



NEW JERSEY LAW REVISION COMMISSION

Revised Draft Tentative Report Concerning Interpretation of the Vote By Mail Law in N.J.S. 19:63-26

October 10, 2023

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **December 19, 2023**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Project Summary

In New Jersey, the grounds for contesting an election,¹ and the procedures and rules governing voting by mail (Vote By Mail Law²) are contained in Title 19.³ An election “may be contested” based upon one or more of the nine grounds enumerated in N.J.S. 19:29-1,⁴ including “[w]hen . . . legal votes rejected at the polls [are] sufficient to change the result.”⁵ By contrast, N.J.S. 19:63-26 directs that “[n]o election shall be held invalid due to any irregularity or failure in the preparation or forwarding of any mail-in ballots.”⁶

The *In re Election for Atlantic County Freeholder District 3 2020 General Election* decision addressed whether N.J.S. 19:29-1 “appl[ies] to an election pursuant to the Vote By Mail Law.”⁷ The *In re Atlantic County Election* Court held that, if applicable to a contest claim, “N.J.S.A. 19:63-26 operates as a rebuttable presumption [when a] contestant . . . assert[s] one or more of the grounds under N.J.S.A. 19:29-1.”⁸

The Commission released a Tentative Report in October 2022 proposing modifications to N.J.S. 19:63-26 and N.J.S. 19:29-1, intended to clarify that N.J.S. 19:63-26 creates a rebuttable presumption when vote by mail elections are contested pursuant to N.J.S. 19:29-1.⁹ Following outreach to knowledgeable and interested individuals and organizations, an Update Memorandum was presented to the Commission in April 2023 summarizing the feedback.¹⁰

At the April 2023 Commission meeting, the Commission authorized additional research and outreach regarding case law holding that election contest claims premised on Campaign Contributions and Expenditures Reporting Act (Reporting Act) violations are subject to the jurisdiction of the Election Law Enforcement Commission (ELEC), as well as the impact of recent election law changes on the relevant statutes.¹¹

The Appendix sets forth proposed modifications to N.J.S. 19:63-26, N.J.S. 19:29-1, and

¹ N.J. STAT. ANN. §§ 19:29-1 to -14 (West 2023).

² N.J. STAT. ANN. §§ 19:63-1 to -31 (West 2023).

³ N.J. STAT. ANN. §§ 19:1-1 to :63-31 (West 2023).

⁴ N.J. STAT. ANN. § 19:29-1 (West 2022).

⁵ N.J. STAT. ANN. § 19:29-1e.

⁶ N.J. STAT. ANN. § 19:63-26 (West 2023).

⁷ *In re the Election for Atl. Cnty. Freeholder Dist. 3 2020 Gen. Election*, 468 N.J. Super. 341, 357 (App. Div. 2021).

⁸ *Id.* at 360.

⁹ N.J. Law Revision Comm’n, *Tentative Report Concerning Interpretation of the Vote By Mail Law in N.J.S 19:63-26* (Oct. 10, 2022), www.njlrc.org (last visited Oct. 4, 2023) [hereinafter “October 2022 Tentative Report”] (making additional “linguistic changes proposed by Commissioner Bell”).

¹⁰ N.J. Law Revision Comm’n, *Update Memorandum Re: Interpretation of the Vote By Mail Law*, at 6 (Apr. 10, 2023), www.njlrc.org (last visited Oct. 4, 2023) [hereinafter “April 2023 Update Memorandum”] (“[a commenter] indicated that the scope of N.J.S. 19:29-1(h) has been impacted by the formation of the New Jersey Election Law Enforcement Commission, which has jurisdiction over claims arising under the Campaign Contributions and Expenditures Reporting Act”).

¹¹ N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at *6, Apr. 20, 2023, www.njlrc.org (last visited Oct. 4, 2023) [hereinafter “April 2023 Minutes”] (agreeing “that this is an area of law that would benefit from clarification”).

the Reporting Act. These modifications reflect the holding of *In re Atlantic County Election*, and clarify ELEC’s jurisdiction over violations of the Reporting Act.¹²

Background

The *In re Atlantic County Election* decision concerned an election contest filed by the unsuccessful candidate (Parker) in the November 3, 2020, election for Third District Commissioner.¹³ Parker filed a claim to “invalidate the election because a number of voters received defective ballots that did not include the Third District Commissioner election.”¹⁴ Parker contended that enough “legal votes [were] rejected at the polls . . . to change the results,” and asserted the election result should be invalidated pursuant to N.J.S. 19:29-1(e).¹⁵

The winner of the election (Witherspoon) asserted that N.J.S. 19:63-26 “barred Parker’s challenge because the statute limits the court’s ability to overturn an election due to irregularities [in the preparation or forwarding of mail-in ballots] and supersedes N.J.S. 19:29-1.”¹⁶

The trial court rejected Witherspoon’s statutory argument, concluding that “the issues raised . . . were . . . fundamental errors that may have altered the outcome of the election because voters were denied the right to vote.”¹⁷ The court found that voters who received defective ballots were “properly characterized as ‘rejected legal votes,’”¹⁸ and held that “Parker met his burden to set aside the election” pursuant to N.J.S. 19:29-1(e).¹⁹

Analysis

On appeal, Witherspoon raised the same objections to the contest claim.²⁰ The *In re Atlantic County Election* Court noted that whether “N.J.S.A. 19:29-1 [applies] to an election

¹² See *infra* at pp. 16-17.

¹³ *In re Atl. Cnty. Election*, 468 N.J. Super. at 346-47.

¹⁴ *Id.* at 347 (Parker lost the election by 286 votes and 335 erroneous ballots were sent to voters).

¹⁵ *Id.* at 349.

¹⁶ *Id.* at 352–53; see *id.* at 359–60 (“the parties stipulated the ballot defect was an error by the Office of the Atlantic County Clerk, not the voters [and t]herefore, the defect here was in mailing or preparation of the ballots, and implicated N.J.S.A. 19:63-26”) (internal quotations omitted).

¹⁷ *Id.* at 351

¹⁸ *Id.* (“The judge reduced [335] to 328 to account for the seven voters who received corrected ballots.”).

¹⁹ *Id.* at 352.

