



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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PETER J. TOBER
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ALBERT BURSTEIN
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PUBLIC SESSION MINUTES

March 6, 2007

Chair English, Vice Chair Tober, Commissioner Burstein, Counsel Wyse, and Senior Staff 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 10:15 a.m. in Trenton.

2. Approval of Public Session Minutes of January 16, 2007

On a motion by Commissioner Burstein, seconded by Vice Chair Tober and passed by a vote of 3-0, the Commission approved the Public Session Minutes of January 16, 2007.

3. Executive Director's Report

A. Commissioner News

Executive Director Herrmann expressed congratulations on behalf of the Commission to Commissioner Burstein on his renomination to ELEC. He advised the Commission that Personal Financial Disclosure Statements are due at the State Ethics Commission by May 15th and that the forms were included with the agenda mailing. According to the Executive Director, this year the disclosure statements may be filed online.

B. National News

Executive Director Herrmann reported that the U.S. Supreme Court will hear an appeal of a lower court decision that relaxed restrictions on mentioning candidates by name in issue ads run by corporations, unions, and other special interest groups during the height of a campaign. He said that it is expected that the “Wisconsin Right to Life Case” will be argued in April and decided by July. The Executive Director noted that the focus of the litigation is the provision in the McCain-Feingold law that prohibits referring to a candidate in a political communication 30 days before a primary election and 60 days before a general election.

C. Budget Update

Executive Director Herrmann indicated that on January 18, 2007, Deputy Director Brindle, Director of Finance and Administration Gary Alpert, and he met with the Office of Management and Budget staff to present ELEC’s budget request for Fiscal Year 2008. He stated that Governor Corzine delivered his budget address on February 22, 2007, and the staff is waiting for the release of budgetary details to learn the Commission’s Fiscal Year 2008 recommended appropriation.

D. Computer Matters

Executive Director Herrmann stated that thanks to the extraordinary efforts of Division of Information Technology Director Carol Neiman and her staff, candidates may now file electronically over the Internet, noting that the previous electronic filing system relied on using discs, which had to be mailed to the Commission. According to the Executive Director, filing can be done with the proverbial “push of a button” and that beginning with 2007 general election, every candidate for Governor and the Legislature spending over \$100,000 will be required to file using the new system.

E. Staff Activities

The Executive Director announced that staff has set up an e-mail notification system to inform interested parties of upcoming Commission meetings.

Executive Director Herrmann said that as of December, the Compliance Division has trained 607 treasurers and registered 1,007 lobbyists.

Executive Director Herrmann advised the Commission that the Finance and Administration Section ran a program entitled “Ready, Set, Test” on January 24th for 25 staff members. The Executive Director indicated that this event was an informative all-day seminar designed to assist staff members in preparing to take Department of Personnel Civil Service examinations, and added that the session was part of the Section’s ongoing support of personal and professional staff development.

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Executive Director Herrmann informed the Commission that on January 25, 2007, Legal Director Massar was the speaker at a meeting of the Government Sector Lawyers Committee of the New Jersey State Bar Association. She spoke about the new pay-to-play laws. The Executive Director stated that her audience was comprised of attorneys who are currently responsible for administering the contracting aspects of these new statutes.

F. Legislative Developments

Executive Director Herrmann reported that on January 29, 2007, Director of Special Programs Amy Davis and he attended the Senate State Government Committee Hearing on S-2438 (Turner) and A-100 (Roberts, Greenstein, Baroni, *et al.*), which create a Clean Elections Pilot Program for 2007. He said that the bills were released by a vote of 4-1 with committee amendments dealing with:

- Placement of candidate links on ELEC's website,
- The advertising process for withdrawals,
- Expedited regulations, and
- The program review process.

Executive Director Herrmann reported that on February 8, 2007, Director of Special Programs Davis and he attended the Senate Budget and Appropriations Committee Hearing on the Clean Elections bills. According to the Executive Director, former Clean Elections Committee Chair William E. Schluter testified against the bills emphasizing that they should include the primary. Dr. Herrmann said that he testified that, although ELEC supports a Clean Elections Pilot Project for 2007, it would be "nearly impossible" to administer the program for the primary at such a very late date. The Executive Director noted that the Committee voted 8-7 to release the bills without recommendation.

