



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the May 27, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the April 29, 2010 Meeting

Mr. Youngblood moved to accept the minutes of the April 29, 2010 meeting as drafted. Ms. Matheson seconded the motion.

The motion passed unanimously (4-0).

Agenda Item #2. Endorsements - Request for Advice by Rep. Thomas Saviello

Mr. Wayne explained that Rep. Thomas Saviello of Wilton, a Republican candidate for State Senate District 18, wishes to endorse three Republican House candidates in his area. Those candidates may be interested in sending mailings to voters in their districts citing his endorsement. His candidacy for State Senate would not be mentioned and he would be referred to as Rep. Tom Saviello in the mailings. In Rep. Saviello's view, these mailings would benefit the House candidates and not him. Mr. Wayne said this issue – when a candidate is mentioned in a public communication – has given rise to complaints in the past. The complainants contended that the candidate received an in-kind contribution by getting more name recognition as a result of the communication. Rep. Saviello asked whether the use of his endorsement in a campaign communication by another candidate would be consistent with Maine campaign finance law and whether the staff could assure him that it would not be considered an in-kind contribution. Mr. Wayne explained that it would be beneficial for candidates if the Commission had a policy on this issue. He

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recommended for the Commission's consideration the proposed policy drafted by the staff contained in his memo to the Commission.

Ann Woloson, Democratic candidate in State Senate District 18, spoke in opposition to the use of public funds by a MCEA candidate to pay for campaign communications that include the name and endorsement of another MCEA candidate, who is not sharing the cost to the communication. She said the Commission's expenditure guidelines specifically prohibit the use of MCEA funds to "assist in any way the campaign of [another] candidate." Since the communications would be made to voters in the district that the endorsing candidate is campaigning in, the endorsing candidate is likely to receive a benefit from the communication. She said that the endorsing candidate could also receive a benefit from the mailing by getting more name recognition in areas where the candidate is not as well known. The candidate would be introduced to voters in that district by virtue of the other candidate's mailing. She thought it would be reasonable that endorsements on materials that had not been paid for with MCEA funds and that were distributed outside of the endorsing candidate's district would be allowable.

Daniel I. Billings, Esq., said he was not representing any party in this matter, however, candidates ask this type of question on a regular basis. He said he agreed with the staff's policy to look at the purpose of the expenditure. He said if the purpose of the expenditure is to benefit the candidate who is making the expenditure, it is an appropriate use of MCEA funds. He said the general rule to apply when deciding whether Clean Election funds should be used is whether the expenditure is a traditional type of campaign tactic that would have been used prior to the MCEA program. He said the use of endorsements is a traditional campaign tactic. He cautioned against prohibiting the use of MCEA funds for communications that contain these kinds of endorsement because it would shut down a traditional means of campaign communication simply because a candidate was using the Clean Election system. He said this type of activity has been going on for years without any controversy. There could be times when one has to look beyond the communication and look at other circumstances to decide if there is a purpose other than promoting the candidate who paid for the communication. He said that he thought the staff advice should be followed.

Joseph Greenier, concerned citizen from Stockton Springs, Maine, stated he viewed this matter differently. He said it could be possible Rep. Saviello, who has been a Democrat and an independent, is looking to seek recognition from the Republicans in the Senate district.

Alison Smith, co-chair of Maine Citizens for Clean Elections, supports the staff recommendation. She cautioned the Commission to stay clear of any procedure that would appear to be pre-approval of communications by candidates.

Ms. Matheson asked Ms. Smith whether matching funds would be triggered if it were a privately financed candidate who made the expenditure.

Ms. Smith said it would be a complicated task to allocate the portion of the costs of a communication that could be attributed to an endorsement, which is a part of traditional campaigning.

Ms. Woloson stated for clarification she does not support the idea that Clean Election Act candidates not be allowed to endorse other candidates. She suggested doing this by letters to the editor of a newspaper as an example. She said as long as the endorsement is not using Clean Election funds to do so. She explained her issue was using MCEA funds on campaign materials, which will promote another candidate.

