

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION
20 Trinity Street • Hartford, Connecticut 06106 - 1628

Testimony of Stephen F. Cashman
Chairman, State Elections Enforcement Commission
March 16, 2007

Chairpersons Slossberg and Caruso, Ranking members Freedman and Hetherington, and distinguished members of the committee, thank you for the opportunity to present testimony today.

I am here to support portions of H.B. 7372, AN ACT CONCERNING RECOMMENDATIONS CONTAINED IN THE FINAL REPORT OF THE COCHAIRPERSON AND VICE-CHAIRPERSON OF THE GOVERNMENT ADMINISTRATION AND ELECTIONS COMMITTEE REGARDING EVENTS SURROUNDING STATE ELECTIONS ENFORCEMENT COMMISSION File No. 2005-311, and to express concerns about other portions of the bill.

There were valuable lessons learned from our experience last year, including identifying gaps in the law. I think Section 1 addresses concerns about the reach of the contribution and solicitation ban on department heads not extending to the Governor's Chief of Staff and others in high level governmental positions within the state, or someone knowing and willfully inducing another to violate the law, and the Commission supports Section 1. You may want to consider clarifying which state departments are subject to Conn. Gen. Stat. § 9-622(11) (formerly 9-333x(11)). The organization of many departments has changed since the law first passed in 1983, and our investigation revealed that it only applied to departments covered in Conn. Gen. Stat. § 4-5, by prior Commission advisory opinion. The rationale seems outdated now, and we support extending the prohibition to all department heads appointed by the Governor.

We support the public policy in Section 3, which would provide that no person employed in the unclassified service could engage in political activity while on duty or during any period of time when they are expected to perform services for the state, and the ban on the use of state funds, supplies and facilities for political purposes. It is unclear as the bill is drafted who would be expected to enforce this law. Depending upon where it is codified, there could be different implications for whether it can be enforced civilly or criminally, or both, and by whom. If you place it in the State Personnel Act, the DAS Commissioner would enforce it, and if you place it in the election laws, the Commission would enforce it.

I must express the Commission's strong opposition to Section 6, which would bar the Executive Director and General Counsel from being involved in any investigation or settlement of any matter before the commission. We have reorganized the agency to comply with the mandates of Public Act 05-5 and as a practical matter, our Director of

Legal Affairs and Enforcement now oversees our investigations and enforcement actions. Our Executive Director and General Counsel is now responsible for the overall administration of the agency and does not have a role in cases. Although we are growing, we are still a small agency by state agency standards. As such, staff members within the agency take on different roles in different matters. The Uniform Administrative Procedures Act contemplates and provides for people performing different roles in different matters. We do not wish to be precluded from tapping into the 28 years of institutional memory that our present Executive Director has acquired, or utilizing him on a particular case if the existing Director of Legal Affairs and Enforcement has a conflict. The Commission also has new responsibilities as the state agency responsible for receiving and hearing federal Help America Vote Act complaints and voter appeals under Conn. Gen. Stat. § 9-317. Each of these new procedures has a strict and short timeline (hearings within 90 and 21 days, respectively) and if we receive numerous complaints we will need all attorneys on staff to assist with hearing and deciding such cases. The agency has operated successfully for over 30 years, and a single case should not merit a wholesale change in its operations. The Commission does not wish to criminalize his participation in a core function of the agency that he has overseen for 28 years. The Executive Director is also responsible for evaluating the other managers in the agency, including the Director of Legal Affairs and Enforcement. I can conceive of no other situation where an executive would be statutorily precluded from involvement in something he or she is ultimately responsible for, and believe it sets up a problem of accountability. Again, we have changed our structure so that the Executive Director is not generally responsible for enforcement matters, but it is entirely another matter to statutorily bar him from any involvement. That might mean that the current Director of Legal Affairs and Enforcement could not ask him a hypothetical question, without disclosing names, as to whether he recalls an investigation into or a case concerning a particular type of fact pattern so that she could review it and see what the Commission did in that matter. The Commission believes that the public would be ill served by formally cutting off the ability to have that conversation.

The Commission generally supports Section 7 to the extent that it attempts to create more autonomy and independence from the Department of Administrative Services. As you may have seen in the report we provided to this committee in October, we had considerable difficulty creating positions necessary to implement Public Act 05-5, even though such positions were funded and approved by the legislature. However, we still want to explore the implications of our present managerial employees, who are all in the classified service, being moved to the unclassified service. What we don't want to do is create vulnerability or the opportunity for repercussions of politically unpopular decisions against our staff. As you know, our staff investigates and audits people in positions of power. We want them to be able to perform their sensitive functions impartially without fear of repercussion, and would seek to preserve their independence. We would be happy to work with the committee on language to achieve that goal. The bill seems to only affect managerial employees, and as we read it, would not affect the majority of our union employees.

