



*State of New Jersey*

**ELECTION LAW ENFORCEMENT COMMISSION**

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PAULA A. FRANZESE  
Commissioner  
  
LYNNAN B. WARE  
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PUBLIC SESSION MINUTES

July 28, 1998

Chair Martin, Commissioner Franzese, Commissioner Ware, the Counsel, Senior Staff, and Deputy Legal Director Nedda Gold Massar were present.

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 10:00 a.m. in Trenton, New Jersey.

2. Approval of Public Session Minutes of June 23, 1998

On a motion by Commissioner Franzese, seconded by Commissioner Ware and passed by a vote of 3-0, the Commission approved the Public Session Minutes of June 23, 1998.

3. Executive Director's Report

A. Staff Activities

Executive Director Herrmann announced that Gail Shanker has been promoted to Assistant Legal Director from Legal Assistant. According to the Executive Director, she did outstanding work in her former position that included creating a case law library and working with Legal Director Nagy on a case law summary. He noted that the summary was shared with the members of the Northeastern Regional Conference on Lobbying (NORCOL) at last summer's conference.

Executive Director Herrmann noted further that Darlene Kozlowski and Pam Kinsey have been promoted to the data entry staff. The Executive Director said that they had both done excellent work for ELEC on the temporary public financing staff.

Executive Director Herrmann said that a study of the Research Bureau of the California State Library entitled, "Local Government Ethics Ordinances in California" cites his article "Bricks Without Straw: The Plight of Local Government Ethics Agencies." He advised the Commission that the study uses the article's criteria for strong ethics agencies (autonomy, budgeting, and enforcement capability) to evaluate local government ethics boards in California. According to the Executive Director, the Seattle Ethics and Elections Commission has requested a copy of the article to use in its discussions with City Council to strengthen the agency.

B. Budget

Executive Director Herrmann reported that the new FY-99 operational budget of \$1,920,000 is a continuation budget from last year. He said, however, that the Governor's \$1,000,000 initiative for data processing enhancements was approved by the Legislature as an addition to ELEC's regular funding for the new fiscal year. The Executive Director noted that a vendor is already at work with the staff developing a scanning system, a searchable database for the internet, and electronic filing. Executive Director Herrmann informed the Commission that ELEC's plan is similar to current Federal Election Commission practice wherein candidate reports are scanned onto the Internet and electronic filing is made available to those filing entities which are sophisticated enough to use it. Executive Director Herrmann said that only 50 out of 8,000 entities are currently filing electronically at the Federal level but that number is expected to be continually growing. He added that about 60 percent of the states are currently involved in establishing some sort of electronic filing.

C. Future Budget Needs

Executive Director Herrmann said that there are only four positions on the review staff to monitor 25,000 filings a year. He noted that five new laws were enacted since 1990. They are:

- \* 92-Lobbying Reform Act;
- \* 93-Campaign Financing Reform Act;
- \* 94-Street Money Reform Act;
- \* 95-Recall Act; and,
- \* 96-Political Identification Act.

According to the Executive Director, A-1695 (Lefevre) addresses this situation and provides an appropriation of \$200,000 to double the size of the review staff and add an attorney to the legal staff. He said that this bill was reported favorably out of the Assembly State Government Committee on May 7, 1998. Executive Director Herrmann said that he testified in its favor and will continue to monitor its progress.

Executive Director Herrmann mentioned that Congress has added another \$2,800,000 to the Federal Election Commission's budget to beef up its enforcement activities.

D. NORCOL Conference

Executive Director Herrmann reported that the NORCOL conference will be held on August 11, 1998, as part of the Council of State Governments - Eastern Regional Conference in Wilmington, Delaware. He said that NORCOL is comprised of governmental agencies from the District of Columbia to Maine that regulate lobbying. Executive Director Herrmann said that Legal Director Nagy, Deputy Legal Director Massar, and Director of Compliance and Information Ford, and he will be attending the conference. The Executive Director said that the guest speaker will be Kent Cooper, formerly of the Federal Election Commission and the Center for Responsive Politics and the recipient of the 1996 COGEL Award. The Executive Director noted that each State will be making a presentation about recent lobbying developments and that he will discuss New Jersey activities and mention the reimbursement regulation on which the Commission has been working.