Mr. Youngblood stated he thought the staff's recommendation was well thought out and he would support it.

Mr. Duchette agreed. He said that the Commission should be cautious about the advice it gives and that candidates should be aware that the Commission will look at the factual issues surrounding a communication. He said candidates should also be aware that there could be risks in using MCEA funds in publicizing this kind of endorsement.

Mr. McKee said he would prefer to stay away from an advisory opinion by the Commission and supported the staff's assessment and recommendation. He said that the staff's recommendation was reasonable and consistent with Maine law.

Mr. McKee moved that the Commission authorize the Commission staff to give advice to candidates as indicated on page 5 of the staff's memo. Mr. Duchette seconded.

Motion passed unanimously (4-0).

Agenda Item #3. Request for Reconsideration by Peter Martin

At its April 29, 2010 meeting, the Ethics Commission found that Peter Martin had not registered as a lobbyist as required by law for lobbying performed in March 2010 on behalf of Black Bear Entertainment. Peter Martin requests that the Commission reconsider the decision on the grounds that he registered on time.

Mr. McKee stated he would prefer to first address the issue of whether to re-open the determination made at the April meeting and asked whether the reconsideration was based upon new evidence or different analysis.

Mr. Wayne explained Mr. Martin has provided more detailed information concerning when the lobbying took place in March 2010.

Mr. McKee expressed his concern about the negative impacts on the Commission's decision-making process if the Commission were to allow reconsideration of every determination, which the Commission is free to do but does not have to. He said the Commission needs to have some finality and be able to move forward once it has made a decision. He said he would like to hear what the other Commission members think about the issue of reconsidering determinations in general, before taking up this specific request for reconsideration.

Mr. Duchette said it would be important to look into the basis for reconsideration and whether that provided sufficient grounds to grant reconsideration, *e.g.*, if there were new and relevant evidence that suddenly came to light. He said that in this case, there was no new evidence presented that was not available for the last meeting. It may be that the argument and the way the evidence is presented are new and thoughtful but the time for that was at the last meeting. It does not support reconsidering the determination.

Mr. Youngblood agreed and said he was opposed to reopening the issue. He said the information provided by Mr. Martin now could have been presented last month.

Daniel Walker, Esq., said there were two factors that supported a reconsideration of the Commission's determination. First, Mr. Martin wanted to provide relevant information to the Commission at the last meeting about the timing of his lobbying activities, most of which took place after March 17. Second, he said that the Commission's determination itself was not based on sound grounds. He said that the Commission had to carry the burden of proof before it could impose a penalty on Mr. Martin. Mr. Bailey's complaint was not based on personal knowledge and contained no specific facts to prove that Mr. Martin spent more than eight hours lobbying prior to March 17. Mr. Bailey said in his letter that he heard from other people that Mr. Martin was at the State House. Mr. Greenier said at the hearing that he saw Mr. Martin at the State House. While the evidence provided by Mr. Martin could have shown more clearly that he did not exceed the threshold prior to March 17, there was no actual proof presented to the Commission that Mr. Martin did spend more than eight hours lobbying prior to March 17.

Joseph Greenier, concerned citizen from Stockton Springs, said he was concerned that there were more hours than reported by Mr. Martin.

Mr. McKee moved that the Commission not reopen this matter for reconsideration since the information provided at this meeting does not present any new facts which could not have been discovered prior to the April meeting. Mr. Duchette seconded.

Motion passed unanimously (4-0).

Agenda Item #4. Request for Waiver of Penalty by Black Bear Entertainment PAC

Mr. Wayne explained at the April 29, 2010 meeting, the Ethics Commission found that the January 19, 2010 campaign finance report filed by the Black Bear Entertainment political action committee (PAC) was late because it did not substantially conform to the reporting requirements due to the omission of a \$50,000 payment to Atlantic Strategies in October. The preliminary penalty for the late filing is \$10,000. The PAC requests a waiver of the penalty.