²⁰ *Id.* (affirming the trial court with respect to whether defective mail-in ballots fell within the definition of “rejected legal votes” in N.J.S. 19:29-1(e)” and concluding that “[a] vote has been ‘rejected’ . . . ‘in any situation in which qualified voters are denied access to the polls’ . . . or . . . ‘through no fault of their own’ [are] ‘prohibited from voting for a specific candidate by some irregularity in the voting procedures,’” including the defective mail-in ballots that “provided [voters with] no opportunity to vote for any candidate in the Third District County Commissioner race”). See also *In re Petition of Gray-Sadler*, 164 N.J. 468, 482 (2000) (holding that unclear instructions for submitting a vote for a write-in candidate made it impossible to “determine with reasonable certainty those candidates who received a majority of the votes”).

pursuant to the Vote By Mail Law, N.J.S.A. 19:63-1 to -28” was an “issue of first impression,”²¹ and considered both the canons of statutory interpretation and the intent of the legislature.²²

To “discern[] . . . legislative intent,” the Appellate Division examined N.J.S. 19:63-26 in the context of Title 19, as well as “the legislative objectives sought to be achieved by enacting the statute.”²³ When interpreting election laws, courts “must . . . construe [statutes] in a common-sense way that accords with the legislative purpose” of favoring “the enfranchisement of voters.”²⁴

Guided by these principles, the Court determined that the Legislature did not “intend[] to eliminate the ability to contest an election pursuant to N.J.S.A. 19:29-1 merely because the vote occurred by mail.”²⁵ Rather, the Court favored the Attorney General’s suggested interpretation, which it found “[h]armoniz[ed] N.J.S.A. 19:63-26 and N.J.S.A. 19:29-1 and read[the] statutes *in pari materia* with the overall scheme” of the election laws.²⁶

The *In re Atlantic County Election* Court aligned its holding with the position of the Attorney General²⁷ that “N.J.S.A. 19:63-26 establishes a presumption that an irregularity or failure in the preparation of forwarding of any mail-in ballot will not invalidate an election,” which may be rebutted “by asserting one or more of the grounds under N.J.S.A. 19:29-1 as a basis to invalidate the election.”²⁸

October 2022 Tentative Report

The Commission released a Tentative Report in October 2022 proposing modifications to N.J.S. 19:63-26 and N.J.S. 19:29-1 that reflected the holding of *In re Atlantic County*.²⁹ The proposed modifications to N.J.S. 19:63-26 clarified that the statute creates a rebuttable presumption when an election is contested pursuant to N.J.S. 19:29-1.³⁰ The proposed modifications to N.J.S. 19:29-1 added a cross-reference to the rebuttable presumption in N.J.S. 19:63-26, as well as other changes.³¹

²¹ *In re Atl. Cnty. Election*, 468 N.J. Super. at 357.

²² *Id.*

²³ *Id.* (internal quotations omitted).

²⁴ *Id.* at 358.

²⁵ *Id.* at 360 (rejecting Witherspoon’s argument that the omission of “mail-in ballot deficiencies” from N.J.S. 19:29-1 demonstrated a legislative intent “to exclude such deficiencies as potential grounds for invalidating an election,” and that the enactment of N.J.S. 19:63-26 “clarified that exclusion.”)

²⁶ *Id.* at 360.

²⁷ *Id.* at 353.

²⁸ *Id.* at 360 (“An election shall be set aside if the trial judge concludes the contestant has proved a basis to do so under N.J.S.A. 19:29-1 by a preponderance of the evidence and the judge finds that no person was duly elected, as per N.J.S.A. 19:29-9.”).

²⁹ October 2022 Tentative Report, *supra* note 9.

³⁰ *Id.* at 8.

³¹ *Id.* at 8-9; *see also* N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at *6, Oct. 10, 2022, www.njlrc.org (last visited Oct. 4, 2023) [hereinafter “October 2022 Minutes”] (making the “linguistic changes proposed by Commissioner Bell”).

April 2023 Update Memorandum

Following the release of the Tentative Report, outreach was conducted to several knowledgeable individuals and organizations. Alternative language was proposed by Scott D. Salmon, Esq., who represented Thelma Witherspoon in the *In re Atlantic County Election* case.³² The feedback and alternate language from Mr. Salmon was presented to the Commission in an Update Memorandum at the April 20, 2023, Commission Meeting.³³

Mr. Salmon also informed Staff that the scope of N.J.S. 19:29-1(h) was impacted by the formation of the New Jersey Election Law Enforcement Commission, which has jurisdiction over claims arising under the Reporting Act.³⁴ He provided two decisions in which the courts have “abrogated this provision to ‘injunction actions filed during a campaign or criminal actions.’”³⁵

During the April 2023 Commission meeting, the Commission authorized continued research and outreach.³⁶ The Commission advised Staff to review recent legislation in the area of election law, including the Elections Transparency Act, to determine its impact on the Vote By Mail law.³⁷

³² E-mail from Scott Salmon, Esq., Partner, Jardim, Meisner & Susser, P.C., to Whitney G. Schlimbach, Counsel, NJLRC (Dec. 5, 2022, 1:07 PM EST) (on file with NJLRC) [hereinafter “Salmon E-mail”].

³³ April 2023 Update Memorandum, *supra* note 10. *See also* April 2023 Minutes, *supra* note 11, at 5.

Mr. Salmon contended that, rather than add a rebuttable presumption to N.J.S. 19:63-26, the statute “should simply [be] repeal[ed] and maybe . . . a clarifying point [added] within 19:29-1 that the basis for an election contest must be found in that statute.” April 2023 Update Memorandum, *supra* note 10, at 5. In addition, Mr. Salmon opposed the change in N.J.S. 19:29-1(a) changing the language “the voters of this State” to “any eligible voter of this State.” *Id.* He pointed out that N.J.S. 19:29-2 requires a certain number of voter signatures to contest an election and the implication of “any eligible voter” is that “a single voter could contest the election.” *Id.*; *see also* N.J. STAT. ANN. § 19:29-2 (West 2023). Mr. Salmon also suggested that “candidates to said election” should be added to the list of entities that may contest an election pursuant to N.J.S. 19:29-1 and N.J.S. 19:29-1(g) should “include public questions.” April 2023 Update Memorandum, *supra* note 10, at 5. Finally, Mr. Salmon proposed restructuring N.J.S. 19:29-1 to group the available grounds according to whether they constitute “offenses that, on their own, are sufficient to overturn a result, [or] require more of a demonstration (i.e., sufficient to change the results).” *Id.* at 5-6 (Commissioner Bell made a similar suggestion that subsections (b), (c), and (d) should be combined because they address “eligibility” for nomination or office).

³⁴ N.J. STAT. ANN. §§ 19:44A-1 to -47 (West 2023). *See also* N.J. STAT. ANN. § 19:44A-6(b) (West 2023) (“It shall be the duty of the commission to enforce the provisions of this act, to conduct hearings with regard to possible violations and to impose penalties; and for the effectual carrying out of its enforcement responsibilities the commission shall have the authority to initiate a civil action in any court of competent jurisdiction for the purpose of enforcing compliance with the provisions of this act or enjoining violations thereof or recovering any penalty prescribed by this act. The commission shall promulgate such regulations and official forms and perform such duties as are necessary to implement the provisions of this act.”).

³⁵ *See* April 2023 Update Memorandum, *supra* note 10, at 6 (citing *In re Contest of Democratic Primary Election of June 3, 2003 for Off. of Assembly of Thirty-First Legislative Dist.*, 367 N.J. Super. 261 (App. Div. 2004) and *Nordstrom v. Lyon*, 424 N.J. Super. 80 (App. Div. 2012)).

³⁶ April 2023 Minutes, *supra* note 11, at 6.

³⁷ *Id.* at 5.

