



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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PUBLIC SESSION MINUTES

APRIL 5, 1989

All of the Commissioners and senior staff were present.

Chairman Bedford called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-8 et seq., special 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 9:50 a.m., at the Maplewood Municipal Building, Maplewood, N.J.

1. Certification of Public Funds

A. Candidate Gerald Cardinale

The net amount submitted by candidate Cardinale for match was \$13,225. A complete review of all items did not result in temporary refusal of any contribution items. It was determined that \$13,225 was eligible for match at the 2:1 ratio.

Staff therefore recommended that the Commission certify \$26,450 in matching funds. Since this submission is Candidate Cardinale's second, the Commission has now certified at total of \$240,000 in matching funds to this candidate.

On a motion by Commissioner Axtell, seconded by Chairman Bedford and passed by a vote of 4-0, the Commission certified \$26,450 in matching funds to Candidate Gerald Cardinale.

B. Candidate Cary Edwards

The net amount submitted by candidate Edwards for match was \$228,695. A complete review of all items resulted in temporary refusal of 60 contributions items. It was determined that \$195,305 was eligible for match at the 2:1 ratio.

Staff therefore recommended that the Commission certify \$390,610 in matching funds. Since this submission is candidate Edward's second, the

Commission has now certified a total of \$1,139,660 in matching funds to this candidate.

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission certified \$390,610 in matching funds to candidate Cary Edwards.

C. Candidate Chuck Hardwick

The net amount submitted by candidate Hardwick for match was \$152,921.50. A complete review of all items resulted in temporary refusal of 51 contribution items. It was determined that \$128,376.50 was eligible for match at the 2:1 ratio.

Staff therefore recommended that the Commission certify \$256,753 in matching funds. Since this submission is candidate Hardwick's third, the Commission has now certified a total of \$897,451 in matching funds to this candidate.

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission certified \$256,753 in matching funds to candidate Chuck Hardwick.

2. Report on Public Funds Submission No. 7

Legal Director Nagy reported that the following applications for public funds were received by the Commission on April 3, 1989:

- a. Candidate Gerald Cardinale, \$24,372
- b. Candidate Jim Courter, \$734,398
- c. Candidate Cary Edwards, \$72,170
- d. Candidate Jim Florio, \$303,475
- e. Candidate William Gormley, \$93,500
- f. Candidate Chuck Hardwick, \$153,543

Legal Director Nagy requested that the Commission rule on the permissibility of accepting the submission made by Candidate William Gormley for certification on April 3, 1989. Candidate Gormley's submission was presented at the Commission's offices approximately 44 minutes late. Legal Director Nagy indicated that the campaign staff explained that a computer problem caused the delay in making the submission, and a letter from Treasurer Charles Persango, dated April 3, 1989, was circulated.

Counsel Farrell said that this issue can be viewed in the same manner as the court views late submissions of court documents. Counsel Farrell said that the test for the court is two-fold: does that lateness affect anyone else and/or is there good reason not to allow the filing? He said the court had the right to be flexible about its rules and so does the Commission.

On a motion by Commissioner Linett, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission voted to allow the April 3, 1989 submission of Candidate Gormley as timely filed.

3. Proposed Meeting Schedule

The following meetings were scheduled by the Commission: April 18, 1989, Trenton, 10:00 a.m.; April 25, telephone, 9:30 a.m.; May 4, telephone, 9:30 a.m.; May 16, Trenton, 9:30 a.m.; May 19, telephone, 9:30 a.m.; May 26, telephone, 9:30 a.m.; and June 1, Montclair, 10:00 a.m.

Legal Director Nagy noted that any large public financing submissions made on April 10, 1989, will in all probability not be readied for certification until the April 25th meeting. He said staff would attempt to complete the review of the submissions by April 18th but would probably not be able to meet that deadline.

Scott Weiner, Treasurer for the Florio for Governor Committee, said the campaign would have no objection to the two-week turn-around period for any submission it makes on April 10.

The Commission sanctioned the possible two-week review period for the April 10th submission.

4. Percentage Certification

Legal Director Nagy reviewed a memorandum to the Commissioners from Executive Director Frederick M. Herrmann, dated March 30, 1989. The memorandum deals with the use of an automatic pre-review percentage certification process for the 1989 primary election and a primary submission review schedule. For details, see this memorandum.

Paraphrasing the memorandum, Legal Director Nagy said the Commission is approaching the one-week certification period. He said that, as such, the Commission will in all probability have to implement its past percentage approval policy. Legal Director Nagy said this method of approval is especially needed this year because of the change in the public funds law which has more than doubled the number of transactions to be reviewed. He said the percentage approval policy, which would go into effect no earlier than April 25, 1989, would not apply to first submissions, only to subsequent submissions. Legal Director Nagy suggested percentage certifications be rounded off to the nearest 5 percent (in no case being more than 95 percent), based on the established ineligible rates of the various campaigns. He said the better the ineligible record, the higher the percentage certification. Legal Director Nagy said this approach differed slightly from previous gubernatorial elections, when a flat automatic percentage certification rate was applied to all campaigns.