E. National Ethics News

Executive Director Herrmann advised the Commission that the Washington State Supreme Court has struck down a law on false political advertising. He said that the law had made it illegal for "a person to sponsor with actual malice political advertising that contains a false statement of material fact." Executive Director Herrmann said that the Court went so far as to compare this law with the infamous Sedition Act of 1798. According to the Executive Director, the Court said "The First Amendment prohibits the State from silencing speech it disapproves, particularly silencing criticism of government itself." Executive Director Herrmann noted that the Washington State Law had served as a model for many State efforts in this area including New Jersey because it was so narrowly drawn.

F. Fall Meeting Schedule

September 29, 1998 at 10:00 a.m. in Trenton

September 29, 1998 at 2:00 p.m. in Trenton (25<sup>th</sup> Anniversary Celebration)

October 28, 1998 at 11:00 a.m.

November 18, 1998 at 11:00 a.m.

Vice Chair Linett arrived at this juncture.

4. Proposed New Rule on Signature Requirements of Limited Liability Entities

For detailed information, please see the Public Session Minutes of the May 1998 and June 1998 meeting of the Commission.

At the June, 1998 Commission meeting, staff was directed to review existing regulations requiring the signature of each contributing member of a limited liability partnership (or a limited liability company) that passed funds to a continuing political committee (CPC) controlled by the limited liability partnership or company. Legal Director Nagy explained that staff believed that the existing signature requirements in the regulations serve no disclosure or contribution limit purpose in the narrow circumstance when a limited liability entity, which may have thousands of partners or members, passes funds to a CPC it controls. Therefore, a new rule and amendments to the existing rule on partnerships was proposed to delete signature requirements when a limited liability entity passes funds to a CPC it controls. The proposed new rule and amendments will not alter signature requirements applicable to other limited liability entity transactions, such as contributions to a candidate, or to any other reporting entity that is not a CPC controlled by a limited liability entity.

Legal Director Nagy indicated that staff believed the proposed change in the signature requirement served the desirable purpose to encourage partnerships to establish CPCs rather than to use partnership funds for partners' contributions to candidates. He also explained that the proposed new rule recodifies existing partnership rules at N.J.A.C. 19:25-11.2(d) through (f) as N.J.A.C. 19:25-11.10(a) through (c) and adds new sections N.J.A.C. 19:25-11.10 (d) and (e) as follows:

(d) In the case of a partnership entity, as defined in (b) above, and in the case of a limited liability company, as described in (c) above, whose partners or members are making contributions by means of a check issued by the partnership entity or limited liability company to a continuing political committee that is established and controlled by the partners or members, provided that the partnership entity or limited liability company controls only a single continuing political committee, the requirement to obtain a signed acknowledgment from each contributing partner or member may be satisfied if the check from the partnership or entity or limited liability company is accompanied by a list of the names of all contributing partners or members and a certification from an authorized partner or member or other authorized individual identifying any partner or member whose contributions to the continuing political committee in the calendar year exceed \$300 in the aggregate.

(e) A contribution received by an organizational treasurer from a contributing partner or member by means of a check drawn on the account of a partnership entity, as defined in (b) above, or limited liability company, as described in (c) above, shall be reported pursuant to N.J.A.C. 19:25-9.3, 10.2, and 10.3.

Vice Chair Linett said that the regulation addresses certain problems, but not all. He said that he would support it as far as it goes.

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 4-0, the Commission directed staff to file the proposed new rule and amendments with the Office of Administrative Law for proposal in the New Jersey Register.