Recent Legislation

As the Commission noted, the Elections Transparency Act extensively amended the Reporting Act when it was enacted in April 2023.³⁸ Primarily, the amendments altered regulatory provisions in the Reporting Act, including increasing contribution and expenditure limits, changing reporting requirements and public contract rules, and creating a “housekeeping account” for candidates.³⁹

With respect to ELEC, the Elections Transparency Act amendments replaced the current commissioners with gubernatorial appointees⁴⁰ and imposed a two-year statute of limitations for enforcement actions to be applied retroactively.⁴¹ The Elections Transparency Act did not make any changes to, or have any impact on, the Vote By Mail law, nor did it alter the jurisdictional conflict between N.J.S. 19:29-1 and the Reporting Act.

In addition to the Elections Transparency Act, several amendments were made to the Vote By Mail law during the 2022-2023 Legislative session.⁴² These amendments did not impact the relationship between N.J.S. 19:29-1 and N.J.S. 19:63-26.⁴³

Finally, there is one pending bill that proposes new legislation requiring “an initial judgment within 24 hours, or in the shortest amount of time deemed practicable by the court” when “an election-related cause of action authorized pursuant to . . . Title 19 . . . is brought before a court of competent jurisdiction” in the fourteen days before an election.⁴⁴ The bill would also “authorize[] . . . ELEC[] to petition the Superior Court to immediately suspend, temporarily or permanently, the campaign accounts of persons, . . . who violate State campaign finance laws.”⁴⁵

³⁸ L.2023, c.30, eff. Jan.1, 2023.

³⁹ *Id.*

⁴⁰ *Id.* (amending N.J.S. 19:44A-5 to require that, “. . . within 90 days following the enactment date of this act . . . , the Governor shall directly appoint four members to the commission, . . . and the terms of office of the members of the commission currently serving shall expire upon the Governor's appointment of the new members. . . . [u]pon the expiration of the initial term of each member appointed pursuant to this subsection, members of the commission shall be appointed pursuant to subsection a. of this section”).

⁴¹ *Id.* (enacting N.J.S. 19:44A-6a, which requires that “[a]ny enforcement action brought by the Election Law Enforcement Commission for any violations of P.L.1973, c. 83 (C.19:44A-1 et seq.) shall be subject to a statute of limitations of two years following the occurrence of the alleged violation”).

⁴² L.2022, c.67; L.2022, c.68; L.2022, c.69; L.2022, c.70.

⁴³ L.2022, c.67 (amending N.J.S. 19:63-3, -6, -17, & -22 to “require[] ballot privacy sleeves” and “make[] various changes to . . . mail-in voting procedures”); L.2022, c.68 (amending N.J.S. 19:63-3, -3.1, -5, -6 & -9 to “specif[y] circumstances when voter will be removed from permanent vote by mail status and when ballot will be sent to primary address”); L. 2022, c.70 (amending N.J.S. 19:63-9 & -16.1 to “change[] deadlines for mailing of mail-in ballots[,]” “require[] certain reporting on canvass of ballots[,]” and “permit[] establishment of pickup schedule for certain mail-in ballots”).

⁴⁴ S.B. 4051, 220th Leg., 2023 Sess. (June 30, 2023) (“[r]equires court to respond within 24 hours for election-related actions arising within 14 days of election; authorizes ELEC to petition court to suspend campaign accounts of persons who violate campaign finance laws”).

⁴⁵ *Id.*

Jurisdiction of ELEC Over Claims Arising Under the Reporting Act

The New Jersey Election Law Enforcement Commission (“ELEC”) was created in 1973 with the enactment of the Reporting Act to “administer its provisions.”⁴⁶ As noted by Mr. Salmon, the Appellate Division has held that election contest claims premised on Reporting Act violations should be heard by ELEC in the first instance.⁴⁷

Both *In re Contest of Democratic Primary Election of June 3, 2003 for Office of Assembly of Thirty-First Legislative District* and *Nordstrom v. Lyon* address whether election contest claims based on campaign finance and reporting violations are cognizable under N.J.S. 19:29-1(h).⁴⁸ In each case, the trial court decided the election contest claim and the Appellate Division held that the Reporting Act violations should have been transferred to ELEC after conducting a primary jurisdiction analysis.⁴⁹

- *In re Contest of Democratic Primary Election of June 3, 2003 for Office of Assembly of Thirty-First Legislative District*

In re Contest of Democratic Primary Election involved an election contest⁵⁰ brought pursuant to N.J.S. 19:29-1⁵¹ based on alleged campaign contribution violations of the Reporting Act during a primary election.⁵² The Appellate Division “conclude[d] that the Legislature intended that ELEC have primary jurisdiction over [Reporting] Act complaints not brought under either N.J.S.A. 19:44A-21 (criminal complaint) or 19:44A-22.1 (pre-election summary action).”⁵³

In reaching this determination, the Appellate Division examined the language of three Reporting Act statutes and found that the Reporting Act provides jurisdiction to either ELEC or the court in “three different situations.”⁵⁴ N.J.S. 19:44A-22 involves (1) a “non-criminal complaint of an Act violation, which ELEC considers;” N.J.S. 19:44A-21 covers (2) “the criminal complaint,

⁴⁶ See *O’Neill v. Lerner*, 154 N.J. Super. 317, 321 (App. Div. 1977); see also N.J. STAT. ANN. § 19:44A-6(b) (West 2023) (“The commission shall promulgate such regulations and official forms and perform such duties as are necessary to implement the provisions of this act.”).

⁴⁷ See *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 266; see also *Nordstrom*, 424 N.J. Super. at 102.

⁴⁸ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39).

⁴⁹ See *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 266 and *Nordstrom v. Lyon*, 424 N.J. Super. at 102.

⁵⁰ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 265 (“[t]he complaint also alleged claims of other election irregularities, not covered by the [Reporting] Act, which were properly cognizable in the Superior Court under the election contest provisions of Title 19,” and “were never substantiated [so] this aspect of the complaint was dismissed”).

⁵¹ *Id.* at 265, n.1 (citing subsection (h) of N.J.S. 19:29-1).

⁵² *Id.* at 264-65 (reversing the trial court’s determination that the Reporting Act did not apply to primary elections).

⁵³ *Id.* at 283.

⁵⁴ *Id.*

which a court considers; and” N.J.S. 19:44A-22.1 addresses (3) “the pre-election summary action proceeding, which a court considers.”⁵⁵

The Court explained that the case had “proceeded in the Law Division on the theory that a Superior Court judge can adjudicate a [Reporting] Act-based complaint as if it were an election contest under N.J.S.A. 19:29-1h.”⁵⁶ Rather than “allow a complaint of an Act violation to proceed as an election contest,” the Appellate Division directed that:

a trial judge should (a) deem a verified petition that contains alleged Act violations as if it were a complaint under N.J.S.A. 19:44A-22d; (b) transfer the case, or the relevant counts containing Act violations, to ELEC, to whom the Legislature in our view assigned primary jurisdiction, . . . unless the judge determines to keep jurisdiction after an appropriate analysis; and (c) if the judge decides to retain jurisdiction under the aegis of N.J.S.A. 19:29-1h, apply the standards ELEC would apply if the case was before ELEC.⁵⁷

With respect to the “appropriate analysis,” the Appellate Division instructed trial courts “engage in a primary jurisdiction analysis before retaining the case,” as articulated in *Muise v. GPU, Inc.*⁵⁸ The Court provided that “[p]rimary jurisdiction principles are applicable . . . because the judge conceivably had a basis for jurisdiction” pursuant to N.J.S. 19:29-1(h).⁵⁹ In the context of an election contest claim premised on Reporting Act violations, the Court found that “prudential

⁵⁵ *Id.* (citing N.J. STAT. ANN. § 19:44A-22(d) (West 2023); and N.J. STAT. ANN. § 19:44A-21 (West 2023); and then N.J. STAT. ANN. § 19:44A-22.1 (West 2023)).

