



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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Compliance Director

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Legal Counsel

PUBLIC SESSION MINUTES

December 16, 2008

Chair English, Commissioner Burstein, Commissioner Saunders, Legal Counsel Wyse, and Senior Staff were present. Vice Chair Tober was absent.

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. Approval of Public Session Minutes of November 18, 2008

On a motion by Commissioner Saunders, seconded by Commissioner Burstein and passed by a vote of 3-0, the Commission approved the Public Session Minutes of November 18, 2008.

3. Executive Director's Report

A. Commissioner News

Executive Director Herrmann reported that on December 11, 2008, the Northern District Council of the Urban Land Institute presented Chair English with its "Educator of the Year" award. According to the Executive Director, she was given this honor "for her role as an Adjunct Professor at the New Jersey Institute of Technology and for inventing the pioneering graduate course in environmental problem solving." Executive Director Herrmann said that the Chair taught this innovative course from 1983 to the present with only one year off during that time.

Dr. Herrmann on behalf of the Commissioners and staff congratulated Chair English on receiving this important recognition.

B. Staff Activities

Executive Director Herrmann mentioned that on November 24, 2008, Public Financing Analyst Kristen Auricchio left the staff for family reasons. He indicated that since she was a provisional employee, her departure will not affect ELEC's full time employee count of 67 and that it is not anticipated at this time that staff will seek a replacement for her.

Executive Director Herrmann advised the Commission that the Council on Governmental Ethics Laws (COGEL) presented him with its Honorary Membership Award in December at its annual conference in Chicago. He noted that the award is given to a retiring member in recognition of extensive contributions to COGEL and distinguished service with his or her agency. The Executive Director stated that former ELEC Legal Director and former COGEL President Nedda Massar accepted the award on his behalf and read a letter he prepared for the occasion.

C. History of the Gubernatorial Public Financing Program

Dr. Herrmann informed the Commission that New Jersey has the oldest Gubernatorial Public Financing Program in the nation. According to the Executive Director, its enabling legislation was sponsored by Commissioner Burstein and Chair English participated in its original implementation while she was serving as Legislative Counsel to Governor Brendan T. Byrne.

Executive Director Herrmann recounted that starting in 1977, it covered only the general election. He noted that the program had two major purposes which it retains today:

- helping candidates of limited means, and
- keeping campaigns free from improper influence.

The Executive Director maintained that it worked so well that in the next election held in 1981, the program was extended to the primary election as well. He indicated that from 1977-2005, 63 candidates received over \$91 million. Dr. Herrmann said that the Gubernatorial Public Financing Program is funded through a one dollar income tax checkoff and the general treasury and that New Jersey has consistently had the highest checkoff rate in the nation – currently about 15 percent. He advised the Commission that the program consists of a five-part formula:

- a contribution limit - \$3,400 applied separately in the primary and general elections;
- a qualification threshold - \$340,000 applied separately in the primary and general elections;

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- a matching ratio – two dollars for every one dollar collected after raising \$109,000 applied separately in the primary and general elections;
- a public funds cap - \$3.1 million in the primary election and \$7.3 million in the general election; and,
- an expenditure limit - \$5 million in the primary election and \$10.9 million in the general election.

Dr. Herrmann stated that public dollars may only be spent for communication and compliance costs, noting that there are four types of spending that are exempt from the expenditure limit:

- candidate travel,
- food and beverages for fundraising,
- election night activities, and
- legal and accounting costs.

He explained too that unexpended funds must be returned within six months after the election and that every four years ELEC adjusts the various thresholds for inflation.

According to Executive Director Herrmann, there is also a general election Sample Ballot Program under which each candidate whether or not publicly-funded is permitted to place a 500-word statement on the sample ballots mailed to voters. He said that for the 1989 election a debate requirement was added to the program through legislation sponsored by the late Senator Byron Baer. Dr. Herrmann commented that it requires each candidate who receives public dollars to debate twice in the primary election (unless there is no challenger) and twice in the general election for at least one hour each time. A candidate who qualifies but does not accept public money may choose to participate in the debates, while a candidate who does not qualify may not be part of the debates. The Commission chooses the debate sponsors.