5. Discussion of Comments Concerning Gubernatorial Public Financing Program

For a summary of the oral and written comments received relative to the February, March, and April, 1998 hearings which were conducted to elicit testimony concerning the gubernatorial public financing program, please see the July 15, 1998 memorandum from Nedda G. Massar, Deputy Legal Director, to Frederick M. Herrmann, Ph.D., Executive Director entitled, "Comments Concerning the Gubernatorial Public Financing Program."

At the direction of Chair Martin, the Commission discussed each individual's testimony which dealt with the following issues:

- The Gubernatorial Ballot Statement Program;
- Treatment of contributions from out-of-state contributors;
- Amendment to the "unambiguous reference" test in the coordinated expenditures regulations;
- Amendment to the regulations governing applications to sponsor gubernatorial debates;
- The gubernatorial expenditure qualification threshold;
- Amendment to the definition of "political communications" to include electronic media;
- Amendment of the regulations concerning emergent expenditure limit complaints;
- Possible revision of the statutory public financing qualification deadlines; and,
- Possible statutory change to require occupation and employer information for Inaugural contributions.

Vice Chair Linett suggested that a change was needed in the rounding procedures for the quadrennial cost adjustment process. Deputy Legal Director Massar noted that a change was recommended in the "1997 Cost Index Report," and that it could be reiterated at this time.

Regarding the ballot statement issue, Commissioner Franzese said that she had some concerns about replacing the ballot statement program with publication of these statements on the Internet. She said that she was worried about access to the Internet by all people.

Vice Chair Linett suggested that if the ballot statement program is eliminated there would be an outcry from Independent candidates.

Chair Martin said that there is no hard data on how effective the ballot statement program is and that perhaps the money spent on that statement could be better applied.

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Commissioner Ware agreed with Vice Chair Linett regarding the response from Independents and suggested that a study be conducted by the Legislature vis-à-vis utilizing the Internet for the ballot statement program.

Commissioner Franzese said that any use of the Internet for this purpose should not be construed as a substitute for the ballot program.

Executive Director Herrmann mentioned that the gubernatorial candidates' statements could be posted earlier on the Internet than the mailing of the sample ballots.

Regarding the comment received from Senator Donald DiFrancesco that out-of-state contributions should not be matched with public funds or count toward the gubernatorial qualification threshold, Vice Chair Linett said that it is a very touchy issue. Vice Chair Linett said that without a prohibition against corporate contributions, ELEC will have a very difficult time enforcing this out-of-state contribution requirement.

Chair Martin said that this matter is a public policy question for the Legislature to decide. He also noted that the prohibition suggested by Senator DiFrancesco would be extremely difficult to administer in the short time of the public financing program.

Vice Chair Linett disagreed stating that part of the Commission's job was to make recommendations.

Chair Martin said that this issue involving a major policy change, a major funding change, and a major enforcement change should be undertaken by the Legislature.

Commissioner Ware said that there are public policy changes and there are public policy changes. She said that this would constitute a major policy change and should be done by the representatives of the people.

Vice Chair Linett said that he disagreed with Commissioner Ware's assumption. He said, however, that he did agree with the conclusion that the issue of out-of-state contributions should be left to the Legislature.

With regard to the issue of the disclosure of contributions in the context of the public financing program, the Commission agreed that disclosure of contributions should continue as required pursuant to current law and that disclosure should not be voluntary as suggested by some commenters.

Regarding the issue of the public financing of legislative campaigns, the Commission noted that a previous Commission white paper endorsed this proposal.

The Commission agreed also to continue to recommend a 1:1 match of public funds in the general election rather than the existing 2:1 match.

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With regard to the test in the existing coordinated expenditures regulations, which require an "unambiguous reference" to a gubernatorial candidate, staff recommended elimination of those words from the regulation and replacing them with more objective criteria for determining whether an advertisement is generic or not. Commissioner Franzese said that she supported the staff's recommendation and noted that First Amendment concerns should be paramount and that the regulation text should be more precise to provide guidance.

