



*State of New Jersey*

## **ELECTION LAW ENFORCEMENT COMMISSION**

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Chair

PETER J. TOBER  
Vice Chair

ALBERT BURSTEIN  
Commissioner

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Legal Director

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Compliance Director

JAMES P. WYSE  
Legal Counsel

### PUBLIC SESSION MINUTES

January 15, 2008

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 11:00 a.m. in Trenton.

#### 2. Approval of Public Session Minutes of December 18, 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 December 18, 2007.

#### 3. Advisory Opinion Request No. 01-2008

The Commission received a request for an advisory opinion from Richard K. Weinroth, Esq. on behalf of former Senator Wayne R. Bryant (5<sup>th</sup> Legislative District). Mr. Weinroth asked whether or not Mr. Bryant may use candidate committee funds to pay legal fees and expenses in connection with criminal proceedings. Mr. Weinroth submitted the request with Co-counsel Joseph E. Sandler, Esq., of Sandler, Reiff & Young, P.C. in Washington, D.C.

The following question was submitted:

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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?

Mr. Weinroth wrote that Mr. Bryant was indicted on thirteen counts on March 29, 2007, by a federal grand jury, see United States v. Bryant, Crim No. 07-267 (D.N.J., filed March 29, 2007). Mr. Weinroth wrote that Mr. Bryant has denied all of the charges, has entered a plea of not guilty to all charges, and intends to mount a vigorous defense. He indicated Mr. Bryant has retained counsel in connection with the criminal proceeding, has incurred substantial charges for legal fees and expenses in connection with his defense, and anticipates incurring considerable additional fees and expenses in the future in connection with his representation. Mr. Weinroth wrote that the former senator wishes to use contributions received by his candidate committee to do so.

Mr. Bryant served in the State Senate since 1995. He did not run for reelection in the 2007 primary election, and his term of office expired on January 8, 2008. Mr. Weinroth noted that Mr. Bryant may run for office in the future.

Chair English invited Richard K. Weinroth, Esq., attorney for Mr. Wayne Bryant, to address the Commission.

Mr. Weinroth stated that Mr. Bryant has always adhered to the rules of ELEC and that his request to use campaign funds to defend himself in a matter directly connected to his being an officeholder falls within that category.

Mr. Weinroth added that this request is consistent and identical to those uses permitted by the Commission's regulations allowing an individual to defend himself against ethics violations. He said also that it fits with previous advisory opinions that pertain to legal representation. He said that there is a direct relationship between office holding and the charges made by the U.S. Attorney against Mr. Bryant. Mr. Weinroth said that to not allow the use of campaign money to pay for the expenses of defending Mr. Bryant against the allegations would be to turn the concept of the presumption of innocence on its head. He said that Mr. Bryant has a right to defend himself. An officeholder, he added, has a right to defend himself if the charge is related to office holding.

Mr. Weinroth added that the Federal Election Commission (FEC) has consistently allowed officeholders to use campaign money in this context.

Vice Chair Tober commended Mr. Weinroth on a well written brief. He stated, however, that in the statute there is also the language "ordinary and necessary" in relation to office holding expenses. He said that this language is different from federal law.

Mr. Weinroth argued that taken together the ordinary and necessary language fits well with the supposition that Mr. Bryant should be allowed to use these funds to defend himself.

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Commissioner Burstein said that in many instances, such as with respect to the Second Amendment, for example, people are given to parsing the language. In that context, would you consider the charges against Senator Bryant ordinary, he asked? Would you be modifying the definition of the word to mean something different than most people would view it to mean?

Mr. Weinroth said that you would have to come to a conclusion as to what ordinary means. He asked, for example, is it ordinary to expect a lawyer to defend you in a case related to office holding?

Commissioner Burstein asked: What about necessary?

Mr. Weinroth said that necessary and ordinary are corollary terms in this context.

Commissioner Burstein said that the staff recommendation has made a distinction between this case and previous ones.

Mr. Weinroth said that he did not see a distinction. He said that this one comes within the narrow purview of the regulations in that the situation is parallel to an ethics violation.

Chair English said that this is the first time the Commission has been asked this question. It is a matter of first impression, she added.

Chair English said, help me with this. When you use the term irrespective does it mean "but for" in the old tort sense? If he had a disagreement about a contract, would not the matter be "personal"? Chair English asked would the fact that Mr. Bryant was in the Senate change the matter?

Mr. Weinroth said that what he is saying is that if Mr. Bryant had not been a Senator those charges would not have arisen. He said that the charges arose as the result of the Senator being on the Appropriations Committee. He said that the charge is that he improperly influenced the appropriations process. He said that it stems from the fact that he was a senator and it could not have arisen if he were not a senator.

Chair English said that because of his position, then, he was in a position to influence the budget process inappropriately to benefit the client.

