NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION v. SHARPE JAMES

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0726-12T4

NEW JERSEY ELECTION LAW

ENFORCEMENT COMMISSION,

Plaintiff-Respondent,

v.

SHARPE JAMES, CHERYL JOHNSON,

AND ELECTION FUND OF SHARPE

JAMES,

Defendants-Appellants.

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January 16, 2015

Argued May 28, 2014 Decided

Before Judges Fisher, Koblitz and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-131-11.

Angelo J. Genova argued the cause for appellants (Genova Burns Giantomasi Webster, L.L.C., attorneys; Mr. Genova and Alan Dexter Bowman, of counsel and on the brief; Celia S. Bosco and Brett M. Pugach, on the brief).

Lindsay Puteska, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Puteska, on the brief).

The opinion of the court was delivered by

O'CONNOR, J.A.D.

Defendants Sharpe James, Cheryl Johnson, and the Election Fund of Sharpe James (campaign fund or fund) appeal from an order granting summary judgment to plaintiff New Jersey Election Law Enforcement Commission (ELEC) and denying their cross motion for summary judgment. The trial court found that James and Johnson (defendants) violated the New Jersey Campaign Contributions and Expenditures Reporting Act (Act), N.J.S.A. 19:44A-1 to -47, specifically N.J.S.A. 19:44A-11.2(a)(6) and its implementing regulations, for using campaign funds to pay for personal legal expenses. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

James was the mayor of Newark from July 1, 1986 to June 30, 2006, and served as a state senator from June 1999 to January 2008. In anticipation of running for re-election as mayor, in 2002 James created the Election Fund of Sharpe James, a "candidate committee." See N.J.S.A. 19:44A-9. The purpose of a candidate committee is to receive campaign contributions and make expenditures in accordance with the Act. See N.J.S.A. 19:44A-3(q). Expenditures from a candidate committee must be made through the treasurer of the committee. N.J.A.C. 19:25-6.4. Johnson was the treasurer of this candidate committee. She also served as the chief of staff of James s mayoral office.

On July 12, 2007, a federal grand jury charged James with, among other things, conspiracy, embezzlement, and fraud in a thirty-three count indictment. James was alleged to have used city-issued credit cards to pay his and others' personal expenses while on vacation in Martha's Vineyard, Rio de Janeiro, the Dominican Republic, and Puerto Rico. The indictment also alleged James misused his position as mayor and senator by arranging the sale of real property owned by Newark at substantially reduced prices to James's friend, Tamika Riley, who re-sold the property at significantly higher prices, yielding thousands of dollars in profit.1 In April 2008, James was convicted of conspiracy, embezzlement, fraud, fraud by wire, and tax evasion, and sentenced to twenty-seven months in federal prison.

Approximately one year before he was indicted, James became aware from reports in the media that he was the subject of a criminal investigation being conducted by the United States Attorney's Office and the New Jersey Attorney General's Office.

On August 29, 2006, Johnson telephoned ELEC and reported that James's mayoral campaign records were subpoenaed, and inquired whether the money in the campaign fund could be used to pay for counsel fees.2 Johnson did not specify the purpose for needing legal representation. A representative from ELEC referred Johnson to Section N of the Compliance Manual for Candidates, a publication issued by ELEC. See New Jersey Election Law Enforcement Commission, Compliance Manual for Candidates 32 (2006). Section N states

Contributions received by a candidate or committee may be used for the reasonable fees and expenses of legal representation when the need for legal representation arises directly from, and is related to, the campaign for public office, or from the duties of holding public office. Legal fees and expenses incurred in connection with the candidate or officeholder's personal or business affairs may not be paid from contributions.

On August 30, 2006, James retained Greenbaum, Rowe, Smith & Davis LLP (Greenbaum). The retainer agreement set forth the scope of the firm's representation of James, stating

The purpose of this letter is to formalize our arrangement with respect to legal services provided to you by the firm. You have consulted us with respect to investigations being undertaken by the United States Attorney's Office for the District of New Jersey and the New Jersey Attorney General's Office. I have confirmed the existence of those investigations with representatives of those respective offices. We have agreed that this firm will undertake to represent you with respect to those investigations until they are terminated or until formal action is taken by one of those offices.

