

Bruce I. Afran
Attorney-at-Law
10 Braeburn Dr.
Princeton, NJ 08540
609-454-7435
bruceafran@aol.com

January 9, 2023

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
22 South Clinton Avenue
Trenton, NJ 08625-0080

Re: **Jeffrey Brindle, Executive Director, Elections Law Enforcement Commission**

Dear Mr. Morris:

I am private counsel for Jeffrey M. Brindle, the Executive Director of the New Jersey Election Law Enforcement (ELEC). I am writing in response to the request of the Attorney General that Mr. Brindle participate in the Attorney General's investigation of an alleged discriminatory act by Mr. Brindle and with pre-investigation "training" in connection with such process. This letter addresses: 1) the violation of ELEC's statutory independence that would result from the Attorney General's conducting such inquiry; and 2) the Governor's recent attempts to force Mr. Brindle's resignation by threat and coercion, and then his discharge, in an extralegal manner.

1. THE STATUTORY INDEPENDENCE OF THE ELECTION LAW ENFORCEMENT COMMISSION (ELEC).

In our discussions over the past two weeks, most recently on Thursday, January 5, 2023, I raised concerns as to the jurisdiction of the Attorney General due to the statutory independence of ELEC of which Mr. Brindle is the senior and highest ranking administrative official (outside of the three Commissioners presently in office).

In creating ELEC, the Legislature sought to establish a neutral campaign finance agency to supervise and oversee New Jersey's election finance laws, an agency that was to be independent of jurisdiction or oversight from any other agency, division or department, including ELEC's home department, the Department of Law and Public Safety (DLPS). ELEC's enabling statute states:

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
January 9, 2023

For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the Election Law Enforcement Commission is hereby allocated within the Department of Law and Public Safety; but, notwithstanding said allocation, the commission shall be independent of any supervision or control by the department or by any board or officer thereof, it being the intention of this act that the assignment, direction, discipline and supervision of all the employees of the commission shall be so far as possible, and except as otherwise provided in this act, fully determined by the commission or by such officers and employees thereof to whom the commission may delegate the powers of such assignment, direction, discipline and supervision.

N.J.S.A. 19:44A-5 [emphasis added].

By its very terms, this provision renders all “direction, discipline and supervision” of ELEC’s officers and employees “*independent of any* supervision or control by the department [i.e., DLPS]”. N.J.S.A. 19:44A-5 [emphasis added]. This legislative terminology has long been understood by our courts as the “in but not of” formula in which the independent agencies are not subject to supervision or intervention by the department (i.e., DLPS) in which the agency is housed.

In *N.J. Exec. Com'n on Ethical Standards v. Byrne*, 238 N.J. Super. 84, 569 A.2d 264 (App. Div. 1990), the Appellate Division held that the State Treasurer may not enforce a subpoena requiring “a regulatory employee” of the Board of Public Utilities (BPU) to appear before an investigator of the New Jersey Executive Commission on Ethical Standards (ECES). Holding that such power would interfere with the statutory independence of the BPU, the Appellate Division quashed the subpoena and made clear that the agency’s “essential independence” bars an external investigation over its employees:

It might appear that the State Treasurer, as head of the Department of the Treasury, either adopts a code of ethics for BPU or designates the President as "principal officer in charge" of BPU to do so. Neither of these possibilities is consistent with BPU's statutory function and position. BPU is "in but not of" the Department of the Treasury and is "independent of any supervision or control by the Department." *N.J.S.A.* 52:18A-2.1. It is an independent agency charged with the sensitive function of regulating public utilities, and its essential independence would be compromised if the State Treasurer could impose a code of ethical standards on BPU Commissioners and employees or could grant or withhold permission for BPU to set standards.

N.J. Exec. Com'n on Ethical Standards, supra, 238 N.J. Super. at 89.

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
January 9, 2023

ELEC is subject to this same legislative terminology, i.e., it is “independent of any supervision or control by the Department”. N.J.S.A. 19:44A-5. This means that Mr. Brindle cannot be subject to compelled participation in the Attorney General's “EEO” inquiry, as per the same legal standard that required the quashing of the subpoena in *N.J. Exec. Com'n on Ethical Standards*.