Vice Chair Tober said that when the Commission adopted the regulations clarifying the use of campaign funds in the context of compensating one's legal defense it noted that this could open a large door. He asked: Where does the Commission draw the line?

Mr. Weinroth said that the issue does not have to do with criminal activity but rather with him being a senator.

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Commissioner Burstein said that in terms of the prior ELEC determinations upon which you are relying let us assume that they were wrongly decided. With regard to the statute at N.J.S.A. 19:44A-11.2a(6) don't you have to look at what preceded it to get an idea of what ordinary and necessary means? In other words what was the legislative intent?

Mr. Weinroth stated that every situation cannot be foreseen.

Chair English stated that, looking at what the Legislature intended and the Election Law Revision Commission's concern for the integrity of the process, it is hard to believe that they thought a contribution would be used for anything other than campaigning. Chair English added that the Commission just finished administering the Clean Elections Program. She noted that in making ten dollar donations, contributors were not thinking that their money would be used for legal defense in a criminal matter.

Mr. Weinroth answered that a contributor really has no expectation of what his or her contribution will be used for. He said there are many circumstances whereby questions could be raised, i.e., wheeling.

Chair English indicated that this issue has to do with the postelection period.

Mr. Weinroth said that there is always an election taking place. He mentioned that contributions are maintained.

Chair English asked: Is there a divide in your analysis between civil and criminal?

Mr. Weinroth said "there is not." He said that every situation is different and that there needs to be a presumption of innocence.

Chair English queried about the possibility of a legal defense fund.

Mr. Weinroth doubted if these funds come under ELEC's jurisdiction. He said they do exist but that he is asking about the matter before the Commission.

Chair English asked whether or not Mr. Weinroth would agree to giving the Commission more time to consider the matter.

Mr. Weinroth agreed, stipulating that the matter should be decided in a reasonable amount of time.

Commissioner Burstein indicated that he agreed with taking more time to render a decision because of the importance of the issue.

Vice Chair Tober said that he was in a position to make a decision now; but, that if the Commission desired more time, he would agree to that.

On a motion by Commissioner Burstein seconded by Vice Chair Tober, the Commission voted 2-1 to defer a decision for a period not to exceed two weeks within which a special meeting by telephone would be called to decide the matter.

Vice Chair Tober voted against the motion.

4. Petition for Rulemaking

The New Jersey Hospital Association (NJHA), through its acting general counsel, Karen S. Ali, Esq., petitioned the Commission for rulemaking pursuant to the provisions of N.J.A.C. 1:30-4 ("Petition for Rulemaking"), which provides that an "interested person" may petition an agency to adopt a new rule or amend or repeal an existing rule. The NJHA submitted its petition on behalf of its 112 nonprofit members, some of which were or are required to file the "Business Entity Annual Statement" with the Commission.

Legal Director Hoekje advised the Commission that Governor Corzine signed legislation exempting non-profits from the disclosure requirements of the Pay-to-Play law. She further advised the Commission that as a result of the enactment of the legislation, the non-profit groups no longer had a filing requirement for the Business Entity Disclosure Form due January 15, 2008, for calendar year 2006, and March 30, 2008, for calendar year 2007. She stated that staff will so advise the public on its website.

Chair English stated that staff should inform the Hospital Association that ELEC is independent and its opinion can differ from the Attorney General.

Chair English recognized Mr. Bob Polakowski on behalf of the Association of Independent Colleges and Universities in New Jersey.

Mr. Polakowski thanked the Commission for extending the disclosure deadline and allowing the Legislature to clarify the issue.

Chair English recognized Ms. Karen S. Ali, general counsel, New Jersey Hospital Association. Ms. Ali also thanked the Commission for the extension of time. Legal Director Hoekje advised Ms. Ali that the Commission planned to address the issue when it considers new regulations in the Summer.

On a motion by Vice Chair Tober, seconded by Commissioner Burstein and passed by a vote of 3-0, the Commission declared the issue presented by the rulemaking petition moot.

Legal Director Hoekje advised the Commission that staff will file a Notice of Action on the rulemaking petition with the Office of Administrative Law.

5. Report on Reimbursement of 2007 Clean Elections Ballot Statement Costs

Special Programs Director Amy Davis reported to the Commission on the status of the reimbursements to the six county clerks in the 14<sup>th</sup>, 24<sup>th</sup>, and 37<sup>th</sup> Legislative Districts for the costs associated with placing the Clean Elections candidates' ballot statements on the 2007 general election sample ballots. She said that the Commission is required to reimburse the six clerks for the costs of printing and mailing associated with placement of the candidates' statements on the sample ballots. She stated that the Commission received an appropriation of \$75,000 in the 2008 budget to reimburse the six clerks for the printing and mailing costs relevant to the ballot statements.