The day James signed the retainer agreement, Johnson signed a check made payable to Greenbaum for $35,000 drawn from funds held by the candidate committee. On October 25, 2006, Johnson telephoned ELEC3 and advised that James was not going to run for re-election, but that the money in the fund was being used to pay legal fees. Johnson asked if the account could be kept open until the "legal investigation" was over and the legal fees paid, or whether the account had to be closed. The ELEC representative asked what the legal fees were for, and Johnson replied that James was "under investigation pertaining to him being a mayor. It is a federal and State investigation I guess for criminal charges." The ELEC representative told Johnson that she would look into the matter and call Johnson back. The following day, another representative called Johnson and said

I'm returning your call about the use of campaign funds for legal expenses. We cannot comment on what expenses were already made. Our regulations do not specifically cover your situation. If you believe there will be future legal expenses you will need to request an advisory opinion.[4] [An advisory opinion can be provided in] 10 days.

Defendants did not request an advisory opinion.

Between November 2006 and September 2007, Greenbaum forwarded a total of nine bills to James. In September 2007, Greenbaum ceased representing him. All of Greenbaum's bills were paid with money from the campaign fund. Although these bills total $79,161.79, it is not disputed Johnson wrote three checks from the fund to Greenbaum that in the aggregate were $86,504.08.5 Of the $79,161.79 billed to James, $30,871.35 was for legal services rendered or expenses incurred after James was indicted. Another two checks totaling $7500 were also drawn from the fund to pay for legal services provided to Johnson by attorneys from another firm. Johnson sought legal counsel when she was served with subpoenas from the United States Attorney's Office that commanded that she provide documents and appear before a federal grand jury.

Consistent with the retainer agreement, Greenbaum's billing statements indicate the legal services provided were in connection with the criminal investigation. Although during their depositions James and one of the attorneys from Greenbaum claimed that some of the legal services were for other matters, defendants did not identify the entries on the billing statements that were for services unrelated to the criminal investigation or, for that matter, the amount billed for these unrelated services.6

It is undisputed James's attorneys advised him that he could use money from the campaign fund to pay counsel fees rendered in connection with the criminal investigation before, although not after, an indictment.

On May 11, 2011, ELEC filed a complaint in the Chancery Division alleging James and Johnson violated N.J.S.A. 19:44A-11.2(a)(6), N.J.A.C. 19:25-6.5, N.J.A.C. 19:25-6.7, and N.J.A.C. 19:25-6.10 because $94,004.08 was withdrawn from the fund to pay their respective attorneys' legal services related to the criminal investigation. ELEC sought to have Johnson and James assessed the maximum statutory civil penalties under the Act and permanently enjoined from making additional expenditures from the fund. ELEC also alleged defendants breached the fiduciary duty owed to campaign contributors under the common law when they took money from the fund for their personal use; ELEC sought restitution of that money.

ELEC filed a motion and defendants a cross motion for summary judgment. The primary issue before the trial court was whether the Act prohibited using money from the fund for legal fees before an officeholder was indicted. Defendants concede the use of campaign funds to pay for counsel fees after indictment is prohibited under the Act. The trial court concluded such expenditures were not permitted and granted ELEC's motion for summary judgment. The court ordered James and Johnson to reimburse the fund $94,004.08, found them jointly and severally liable for penalties totaling $30,000, and permanently enjoined them from making any additional expenditures from the fund. The court denied defendants' cross motion for summary judgment, which sought dismissal of the complaint on the ground it was time-barred.

II

Summary judgment is appropriate where there are no genuine issues of material fact. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed.2d 202, 214 (1986). Viewing the facts in a light most favorable to the non-moving party, a trial court must determine whether the materials presented "are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Carmichael v. Bryan, 310 N.J. Super. 34, 47 (App. Div. 1998). If a court does not so find, it "should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540. Credibility findings are not germane for judicial determination on summary judgment, instead those issues should be submitted to a jury. Ibid.

This court uses the same standard when reviewing an appeal from summary judgment. Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010). While the trial court's legal conclusions are owed no deference, the court should affirm the judgment if it finds that the trial court's conclusions of law were correct. Id.