In fact, the Attorney General has *already* stated that Mr. Brindle’s participation is compulsory and that any “[f]ailure to comply with the investigation”, may result in “administrative and/or disciplinary action, up to and including termination...”. See Email of Judi Stipick, Director of the Office of Equal Employment Opportunity, to Bruce Afran, 12/22/22. Obviously, discipline or termination for “failure to comply” is substantially as coercive and equally violative of ELEC’s independence as the subpoena in *N.J. Exec. Com'n on Ethical Standards*.¹

The formula governing ELEC has long been interpreted by the Supreme Court as a “term of art” chosen by the Legislature to guarantee the agency’s independence from the Executive branch:

Because COAH is an executive agency, the Constitution required the Legislature to place COAH "within" an Executive Branch department. See *N.J. Const.* art. V, § 4, ¶ 1. At the same time, the Legislature took steps to make COAH independent and insulate it from complete Executive control. To achieve that aim, the Legislature included ***a term of art in COAH's enabling legislation when it placed COAH "in, but not of," the Department of Community Affairs (DCA). [That phrase has long been understood to signify an agency's independence, see N.J. Tpk. Auth. v. Parsons, 3 N.J. 235, 244, [(1949), ...]***

In re COAH, 214 N.J. 444, 448, 70 A.3d 559 (2013)[emphasis added].

¹ Independent agencies are also *excluded* from the term “agency” as used in the Reorganization Act of 1969 that governs the operation of state government:

The Reorganization Act uses...precise language. Its reach extends to agencies that are "of" the Executive Branch, *N.J.S.A.* 52:14C-3 -- not to independent agencies that are simply "in" it. Because COAH is "in" -- "but not of" -- an Executive Branch department, it is not subject to the Act. The plain language the Legislature used in drafting the law compels that conclusion.

In re COAH, 214 N.J. 444, 468-469, 70 A.3d 559 (2013). In this same way, ELEC, being “in but not of” the executive branch is not an “agency” as that term is understood under the Reorganization Act. As such, any “EEO” investigation must take place under the jurisdiction of ELEC’s commissioners as per the independence mandated by N.J.S.A. 19:44A-5.

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
January 9, 2023

Among the purposes of insulating the independent agency from its “allocated” department is to prevent interference from the Chief Executive:

Underlying the Legislature's approach is a practical reality: to insulate an office from a principal department head, but not from the Chief Executive to whom the agency head reports, *see N.J. Const.* art. V, § 4, ¶ 2, would accomplish little.

In re COAH, at 473.

As described in Section 2, below, the need “to insulate [ELEC] from...the Chief Executive” is particularly important since there has *already* been extensive interference by the Governor’s staff who have used vague, undocumented charges of discrimination to force Mr. Brindle to resign and, when he failed to do so, “advised” the ELEC Commissioners to fire him, conduct comprising direct gubernatorial interference with ELEC in violation of N.J.S.A.19:44A-5.

2. THE GOVERNOR’S ATTEMPTS TO INTERFERE IN THE OPERATION OF THE ELECTION LAW ENFORCEMENT COMMISSION.

A. The Governor’s Attempt to Force Executive Director Brindle’s Resignation.

As I outlined to you in our first discussion, in connection with this alleged claim of discrimination, Governor Murphy has attempted to force and coerce the resignation of Mr. Brindle in an extra-legal manner and without the ELEC Commissioners’ knowledge.

This began on November 1, 2022 when Mr. Brindle was told to report to a meeting at the Governor’s office on the next day, November 2, 2022. At the meeting, where he signed in, Mr. Brindle was confronted by the Governor’s highest ranking staff members: Parimal Garg, Counsel to the Governor; George Helmey, Chief of Staff; and Dominic Rota, the Governor’s Chief Ethics Advisor. The three peremptorily demanded that Mr Brindle resign immediately as Executive Director of ELEC and, if he refused, the allegation that he made an “anti-gay” remark in an email would be publicized. When Mr. Brindle asked if there was a complaint he could see or if there was any writing documenting the allegation, he was told that the Governor’s staff was in possession of an email that would **not** be provided.

Also at this meeting, Mr. Brindle was handed a pre-drafted resignation letter in his name *written on the Governor’s letterhead*, see copy attached, demonstrating further the direct involvement of the Governor and his immediate staff in the effort to force Mr. Brindle’s resignation. At the

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
January 9, 2023

meeting, Mr. Brindle was told he must resign by the next morning or the claim of discrimination would be publicized.