Staff recommended that the Commission approve payments totaling \$31,051.52 to the six county clerks for reimbursement of 2007 Clean Elections Ballot Statement Costs.

On a motion by Commissioner Burstein, seconded by Vice Chair Tober and passed by a vote of 3-0, the Commission approved the reimbursement of \$31,051.52 to the county clerks.

6. Executive Director's Report

A. Staff Activities

Executive Director Herrmann advised the Commission that the Special Programs Section in the Legal Division has set up three in-house training sessions on January 14<sup>th</sup>, February 19<sup>th</sup>, and March 14<sup>th</sup> for Pay-to-Play filers. He said that Pay-to-Play reports are due March 30<sup>th</sup>, for calendar year 2007 activity.

The Executive Director announced that the Lobbying Section in the Compliance Division has established January dates for its in-house training seminars for lobbyists in preparation for the February 15<sup>th</sup> annual report filing date.

Executive Director Herrmann informed the Commission that Deputy Director Brindle is at work on preparing the Clean Elections Report and that it should be ready for Commissioner review at the March meeting. He said that the report, which is required to be "strictly fact-based and shall contain no recommendations with respect to any future pilot project," has to be sent to the legislative leaders by March 28<sup>th</sup>. According to the Executive Director, it is anticipated that the Legislature will make use of the data in the report to plan the future of the Clean Elections Program.

Executive Director Herrmann mentioned that Legal Director Hoekje is in the process of interviewing candidates to fill the Deputy Legal Director position that she vacated and to hire a new Assistant Legal Director to replace Leonard Gicas who vacated this position to become Director of Review and Investigation.

B. Budget Update

Executive Director Herrmann stated that on December 17<sup>th</sup>, Deputy Director Brindle, Director of Finance and Administration Steve Dodson, and he met with the Office of Management and Budget (OMB) officials to discuss ELEC's budgetary needs for Fiscal Year 2009. He indicated that background information on the Commission was provided to assist OMB in its budgetary decision making. Executive Director Herrmann noted that ELEC staff pointed out that the Reform Package of 2004 gave the Commission jurisdiction over 17 new laws including: a State and local pay-to-play prohibition, clean elections, and the most expansive lobbying program in the nation. Executive Director Herrmann told the Commission that he advised OMB that ELEC's operating budget was increased at that time from \$3 million to \$5 million so that the Commission could increase its staff size from 54 to 90 positions. He said that there was a heavy impact on the Commission's workload that included:

- extensive additional regulations,
- more complex advisory opinions,
- new forms and instructions,
- computer system reprogramming,
- website alterations,
- more training sessions,
- increased compliance requests from filers,
- additional media questions,
- more OPRA requests,
- heightened investigative activity, and
- increased requests from sister law enforcement agencies for ongoing technical assistance and support in court cases.

According to Executive Director Herrmann, due to ongoing budget assessments and the hiring freeze falling in the middle of adding staff, ELEC has only 70 of its originally intended 90 positions filled. The Executive Director said, moreover, that an "unfunded" Pay-to-Play disclosure law enacted in 2006 has added filings with ELEC from over 2,000 business entities. Executive Director Herrmann said that they have reported 21,000 contracts worth \$5.2B and \$12M in contributions being made. He noted that the Commission also enforces filings with: every state agency, 21 counties, 566 municipalities, 616 school districts, and 187 fire districts.

Executive Director Herrmann indicated that OMB will be using this background information to assist its formulation of a recommendation to the Governor on ELEC's Fiscal Year 2009 budget.

C. Legislative Developments

Executive Director Herrmann advised the Commission that S-2504 (Codey/Lance et al.), which bans lobbyist benefit passing, did not pass the Legislature although it did receive extensive action in both houses. He added that S-3025 (Lesniak/Kyrillos), which clarifies that nonprofit businesses are not covered by the Pay-to-Play disclosure law, did pass the Legislature on January 7, 2008, and was signed by the Governor on January 13, 2008. Executive Director Herrmann stated that he communicated to the Legislature, the Governor's Office, and the Attorney General that ELEC believes that clarifying the status of nonprofit businesses under the Pay-to-Play disclosure law is important to avoid regulatory confusion. Executive Director Herrmann added that the Commission thinks that, if it were not possible in the lame duck session for the Legislature to review the different types of nonprofit entities to determine whether or not some of them should be covered by the law, such a review should occur in the new session.

D. Winter Meeting Schedule

- February 19, 2008 at 10:00 a.m. in Trenton; and,
- March 18, 2008 at 10:00 a.m. in Trenton.

7. 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. 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.
- C. 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.

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8. 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 1:30 p.m.

Respectfully submitted,

Frederick M. Herrmann, Ph.D.  
Executive Director

FMH/elz