Daniel Walker, Esq., counsel for Black Bear Entertainment explained that the problem arose because the PAC's usual procedure for making payment to vendors was not followed for this payment to Atlantic Strategies. He said the PAC's checking account should be used to pay for all campaign related expenses. He said in this case the expenditure to Mr. Martin, Atlantic Strategies, was made electronically from Black Bear's money market account to Mr. Martin's private account, so it did not appear in the checking account statement for the PAC. Mr. Walker said this is a mitigating circumstance because the report was filed on time but due to the way in which the bank processed this payment, the expenditure was overlooked.

Mr. McKee asked how the staff arrived at the reduced penalty amount of \$500.

Mr. Wayne explained the staff felt that the amount needed to convey that this was a serious omission; however, the remaining report was filed on time and accurate. In keeping with the severity of the omission as well as the good faith of the PAC, staff arrived at this amount.

Mr. Youngblood said this amount was a very lenient reduction. He said the amount of the error was so significant it did not seem possible that it could be overlooked. He said a penalty of \$500 does not discourage others from doing so again.

Mr. Duchette recalled at the previous meeting the focus was on whether a violation had occurred and not so much on the amount of the penalty. He said the testimony was credible and the circumstances were understandable, so he would support a reduction.

Ms. Matheson agreed with Mr. Duchette. She said every situation needs to be looked at differently and the facts in this matter warrant a reduction.

Mr. McKee said he supports mitigating the penalty down; however, the \$500 does not seem sufficient in his view. He said he accepts the PAC's explanation and understands circumstances do arise from time to time. The amount was significant and the Commission needs to send a message that a great deal of care needs to be used when large sums of money are being used. He said he would support a penalty of \$1,000.

Mr. McKee moved that the Commission waive the entire penalty except for \$1,000. Mr. Youngblood seconded.

Motion passed unanimously (4-0).

Agenda Item #5. Finding of Violation for Unregistered Candidates

Mr. Wayne explained that candidates for legislative and county office are required to register with the Ethics Commission within ten days of becoming a candidate. The Commission staff has sent three written notices to unregistered candidates and there are currently two candidates have not registered. Mr. Wayne also noted that assessing the penalty and forwarding to the Attorney General as required by statute is more costly than to waive the \$10 fee for not registering.

Mr. McKee moved that the Commission find candidates Randell C. Sprague and Marcus I. Welch in violation for not registering and that the Commission assess no penalty. Mr. Youngblood seconded.

Motion passed unanimously (4-0).

Agenda Item #6. Referral of Scarborough Republican Town Committee to Attorney General

The Commission staff recommends referring this matter to the Maine Attorney General for collection of the \$250 penalty assessed against the Scarborough Republican Town Committee in January 2010.

Mr. McKee questioned whether it was necessary for these kinds of referrals (for the collection of unpaid penalties) to be voted on by the Commission or whether it should be automatically referred after 30 days has passed since the notice of the penalty. He said he thought it should be an automatic procedure. Mr. McKee referred to the statute and confirmed that the Commission could pass the information directly on to the Attorney General for processing which would be most efficient.

Mr. Duchette agreed.

It was agreed that these collection matters will go directly to the Office of the Attorney General for further action.

In consideration of the Commission's practice to address agenda items out of order to accommodate the attendance of public participants regarding particular items, the following agenda items were taken out of order:

Agenda Item #8. Use of Maine Clean Election Act Funds to Discuss People's Veto Referendum

Mr. Wayne explained that Attorney Daniel I. Billings seeks advice on behalf of a number of Republican candidates. Mr. Billings has two questions: Whether candidates may spend Maine Clean Election Act funds to advocate in favor of the June 8, 2010 people's veto referendum on the tax reform bill and whether a business owned by a candidate can run ads discussing the negative effect on his business if the people's veto does not pass and remain in compliance with campaign finance law.