In *Hammer v. N.J. Voice, Inc.*, the Superior Court addressed a request for injunctive relief pursuant to N.J.S. 19:44A-22.1 based on allegations of campaign financing violations of the Reporting Act. *Hammer v. N.J. Voice, Inc.*, 302 N.J. Super. 169, 171 (Law. Div. 1996); *see also* N.J. STAT. ANN. § 19:44A-22.1 (“If a political committee . . . , having been established or consisting of members or having received contributions in violation of this act, shall have made any contribution or expenditure in opposition to . . . a candidate, that candidate may, in a summary action in the Superior Court, apply for an order directing that political committee . . . to show cause why the court should not grant such injunctive relief as the candidate may seek.”). By the time depositions and discovery were completed, the affected election had passed, and the *Hammer* Court concluded that “the threat of irreparable harm alleged ha[d] been rendered moot.” *Hammer*, 302 N.J. Super. at 175. Therefore, the Court “addressed . . . whether the Superior Court has jurisdiction under the Reporting Act and, more particularly, N.J.S.A. 19:44A-22.1, if irreparable harm does not exist.” *Id.* Relying on the language in N.J.S. 19:44A-22.1 and -22(f), the Appellate Division found that “[a]s it relates to the issue of jurisdiction in post-election matters, the legislative intent appears to yield to the expertise of ‘ELEC.’” *Id.* at 177.

⁵⁶ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 283-84 (permitting “a person [to] contest a primary or general election for ‘[t]he paying, promise to pay or expenditure of any money or other thing of value or incurring of any liability in excess of the amount permitted by this title for any purpose or in any manner not authorized by this title [Title 19]’”).

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Id.* at 285-86 (citing *Muise v. GPC Inc.*, 332 N.J. Super. 140, 158 (App. Div. 2000) (“Primary jurisdiction is defined as the circumstance in which a court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”) (internal quotations omitted)).

⁵⁹ *Id.* at 287-88.

considerations dictate that the trial judge should ordinarily allow ELEC to hear complaints of Act violations.”⁶⁰

Therefore, the *In re Contest of Democratic Primary Election* Court held that “complaints about campaign finance violations, other than injunction actions filed during a campaign or criminal actions, presumptively should be heard by ELEC under the doctrine of primary jurisdiction.”⁶¹

- *Nordstrom v. Lyon*

In *Nordstrom v. Lyon*, the Appellate Division addressed an election contest claim filed after the primary election, which was based on the nominated candidate’s failure to comply with reporting obligations and contribution limits under the Reporting Act.⁶² After conducting a primary jurisdiction analysis,⁶³ the trial court held the winning candidate’s nomination to be “null and void.”⁶⁴

The Appellate Division addressed the jurisdiction of ELEC over excess contribution and reporting violations of the Reporting Act separately.⁶⁵ The Court reiterated the *In re Contest of Democratic Primary Election* holding that ELEC has primary, but not exclusive, jurisdiction over excess contribution claims.⁶⁶ After reviewing the *Muise* factors,⁶⁷ the Appellate Division concluded that “[t]he management, control, and remediation of excess campaign contributions are

⁶⁰ *Id.* at 288 (finding the trial court “should have transferred the case to ELEC so the agency could have exercised its primary jurisdiction” and “remand[ing] the case to ELEC to develop a record and utilize its expertise in interpreting the Act’s provisions as to the claimed violations”).

⁶¹ *Id.* at 291-92.

⁶² *Nordstrom*, 424 N.J. Super. at 85 (“petition asserted that [the winning candidate] committed violations of N.J.S.A. 19:29-1(h) and ‘the campaign finance law, N.J.S.A. 19:44A-21(c),’ [and s]pecifically . . . urged that [the winning candidate] had (1) willingly exceeded the campaign contribution limits by accepting a \$16,000 contribution from his father[] and (2) failed ‘to disclose donations as required by the 48 hour rule’”).

⁶³ *Id.* at 88 (“[c]oncluding that at least three of the four [*Muise*] factors skewed in favor of judicial, rather than administrative, oversight, and finding that ‘this matter clearly involves an issue of urgency which can be better addressed in this forum’”).

⁶⁴ *Id.* (“the . . . Republican Committee timely selected [the other nominee candidate] to fill the vacancy created by the nullification of the . . . primary election” and “[a]t the . . . general election, [the Republican Party nominee] defeated [the] Democratic Party opponent”); see also N.J. STAT. ANN. § 19:3-7 (West 2023) (“If any candidate . . . shall fail to file any statement or oath required by this Title to be filed . . . or shall file any false statement, the nomination or election of such candidate . . . shall be null and void.”).

⁶⁵ *Id.* at 97.

⁶⁶ *Id.*; see also *In re Contest of Democratic Primary Election Court* (holding that “complaints about campaign finance violations, other than injunction actions filed during a campaign or criminal actions, presumptively should be heard by ELEC under the doctrine of primary jurisdiction”).

⁶⁷ *Nordstrom*, 424 N.J. Super. at 100-102 (finding first that “ELEC – author of the regulations and overseer of the Reporting Act on a daily basis – was in the best position to first weigh in on the excess contribution controversy[;]” second, that “[t]he Reporting Act is squarely within the expertise of ELEC as the commission was created specifically with the intention that it have the fulsome ability to interpret and apply the law[;]” third, contrary to its assurance that “there would be no danger of disrupting the statutory scheme,” the trial court “nullification of [the] nomination . . . was disproportionate to the putative violation and absolutely beyond the range of ELEC’s power [which] create[ed] the very real potential for disparate outcomes in the future[;]” and finally, the complaint was not “lodged with ELEC before . . . proceed[ing] . . . in court” which “weighed in favor of . . . agency primacy”).

best left with the agency most experienced and equipped by the Legislature to handle such matters: ELEC, not the judiciary.”⁶⁸

The Court found, however, that “ELEC has exclusive jurisdiction regarding reporting violations” based on the “general rule [that] jurisdiction of an administrative agency may be said to be exclusive when the remedy which the agency is empowered to grant is the only available remedy for the given situation.”⁶⁹ The Court explained that “the only vehicles for nullifying an election for Reporting Act violations” are found in the Reporting Act, and the provision relied upon by the trial court (N.J.S. 19:3-7) “is inapplicable to [the] reporting obligations imposed by the Reporting Act.”⁷⁰

- *South Hunterdon Regional School District Public Question v. Hunterdon County Board of Elections*