With respect to subsection (a) of Section 8, which requires a written authorization to communicate with the Commission on behalf of the subject of an investigation, a change in the law is unnecessary. The Commission instituted this requirement as a matter of policy last year, and has sought to codify it more formally in regulations submitted to the Regulations Review committee earlier this month.

The Commission strenuously opposes subsection (b) of Section 8, which requires the Commission to provide any and all information obtained by the commission during an investigation to the subject of the investigation. The bill as drafted does not specify a time period, and therein lies our objection. It is a dangerous proposition to require such disclosure during the pendency of an investigation. As you know, our investigations sometime lead to criminal prosecutions, and the law already specifies that we are a law enforcement agency for such purposes, and investigation records are exempt until the conclusion of the case. See Conn. Gen. Stat. §§ 9-7b(a)(15) and 1-210(b)(3). Once our cases are concluded, most information in our files becomes available to anyone who requests it under FOI. Requiring disclosure of staff investigation reports or evidence gathered earlier can significantly interfere with and compromise the integrity of our investigations, and could hamper our ability to work cooperatively with other law enforcement agencies. It has been our experience, for example, that early disclosure can invite tampering with witnesses. In absentee ballot fraud investigations, cases that already involve alleged inappropriate contacts between a voter and a party worker or campaign worker or a candidate, early disclosure of investigative results could invite a Respondent to contact a witness and intimidate them into not testifying or encourage them to alter their testimony. In the Garcia case, the witnesses were approached and intimidated by the Respondents, and individuals were charged criminally. Respondents in such situations know whose ballots they took, but won't know which electors are cooperating with us. Don't make a difficult job more difficult by handicapping our investigators.

There is a time and place for such disclosures, but it is not during the pendency of an investigation. The appropriate time is in preparation for trial or a hearing. Such protections are already in place: The Commission's regulations provide that parties to a contested case hearing must exchange witness lists seven days prior to the hearing. The failure to do so can result in the exclusion of witness testimony. See Regulations of Connecticut State Agencies § 9-7b-39(b). The Uniform Administrative Procedures Act provides for disclosure of information at the hearing stage. See Conn. Gen. Stat. § 4-177c, which provides that each party to a contested case shall be afforded the opportunity to inspect and copy relevant and material records, papers and other documents not in the possession of such party. As a measure of comparison, in criminal prosecutions, the only information required to be provided is exculpatory information. Witness statements are not required to be provided to the defense until after a witness testifies. Witness statements are exempt from disclosure under FOI. It seems unwise and unnecessary to provide more disclosure to a Respondent in a civil administrative investigation than in a criminal investigation and trial. We would not object to the disclosure of exculpatory information, but the Commission staff should be permitted to complete the investigation before any disclosure. As a practical matter, many Commission cases are dismissed at

that point because the evidence does reveal a violation. Disclosure under this provision should also be upon request. Such requests are not common, and it would unnecessarily expend resources to require the Commission to inundate people with documents that they had not requested.

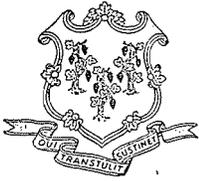
The Commission objects to subsection (c) of Section 8, which would require the Commission to adopt regulations to separate the negotiation and settlement process from the hearing process, such that any panel that hears a preliminary complaint shall not be the panel that judges such complaint in the event that negotiation and settlement efforts fail. The bill also proposes an intermediate step prior to assessment of a civil penalty, which is entirely redundant with the procedures already in place under the Uniform Administrative Procedures Act. Pursuant to Conn. Gen. Stat. §9-7b, and derived from constitutional due process, an individual who may be assessed a civil penalty must first be provided the opportunity to have a hearing. To the extent that this proposal derives from the Respondents' comments in File No. 2005-311, please understand that *every such Respondent had an opportunity for a hearing before the Commission and waived it* and entered voluntarily into a consent agreement. Each of the sixteen consent agreements in that matter contains express language that the right to a hearing is being waived. The Commission's existing procedures comport with due process and the Uniform Administrative Procedures Act, and have been reviewed and approved by the Attorney General. That being said, we heard and heeded the comments made last year, and now provide a written explanation of the Commission's procedures to each Respondent and Complainant when a complaint is filed (attached). That written explanation includes an express notice that Respondents have a right to a hearing and are not obligated to accept a settlement offer. Encumbering the process will also delay outcomes, and justice delayed is justice denied. Candidates often complain to us that delay in case outcomes hamper their reputation interests.