Under the Act, a candidate committee's use of campaign funds is limited

a. All contributions received by a . . . candidate committee . . . shall be used only for the following purposes

(1) the payment of campaign expenses;

(2) contributions to any charitable organization . . . ;

(3) transmittal to another . . . candidate committee . . . for the lawful use by such other . . . committee;

(4) the payment of the overhead and administrative expenses related to the operation of the candidate committee

. . . ;

(5) the pro rata repayment of contributors; or

(6) the payment of ordinary and necessary expenses of holding public office.

[N.J.S.A. 19:44A-11.2(a) (emphasis added).]

N.J.A.C. 19:25-6.5(a) also limits the use of campaign funds to those listed in N.J.S.A. 19:44A-11.2(a). Here, only the sixth use is in issue.

The word "ordinary" is not defined in the Act. Therefore, this word must be accorded its "'generally accepted meaning, according to the approved usage of the language.'" In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 264 (2010) (quoting N.J.S.A. 1:1-1). The word "ordinary" has been defined as "customary[,] usual[,] normal." Webster's Unabridged Dictionary of the English Language 1363 (2001). In addition, N.J.A.C. 19:25-6.7(a) defines the term "ordinary and necessary expenses of holding public office" as used in N.J.A.C. 19:25-6.5(a)(6) to mean "any expense that reasonably promotes or carries out the responsibilities of a person holding elective public office . . . ."

When defendants drew money from the fund in 2006 and 2007, N.J.A.C. 19:25-6.10(a) permitted campaign funds to be used for legal fees, but only for those fees which arose directly from the duties of holding public office.7 Further, subsection (c)8 of this regulation prohibited as it does currently the use of funds for legal fees and expenses incurred in connection with an officeholder's personal or business affairs, or which would otherwise qualify as "personal use" under N.J.A.C. 19:25-6.5(c). See N.J.A.C. 19:25-6.10(c). The definition of "personal use" under N.J.A.C. 19:25-6.5(c) means "any use of contributions to pay or fulfill a commitment, obligation or expense of any person that would arise or exist irrespective of the candidate's campaign or irrespective of the candidate's ordinary and necessary expense of holding public office."9

III

On appeal, James contends the counsel fees he incurred pre-indictment were an ordinary and necessary expense of holding public office, as hiring counsel to ward off or prepare for potential criminal charges is a necessary duty and responsibility of holding public office and is an expense that would not have arisen but for the fact he was holding public office. Johnson argues she was entitled to use campaign funds to hire an attorney to obtain advice on how to respond to the subpoenas, as well as prepare her for testifying before the grand jury. Both defendants argue the trial court erred when it determined they could not use campaign funds to retain counsel for these purposes. We disagree.

There is no case addressing the use of campaign funds before an officeholder has been indicted. However, while not entirely analogous because the standard of review differs from the one here, the

analysis in In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, supra, 201 N.J. at 254 is instructive.10 In that matter, the issue was the propriety of using campaign funds to pay for legal expenses incurred by an officeholder post-indictment.

In December 2007, State Senator Wayne Bryant sought an advisory opinion from ELEC questioning whether he could use campaign funds from his candidate committee to pay for his legal defense after indictment. In January 2008, ELEC issued Advisory Op. No. 01-2008, (ELEC January 25, 2008), http://www.elec.state.nj.us/pdffiles/ao/2008/ao012008.pdf, in which it concluded that criminal defense costs are not an ordinary and necessary expense of holding public office under N.J.S.A. 19:44A-11.2(a)(6), N.J.A.C. 19:25-6.5(a)(6), N.J.A.C. 19:25-6.5(c), N.J.A.C. 19:25-6.7, and N.J.A.C. 19:25-6.10, because such expenditures do not reasonably promote or carry out the responsibilities of a person holding elective office. In addition, ELEC found that such expenses were an impermissible personal use under N.J.A.C. 19:25-6.10(b) and N.J.A.C. 19:25-6.5(c).

We affirmed ELEC, finding nothing plainly unreasonable in its construction of the Act or interpretation of N.J.A.C. 19:25-6.10. In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, supra, 404 N.J. Super. at 39. Our decision was affirmed by the Supreme Court. In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, supra, 201 N.J. 254. The Court s findings and observations are edifying

Despite blaring headlines that announce the most recent prosecution and conviction of a public official, we have yet to reach the point when it can be said that defending against a federal or state criminal indictment alleging corrupt practices is an "ordinary" expense of holding public office. A grand jury indictment is not a customary, or usual, or normal incident of holding public office, nor does it occur in the regular course of events. . . . We cannot conclude that the Legislature intended that defending against a federal or state criminal indictment would be an ordinary incident of holding public office, or that the use of campaign funds to cover such defense costs would be an "expense that reasonably promotes or carries out the responsibilities of a person holding elective public office," N.J.A.C. 19:25-6.7(a) (emphasis added).