Executive Director Herrmann mentioned that there are three restrictions on debate sponsorship:

- organizations may not be affiliated with any political party, candidate, or officeholder;
- organizations may not endorse a candidate until after the sponsored debate; and,
- organizations must have sponsored a statewide televised debate since 1976 unless they are a news or broadcast association.

Finally, he said for the first time there will be a Lieutenant Governor running in the general election of 2009.

Executive Director Herrmann stated proudly that the Gubernatorial Public Financing Program has been successful in New Jersey because it has: helped candidates of limited means to run for the State's highest office, greatly reduced even

the appearance of undue influence on candidates, and been well designed so as to be simple for ELEC to administer and for candidates to comply.

Dr. Herrmann noted that Director of Special Programs Amy F. Davis and her staff have produced a tutorial overview and a manual for the Gubernatorial Public Financing Program, which should both prove very useful to the candidates, media, and good government groups. He stated that they are available in hard copy and on the website.

D. Winter Meeting Schedule

- January 20, 2009 at 10:00 a.m. (public hearing on handling campaign debt at 11:00 a.m.) in Trenton;
- February 17, 2009 at 10:00 a.m. in Trenton; and,
- March 17, 2009 at 10:00 a.m. in Trenton.

4. 2009 Gubernatorial Public Financing Program Preparation

Amy F. Davis, Director of Special Programs, reviewed steps that have been taken by staff to prepare for the 2009 Public Financing Program. Director Davis also outlined proposed procedures for certification by staff of public matching funds to participating candidates. In her presentation, she requested that the Commission specifically authorize staff to certify public fund amounts to the Department of the Treasury for payment upon completion of the staff's review of a submission.

Director Davis said that the major planning for public financing is complete and that staff has reviewed the operation of the matching funds program in 2005, and updated the detailed internal procedures and manuals. Moreover, she said the two computer assistants and two public financing analysts have been hired and are being trained in public financing procedures, including the Gubernatorial Electronic Filing System (GEFS). The director noted that the first date for submitting a claim for 2009 primary election matching funds is January 6, 2009. Director Davis then outlined several administrative procedures that will be undertaken by staff to assure that the program is managed properly. She stated an overview of the program and the public financing manual are on the website noting that information sessions have been held.

The director reviewed the process of candidate qualification. She said that candidates must raise and spend \$340,000 to participate in two debates and disclose any previous involvement in issue advocacy groups.

As part of her presentation, Director Davis discussed the submission review process. She said that each contribution in each submission and its supporting documentation will be reviewed by staff for conformity with statutory and regulatory criteria. The director said that source documents provided for each contribution (i.e., copies of contribution checks, and deposit slips) will be scrutinized for mistakes which require adjustment or for violations which require temporary rejection for match. Further, she stated each contribution will be

coded and keyed into the database and given a final review for compliance with the \$3,400 contribution limit.

Director Davis mentioned that staff anticipates that the detailed submission review process for initial submissions received from each campaign will take a minimum of three weeks as they may be very large. She added, however, as campaigns become familiar with the complex public financing submission requirements, later submissions usually contain fewer errors and therefore can be reviewed more quickly. The director said that once staff has completed its detailed examination of a submission and all data is entered into the computer and verified, a computer calculation is made to determine the exact amount of public funds to be certified to the candidate for the submission.

At this point, Director Davis stated that it is important to certify public matching fund amounts to the Department of the Treasury as quickly as possible and therefore make public funds promptly available to candidates. She requested that the Commission specifically authorize staff to certify public fund amounts to the Department of the Treasury for payment upon completion of its review of a submission. She noted that matching fund checks will then be available from the Department of the Treasury for deposit into a candidate's public funds bank account and complete contributor lists will be made available to the public on the Commission's website at the time that funds are deposited.

Finally, the director discussed the gubernatorial debate procedures and expenditure compliance issues, including emergent procedures involving expenditure limit litigation.

Commissioner Burstein asked whether or not the incumbent Governor will be participating.

Director Davis said that at this point the staff has no indication that the Governor will participate in the program.

Chair English asked whether or not the gubernatorial candidates are required to file via the Internet.

Director Davis responded that any gubernatorial candidate who raises or spends, or expects to raise or spend in excess of \$100,000, must file electronically via the Internet.

On a motion by Commissioner Burstein, seconded by Commissioner Saunders and passed by a vote of 3-0, the Commission authorized staff to certify public funds amounts to be provided by the Department of the Treasury.