The Commission does not have preliminary hearings, and I believe the bill refers to the Commission's practice of reviewing the investigation report and authorizing a settlement in executive session. This practice does not bias the Commissioners in the event that one of them later has to serve as a hearing officer. First of all, a decision in a contested case hearing, pursuant to the UAPA, must be based solely upon the evidence on the record at the hearing. Secondly, there is usually a considerable time lag between the Commission meeting authorizing a settlement, and a hearing if one is scheduled. It is unlikely that an individual Commissioner will recall the specific details of a report that they reviewed months ago, and it is the prosecutor's responsibility to prove the allegations at the hearing. The Commission feels that it is important to retain the bi-partisan structure of the present system. The proposed process will be difficult working with 5 Commissioners to preserve a separate panel, but if that is the Committee's will, we may need more Commissioners, given all of the other new functions the Commission is performing pursuant to the Comprehensive Campaign Finance reform in Public Act 05-5.

The Commission has no objection to Sections 9 and 10, but we should point out that the forms that we have already designed will have to be changed to provide space for disclosure of a campaign manager. The Commission also believes that the amendment in

Section 9 more appropriately belongs in Section 9-604, which governs candidate committees, and not in Section 9-605, which applies to political committees.

Thank you for the opportunity to testify, and I will be happy to answer any questions.



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EXPLANATION OF COMMISSION PROCEDURES

Complaint

When a complaint is filed that alleges facts, which if proven true, would constitute a violation of state election or campaign finance laws, it will be docketed and assigned to a staff member to investigate. If a complaint does not allege facts, which if proven true, would constitute a violation of a Connecticut election law statute within the Commission's jurisdiction, it may not be docketed and the complainant will be so advised in writing.

The Investigation

The investigator will analyze documents, collect evidence and interview witnesses, as necessary in a particular case, and prepare an investigation report for the case manager and Commission members to review.

Representation by Counsel

A Respondent may be represented by an attorney at any stage of the Commission's complaint or hearing process, although it is not required.

Commission Review

The Commission typically meets once a month, and when a complaint is on its agenda at such a meeting, it may 1) conclude that there is no reason to believe that a violation of law within its jurisdiction occurred and dismiss the matter; 2) authorize the staff to try and resolve the matter without having a hearing; 3) find reason to believe that a violation of law occurred and proceed to a hearing; or, 4) refer the matter to the Chief State's Attorney's office for criminal prosecution.

Settlement Offers

The Commission resolves many complaints by way of consent agreement. It is an opportunity to resolve the matter without having a hearing on mutually agreeable terms. No one is obligated to accept a settlement offer by the Commission.

Hearing

If the Commission finds reason to believe that a violation occurred, a hearing officer will be appointed and a date scheduled. At that point the matter becomes a "contested case" and hearings are conducted pursuant to the Uniform Administrative Procedures Act (Conn. Gen. Stat. §4-176, et. seq.) and the Commission's Regulations of Practice and Procedure (available on our website at www.ct.gov/seec). A staff attorney of the Commission will act as a civil prosecutor at the hearing, and present evidence and make legal arguments on behalf of the State. A Respondent is entitled to have legal counsel represent him or her at the hearing, cross-examine the State's witnesses, present evidence

and call witnesses in his or her defense. The hearing officer will prepare a hearing officer's report, which is sent to the parties in advance of the next Commission meeting.

Final Decision

A signed settlement agreement between the parties has the force and effect of a final decision under the Uniform Administrative Procedures Act once it is approved by the Commission. A proposed hearing officer's report may be accepted, modified or rejected by the full Commission, and is not a final decision until approved by the Commission. Parties to a contested case have the opportunity to make argument to the full Commission for or against the adoption of a hearing officer's report if the case was heard by a single hearing officer.

Disclosure under the Freedom of Information Act

The fact that a complaint has been filed is public, and anyone may request and receive a copy of the complaint at any time thereafter. The Commission has discretion during the pendency of case, particularly the investigation and settlement negotiation phases, to withhold access to other documents in the file.

The Commission typically meets in executive session to consider whether or not to commence enforcement proceedings or authorize staff to negotiate a settlement agreement. Any formal votes are taken in public session.

The public session portion of Commission meetings and contested case hearings are open to the public under the Freedom of Information Act, and may be televised on CTN, the state's television network. Once the file is closed, most documents are available to the public upon request, unless a specific exemption applies.