Commissioner Linett said he was not comfortable with the 95 percent automatic certification rate. He suggested that regular staff be redeployed during this period to review the submissions.

Executive Director Herrmann said permanent staff could not be utilized for this purpose without great harm to ELEC's workload because of the Commission's increased responsibilities in other areas. He said this period is one of the busiest times of the year for the Commission, the time when all candidates file reports with it, including Assembly candidates, and a time when the Commission is expected to provide analytical press releases as well as fulfill a tremendous demand for public information.

Chairman Bedford said he would prefer to apply a flat automatic certification rate to all candidates. Vice Chairman McNany agreed that a flat certification rate was preferable, saying that it was both better and fairer.

On a motion by Commissioner Linett, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission approved an 80 percent automatic certification rate for April and a 90 percent automatic certification rate for May to be applied to all candidates.

5. Debate Schedule

Legal Director Nagy reported on the schedule for the primary gubernatorial debates. Letters from the selected sponsors were circulated.

The League of Women Voters of New Jersey Education Fund sponsored debates are:

1. Democratic candidates, Thursday, May 11, 1989, 7-8 p.m., Labor Education Center, Douglas Campus, Rutgers University; and
2. Republican candidates, Wednesday, May 17, 1989, 7-8 p.m., Nicholas Music Center, Douglas Campus, Rutgers University.

WPVI/TV Philadelphia sponsored debates are:

1. Republican candidates, Saturday, May 20, 1989, 7-8 p.m.;
2. Democratic candidates, Saturday, May 20, 1989, 8-9 p.m.

Vice Chairman McNany said that he was concerned about the League of Women Voters debates being at different locations with different seating capacities. He suggested that both debates be held at the same location. Vice Chairman McNany recommended that staff contact the League and make this concern known.

Commissioner Linett agreed with Vice Chairman McNany's suggestion. He said also that he was concerned about the WPVI/TV debates being back to back on the same Saturday night.

Commissioner Axtell said the Commission should not get involved in these matters.

Chairman Bedford said the statute makes it clear that the only role that the Commission is to play in the debate process is in the selection of sponsors. He said that all other matters pertaining to the debates are left by law to the sponsors, the State Political Parties, and the candidates.

Counsel Farrell said that this reading of the statute is correct but that as a practical matter, if a problem arises with the debates, the candidates are going to look at the Commission, not the courts, for remedy.

Chairman Bedford said if that type of situation should arise, then the Commission should deal with it at that time. He said that for now the Commission should remain disengaged.

Vice Chairman McNany said he was not concerned about the back-to-back scheduling of WPVI/TV, but rather about the issue of evenhandedness in audience participation between the Democratic debates and the Republican debates because of the difference in seating capacities of the sites selected by the League of Women Voters.

Executive Director Herrmann said the Commission should be very careful about involving itself in the process at this stage. He said that consideration should be given to the statutory provision that the sponsors are responsible for selecting the date, time, and location of the debates.

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved the dates and times of the debates and instructed staff to bring the "audience size" question to the attention of the League of Women Voters.

The Commission next discussed Commissioner attendance at the debates.

Vice Chairman McNany said he would like to attend the debates. Commissioner Linett stated he would also.

Chairman Bedford said he believed that it was better for the Commission members not to attend the debates. He said they are partisan events and the Commission had to be concerned about the perception of neutrality.

Counsel Farrell said he believed it was a very delicate matter since the Commission is not in charge of the debates. He said the debates cannot be considered non-partisan and the perception issue does exist.

Vice Chairman McNany said it was his belief the Commissioners would be remiss in not attending the debates.

Chairman Bedford said since there was an equally strong feeling on both sides of the issue, he would leave it to the conscience of the

individual members to determine whether they would or would not attend the debates.

6. Coordinated Expenditures Regulation Amendments

Legal Director Nagy circulated a memorandum concerning revisions to the proposed text of the "coordinated expenditure" regulation.

See text for details.

19:25-15.29(a)

The only change from the proposal text in subsection(a) is the addition of the contribution limit language. In addition, the words "substantial" and "an audio" have been added to paragraph one, and a test of actual control by the gubernatorial candidate has been added to paragraph two.

Commissioner Linett proposed that the word "substantial" be eliminated in paragraph one as unnecessary. Paragraph one now reads: 1) The communication makes [a substantial] an unambiguous reference to the gubernatorial candidate in an audio, visual or printed format.

On a motion by Commissioner Linett, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission approved the text of 19:25-15.29(a) as amended by Commissioner Linett.

19:25-15.29(b)

This subsection(b) paraphrases the "slate card" and "volunteer" activities exemption of the federal statutes.

Commissioner Linett said he was uncertain whether the Commission had the authority to adopt a regulation like this one.

Counsel Farrell said while he could not state the Commission had this authority with any great certainty, the proposal seemed to be a reasonable reaction to the Supreme Court Opinion in the Kean case and was therefore defensible.

Chairman Bedford said he believed the Commission had the authority to adopt a regulation such as this one.