In 2023, the Appellate Division reaffirmed the *Nordstrom* holding in *South Hunterdon*.⁷¹ In the Appellate Division, the “[p]laintiffs argue[d] the trial court erred in dismissing [the] count . . . alleging illegal expenditures, and electioneering to steer the electorate to a ‘Yes’ vote” when it “declin[ed] to exercise jurisdiction to consider [these] Reporting Act grievances.”⁷²

The *South Hunterdon* Court rejected the plaintiff’s assertion that “the court may retain jurisdiction to hear Reporting Act violations through N.J.S.A. 19:29-1(h).”⁷³ Rather, the Appellate Division reaffirmed that “the better policy is to adjudicate the violation through the procedures the Legislature has expressed in the Reporting Act,” and reiterated the *Nordstrom* Court’s holding that “while ELEC has primary jurisdiction over excess contribution claims under the Reporting Act, it enjoys exclusive jurisdiction over alleged reporting violations.”⁷⁴

The *South Hunterdon* added that, in the case before it, “part of the remedy sought by plaintiffs requires a finding of Reporting Act violations,” and the Reporting Act “has vested jurisdiction for such claims with ELEC.”⁷⁵

⁶⁸ *Id.* at 102 (“except for the limited circumstances under N.J.S.A. 19:44A–21(c) (voiding a nomination or office after a finding of guilt to certain election-related fourth-degree crimes) and –22.1 (permitting an aggrieved candidate to bring a summary action)”).

⁶⁹ *Id.* at 97-98 (explaining that “N.J.S.A. 19:44A–16 comprehensively details candidates’ reporting obligations,” and the “[f]ailure to comply with the statute and its implementing regulations, . . . exposes applicable persons—including candidates—to an array of penalties, including potential criminal sanctions found in N.J.S.A. 19:44A–21(b), and civil remedies found in N.J.S.A. 19:44A–22(a)(1)”).

⁷⁰ *Id.* at 98 (holding that “[t]he use of N.J.S.A. 19:3-7 to invalidate [the] nomination was an unwarranted judicial arrogation of ELEC’s authority”).

⁷¹ *S. Hunterdon Reg’l Sch. Dist. Pub. Question v. Hunterdon Cnty. Bd. of Elections*, 2023 WL 2171099, at *5-6 (N.J. Super. Ct. App. Div. Feb. 23, 2023).

⁷² *Id.* at 5.

⁷³ *Id.*

⁷⁴ *Id.* (quoting *Nordstrom*, 424 N.J. Super. at 97).

⁷⁵ *Id.* (citing *In re Election L. Enft Comm’n Advisory Opinion No. 01-2008*, 201 N.J. 254, 261–62 (2010) (“The Election Law Enforcement Commission has been charged by the Legislature with enforcing the provisions of the New Jersey Campaign Contributions and Expenditures Reporting Act . . . ”)).

Pending Bills

There are no pending bills that address either N.J.S. 19:63-26 or N.J.S. 19:29-1.

Conclusion

In accordance with the holding of *In re Atlantic County Election*, the proposed modifications to N.J.S. 19:63-26 add language clarifying that, when an election involving mail-in ballots is contested, N.J.S. 19:63-26 operates as a rebuttable presumption which may be overcome by establishing one of the grounds in N.J.S. 19:29-1.⁷⁶

The proposed modifications to N.J.S. 19:29-1 add a cross-reference to N.J.S. 19:63-26 explaining the operation of the rebuttable presumption therein. Additional modifications reflect feedback received from commenters, including a reference to the jurisdictional reach of the Election Law Enforcement Commission, as set forth in the Reporting Act.

The proposed modifications to the Reporting Act reflect the scope of ELEC's jurisdiction over Reporting Act violations, as held in *In re Contest of Democratic Primary Election and Nordstrom*, among other Appellate Division decisions.⁷⁷

Guidance is requested from the Commission and commenters regarding whether modification of the Reporting Act in this manner is appropriate and, if so, the statutory section in which the modification should be located.

⁷⁶ See *supra* at pp. 3-4.

⁷⁷ See *infra* at pp. 16-17.

APPENDIX

The proposed modifications to N.J.S. 19:63-26, Validity of election due to irregularity or failure in mail-in ballot processing, and N.J.S. 19:29-1, Grounds stated, (shown with ~~strike through~~, underlining, and *italics*⁷⁸), are shown on the following pages.

The Appendix also includes proposed language, intended to clarify the jurisdiction of the Election Law Enforcement Commission, with three optional locations for its placement (shown as Options 1 – 3 at the end of the Appendix) and comment is sought regarding whether the inclusion of this language is appropriate and – if so – where it should be located:

N.J.S. 19:63-26. Validity of election due to irregularity or failure in mail-in ballot processing.

a. ~~No~~ An election shall not be held to be invalid solely⁷⁹ due to any irregularity or failure in the preparation or forwarding of any mail-in ballots prepared or forwarded pursuant to the provisions of P.L.2009, c. 79 (C.19:63-1 et al.).⁸⁰

b. This section establishes a rebuttable presumption that an irregularity or failure in the preparation or forwarding of any mail-in ballots shall not invalidate an election. This presumption may be rebutted by establishing one or more of the grounds set forth in N.J.S. 19:29-1 as a basis to invalidate an election.

COMMENT

Subsection (a)

The proposed modifications divide the statute into two lettered subsections to improve accessibility. In addition, the proposed modifications replace the language “No election shall be held to be invalid due to . . .” with “An election shall not be held to be invalid solely due to . . .” in order to alert the reader that the prohibition is qualified by the rebuttable presumption set forth in subsection b.

Subsection (b)

The proposed modifications add language to N.J.S. 19:63-26 in new subsection b. clarifying that the statute operates as a rebuttable presumption, as established by the *In re Atlantic County Election* holding.⁸¹ The proposed language is derived from the language employed by the Appellate Division in that decision, except that the term “asserting one or more of the grounds” has been replaced with “establishing one or more of the grounds,” with respect to what is required to rebut the presumption.⁸²

⁷⁸ Italicized language represents language that has been modified since the release of the October 2022 Tentative Report.

⁷⁹ See October 2022 Minutes, *supra* note 31, at 6 (“Commissioner Bunn . . . suggested in [N.J.S. 19:63-26(a)] adding in the word ‘solely’ so that it reads ‘An election shall not be held to be invalid “solely” due to any irregularity’”).

⁸⁰ See *id.* at 6 (“[Commissioner Bell] noted that ‘no election shall be held to be invalid’ should be changed to ‘an election shall not be held to be invalid’”).

⁸¹ *In re Atl. Cnty. Election*, 468 N.J. Super. at 360.

⁸² *Id.* (“N.J.S.A. 19:63-26 establishes a presumption that an irregularity or failure in the preparation of forwarding of any mail-in ballot will not invalidate an election[, but] a contestant may rebut the presumption by asserting one or more of the grounds under N.J.S.A. 19:29-1 as a basis to invalidate the election”). See October 2022 Minutes, *supra* note 31, at 6 (“[Commissioner Bell proposed] chang[ing] the word ‘asserting’ to ‘establishing’ in the statute”).