The next day, November 3, 2022, Mr. Brindle told Mr. Rota by telephone that he would not be resigning because he did not commit any discriminatory act and because the Governor's staff refused to provide documentation of any such act. Mr. Rota responded, "we will then be litigating", or words to such effect.

B. The Attempt to Force the ELEC Commissioners to Terminate Mr. Brindle.

Gubernatorial interference did not end with the attempt to extort Mr. Brindle's resignation but continued with direct pressure upon the independent ELEC Commissioners, as follows.

On November 15, 2022 the ELEC Chair received a phone call from Dominic Rota, the Governor's Chief Ethics Officer who "advised" that the Commissioners should fire Mr. Brindle because of a claim that he made an "anti-gay" and "racist" statement. Rota followed the phone call with an email but, to the best of my knowledge, did not provide any complaint or other documentation. The ELEC Commissioners, in the absence of documentation of any discriminatory acts, quite properly refused to take action as to a longstanding Executive Director with a high reputation for integrity in the operation of the campaign finance agency.

C. Such Acts Demonstrate that Governor Murphy and His Staff have Attempted to Interfere with the Independence of ELEC.

The above summary demonstrates that the Chief Executive of New Jersey, Governor Philip Murphy, interfered directly with the operation of an independent state campaign finance agency. This occurred through the actions of the Governor's highest ranking staff members even to the point of drafting Mr. Brindle's resignation letter on the Governor's letterhead. The purpose of such interference was to force the departure of Mr. Brindle, ELEC's Executive Director who is charged with the duty of neutrally administering and investigating potential violations of campaign finance laws by individuals, corporations, political parties, candidates and officeholders.

The attempt to force Mr. Brindle's resignation, and then his discharge, occurred outside of legal channels and, initially, without communication to the ELEC Commissioners. Moreover, this occurred through the use of extortion, i.e., the threat that the "charges" would be publicized if Mr. Brindle did not resign. The subsequent attempt to "advise" the ELEC Commissioners to discharge Mr. Brindle is equally intrusive in the operation of an independent agency, particularly

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
January 9, 2023

where the Legislature has established that **only** the Commissioners have the power to hire or fire the Executive Director. N.J.S.A. 19:44A-6(a).

The above facts represent precisely the type of interference the Legislature sought to prohibit as to the independent state agencies when it promulgated N.J.S.A. 19:44A-5 and its cognates. Maintaining such independence is particularly important in the case of ELEC, the state's campaign finance enforcement agency that must be neutral and apart from all other actors, both governmental and political.

3. MR. BRINDLE'S PARTICIPATION IN THE ATTORNEY GENERAL'S INVESTIGATION WOULD COMPROMISE THE INDEPENDENCE AND INTEGRITY OF THE ELECTION LAW ENFORCEMENT COMMISSION.

The history of this matter since November 2, 2022 demonstrates an extralegal attempt by the Governor and his staff to force and coerce the resignation of a high state officer who directs an independent election monitoring agency whose independence is guaranteed by law.

In the context of these extralegal actions, it is all the more important to adhere to the Legislature's plainly stated intent to maintain the independence of ELEC in its supervision and discipline of its employees and officers, as provided under N.J.S.A. 19:44A-5. As such, I am required to advise Mr. Brindle, and he is accepting my advice at this time, to refrain from participating in any investigative efforts by the Attorney General into the alleged claim of discrimination.

Of course, we respect entirely the need to investigate a claim of discrimination and we encourage the Attorney General to forward any such complaint to the ELEC Commissioners who are empowered by statute to conduct their own inquiry and impose discipline pursuant to N.J.S.A. 19:44A-5. To my knowledge, neither Mr. Brindle nor the Commissioners have received any complaint or documentation of an actual allegation.

In our discussions, you have taken the position that the "EEO" inquiry would not breach ELEC's independence because any resulting discipline can only be imposed by the ELEC Commissioners. However, the statutory independence of ELEC was carefully drawn by the Legislature to extend to "discipline *and supervision*". N.J.S.A. 19:44A-5 [emphasis added]. Since "supervision" reasonably includes the power to investigate the conduct of an officer such as Mr. Brindle, the statutory independence of ELEC must extend to investigating an allegation of discrimination against the agency's Executive Director. To do otherwise, would subject the

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
January 9, 2023

independent campaign finance agency to control by the Executive Branch, contrary to the Legislature's plainly stated intent.