Commissioner Ware said that she was in general agreement with Commissioner Franzese but that she would prefer to wait until a draft of the proposed amendment is circulated.

Chair Martin indicated that he liked the approach and stated that the problem the Commission faced last fall was whether or not the words on the tape it viewed were enough to identify a gubernatorial candidate.

Commissioner Ware said that she viewed the tape and reviewed the existing law. She said that she concluded that it did not reference a gubernatorial candidate. She said that she had concerns about the First Amendment and the Court's obvious tendency to decide in favor of free speech. She also said that she was concerned that by getting into subjective judgment the Commission might be interfering in a political party's ability to communicate a message or to rally around a slogan.

Vice Chair Linett said that the Commission was charged with the responsibility to protect the integrity of contribution and expenditure limits. He also said that he believes use of the unambiguous reference test has allowed generic ads to become more candidate specific, and that soft money was originally intended for party building activities, not specific advertising.

Commissioner Ware reiterated that the Commission must be concerned with the First Amendment.

Chair Martin said that it is important to note that the Commission is no longer using the four-pronged test as used in regulations prior to 1989 and that this fact should be emphasized in the minutes.

Vice Chair Linett said that the Commission needed to see a draft proposal for a new regulation.

At this juncture, Vice Chair Linett said that he was not sure of the purpose of Legislative Leadership Committees. He added that he is not sure they enhance the two-party system. He said that rather than lower the limits on contributions to them perhaps the Commission should recommend that they be abolished.

Chair Martin said that this topic was not germane to the discussion of public financing recommendations.

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Regarding the public financing debates, Chair Martin said that he strongly opposes debate sponsors being able to sell tickets to the debates.

Commissioner Franzese said that she agreed with staff's suggestion to expand the debate sponsor application to require additional information to permit the Commission to make more informed decisions.

Commissioner Ware said that she too shared this concern and supported the idea of an expanded checklist for sponsor selection.

Vice Chair Linett said that the intention of the law is to provide media access so that as wide an audience as possible can see and hear the debates. He said the main concern is not the composition of the audience and noted that the law does not mention an audience.

Chair Martin said that there should be a no fee stipulation in the established criteria for debate sponsorship.

Commissioner Ware said that audience interaction is important.

Vice Chair Linett said that the Legislature should give the Commission more authority in this area.

Commissioner Ware recommended that staff elaborate and expand upon the checklist of sponsor selection criteria. She also noted that the criteria should not be so restrictive that the result is no qualified applicants.

Regarding the issue of the requirements for qualifying for public financing and debate participation, Vice Chair Linett said that the spending requirement should be eliminated.

Commissioner Ware agreed and pointed out that the system contains the statutory safeguard requiring return of all unspent funds at the conclusion of a publicly-financed candidacy.

Executive Director Herrmann said that the Commission might refine the test regarding spending in the regulations if the law is not amended.

Legal Director Nagy said that the September 1<sup>st</sup> deadline for a candidate to prove that he or she has spent the threshold amount is difficult to meet because candidates have not yet determined exactly what media buys they are going to make.

Chair Martin said that he is not sure the spending requirement should be eliminated. He said that the Commission is responsible for overseeing the proper use of public money.

Vice Chair Linett said that any unspent funds must be returned to the State. Therefore, he said, there is no danger in eliminating the spending threshold.



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Chair Martin suggested that the "irrevocably committed" language should be better defined and agreed with the staff suggestion to amend the regulatory definition of "spending."

Executive Director Herrmann added that raising money is the true test of qualification.

Commissioner Franzese agreed with the staff suggestion that a certification from a media consultant that funds had been received for the purpose of buying media might be sufficient as proof of spending.

The Commission agreed with the suggestion by staff to set a \$10,000 level as the threshold for considering gubernatorial complaints dealing with the expenditure limits for emergent relief.

Vice Chair Linett argued that there is no need to set any threshold.