N.J.S. 19:29-1. Grounds stated.

a. The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by ~~the any eligible~~ voters of this State⁸³ or of any of its political subdivisions affected thereby, or by any defeated candidate for such nomination, party position or public office,⁸⁴ upon ~~± one~~ or more of the following grounds:

~~a.~~ 1. When ~~M~~malconduct, fraud or corruption on the part of the members of any district board, or of any members of the board of county canvassers, is sufficient to cast doubt on the validity of the nomination or election ~~challenge the result;~~⁸⁵

~~b.~~ 2. When the incumbent was not eligible to the office at the time of the election;

~~c.~~ 3. When the incumbent had been duly convicted before such election of any crime which would render him incompetent to exercise the right of suffrage, and the incumbent had not been pardoned at the time of the election;

~~d.~~ 4. When the incumbent had given or offered to any elector or any member of any district board, clerk or canvasser, any bribe or reward, in money, property or thing of value for the purpose of procuring his election;

~~e.~~ 5. When illegal votes have been received, or legal votes rejected ~~at the polls~~ in sufficient numbers to change the result;

~~f.~~ 6. For any error by any board of canvassers in counting the votes or declaring the result of the election, if such error would change the result;

~~g.~~ 7. For any other cause which shows that another ~~was the~~ person was legally elected or another outcome on a public proposition was the legal result;⁸⁶

~~h.~~ 8. The paying, promise to pay or expenditure of any money or other thing of value or incurring of any liability in excess of the amount permitted by this title for any

⁸³ The proposed modification in the October 2022 Tentative Report replacing the phrase “the voters of this State” with “any eligible voter of this State” has been removed because N.J.S. 19:29-2 requires multiple voter signatures to contest an election. See N.J. STAT. ANN. § 19:29-2 (“[i]n the case of an office or proposition voted for by the voters of the entire State or more than 1 county thereof, the contest . . . shall be commenced by the filing of a petition . . . signed by at least 25 voters of the State or by any defeated candidate for such nomination, party position or public office” and “[i]n all other cases the contest shall . . . be commenced by the filing of a petition . . . signed by at least 15 voters of the county or by any defeated candidate”).

⁸⁴ Following the release of the October 2022 Tentative Report, Mr. Salmon suggested that N.J.S. 19:29-1 should include “candidates to said election” in the list of entities that may bring an election contest. See *supra* note 33. The proposed language is derived from N.J.S. 19:29-2, which permits “any defeated candidate for such nomination, party position or public office” to sign the petition contesting an election. N.J. STAT. ANN. § 19:29-2.

⁸⁵ To conform the proposed language in N.J.S. 19:29-1(a) with the language in the statute’s introductory paragraph, which permits challenges to nominations, elections *and* public propositions, the proposed modifications replace the proposed language “nomination or election” with the original language: “result.” See *supra* note 33 (proposing that N.J.S. 19:29-1(g) should “include public questions”).

⁸⁶ This language was proposed by Mr. Salmon. See *supra* note 33; see also *infra* at p. 15, note 92.

purpose or in any manner not authorized by this title[, *except as subject to the jurisdiction of the Election Law Enforcement Commission in N.J.S. 19:44A-[]*]⁸⁷;

± 9. When a petition for nomination is not filed in good faith or the affidavit annexed thereto is false or defective.

b. The term “incumbent” means the person whom the canvassers declare elected or the person who is declared elected as a result of a recount; but in the case of a tie vote as a result of the canvass or recount, either party may contest the election, in which case the term “incumbent” means the person having an equal number of votes with the contestant.

c. The grounds set forth in subsection (a) of this section may rebut the presumption pursuant to N.J.S. 19:63-26.

COMMENT

The statute has been re-lettered and numbered to improve accessibility, in keeping with current statutory drafting practices.

Subsection (a)

In the introductory paragraph in subsection (a), the proposed modifications no longer replace the term “voters of this State” with the language “any eligible voter” given that N.J.S. 19:29-2 requires multiple voter signatures to file an election contest petition.⁸⁸

Subsection (a)(1)

In subsection (a)(1), the language is modified to be consistent with subsequent subsections by beginning the subsection with the word “when.”⁸⁹

In addition, given the ambiguity of the phrase “sufficient to challenge the result” in the context of determining the necessary degree of “malconduct, fraud or corruption,” the proposed modifications replace this term with language indicating that the misconduct must be “sufficient to cast doubt on the validity” of the outcome.⁹⁰

Finally, the proposed language no longer replaces the word “result” with “nomination or election” to ensure that this subsection is not inappropriately narrowed to exclude public propositions. Retaining the word “result” in subsection (a)(1) maintains consistency with subsections (a)(5) and (a)(6), which also are not limited to the nomination or election of an individual.

Subsection (a)(5)

In subsection (a)(5), the proposed modifications eliminate the phrase “at the polls” as it is not clear that this language is necessary to convey the Legislative intent that illegal votes or rejected legal votes in sufficient numbers may form the basis for an election contest claim.⁹¹

⁸⁷ This modification reflects that subsection (h) may not be used to avoid the jurisdiction of ELEC over Reporting Act violations, as held by the Appellate Division in *Nordstrom* and *In re Contest of Democratic Primary Election*. See *supra* at pp. 3-4.

⁸⁸ N.J. STAT. ANN. § 19:29-2; see *supra* note 83.

⁸⁹ See October 2022 Minutes, *supra* note 31, at 6 (“Commissioner Bell would add the word ‘when’ to subsection a.(1) . . .”).

⁹⁰ *Id.* (“Commissioner Bell would . . . modify ‘sufficient to change the result’ to ‘is sufficient to cast doubt on the validity of the nomination or election.’”).

⁹¹ *Id.* (“Commissioner Bell suggested . . . eliminat[ing] the phrase ‘at the polls’ in subsection a.(5).”).

Subsection (a)(7)

The proposed modifications to subsection (a)(7) add language clarifying that the provision is applicable to elections *and* public propositions, as suggested by Mr. Salmon.⁹² With respect to this subsection’s applicability to public questions, Staff was unable to locate any decisions that involved an election contest pursuant to this catch-all section.⁹³ Therefore, Staff requests the guidance of the Commission regarding this modification.

Subsection (a)(8)

The proposed modifications to subsection (a)(8) add a cross-reference to the (to be determined) section of the Reporting Act in which language is added to clarify that election contest claims premised on Reporting Act violations are subject to the jurisdiction of ELEC.⁹⁴

Commission guidance regarding this modification is requested.

Subsection (b)

There are no modifications proposed with respect to the substance of subsection (b), which has been re-lettered consistent with modern statutory drafting practice.

Subsection (c)

Finally, the proposed modifications add new subsection (c), which contains a cross-reference to the presumption in N.J.S. 19:63-26, making clear that the grounds for invalidating an election set forth in N.J.S. 19:29-1 may rebut the presumption pursuant to N.J.S. 19:63-26, if relevant.⁹⁵

⁹² See *supra* note 33.