Daniel I. Billings, Esq. spoke on behalf of a number of Republican candidates who are interested in running ads that, as well as promoting their election, will mention the people's veto referendum. Mr. Billings said he was more comfortable getting an advisory opinion before the expenditure was made because the potential penalties for misuse of MCEA funds can be substantial. He said that there is a history of candidates tying their campaigns to referendum issues, so what is being proposed for this election is not unusual. He said the Commission's expenditure guidelines and the statute state that MCEA funds must only be spent for campaign related purposes. He said that discussing issues during an election is a campaign related purpose. He said that if the script for the radio ad that had been given to the Commission dealt with healthcare, jobs, or taxes in general but did not mention a referendum, he did not think that anyone would suggest it was not campaign related. As an example, he referred to the marriage issue that was on the ballot in 2009. He said if an MCEA candidate were to run an ad during this election regarding this matter, it would not be considered inappropriate because the issue is not on the ballot. He did not think that the analysis should change simply because an issue in the subject of the ballot question. The question to ask is whether the communication promotes a candidate's campaign as well as discussing an issue.

Mr. Billings also addressed the issue regarding candidates whose businesses are affected by the tax reform act, which is the subject of the people's veto. In particular, the business of a candidate would run an ad using the candidate's voice stating the impact of the tax reform act on his business. He would not state in the ad that he is running for office and would only focus on the negative impact that the tax reform act will

have on his business and the economy. He also raised the question whether private funds could be used for the ad, if the use of MCEA funds were considered inappropriate. He referred to a flyer by Rep. Terry Hayes, which talks about a referendum issue. Rep. Hayes was told by Commission staff she could spend her private funds on the flyer as long as it did not state she was running for election on the flyer. He stated he believes allowing the use of personal funds for this type of expenditure creates a loophole in the MCEA system. He reiterated that the Commission has taken this issue up before and therefore should consider the precedent.

Alison Smith, co-chair of Maine Citizens for Clean Elections, cautioned the Commission not deal with hypothetical issues. She said dealing with specific cases is the best procedure to follow. She said the statute is clear that public funds are for promoting a specific candidate's own campaign and not for any other purpose. She said the expenditure guidelines disallow public funds to promote or oppose ballot issues. She said the hypothetical radio ad in question could fall on either side of the law; however, the Commission's role is not to advise candidates on what they can or cannot say in communications. She said the Commission does have authority to remind candidates and reinforce the purpose of Clean Election funds as well as what is allowed under the expenditure guidelines.

Ms. Smith suggested some criteria the Commission might chose to weigh in with regard to advertising. For example, whether a candidate is in a contested race, how much of the communication relates to a ballot question as opposed to the candidate, whether there is a call to action, and if so, what is the call to action. She strongly advised against preapproval of any communications by the Commission.

She said with regard to the second question, business-related advertising, it is possible that a loophole could exist. She said that business advertising could be used to evade contribution limits and disclosure requirements. In the future, she thinks the Commission should look at business advertising by candidates more closely. She said the ad in question falls less under business advertising and more under political speech.

Mr. McKee suggested the two issues be discussed and voted upon separately. He said the second issue with regard to the radio ad by the candidate's business really has other factors that need to be taken into account, such as timing and content, for example. He said he agreed with Commissioner Marsano's view

back in 2008 that the Commission be careful about placing limits on our citizen's legislature when they need to advertise their businesses around the election. He said he would be inclined to defer a decision on this particular matter at this time and deal with a more concrete matter, such as a complaint regarding a specific ad, if it should arise at a later time.

Mr. Youngblood said the materials provided by Commission staff for guidance are very well thought out and he sees no reason to change a thing.

Mr. McKee, in the matter of Mr. Billing's question #2 requesting advice regarding a radio ad, moved that the Commission not provide an advisory opinion. Mr. Duchette seconded.

Motion passed unanimously (4-0).