Chair Martin said that this suggestion could be the Commission's response to frivolous litigation and provides an objective criterion for use during the preelection timeframe. He also noted that the amount was sufficient to make filing a complaint worthwhile and probably low enough not to affect the outcome of a gubernatorial election.

Chair Martin recognized Mr. Leonard Flynn, representing the Libertarian party.

Mr. Flynn asked if the minutes of the meeting would be available to the public.

Executive Director Herrmann said that following their approval at the next meeting they would be made public.

Mr. Flynn suggested that the Commission's recommendation to have a 1:1 matching ratio in the general election be extended to the primary election. Mr. Flynn stated that the Commission had a responsibility to make a recommendation about out-of-state contributions and not hide behind the premise that it is a major public policy issue and therefore it should not get involved. He said the Commission was not doing a service to the public by not making a recommendation. Mr. Flynn said that a ban on out-of-state contributions would be detrimental to the electoral process because it would make it more difficult for candidates, particularly third-party candidates, to get their message to the public.

Chair Martin said that Mr. Flynn should not characterize a non-recommendation as a bail out. He said ELEC is a regulatory agency, one which carries out the public policy of the Governor and the Legislature.

Mr. Flynn expressed support for the removal of the expenditure threshold but expressed dismay that the Commission did not address the issue of redoing the qualification threshold. He said that this threshold is too high and very difficult for third-party candidates to meet. He indicated that this threshold would again be adjusted upward in 2001, making it even more difficult for third-party candidates to comply.

6. Advisory Opinion Request No. 06-1998

This request for an advisory opinion involved the question of what degree of participation in a public question political committee is permissible for a candidate and treasurer.

The Commissioners reviewed a draft response prepared by staff. This request, made by Mr. William J. Irwin, Treasurer for New Brunswick 1998 general election candidate Tracy Ford Muhammad, and received on July 24, 1998, stated that a number of New Brunswick residents are collecting petition signatures to place a public question on the 1998 general election ballot. This question would constitute a ballot initiative to change the school district from a Type I (appointed) school district to a Type II (elected) school district. These residents are further interested in forming a political committee to support the passage of the public question. Mr. Irwin stated that the candidate and treasurer may participate in possible activities which may be undertaken by the political committee. Examples of contemplated activities include: collecting signatures on petitions to place the public question on the ballot, participating in public education about the ballot question, handing out literature paid for by the public question committee, participating in public announcements, and conducting fundraising events.

Staff recommended that the Commission advise that a candidate does not violate N.J.S.A. 19:44A-9h by his or her mere attendance at, assistance with, or participation in the political committee activities which are listed in the advisory opinion request. Staff further recommended that the Commission advise that a candidate would be in violation of Section 9h if the candidate participates directly, or indirectly, in control of or in any decision-making with regard to the activities of the public question political committee.

Staff suggested further that the Commission advise Mr. Irwin that the Section 9h prohibition is applicable only to candidates and that the Commission is unaware of any statutory or regulatory prohibition against the participation of the treasurer.

Vice Chair Linett stressed that this issue is fact sensitive.

On a motion by Vice Chair Linett, seconded by Commissioner Franzese and passed by a vote of 4-0, the Commission directed staff to issue the advisory opinion based upon the staff recommendation.

7. Resolution to Go Into Executive Session

On a motion by Vice Chair Linett, seconded by Commissioner Ware and passed by a vote of 4-0, the Commission resolved to go into closed Executive Session to discuss the following matters which will become public as follows:

- A. Final Decision Recommendations in violation proceedings which will not become public. However, the Final Decisions resulting from those recommendations will become public no later than 35 days after mailing.

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- B. 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 no later than 50 days after mailing.
- C. 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 no later than 50 days after mailing.

8. Adjournment

On a motion by Vice Chair Linett, seconded by Commissioner Ware and passed by a vote of 4-0, the Commission voted to adjourn at 1:45 p.m.

Respectfully submitted,

Frederick M. Herrmann, Ph.D.  
Executive Director

FMH/elz