⁹³ In 1951, the Appellate Division decided an election contest claim premised on a county clerk’s failure “to cause to be printed on the ballot immediately beneath the printed questions the ‘Explanatory Statement’ in the verbiage appearing in the pertinent section of the statute.” *Sharrock v. Borough of Keansburg*, 15 N.J. Super. 11, 16 (App. Div. 1951). The *Sharrock* Court “assumed but [did] not decide that the complaint alleged a cause of contest comprehended by R.S. 19:29—1, N.J.S.A.” *Sharrock*, 15 N.J. Super. at 20. The *Sharrock* Court specifically found that “the irregularity was artless, not artful,” *id.* at 18, which removed it from the reach of subsections requiring bad faith, as well as any sections requiring conduct by a party other than the county clerk, which leaves only the “catch-all” provision in subsection (g). See *e.g.* N.J. STAT. ANN. § 19:29-1(a), (h) and (i) (requiring bad conduct or bad faith); N.J. STAT. ANN. § 19:29-1(b) - (d) and (f) (focusing on the “incumbent” and board of canvassers), and N.J. STAT. ANN. § 19:29-1(e) (involving illegal or rejected legal votes); *but see Richards v. Barone*, 114 N.J. Super. 243, 247-48 (Law. Div. 1971) (finding that an election contest claim premised on the “failure to include specific notice of the date on which the public question election would be held” “would be deemed to come within the terms of N.J.S.A. 19:29—1(a), ‘malconduct * * * on the part of the members of the district board,’ in that they failed to be sure that the public question was included in the published notices”).

⁹⁴ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 283 (“conclud[ing] that the Legislature intended that ELEC have primary jurisdiction over [Reporting] Act complaints not brought under either N.J.S.A. 19:44A-21 (criminal complaint) or 19:44A-22.1 (pre-election summary action)”; *Nordstrom*, 424 N.J. Super. at 97 (“while ELEC has primary jurisdiction over excess contribution claims under the Reporting Act, it enjoys exclusive jurisdiction over alleged reporting violations”).

⁹⁵ *In re Atl. Cnty. Election*, 468 N.J. Super. at 360.

Optional language concerning the jurisdiction of the Election Law Enforcement Commission – three options:

OPTION #1

(new section) N.J.S. 19:44A-[].

Subject to the provisions of N.J.S. 19:44A-21 and N.J.S. 19:44A-22.1, the Election Law Enforcement Commission shall have:

(a) exclusive jurisdiction over violations of the reporting requirements of this Act; and,

(b) primary jurisdiction over violations of all other requirements of this Act.

COMMENT

To clarify the scope of ELEC’s jurisdiction over different types of Reporting Act violations, the proposed modifications create a new statutory section reflecting the common law on this issue.⁹⁶ Two additional options are set forth below, which alternatively propose modifying N.J.S. 19:44A-6 (Option #2) and N.J.S. 19:44A-22 (Option #3) in the Reporting Act. Given the significance of language defining the jurisdictional limits of ELEC, Commission guidance is requested with respect to the most appropriate location for the proposed modification.

In addition, the current Reporting Act does not clearly define the breadth of ELEC’s jurisdiction and appellate courts have crafted the jurisdictional scope of ELEC over Reporting Act violations in various contexts, including election contest claims, relying on jurisdictional principles and statutory language. However, the Reporting Act is extensive and complicated, and understandably, the courts have not necessarily addressed ELEC’s jurisdiction over the broad range of possible violations.

Therefore, given the importance of accurately reflecting the scope of ELEC’s jurisdiction, Commission guidance is requested with respect to whether, rather than modifying Title 19 to define the limits of ELEC’s jurisdiction, the Commission should bring this issue to the attention of the Legislature to decide the appropriate course of action.

Commenter feedback on these two issues may also prove illuminating if the Commission is inclined to release a Tentative Report reflecting the different options set forth herein.

Subsection (a)-(b)

The proposed introductory sentence sets forth that ELEC maintains jurisdiction over Reporting Act violations, subject to the provisions in N.J.S. 19:44A-21, which addresses the filing of a criminal complaint, and N.J.S. 19:44A-22.1, which addresses pre-election summary actions for injunctive relief.⁹⁷

Subsection (a) sets forth the holding in *Nordstrom*, which provides that ELEC maintains exclusive jurisdiction over reporting violations of the Reporting Act.⁹⁸

⁹⁶ See *supra* at pp. 7-10.

⁹⁷ N.J. STAT. ANN. § 19:44A-21 (setting forth conduct constituting fourth degree crimes); N.J. STAT. ANN. § 19:44A-22.1 (“candidate may, in a summary action in the Superior Court, apply for an order directing that political committee or continuing political committee to show cause why the court should not grant such injunctive relief as the candidate may seek”). See also *Hammer*, *supra* note 55, at 175-77 (addressing “whether the Superior Court has jurisdiction under the Reporting Act and, more particularly, N.J.S.A. 19:44A–22.1, if irreparable harm does not exist” and holding that “[a]s it relates to the issue of jurisdiction in post-election matters, the legislative intent appears to yield to the expertise of ‘ELEC’”).

⁹⁸ *Nordstrom*, 424 N.J. Super. at 97 (“ELEC has exclusive jurisdiction regarding reporting violations”); see also *South Hunterdon*, 2023 WL 2171099, at *5.

Subsection (b) provides that ELEC has primary jurisdiction over all other violations of the Reporting Act. This proposed language reflects that appellate courts have held that ELEC maintains primary jurisdiction over different types of Reporting Act violations both in and outside the context of an election contest claim.

The *In re Contest of Democratic Primary Election* Court determined that “the Legislature intended that ELEC have primary jurisdiction over [Reporting] Act complaints not brought under either N.J.S.A. 19:44A-21 (criminal complaint) or 19:44A-22.1 (pre-election summary action).”⁹⁹ In *Nordstrom*, the Appellate Division held that “ELEC has primary jurisdiction over excess contribution claims under the Reporting Act.”¹⁰⁰ In *South Hunterdon*, the Appellate Division found the trial court properly declined jurisdiction over claims of “illegal expenditures” after conducting a primary jurisdiction analysis.¹⁰¹

Finally, courts have addressed ELEC’s jurisdiction over Reporting Act violations outside the context of an election contest claim, as well. In *New Jersey Election Law Enforcement Commission v. James*, the Appellate Division considered whether the trial court appropriately retained jurisdiction over a complaint filed by ELEC that alleged misuse of campaign funds to cover legal fees.¹⁰² After conducting a primary jurisdiction analysis, the Court held that “under these narrow, limited factual circumstances, the court does have subject matter jurisdiction.”¹⁰³

Similarly, in *Brennan on behalf of State v. Lonegan*, the Appellate Division considered a complaint filed pursuant to the False Claims Act (“FCA”), which alleged that a candidate “submitt[ed] a false statement in a request for public campaign funds.”¹⁰⁴ The *Brennan* Court found that ELEC “maintains jurisdiction over claims arising out of the Reporting Act,” and although the complaint “allege[d] a violation of the FCA, . . . the underlying accusation . . . is a Reporting Act violation.”¹⁰⁵

OPTION #2

19:44A-6. Executive director; employees; commission; duties; powers; distribution of information; void elections; law applicable; quarters; advisory opinions.

a. The commission shall appoint a full-time executive director, legal counsel and hearing officers, . . .

b. It shall be the duty of the commission to enforce the provisions of this act, to conduct hearings with regard to possible violations and to impose penalties; and for the effectual carrying out of its enforcement responsibilities the commission shall have the authority to initiate a civil action in any court of competent jurisdiction for the purpose of enforcing compliance with the provisions of this act or enjoining violations thereof or recovering any penalty prescribed by this act. The commission shall promulgate such regulations and official forms and perform such duties as are necessary to implement the provisions of this act. Without limiting the generality of the foregoing, the commission is authorized and empowered to:

- (1) Develop forms for the making of the required reports;

⁹⁹ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 283.