Executive Director Herrmann added that on February 8, 2007, he attended the Senate State Government Committee Hearing on four ethics bills: S-222 (Karcher), S-2504 (Codey/Lance), S-2505 (Codey), and S-2506 (Codey/Allen). He said that:

- S-222 prohibits campaign contributions by government entities,
- S-2504 ends benefit passing by lobbyists,
- S-2505 requires the reporting of lobbying on earmarks in appropriations bills, and
- S-2506 bars campaign contributions to charities that personally benefit candidates and officeholders.

Executive Director Herrmann advised the Commission that all the bills were released unanimously.

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The Executive Director mentioned that on February 22, 2007, Senate Floor Amendments to A-100 sponsored by Senator Tuner passed the Senate 34-0. He reported that the amendments revised various dates to allow time for running the Clean Elections Program in the 2007 general election if the bill is enacted by mid-March.

Executive Director Herrmann stated that on February 23, 2007, he attended the Assembly State Government Committee Hearing on three pairs of ethics bills:

- A-4012 (Wheelan/Albano/McKeon) which is identical to S-2504 on ending benefit passing,
- A-4013 (Panter/Schaer) which is identical to S-2505 on reporting of lobbying on earmarks, and
- A-4014 (Connors/Conaway/McKeon) which is identical to S-2506 on banning certain charitable contributions.

The Executive Director mentioned that all the bills were released unanimously.

G. Spring Meeting Schedule

- March 20, 2007 at 10:00 a.m. in Trenton;
- April 24, 2007 at 10:00 a.m. in Trenton; and,
- May 15, 2007 at 11:00 a.m. in Trenton.

4. Proposed New Rules to Implement the Pay-to-Play Disclosure Law

Chair English requested a motion to adopt the proposed rules to implement the pay-to-play disclosure law.

Commissioner Burstein made a motion to adopt the pay-to-play disclosure rules as published in the New Jersey Register on November 6, 2006. The motion was seconded by Vice Chair Tober.

Chair English asked Legal Director Massar to summarize the written comments received and testimony offered at the November 21, 2006 public hearing on the pay-to-play disclosure rules.

Legal Director Massar said that the majority of the comments concerned the issue of whether or not nonprofit businesses should be included in the requirements of the pay-to-play disclosure law, which is also referred to as Chapter 271. The Legal Director explained that Chapter 271 supplements two earlier pay-to-play laws imposing restrictions on contracts. Chapter 271 requires disclosure of contributions made by a business at two junctures: to the government entity awarding a contract having a value in excess of \$17,500 if the contract is

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not awarded pursuant to a fair and open process, and to the Commission in an annual report if a business entity has received \$50,000 or more in a calendar year as a result of contracts with New Jersey government entities.

Chapter 271 also extends the disclosure requirements to entities doing business with school boards and fire districts. A business entity that is not a natural person must disclose contributions made not only from business entity funds but also contributions made by the principals, partners, officers, or directors of the business entity and their spouses.

Legal Director Massar stated that the main arguments against including nonprofit businesses in pay-to-play disclosure were as follows:

- That the Legislature never intended to include nonprofits;
- That requiring nonprofits to disclose contributions made by individual board members would have a chilling effect on volunteerism;
- That nonprofits would need to divert scarce resources to complying with the reporting requirements of the law;
- That it would be administratively burdensome for nonprofits; and,
- That a wrong perception of partisanship might be created due to disclosure of board member contributions.

Legal Director Massar added that the commenters also asked that the comment period on the rules be extended and that an additional public hearing be added. She said that in preparing phase two of the new pay-to-play rules, staff relied upon information available on the websites of the Departments of the Treasury and Community Affairs which included nonprofit businesses in the pay-to-play contracting restrictions. It would have been inconsistent and confusing to the businesses community to treat nonprofits differently.