The threat to ELEC's independence has *already* been demonstrated by the Attorney General's assertion of power to discipline Mr. Brindle, even *before* any finding has been made against him, as demonstrated by the email of Judi Stipick dated December 22, 2022 in which Ms. Stipick stated:

N.J.A.C. 4A:7-3.2(h) allows for interim corrective measures to be taken at the outset of a matter.

Ms. Stipick was referring to N.J.A.C. 4A:7-3.2(h) that states "corrective measures" may be imposed by EEO on an agency employee during the investigation "***if interim corrective measures are necessary to prevent continued violations...***" N.J.A.C. §4A:7-3.2(h)[emphasis added]. The Stipick email thus demonstrates that EEO has reserved to itself the right to discipline the ELEC Executive Director, a power that is contrary to ELEC's required independence in all matters of "discipline and supervision". N.J.S.A. 19:44A-5.²

N.J.A.C. 4A:7-3.2(h) also intrudes upon ELEC's independence by providing for "corrective measures" that equate to "supervision" over agency staff, including:

1. Separation of parties;
2. Removal of parties from the workplace; and
3. Involvement of law enforcement, when appropriate, for instances involving bodily harm or serious bodily harm.

N.J.A.C. 4A:7-3.2(h). Such measures extend to the actual operation of the agency and physical placement of employees and their working conditions, plainly invoking the "supervision" of the agency that is also a matter of ELEC's independence under N.J.S.A. 19:44A-5.

² As noted earlier, Ms. Stipick has also stated that the failure of Mr. Brindle to cooperate in training "may result in administrative and/or disciplinary action, up to an

d including termination of employment. See N.J.A.C. 4A:7-3.1(d)." See Email, Stipick to Afran, *supra*. Such threats implicate directly the independence of ELEC and are coercive in nature.

Steven Morris, D.A.G
New Jersey Office of the Attorney General
Office of Equal Employment Opportunity
January 9, 2023

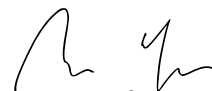
Although you have advised me that the “training” to be held pursuant to N.J.A.C. 4A:7-3.2(h) would only extend to information about the investigatory process including the avoidance of “retaliation”, this, too, would violate ELEC’s independence. Such guidance, particularly as to avoiding “retaliation”, comprises “supervision” and equally implicates ELEC’s statutory independence.

N.J. Exec. Com'n on Ethical Standards also makes it clear that no employee of an independent agency can be subject to the department’s compelled investigative powers in connection with their work at the independent agency. 238 N.J. Super. at 89. Hence, no legal basis appears to exist under which DLPS can compel or mandate Mr. Brindle’s participation in pre-investigation “training” or the investigation itself since such powers are within the exclusive jurisdiction of the ELEC Commissioners.

To the extent these issues present questions of law that have not been directly litigated, I will gladly review and consider any authorities or analysis that the Attorney General believes will support its claimed power to investigate in this instance. Please forward any analysis or authorities that you believe shed light on these legal issues and we will certainly consider the Attorney General’s views in good faith. In the absence of such persuasive analysis, however, I have advised Mr. Brindle that it would be improper for him to participate in the Attorney General’s “EEO” training and investigation and I understand he is accepting and following that advice at this time.

In any event, I encourage the Attorney General to forward any complaint as to Mr. Brindle to the ELEC Commissioners who hold the supervisory and disciplinary authority with respect to an officer of ELEC.

Respectfully,



Bruce I. Afran
Counsel for Jeffrey Brindle

Attachment

Via email to: steven.morris@njoag.gov



State of New Jersey

OFFICE OF THE GOVERNOR
P.O. Box 001
TRENTON, NJ 08625-0001

PHILIP D. MURPHY
Governor

November 2, 2022

The Honorable Philip D. Murphy
Governor
State of New Jersey
P.O. Box 001
Trenton, NJ 08625

Dear Governor Murphy,

Please accept this letter as my formal notice of resignation as the Executive Director, Election Law Enforcement Commission, effective November 18, 2022.

It has been a tremendous honor and privilege to have served your Administration and the people of the State of New Jersey.

Respectfully,

Jeffrey Brindle
Executive Director, ELEC