¹⁰⁰ *Nordstrom*, 424 N.J. Super. at 97 (emphasis added).

¹⁰¹ *South Hunterdon*, 2023 WL 2171099, at *5-6 (“the trial court correctly declined jurisdiction after applying the appropriate analysis of the *Muise*¹ factors”).

¹⁰² 2014 WL 7597254, at *6 (N.J. Super. Ct. App. Div. Jan. 16, 2015).

¹⁰³ *Id.*

¹⁰⁴ 454 N.J. Super. 613, 616 (App. Div. 2018)

¹⁰⁵ *Id.* at 620-21 (finding “Plaintiff is not permitted to use the FCA to circumvent or re-litigate a Commission decision he disputes”).

- (2) Prepare and publish a manual . . . ;
- (3) Develop a filing, coding and cross-indexing system;
- (4) Permit copying or photo-copying of any report required to be submitted pursuant to this act as requested by any person;
- (5) Prepare and make available for public inspection summaries of all said reports . . . ;
- (6) Prepare and publish, prior to May 1 of each year, an annual report to the Legislature;
- (7) Ascertain whether candidates, committees, organizations or others have failed to file reports or have filed defective reports . . . ;
- (8) Ascertain the total expenditures for candidates and determine whether they have exceeded the limits set forth in this act . . . ;
- (9) Hold public hearings, investigate allegations of any violations of this act, and issue subpoenas for the production of documents and the attendance of witnesses;
- (10) Forward to the Attorney General or to the appropriate county prosecutor information concerning any violations of this act

c. The commission shall take such steps as may be necessary or appropriate to furnish timely and adequate information . . . to every candidate or prospective candidate . . . informing them of their actual or prospective obligations and responsibilities under this act. . . .

d. If the nomination for or election to any public office or party position becomes void . . . , the withholding or revocation of his certificate of election, the omission of his name from the ballot or the vacation of the office into which he has been inducted as a result of such void election, as the case may be, shall be subject to the provisions of chapter 3, articles 2 and 3, of this Title (R.S.19:3-7 et seq.).

e. The commission shall be assigned suitable quarters for the performance of its duties hereunder.

f. The commission through its legal counsel is authorized to render advisory opinions

* * *

g. The commission shall establish a training program for campaign treasurers and organizational treasurers

[h. Subject to the provisions of N.J.S. 19:44A-21 and N.J.S. 19:44A-22.1, the Commission shall have exclusive jurisdiction over violations of the reporting requirements of this Act and shall have primary jurisdiction over violations of all other requirements of this Act.]

COMMENT

As set forth *supra*, the proposed language reflects the holdings of various Appellate Division decisions, including *In re Contest of Democratic Primary Election* and *Nordstrom*, and is intended to clarify the scope of ELEC's jurisdiction over different types of Reporting Act violations.¹⁰⁶

Given the importance of the proposed jurisdictional language, the proposed modification is made to N.J.S. 19:44A-6, which sets forth the composition, duties and powers of ELEC.¹⁰⁷

OPTION #3

19:44A-22. Reports, records, notices, etc.; violations; additional penalty; hearing; determination; penalties for illegal contributions

a. (1) Except as provided in subsection e. or f., any person . . . charged with the responsibility under the terms of this act for the preparation, certification, filing or retention of any reports, records, notices or other documents, who fails, neglects or omits to prepare, certify, file or retain any such report, record, notice or document at the time or during the time period, as the case may be, and in the manner prescribed by law, or who omits or incorrectly states or certifies any of the information required by law to be included in such report, record, notice or document, any person who proposes to undertake or undertakes a public solicitation, testimonial affair or other activity relating to contributions or expenditures in any way regulated by the provisions of this act who fails to comply with those regulatory provisions, and any other person who in any way violates any of the provisions of this act shall, in addition to any other penalty provided by law, be liable to a penalty of not more than \$6,000 for the first offense and not more than \$12,000 for the second and each subsequent offense.

(2) No person shall willfully and intentionally agree with another person to make a contribution . . . with the intent, or upon the condition, understanding or belief, that the recipient candidate or committee shall make or have made a contribution to another such candidate or committee A person who violates the provisions of this paragraph shall be liable to a penalty equal to four times the amount of the contribution which that person agreed to make to the recipient candidate or committee.

b. Upon receiving evidence of any violation of this section, the Election Law Enforcement Commission shall have power to hold, or to cause to be held under the provisions of subsection d. of this section, hearings upon such violation and, upon finding any person to have committed such a violation, to assess such penalty, within the limits prescribed in subsection a. of this section, as it deems proper under the circumstances, which penalty shall be paid forthwith into the State Treasury for the general purposes of the State. Subject to the provisions of N.J.S. 19:44A-21 and N.J.S. 19:44A-22.1, the Commission shall have exclusive jurisdiction over violations of the reporting requirements of this Act and shall have primary jurisdiction over violations of all other requirements of this Act.

c. In assessing any penalty under this section, the Election Law Enforcement Commission may provide for the remission of all or any part of such penalty

¹⁰⁶ *Supra* at pp. 16-17.

¹⁰⁷ N.J. STAT. ANN. § 19:44A-6 (West 2023).

d. The commission may designate a hearing officer to hear complaints of violations of this act. Such hearing officer shall take testimony, compile a record and make factual findings, and shall submit the same to the commission, which shall have power to assess penalties within the limits and under the conditions prescribed in subsections b. and c. of this section. The commission shall review the record and findings of the hearing officer, but it may also seek such additional testimony as it deems necessary. The commission's determination shall be by majority vote of the entire authorized membership thereof.

* * *

COMMENT

As set forth *supra*, the proposed language reflects the holdings of various Appellate Division decisions, including *In re Contest of Democratic Primary Election* and *Nordstrom*, and is intended to clarify the scope of ELEC's jurisdiction over different types of Reporting Act violations.¹⁰⁸

The proposed modification is made to N.J.S. 19:44A-22 because the statute sets forth ELEC's power to "hold, or to cause to be held . . . hearings" when it "receiv[es] evidence of any violation of this section."¹⁰⁹ Providing the scope of ELEC's jurisdiction over Reporting Act violations in N.J.S. 19:44A-22(b) aligns with the type of information provided by that section in particular and the statute generally.

¹⁰⁸ *Supra* at pp. 16-17.

¹⁰⁹ N.J. STAT. ANN. § 19:44A-22(b) (setting forth the penalties for violations in subsections (a)(1) and (a)(2)).