The Legal Director advised the Commission that the contribution information required by Chapter 271 disclosure is already required to be reported by the recipient candidates and committees.

Legal Director Massar indicated that commenters also requested that the definition of "officer" exclude the position of vice president. She explained that Chapter 271 did not include a definition of the term "officer," and that staff therefore relied upon the definition in Black's Law Dictionary and information from the Municipal Securities Rulemaking Board in developing the definition. The commenters noted that some businesses, such as banks, may have hundreds of vice presidents, none of whom have a role in contracting.

The Legal Director suggested that the Commission may wish to restrict the definition of "vice president" upon adoption.

In addition, commenters requested that certain industries be excluded from pay-to-play disclosure requirements and that the rules include definitions of the terms "contract," "agreement," and "grant." Legal Director Massar indicated that, as the Commission

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explained in its rule proposal, it plays no part in and has no jurisdiction over the procurement process and must rely upon the determination of a State or other governmental entity as to whether or not a contract exists. She therefore recommended that the Commission is not in a position to define these procurement terms and that a business should rely upon the decision of the contracting government entity as to whether or not a contract exists.

Still other commenters asked the Commission to modify the criteria in the rules for determining whether or not a business exerts control over a continuing political committee (CPC). They were concerned about the unintended impact of the criteria upon a trade association CPC. Legal Director Massar suggested that the Commission consider in a future rulemaking excluding a *bona fide* trade association CPC from the rule.

Further comments suggested that “fair and open” contracts be excluded from the annual disclosure reports filed by businesses that receive \$50,000 or more in a year from government contracts. The Legal Director stated that staff can find no statutory basis to support this interpretation.

Commissioner Burstein asked Legal Director Massar to provide the rationale for including both for-profit and nonprofit businesses in the regulations.

Legal Director Massar said that the commenters expressed their belief that the use of the terms “business corporation” and “legal commercial entity” in the definition of “business entity” in Chapter 271 is an indication of Legislative intent to restrict pay-to-play disclosure requirements to only for profit businesses. However, she said staff could find no basis in Chapter 271 to distinguish between for-profit and nonprofit businesses. Further, she noted that nonprofit businesses often receive large government contracts, and there is a need for transparency in the contracting process.

Vice Chair Tober asked: “Who are the nonprofits with governmental contracts or grants?”

Legal Director Massar mentioned that often hospitals, social service agencies, and environmental groups have contracts with New Jersey government entities. She said that regardless of whether or not contracts are awarded pursuant to a fair and open process, without bid or competition, if a contractor receives \$50,000 or more from contracts in a year, disclosure of contributions is required.

Chair English said that transparency is the issue. She said that even though nonprofits are not allowed to make contributions themselves, their board members do.

Legal Director Massar said that the nonprofits are concerned because they traditionally have no interest in contributions made by their board members and have stated that the reporting requirements create First Amendment issues. The Legal Director reminded the Commission of the constitutional distinction between a statutory prohibition upon making contributions, which is impermissible under most circumstances, and the requirement to report contributions, as required by Chapter 271, which has been upheld consistently as constitutional.

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Legal Director Massar recommended that the Commission may wish to pose this question to the Attorney General for clarification because the Departments of Treasury and Community Affairs, as well as the Commission, are involved in the administration of the pay-to-play laws. The Legal Director also indicated that upon adoption, the Commission might wish to delay the first reporting deadline for the annual disclosure report to September 28, 2007, and also to restrict the definition of “officer” to exclude vice presidents who are not involved in the contracting process.

Commissioner Burstein indicated that he would accept the recommendations to change the filing deadline and to modify the definition of “officer” upon adoption.

Vice Chair Tober asked about the administrative issue.

Legal Director Massar said that she thought it would be possible upon adoption to delay the filing deadline in the first year by three months. She said that this would give the nonprofits additional time to gather the requisite information. She noted that the June 29th deadline is regulatory and not statutory, and that there is already disclosure of the contributions because they are required to be reported by the recipient candidates and committees. However, the contributions are not consolidated into one report by the businesses.