Moreover, contributors to a campaign for elective office -- reading N.J.S.A. 19:44A-11.2(a) -- would hardly contemplate that their donations are amassed for a potential criminal defense fund.

[Id. at 264.]

The reasoning in In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008 applies with equal force to the facts before us.

First, there is no material distinction between the fees incurred while under criminal investigation before an indictment and after an indictment. In both instances a defense attorney's goals are the same: to provide those legal services that will reduce the likelihood a client will be convicted of a crime.

Second, and more to the point, retaining an attorney to attempt to stave off an indictment or, if one appears inevitable, to prepare for the impending criminal charges is by no means an ordinary expense of holding public office. There is no support for the claim that being under criminal investigation is a

customary, usual, or normal occurrence when one holds public office. Moreover, using campaign funds to pay defense costs is not one that reasonably promotes or carries out the responsibilities of a person holding elective public office, and defendants did not proffer any cogent argument in support of such premise. The money taken from the fund was for James's personal benefit. He used the money in an effort to keep from being indicted or, at the least, reduce the severity of charges in the indictment. The fact James used his office to further his criminal activities or that his office records were subpoenaed hardly makes his defense costs an ordinary expense of holding office.

As for Johnson, while she was never the target of a criminal investigation, there is no provision in the Act permitting the use of campaign funds for assistance in responding to subpoenas in a criminal investigation or preparing for grand jury testimony. While she may have believed her legal expenses were not personal ones, nevertheless, she could not use the fund to reimburse her for these expenses, as her legal fees also were not an ordinary expense of holding public office.

IV

Defendants claim ELEC has primary jurisdiction to determine whether a party has violated the Act, and therefore, the Superior Court lacks subject matter jurisdiction, requiring that this matter be remanded to ELEC. Defendants did not raise this argument before the trial court but the issue of subject matter jurisdiction may be raised at any time. Macysyn v. Hensler, 329 N.J. Super. 476, 481 (App. Div. 2000).

The Legislature intended that ELEC have primary jurisdiction over complaints alleging violations of the Act, except in two limited circumstances, see N.J.S.A. 19:44A-21 and N.J.S.A. 19:44-22.1, none of which applies here, although the Act does permit ELEC to initiate a civil action in court to, among other things, "enjoin[ ] violations." N.J.S.A. 19:44A-6(b); In re Contest of the Democratic Primary Election of June 3, 2003 for Office of Assembly of Thirty-First Legislative Dist., 367 N.J. Super. 261, 283 (App. Div. 2004).

But a court need not defer to an agency's primary jurisdiction if after considering the following four factors it determines retaining jurisdiction is appropriate: "1) whether the matter at issue is within the conventional experience of judges; 2) whether the matter is peculiarly within the agency's discretion, or requires agency expertise; 3) whether inconsistent rulings might pose the danger of disrupting the statutory scheme; and 4) whether prior application has been made to the agency." Muise v. GPU, Inc., 332 N.J. Super. 140, 160 (App. Div. 2000) (quoting Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 85 (App. Div. 1999)). To curtail further delay, we invoke our original jurisdiction, R. 2:10-5, to settle the question of jurisdiction; we conclude that, under these narrow, limited factual circumstances, the court does have subject matter jurisdiction.

On the first prong, the issue is whether campaign funds can be used to finance an officeholder's defense costs pre-indictment. ELEC has already determined such funds cannot be used post-indictment, a decision we and the Supreme Court affirmed. In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, supra, 404 N.J. Super. at 39. The issue before the court here is practically indistinguishable from that which was considered in Advisory Op. No. 01-2008, (ELEC January 25, 2008), http://www.elec.state.nj.us/pdffiles/ao/2008/ao012008.pdf. As ELEC has not had any other case

pertaining to the use of campaign funds to pay counsel fees for defense costs, presently the court's experience in handling this issue is commensurate with ELEC's.