5. Proposed Amendments Concerning Permissible Use of Funds for Legal Fees

Legal Director Hoekje discussed the proposed amendments to N.J.A.C. 19:25-6.10, the regulation concerning permissible use of campaign funds for legal fees and staff comments explaining the proposed changes. She indicated that the proposed amendments are based upon the Commission's determination in Advisory Opinion 01-2008, which was affirmed by the Appellate Division on December 4, 2008. The proposed amendment at 6.10 is as follows:

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- (b) Permissible use of funds for legal fees and expenses shall not include legal fees and expenses for criminal defense of a candidate or officeholder, including defense in a criminal inquiry or criminal investigation, and defense of a criminal indictment or other criminal proceeding.

Two other amendments to the regulation are also recommended by staff as follows:

- (a) Contributions received by a candidate committee, joint candidates committee or legislative leadership committee 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 **ordinary and necessary** duties of holding public office . . .

and,

- 3. The defense of [an] **a civil** action or **administrative** proceeding alleging a violation of the Act and naming as a respondent or defendant the candidate or officeholder whose campaign funds are to be used to pay such expenses.

Legal Director Hoekje said that if the amendments are approved by the Commission at the December 16, 2008 meeting, the proposal notice will be submitted to the Office of Administrative Law (OAL) for publication in the January 20, 2009 edition of the New Jersey Register. She said that secondary notice will be accomplished by: posting the proposal on the Commission's website, mailing a notice of the proposal to interested individuals, and circulating a press advisory to the State House Press Corps.

The director further stated that under the proposed schedule, a public hearing would be announced for the Commission's March 17, 2009 meeting and the 60-day period for receipt of written comment would expire on March 23, 2009. She said the rules would be ripe for adoption consideration at the Commission's April 20, 2009 meeting, and the anticipated effective date would be May 18, 2009.

Commissioner Burstein asked about footnote five in the court opinion involving complaints of a criminal nature filed by candidates in the heat of a campaign. In particular Commissioner Burstein raised the issue of what would happen in the case of a State Commission of Investigation (SCI) investigation.

Legal Director Hoekje said that staff had attempted to draw a line between a criminal investigation and a civil investigation. She stated that the language was proposed for the Commission's consideration, but that the Commission makes the determination as to the language to propose.

Executive Director Herrmann added that once a public body, such as the Attorney General, gets involved, use of campaign money for a criminal legal defense would be disallowed.

Chair English congratulated Legal Counsel James P. Wyse on his victory for the Commission on the appeal of its Advisory Opinion 01-2008. The Chair asked if the Appellate Court decision should be mentioned in the proposed regulation.

Legal Director Hoekje stated that the decision would be referenced in the proposal language, but not the text itself.

Commissioner Saunders asked if staff had contemplated the possibility of innocence. In other words, he said, can an officeholder or candidate make application for reimbursement of fees if found innocent?

Executive Director Herrmann said candidates can create a legal defense fund.

Commissioner Saunders stated that candidates at all levels are involved; i.e. council, school board, etc. He said that not all would have the ability to raise the level of fees necessary to pay a lawyer to defend them. He said a legal defense fund would be a better fit for higher level officials but not necessarily for the lower level officeholders or candidates.

Commissioner Burstein suggested that the Commission move forward with the proposal and give further thought to these issues as the process goes along.

Commissioner Saunders stated that the process will provide for input from the public.

Legal Counsel Wyse cautioned the Commission to keep in mind the “ordinary and necessary” language in the statute as it moved forward.

On a motion by Commissioner Burstein, seconded by Commissioner Saunders and passed by a vote of 3-0, the Commission approved the proposed amendments to the regulations.

6. Resolution to go into Executive Session

On a motion by Commissioner Saunders, seconded by Commissioner Burstein 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. Final Decision Recommendations in violation proceedings which will not become public. However, the Final Decisions resulting from those recommendations will become public not later than seven business days after mailing to the named respondents.
- 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 not later than seven business days after mailing to the named respondents.

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7. Adjournment

On a motion by Commissioner Burstein, seconded by Commissioner Saunders and passed by a vote of 3-0, the Commission voted to adjourn at 1:25 p.m.

Respectfully submitted,

Frederick M. Herrmann, Ph.D.
Executive Director

FMH/elz