement because he is often associated with higher taxes and liberal policies. The audio portion of the piece describes the situation that existed in New Jersey in the past under Democrats, including higher taxes and loss of jobs. At the end, the voice-over urges voters to reject the failed policies of the past and to "Vote Republican." (parenthetical material added)

The question to be decided by the Commission was whether or not the costs being paid by the Republican State Committee arising out of the production and broadcasting of the advertisement are coordinated expenditures and therefore allocable to the expenditure limit of publicly financed 1997 gubernatorial general election candidate Christine Todd Whitman.

The resolution of this question turned on whether or not the advertisement makes an unambiguous reference to the 1997 gubernatorial general election candidacy of Governor Whitman in an audio, visual or printed format pursuant to N.J.A.C. 19:25-15.29(a). This regulation reads:

(a) A communication expenditure by any person or entity...is a contribution by such person or entity subject to the limit on a contribution to a gubernatorial candidate in N.J.S.A. 19:44A-29 and is a coordinated expenditure of the gubernatorial candidate properly allocable against the expenditure limit of the gubernatorial candidate in N.J.S.A. 19:44A-7 if:

1. The communication makes an unambiguous reference to the gubernatorial candidate in an audio, visual or printed format; and,
2. The gubernatorial candidate or his or her campaign committee has consented to, authorized, or exercised control over the production or circulation of the communication.

Chair Martin said that the Commissioners have viewed the advertisement and become familiar with all materials submitted in regard to it and have reviewed the arguments submitted by Mr. Sheridan and by Paul Josephson, Esq. on behalf of the McGreevey Campaign.

Chair Martin stated that the Commission would be focusing on the question of whether or not the cost of the advertisement would be allocable against the Campaign of Candidate Whitman. He said that this decision would be based on whether the Commission determined the ad to be generic or not. He said that no extraneous matters, such as whether the Republican National Committee violated the contribution limit, would be considered at today's meeting.

Chair Martin recognized Peter Sheridan, Esq. to speak on behalf of the Republican State Committee in this advisory opinion request.

Mr. Sheridan said that he would be brief in that the papers that he has submitted in support of the Republican State Committee's contention that the ad is generic and not attributable to the Campaign of Governor Whitman speak for themselves. He stated that he did not believe that the argument presented in the documents submitted by the McGreevey Campaign involve issues that are relevant to the request before the Commission. He said also that the Commission should exclude the analysis of the media buys presented at today's meeting by the McGreevey Campaign because at this point he had no way of knowing whether or not it was accurate. He said also that the consultant who conducted the analysis presented by Candidate McGreevey was not available to be cross examined and without that opportunity it would be wrong for the Commission to consider this documentation as part of the record.

Chair Martin recognized Paul Josephson, Esq., Counsel for the McGreevey for Governor Campaign.

Mr. Josephson argued that the media buys are public documents obtained from NBC. He said that they are accurate and should be considered part of the record.

Mr. Josephson said that in making its decision the Commission should be careful in applying Buckley v. Valeo. He said that the First Amendment protections built into Buckley v. Valeo are not based upon a system of public financing. He added that because New Jersey has gubernatorial public financing different standards than under Buckley may apply.

Mr. Josephson mentioned the 9<sup>th</sup> Circuit Court of Appeals decision in FEC v. Furgatch. He said that in this decision the Court determined that it was within the jurisdiction of the FEC to determine what constituted advocacy.

He said that the "Hands" advertisement, which the Republican State Committee characterizes as a generic ad, is a clever circumvention of public financing rules. Mr. Josephson said that under public financing, candidates must adhere to an expenditure limit. Mr. Josephson said that in determining the answer to the question before the Commission it is critical for the Commission to view the ad in the context of other ads that are being shown simultaneously.

Mr. Josephson indicated that the same consultant is placing the ads for the Whitman Campaign as for the Republican State Committee and Republican National Committee. He noted that there is clear evidence that this consultant exercised control.

At this juncture, the Commission viewed a video produced by the McGreevey Campaign which contained the ad which is the subject of the advisory opinion request as well as ads produced by the Whitman for Governor Campaign and the Republican National State Election Committee. Commissioner Ware, who participated by telephone did not view the McGreevey ad presentation.