Commissioner Linett said he was not sure this "volunteer" activity is de minimus.

Executive Director Herrmann said that in 1986, at the Commission's Public Hearing on the Gubernatorial Public Financing Program, one campaign addressed the issue by stating that they could no longer afford to undertake

these expenditures. He said that everyone at the time lamented the decline of the volunteer in gubernatorial campaigns.

Counsel Farrell said that what Legal Director Nagy is attempting to do is lump grass roots activities and volunteer activities together under one regulation.

Commissioner Linett questioned how the activities cited in subsection(b), paragraph two could be defined as volunteer activities. He said that a campaign could pay people to distribute buttons and hand bills.

Commissioner Linett said that the proposal was an improvement over the previous one but that it did not solve all of the problems the Commission could be expected to encounter.

On a motion by Commissioner Axtell, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission approved the text of the proposed regulation 19:25-15.29(b).

19:25-15.29(c)

This subsection(c) establishes the obligation of a gubernatorial candidate to determine total cost of the coordinated communication, and its reasonable value to that candidate.

On a motion by Commissioner Axtell, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission approved the text of the proposed regulation 19:25-15.29(c).

19:25-15.29(d)

Subsection(d) permits a gubernatorial candidate to establish reasonable value to that candidate at less than one hundred percent of cost based on certain factors.

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved the text of the proposed regulation 19:25-15.29(d).

19:25-15.29(e)

Subsection(e) requires a gubernatorial candidate to determine the value of a coordinated expenditure at percentages rounded off to the nearest twenty percent.

Chairman Bedford asked Scott Weiner for his opinion of this proposal.

Mr. Weiner commented that he had difficulty with the allocation schedule which calls for allocations to be rounded off to the nearest 20 percent. He said in a campaign the difference between twenty and forty

percent constitutes a significant amount of money. Mr. Weiner suggested a five percent allocation differentials instead.

Commissioner Linett agreed, and suggested there be a floor allocation of five percent, with successive allocations rounded off to the nearest five percent.

Commissioner Linett said that he was not sure it was in the interest of the political process to discourage this coordination.

Vice Chairman McNany said that intervals of twenty percent would force a campaign into a situation in which it cannot coordinate.

Counsel Farrell said that it is a difficult issue but that the Commission is charged with the responsibility of protecting the expenditure and contribution limits. He said that even if the allocation schedule called for differentials of twenty percent it would be helpful administratively to the Commission if it had a standard. He said with this type of schedule the Commission could recognize the principle of "rebuttable presumption" whereby a campaign would have the right to argue against a certain percentage allocation.

On a motion by Commissioner Linett, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission amended the text of the proposed regulation to require allocation at multiples of five percent between five percent and ninety-five percent.

After discussing whether this proposed regulation should be submitted to the Governor for consideration as an emergency adoption, the Commission decided to instruct Legal Director Nagy to submit it to the Office of Administrative Law (OAL) as a re-proposal, with a hearing at its June 1 meeting.

7. Advisory Opinion No. 07-1989

This advisory opinion request from Senator Richard Codey, involves the question of disclosure and regulation of unspent "testing the waters" funds.

Vice Chairman McNany asked: "If a 'testing the waters' committee has \$10,000 in its account and spends some of it on activities other than 'testing the waters,' which contributors would have to be identified?"

Executive Director Herrmann said Vice Chairman McNany asked an excellent question because funds are fungible.

Counsel Farrell said it is legitimate for the Commission to require the disclosure of all contributors to the "testing the waters" committee if any portion of the committee's money is used for a political purpose.

Commissioner Linett said the Commission may be going beyond its jurisdiction in making Senator Codey disclose "testing the waters" activity.

Chairman Bedford said only if the Senator decided to make political use of the remaining funds would he have to disclose the source of the "testing the waters" fund.

Commissioner Linett suggested that the phrase "remaining unexpended in the pre-candidacy account" be added to the first sentence of the second full paragraph on page two of Counsel Farrell's draft response. The sentence reads: "The Commission is of the view that the use to be made of funds remaining unexpended in the pre-candidacy account should be in conformity with the use permitted for surplus campaign funds set forth in N.J.A.C. 19:25-7.4," a copy of which is enclosed.

Commissioner Linett also recommended that the second sentence of the same paragraph be changed to read: "a report must be filed by 'Citizens for Codey' at the time of such use, and that report must include the identification of contributors of the funds deposited in the pre-candidacy account."

On a motion by Vice Chairman McNany, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission approved the draft response as amended. Chairman Bedford asked Counsel Farrell to send out the opinion to Senator Codey as soon as possible, and Counsel Farrell said he would mail it that afternoon.

8. Executive Session

On a motion by Commissioner Linett, seconded by Commissioner Axtell and passed by a vote of 4-0, the Commission voted to go into Executive Session to discuss investigative and enforcement matters, the results of which will be made public at their conclusion.

9. Adjournment

On a motion by Commissioner Axtell, seconded by Vice Chairman McNany and passed by a vote of 4-0, the Commission voted to adjourn at 12:10 p.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.