



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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Vice Chair

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PUBLIC SESSION MINUTES

January 23, 2008

Chair English, Vice Chair Tober, Commissioner Burstein, and Counsel Wyse participated by telephone. Executive Director Herrmann, Deputy Director Brindle, and Legal Director Carol Hoekje were present.

1. Open Public Meetings Statement

Chair English 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 11:00 a.m. in Trenton.

2. Continued Discussion of Advisory Opinion Request No. 01-2008

Legal Director Hoekje reiterated that the Commission received a request for an advisory opinion from Richard K. Weinroth, Esq., on behalf of former Senator Wayne Bryant (5th Legislative District). Ms. Hoekje stated that the following question was submitted: May an elected officeholder use campaign funds from his or her candidate committee to pay for legal expenses incurred in defense of a criminal indictment issued by the United States Attorney's office?

It was noted by Legal Director Hoekje that it is a case of first impression for the Commission.

Legal Director Hoekje further noted that as a candidate having sought election to State office, Mr. Bryant remains subject to reporting provisions, as long as his single candidate committee continues to control funds and until his single candidate committee has wound up its business and filed a final report with a final accounting of the election fund, or transferred a balance to another election.

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The Legal Director stated that N.J.S.A. 19:44A-11.2 provides that candidate committee funds shall be used for only six purposes and that one of these purposes is the “payment of ordinary and necessary expenses of holding public office,” N.J.S.A. 19:44A-11.2a (6). She stated that Section 11.2 was enacted during the 1993 Amendments to the Reporting Act. She also stated that the statute also includes the term “personal use” in providing that campaign expenses do not include expenses for “those items or services which may reasonably be considered to be for the personal use of the candidate. . . .” N.J.S.A. 19:44A-11.2

Next, Legal Director Hoekje cited N.J.A.C. 19:25-6.5 through 6.10, which are the Commission regulations that concern use of candidate committee funds. She said that N.J.A.C. 19:25-6.5(a) 6 mirrors the statute in providing that campaign funds may be used for the “payment of ordinary and necessary expenses of holding public office. Commission regulation N.J.A.C. 19:25-6.7 defines “ordinary and necessary expenses of holding public office” as “any expense that reasonably promotes or carries out the responsibilities of a person holding elective public office” except for expenses of furnishing, staffing, or operation of the legislative office.

The Legal Director next stated that N.J.A.C. 19:25-6.10 concerns the use of funds for legal fees and that this regulation has two parts. The first subsection is N.J.A.C. 19:25-6.10(a), which provides that candidate committee funds may be used for reasonable fees and expenses of legal representation, the “need for which arises directly from and is related to the campaign for public office or from the duties of holding public office.” She said that specific permissible examples include: 1) fees for litigation directly related to a recount proceeding; 2) defense of a defamation action arising directly from the candidate’s campaign for public office, or from activities of the officeholder directly related to the discharge of the duties of holding public office; 3) defense of an action alleging violation of the Act; and 4) defense of an action before the Joint Legislative Committee on Ethical Standards “or similar public body having authority to hear such action or proceeding and to impose sanctions against the officeholder by reason of his or her status as a holder of public office.”

Legal Director Hoekje stated that the second part of the regulation, N.J.A.C. 19:25-6.10(b), provides that permissible use of funds for legal fees shall not include fees which would otherwise qualify as “personal use” under N.J.A.C. 19:25-6.5(c).

Ms. Hoekje stated that N.J.A.C. 19:25-6.5(c) defines as “personal use” any use of contributions to pay an expense that would arise or exist “irrespective of the candidate’s ordinary and necessary expense of holding public office.”

Legal Director Hoekje next addressed the issue of the Federal Election Commission (FEC) decisions. She stated that the FEC has permitted the use of campaign funds by an officeholder for legal fees and expenses incurred in defending federal criminal charges. She stated that under the FEC test, “personal use” means an expense that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder. She noted that this test is found in both the FEC statute and regulations. This approach asks, would the expense arise regardless of the officeholder’s status or duties? If the answer is yes, it is personal use, and if no, it is permissible. Under this approach, the FEC also examines individual counts of an indictment to determine their relationship to officeholding duties.