On the second prong, there is nothing to suggest this issue is peculiarly within the agency's discretion or requires agency expertise. As for the third prong, given the courts' rulings on this issue, there is no danger of an inconsistent decision. The fourth prong whether there has been a prior application made to the agency does not apply here.

Further, we are mindful of the practical considerations of remanding this matter to ELEC to decide this matter. ELEC's determinations on the issues likely would be the same as they were in the trial court.

Defendants argue the Act neither authorizes restitution nor injunctive relief. First, N.J.S.A. 19:44A-6(b) permits ELEC to seek injunctive relief. Second, a party's remedies are not limited to those within an agency's authority unless a statute expressly states otherwise. Muise, supra, 332 N.J. Super. at 163. "[A] court can consider all judicial remedies, including damages, which are beyond [an] agency's authority; a legislative intent to defeat them will be inferred only if the Legislature has 'explicitly limited the availability of that remedy or relief.'" Ibid. (quoting Boldt, supra, 320 N.J. Super. at 87). The Act neither expressly prohibits injunctive relief nor restitution as a remedy.

V

Defendants challenge the imposition of the $30,000 penalty. The court imposed a penalty of $6,000 for each of the five checks disbursed from the fund; $6,000 is the minimum penalty that can be imposed for a disbursement from a campaign fund. N.J.S.A. 19:44A-22; N.J.A.C 19:25-17.4. Defendants complain that the total penalty that could have been imposed was $6,000, reasoning the removal of the entire $94,004.08 constituted one offense. We disagree. The language in N.J.A.C. 19:25-17.4 clearly contemplates that a penalty for each disbursement is to be imposed. But before imposing the penalty, the court failed to consider the aggravating and mitigating factors in N.J.A.C. 19:25-17.3C. See also N.J.A.C. 19:25-17.4. Accordingly, we vacate the penalty imposed upon James and Johnson, and remand for a hearing at which the trial court will consider the aggravating and mitigating factors, and determine the appropriate penalty for each defendant.

Defendants contend there is no legal authority compelling them to reimburse the fund $94,004.08. However, "'[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" Thompson v. City of Atlantic City, 190 N.J. 359, 383 (2007) (quoting Restatement (First) of Restitution 1 (1937)); see also Jersey City v. Hague, 18 N.J. 584, 595-96 (1955) ("Restitution, by virtue of its adaptability to individual cases on equitable principles may . . . reach situations beyond the grasp of other civil or criminal remedies and do justice on equitable principles . . . always on the fundamental basis of preventing the unfaithful public official or public body profiting from his or its wrongdoing."). But we do not perceive the rationale for making both responsible for reimbursing the fund $94,004.08. By doing so, each defendant is required to replenish the fund with money that was removed and used solely for the benefit of the other.

Johnson removed only $7500 to pay her counsel fees, yet she was ordered, along with James, to reimburse the fund for the $86,504.08 that was paid to Greenbaum for James's counsel fees. Likewise, James was ordered to reimburse the fund for the $7500 that was removed to pay Johnson's counsel fees. Therefore, we reverse the determination requiring defendants to reimburse the fund $94,004.08 and remand for the entry of an order requiring James to reimburse the fund $86,504.08 and Johnson $7500.

VI

Defendants appeal the denial of their cross motion, which asserted ELEC's complaint was time barred under N.J.S.A. 2A:14-10(a). This statute states in relevant part

All actions at law brought for any forfeiture upon any penal statute made or to be made, shall be commenced within the periods of time herein prescribed

a. Within 2 years next after the offense committed or to be committed against the statute, when the forfeiture is or shall be limited by the statute to the state of New Jersey only;

As defendants used campaign funds in 2006 and 2007 and the complaint was not filed until 2011, they argue the complaint is time-barred under this statute. We disagree.

Under N.J.S.A. 2A:14-1.2(a), ELEC had ten years to file a complaint. This statute states in pertinent part

a. Except where a limitations provision expressly and specifically applies to actions commenced by the State or where a longer limitations period would otherwise apply, and subject to any statutory provisions or common law rules extending limitations periods, any civil action commenced by the State shall be commenced within ten years next after the cause of action shall have accrued.