Mr. Josephson explained that the three ads constituted reinforcement advertising. He said that these ads are playing back to back and that there are striking similarities between them. He said that a clock appears in the ads and that all three contain the same slogan. He said that this reference to the Whitman ad by the Republican State Committee ad is the same as a reference to Whitman. He said that there is no question but that the GOP ad has references to the Whitman ad.

Mr. Josephson contended that the Republican State Committee and Republican National Committee have stepped over the line.

Mr. Josephson concluded by stating that the Court in FEC v. Furgatch said that context can be relevant and determinative. He said that in viewing these three ads in context results in viewers widely understanding all three as ads for Governor Whitman. He said that the cost of running the ad by the Republican National Committee must be allocated against the expenditure limit of the Whitman Campaign.

Mr. Sheridan said that he wanted to make two points with regard to the issue. He stated that there are no unambiguous references to Governor Whitman in the commercial, only references to GOP principles. He said the Republican State Committee ad was generic advertising on the part of all Republican candidates.

Mr. Sheridan said that secondly, the Commission, in 1989, said that a reference to the "past 8 years" by the Democratic State Committee was generic and thereby permissible.

Mr. Sheridan said that Republican Candidates have a constitutional right of association. He said that the Republican party has a right to advertise an agenda that is common to all candidates. Mr. Sheridan said that to not allow this advertisement to go forward would be to say that Republican party candidates could not run on a common theme. Mr. Sheridan said that this is what party politics is all about, freedom of association. To think otherwise, he added, would result on the gubernatorial candidate running on a different agenda than other GOP candidates.

Vice Chair Linett asked: What was the role of the Republican State Committee with the Republican National Committee?

Mr. Sheridan said that the Republican State Committee assigned its rights to the commercial to the Republican National Committee and that the same consultant was used.

Commissioner Linett said that it was his understanding then that the ad was produced by the state committee.

Mr. Sheridan indicated that the ad was produced by a consultant, not by the Republican State Committee and that the rights to use the ad were assigned to the Republican National State Election Committee. He said that he acknowledged the Republican State Committee's involvement and that the State Committee plans to use the ad.

Legal Director Gregory E. Nagy said that because the Republican State Committee acknowledged that it assigned its rights to another party, which has used the ad does raise

questions as to whether or not the question is possibly moot under the advisory opinion regulations.

Mr. Sheridan said that it is not a moot question. He said that the Republican State Committee wants to have allocation issues resolved.

Commissioner Linett said that he wondered whether or not the Commission should render an opinion on a matter that had already taken place. He said that if the Commission does not issue a response then a complaint could be brought and the litigants would have a right to litigate.

Commissioner Franzese said that the regulations do require an unambiguous reference. She said that the McGreevey media expert admits that an inference must be made. She queried whether or not it is possible to make an inference using the same slogan.

Mr. Sheridan said that the First Amendment should be strictly applied against this advertising. He said that what the Commission is compelled to decide is based upon the regulatory language. He said that the issue should not be considered in any broader context.

Mr. Sheridan said that the rule as it exists today must apply. He noted that the Republican State Committee plans for the ad campaign have been underway for two years and that it needs the security in terms of what the standard is.

Mr. Josephson said that the Republican National Committee and Republican State Committee did not wait to run this ad until the Commission made its decision. He mentioned that the ad is certainly close enough to the line for the Republican State Committee to ask for an advisory opinion. He said that despite this fact, the GOP went ahead and ran the ad.

Mr. Josephson said that the 1989 advisory opinions are guiding. He said that after the new regulation became effective advisory opinions were issued using the four-pronged test. He noted that the Commission had decided at that time that an unambiguous reference includes a reference to the office of governor. Mr. Josephson said that what is going on is a clever circumvention of the public financing laws.

### 3. Resolution to Go Into Executive Session

On a motion by Commissioner Franzese, seconded by Commissioner Ware and passed by the vote of 4-0, the Commission went into Executive Session for the purpose of consulting with legal staff as to interpretation of Commission regulations.

4. Return to Public Session

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 4-0, the Commission voted to return to public session.

5. 1997 General Election Matching Fund Submissions

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 4-0, the Commission approved the report on Public Funds Distributed which had been circulated by Deputy Legal Director Nedda Gold Massar.