Vice Chair Tober said that the \$300 threshold applies to pay-to-play reporting. He said, therefore, that contributions by directors are out there anyway and that this regulatory approach would simply make it easier for the public to acquire information.

Chair English asked members of the public for comments.

Ms. Linda M. Czipo, Executive Director, Center for Non-Profits, was first to speak. Ms. Czipo stated that her organization represented many nonprofits throughout New Jersey, many of which are very small organizations, with budgets under \$1 million. She said that the administrative impact of including nonprofits in the regulations would be enormous and extremely burdensome. Ms. Czipo added that the regulations will have a chilling effect on recruitment of officers as well as create the false impression that the nonprofits are partisan. She said a perception of partisanship might be created where none exists.

Commissioner Burstein said that directors’ contributions are already disclosed. He asked: “What about this rule would have a chilling effect?”

Ms. Czipo said that lumping contributions in one place might create a linkage wherein none exists for the charity. She added that by shifting the burden of reporting to the charity, it would be administratively burdensome to gather these contributions and comply with the law.

Chair English next recognized Heather Taylor, representing the Citizens’ Campaign. Ms. Taylor said that her organization was involved in writing the pay-to-play legislation and that it was never the intent to apply the law to nonprofits. She said that only commercial entities that stood to make a profit from contracts were intended to be included.

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Vice Chair Tober said that nonprofits received millions in contracts. He asked: “Wouldn’t it further the goals of the legislation to include them since the goal is disclosure?”

Ms. Taylor said that the issue could be looked at in the future, perhaps through the legislative process.

Chair English recognized Gregory Nagy, Esq., of Genova, Burns & Vernioia. Mr. Nagy stated that the motivation for the pay-to-play law was to provide transparency to contributions from business entities receiving contracts from governmental agencies. He said the intent of the legislation was not to include 501(c)(3) organizations in the disclosure requirements. He said that these organizations do not make contributions. For-profit business entities do make contributions, he said.

Mr. Nagy stated that he did concur in the staff recommendations regarding definitions and said that the issue of trade associations should be addressed.

Chair English recognized Mr. August Scotto, a citizen activist from Hamilton Township, Mercer County. Mr. Scotto offered that actions taken by the Mayor of Hamilton Township regarding Klockner Woods violated pay-to-play laws.

Chair English said that it was wonderful to see citizens like Mr. Scotto involved in the process and was delighted to see him at the Commission meeting. She said that while the issue of Klockner Woods was not relevant to the issue before the Commission, that staff would discuss the matter with him following the meeting.

Chair English said she believed it was the intent of Chapter 271 to capture transactions that are “below the radar,” and that citizens should not have to mine the many reported contributions to find those that may be relevant to contracts. She explained that the Commission would return to the rules after the Executive Session.

5. 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 and the following matters, which will become public as follows:

- A. A report on requests from the public for investigations of possible violations, which report will not become public in order to protect the identity of informants and maintain the integrity of investigative procedures and priorities. However, any complaint alleging violations, which complaint may be generated as a result of a request for investigation, 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.

6. Back to Public Session

Proposed New Rules to Implement the Pay-to-Play Disclosure Law

Counsel Wyse stated that there was no discussion of the pay-to-play disclosure rules in Executive Session, and that the matters discussed in Executive Session were only those permitted by the Open Public Meetings Act.

On the motion of Commissioner Burstein to adopt the pay-to-play disclosure rules, amended to change the annual report filing date to September 28, 2007, and to restrict the definition of "officer" to exclude vice presidents who are not involved in the contracting process, which motion was seconded by Vice Chair Tober, and passed by a vote of 3-0, the Commission directed staff to file the rules for adoption at the Office of Administrative Law.

7. 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 12:45 p.m.

Respectfully submitted,

Frederick M. Herrmann, Ph.D.
Executive Director

FMH/elz