N.J.S.A. 2A:14-1.2 applies to actions brought by the State unless it is "expressly and specifically" clear that another limitations period applies. Dep't of Envtl. Prot. v. Larchmont Farms, Inc., 266 N.J. Super. 16, 34 (App. Div. 1993), certif. denied, 135 N.J. 302 (1994). There is no provision in any authority expressly stating the limitations period in N.J.S.A. 2A:14-10 applies to causes of action asserted by ELEC here. Moreover, N.J.S.A. 2A:14-10 applies to actions brought for a forfeiture upon any penal statute. While ELEC sought to have defendants penalized under the Act, this was not an in rem action in which ELEC sought forfeiture of any property. See Larchmont Farms, Inc., supra, 266 N.J. Super. at 31 (citing State v. 1979 Pontiac Trans Am, 98 N.J. 474, 480 (1985)). See also State v. One 1986 Subaru, 230 N.J. Super. 451, 455 (App. Div. 1989), aff'd in part and rev'd in part, 120 N.J. 310 (1990). Accordingly, the complaint was not time-barred because it was filed within ten years after the causes of action accrued.

VII

To the extent that any arguments raised by defendants have not been explicitly addressed in this opinion, it is because we are satisfied that the arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

1 Riley was also charged in the indictment.

2 As of March 31, 2013, there was $609,874.43 in the fund.

3 ELEC does not record telephone conversations but, when an ELEC representative receives a call, a "Telephone Conversation Record" form is completed setting forth the content of the conversation with the caller. Defendants do not contend the information on the forms was inaccurate. During oral argument before the trial court, ELEC clarified that those who answer the telephone at ELEC are not attorneys.

4 The Act authorizes ELEC to issue advisory opinions. N.J.S.A. 19:44A-6(f) states

The commission through its legal counsel is authorized to render advisory opinions as to whether a given set of facts and circumstances would constitute a violation of any of the provisions of this act, or whether a given set of facts and circumstances would render any person subject to any of the reporting requirements of this act.

5 We were unable to account for the $7342.29 discrepancy between the $79,161.79 billed to James and the $86,504.08 paid to Greenbaum from the campaign fund; however, defendants do not dispute Greenbaum was paid $86,504.08 from the fund for legal services.

6 In their brief, defendants argue that even a "cursory review" of various billing entries concerning the following topics reveals that not all of the billing pertained to the criminal investigation: legal research and legal memorandum on the use of campaign funds for legal representation; meeting with client over recent media allegations; communications regarding certain travel records; conversations concerning a Star Ledger article;

and a "review of records" pertaining to the campaign fund. Given the allegations in the indictment, it is not apparent to us that these services were unconnected to the criminal investigation. In our view, none of these entries or the deposition testimony created a genuine issue of material fact warranting submission to the trier of fact. See R. 4:46-2(c).

7 In 2009, this regulation was amended, in part, to restrict the use of campaign funds to pay the legal fees and expenses arising directly from the duties of holding public office to the "ordinary and necessary" duties of holding public office. See N.J.A.C. 19:25-6.10(a) (emphasis added).

8 Subsection (c) of N.J.A.C. 19:25-6.10 had been subsection (b) until recodified as subsection (c) in 2009. See 41 N.J.R. 393(a) (Jan. 20, 2009); 41 N.J.R. 2142(b) (May 18, 2009).

9 In response to our suggestion in In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, 404 N.J. Super. 29, 41 (App. Div. 2008), aff'd, 201 N.J. 254 (2010), that a regulation be adopted clarifying

the use of campaign funds to pay for criminal defense costs, in 2009 the following language was added to N.J.A.C. 19:25-6.10

Permissible use of funds for legal fees and expenses shall not include legal fees and expenses for defense of a candidate or officeholder, who is the subject of a criminal inquiry or criminal investigation, or defense of a criminal indictment or other criminal proceeding.

[N.J.A.C. 19:25-6.10(b). See 41 N.J.R. 393(a) (Jan. 20, 2009); 41 N.J.R. 2142(b) (May 18, 2009).]

10 In In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, the standard of review was whether ELEC'S interpretation of the Act and its implementing regulations was "plainly unreasonable." See Reilly v. AAA Mid-Atlantic Ins. Co. of N.J., 194 N.J. 474, 485 (2008).