Deputy Legal Director Massar had filed a report containing the following information:

**Sabrin 1997 General Election Submission 1**

The public financing staff has concluded its review of the first public matching fund submission filed by 1997 gubernatorial general election candidate Murray Sabrin. On the basis of its review of the submission, public matching funds in the amount of \$322,791.76 were deposited into the separate public funds account established through the Department of the Treasury.

Candidate Sabrin's first application for matching funds contained \$239,762.04 in net contributions submitted for match. Complete review of all items submitted for match resulted in ineligibility of 202 contribution items representing \$9,366.16. After subtraction of the \$69,000 of contributions which is not matched, it was determined that \$161,395.88 was eligible to be matched at the 2:1 ratio. The maximum in public funds which a 1997 general election candidate may receive is \$4.6 million.

**McGreevey General Election Submissions 3, 4, and 5**

Submission #	Total \$ Submitted for Match	Total \$ Eligible for Match at 2:1*	Amount Deposited	Error Rate
3	\$297,840.50	\$272,415.50	\$544,831.00	7.9%
4	\$274,527.00	\$275,380.00	\$550,760.00	8.8%
5	\$198,300.00	\$150,275.00	\$300,550.00	12.2%

Submission #	Total \$ Submitted for Match	Total \$ Eligible for Match at 2:1*	Amount Deposited	Error Rate
4	\$285,005.70	\$233,160.70	\$466,321.40	17.5%
5	\$161,422.00	\$120,072.00	\$240,144.00	24.5%
6	\$215,363.00	\$180,006.00	\$360,012.00	14.2%

\*Total eligible for match after deduction of rejected items in this submission, and addition of items resubmitted for match in this submission and accepted.

**Submissions Received on September 29, 1997**

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Candidates McGreevey and Whitman filed public fund submissions on September 29, 1997 reporting net contributions submitted for match as follows:

James E. McGreevey	\$560,127.28
Christine Todd Whitman	\$335,782.00

Staff applied the 80% automatic percentage certification process to the two submissions and deposited the following amounts in the candidates' public funds accounts:

James E. McGreevey	\$896,203.65
Christine Todd Whitman	\$409,416.86

The amount deposited for Candidate Whitman was the amount needed to reach the \$4.6 million maximum in 1997 general election public matching funds.

Staff will report to the Commission on October 21, 1997, on its complete review of the two submissions filed on September 29, 1997, and additional submissions received in October.

**Total 1997 General Election Public Funds Distributed**

Including the submissions described above, to date, public funds totaling \$8,452,940.41 have been deposited for 1997 gubernatorial general election candidates as follows:

James E. McGreevey	\$3,530,148.65
Murray Sabrin	322,791.76
Christine Todd Whitman	<u>4,600,000.00</u>
TOTAL	\$8,452,940.41

6. Resolution to Go Into Executive Session

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by vote of 4-0, the Commission went into Executive Session to consider Final Decision OAL cases.

7. Return to Public Session - Advisory Opinion Request No. 07-1997 (Continued)

On a motion by Commissioner Franzese, seconded by Commissioner Ware and passed by a vote of 4-0, the Commission voted to return to Public Session and approved the following response to the Advisory Opinion Request:

The Commission notes that pursuant to its advisory opinion authority at N.J.S.A. 19:44A-6f it may render its opinion only as to the given set of facts and circumstances presented in the request. The Commission finds based solely on

the facts submitted by the Republican State Committee, including the copy of the video submitted by the Republican State Committee, that no "unambiguous reference" to the Republican gubernatorial candidate appears in the Republican State Committee video, or its text. The Commission notes that Paul Josephson, Esq., general counsel for McGreevey for Governor '97, Inc., the 1997 Democratic Party gubernatorial general election candidate, has submitted written arguments and appeared before the Commission, and in particular has submitted a separate video which includes not only the advertisement and video that are the subject of this opinion but also two Whitman for Governor advertisements. Mr. Josephson has argued that all three advertisements are sometimes broadcast in conjunction and create a context in which the Republican State Committee advertisement should be evaluated. The Commission does not preclude the possibility that an advertisement which appears unambiguous when viewed alone may become ambiguous when evaluated in the context in which the communication is made. However, this issue or question of context is outside the immediate scope of the advisory opinion process.

8. Adjournment

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 4-0, the Commission voted to adjourn at 6:00 p.m.

Respectfully submitted,

Frederick M. Herrmann, Ph.D.  
Executive Director

FMH/elz