Regarding Mr. Billings' first question, Mr. Duchette said he agreed with Mr. Billings' statement that candidates should be able to discuss the issues. If the issue also happens to be the subject of a ballot question, candidates are still going to want to discuss it. The question is whether they can use MCEA funds to do so or address the issues in other ways, such as letters to the editor. He said that it is important to know the exact content of the communication in order to come to a decision. In this case, the Commission has the script for the ad and he thinks that a decision can be made about this particular radio ad.

Mr. McKee said the content and timing of the ad are factors to consider. This ad is mostly about the ballot question, even though it does also promote the candidate.

Mr. Duchette stated that he was uncomfortable making a distinction between discussing an issue when it is on the ballot and discussing it when it is not on the ballot. He said he was concerned about regulating the speech of candidates by saying that they could not use clean election funds to discuss an issue because it is on the ballot. He said if the issue is important, it should not matter whether it is on the ballot and funds should be allowable in either case.

Mr. McKee said there is a specific guideline prohibiting the use of clean election funds to support or oppose ballot questions or any political or social cause, other than the candidate's campaign. He said this communication seems to fall directly within that prohibition.

Ms. Matheson said it does not seem realistic to say that because an issue is on the ballot, the issue cannot be mentioned in a campaign ad. Taxation, for example, is always going to be a controversial issue regardless of whether there is a ballot question that deals with that issue. She said if the primary focus of the ad were to talk about taxes in general and this candidate's position on taxes in general and include a minor reference to the ballot question, it may be acceptable. She said the primary purpose of this ad is less about the candidate and more about the referendum, which presents an issue of whether Clean Election funds can be used. She said a strict reading of the statute would indicate that Clean Election funds cannot be used for the ad.

Mr. Duchette said he is troubled by saying yes or no on this particular communication. He said candidates know where the line is and should use their judgment.

Mr. Youngblood said making a determination is easier after the fact. He said if a candidate talks about how he or she is voting in a campaign ad, that would be crossing the line. He said the guidance is very good and if a candidate goes by the guidance, there will not be a problem.

Mr. McKee said this particular ad could be a problem because it is more specific as to promoting a ballot issue because it states how the candidate will be voting on the ballot issue.

Mr. Duchette moved that the Commission not provide an advisory opinion regarding Mr. Billings' first request for advice. Mr. McKee seconded.

Motion passed unanimously (4-0).

Agenda Item #9. Request to Rebut Presumption by Diamond PAC

Mr. Wayne explained the Diamond political action committee (PAC) has conducted a poll concerning candidates in a contested primary election for State Senate. It seeks to rebut the presumption that the costs were incurred to influence the nomination or election of the candidates mentioned in the poll. The staff is recommending that the Commission find that this poll was not incurred with the intent to influence the election and the presumption has been rebutted.

Mr. Youngblood moved the Commission accept the staff recommendation. Mr. McKee seconded.

Motion passed unanimously (4-0).

Agenda Item #7. Discussion of Appointment Process for Commissioners

Mr. Wayne explained that Mr. Marsano had expressed dissatisfaction about the appointment process. After checking with the Secretary of State, the appointment process and terms of service were made clearer. Mr. Wayne explained that one possible option would be for the first term of a Commissioner to always be three years regardless of when you begin, even if the appointment was to fill a vacancy. Another option would be to continue with the current practice of having the Commissioner complete the unexpired portion of the term but change the date of the expiration of a term to December 31 for all Commissioners so that vacancies can be filled during a legislative session.

Mr. McKee said he would prefer to have more time to look over the suggestions and agreed that a clearer procedure is needed.

EXECUTIVE SESSION

At 10:50 a.m., Mr. McKee moved to go into executive session in accordance with Section 405, subsection 6(E) of Title 1 for the purpose of discussing pending litigation. Mr. Duchette seconded the motion. The motion passed unanimously (4-0).

At 11:15 a.m., it was moved to come out of executive session. Motion passed unanimously (4-0).

Mr. McKee moved to adjourn. Mr. Duchette seconded. The motion passed unanimously (4-0).

Meeting adjourned at 11:15 a.m.

Respectfully submitted,

Jonathan Wayne, Executive Director