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Legal Director Hoekje stated first that New Jersey law is different than Federal law and that the FEC law and opinions are not controlling for the Commission. She stated next that more important is the difference between the Commission regulations and FEC regulations. The Commission regulations defining personal use are similar to, but not identical to, the FEC regulations. Under the Commission regulations, "personal use" means an expense that would exist "irrespective of the candidate's ordinary and necessary expense of holding public office." Ms. Hoekje stated that the Commission in its regulations chose to carry over the "ordinary and necessary" requirement of the statute. Under the Commission's "irrespective" test, the question is whether or not the expense for legal fees existed regardless of the "ordinary and necessary" expenses of holding public office. Under the Commission's definition of ordinary and necessary, the question is, do the expenses for legal fees for a criminal indictment reasonably promote or carry out the responsibilities of the officeholder? She stated that the Commission may wish to determine that they do not, that the proposed use does exist or arise irrespective of the ordinary and necessary expenses of officeholding, and the use is personal and not permissible.

Ms. Hoekje noted that in adopting the rule on the use of funds for legal fees, the Commission wrote that the proposed rule would promote public confidence that contributed campaign funds are being expended in accordance with campaign and officeholding purposes, citing 29 N.J.R. 5057, and that in adopting the rule the Commission wrote that categorically permitting payment of legal fees may overinflate the scope of the permissible uses the Commission intends, citing 30 N.J.R. 863. She stated that in Advisory Opinion 13-1995, the Commission was careful to limit its decision to the use of candidate committee funds by an officeholder to pay legal expenses for defense in a complaint pending before the Joint Legislative Committee on Ethical Standards. The Commission has carefully carved out exceptions and examples of the permissible uses of campaign funds for legal fees.

Ms. Hoekje stated that the Commission may wish to advise Mr. Weinroth that use of campaign funds for criminal defense purposes is not a permissible use of funds as an "ordinary and necessary" officeholding expense. Ms. Hoekje also stated that the Commission may also wish to determine that the need for legal fees in connection with a criminal indictment does not arise directly from and is not related to the campaign for public office or from the duties of holding public office.

Chair English thanked Legal Director Hoekje for her legal analysis. The Chair asked Mr. Weinroth if he had anything further to add. Mr. Weinroth had nothing further to add.

Commissioner Burstein moved to accept the staff recommendation that the use of campaign funds for criminal defense purposes is not a permissible use of funds as an "ordinary and necessary" officeholding expense.

Vice Chair Tober seconded the motion. In complimenting the legal analysis of staff and Mr. Weinroth, Vice Chair Tober said that in reviewing the six permissible uses and the regulations, he could not see how use of funds for criminal defense fits into either category. He said that he does not see how use of campaign funds in this way fits into "ordinary and necessary" expenses.

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Commissioner Burstein complimented staff on a well constructed analysis. He said that he would find it a torturing of the “ordinary and necessary” standard to allow funds to be used in this manner. Commissioner Burstein stated that he does not see how this would promote the integrity of the process or be consistent with statutory objectives.

Chair English said that campaign law is an evolving process. The Chair said she is not persuaded by Federal law and that the integrity of New Jersey’s system is critically important and the standard should be stricter. Chair English stated that in reviewing that case she was struck by the number of advisory opinions and regulations, etc. that had to be pulled together. Chair English thanked Counsel Weinroth for bringing this matter before the Commission before his client took precipitous action.

On a vote of 3-0 the Commission approved the staff recommendation in denying the use of the funds for criminal defense in the Bryant matter.

3. Resolution to go into Executive Session

On a motion by Commissioner Burstein, seconded by Vice Chair Tober and passed by a vote of 3-0, the Commission resolved to go into Executive Session to discuss anticipated litigation, which will become public as follows:

- A. 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 not later than seven business days after mailing to the named respondents.

4. Adjournment

On a motion by Commissioner Burstein, seconded by Vice Chair Tober 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.
Executive Director

FMH/elz