



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

Additional Materials
Item #2
July 29, 2013

MEMORANDUM

To: Commission on Governmental Ethics and Election Practices

From: Phyllis Gardiner, Assistant Attorney General

Date: July 26, 2013

Re: *In re: Campaign Spending in Maine House of Representatives District 1*
Objections by Rep. Nadeau, filed July 22, 2013

cc: Timothy C. Woodcock, Esq., attorney for Rep. Michael Nadeau
William P. Logan, Esq., attorney for Philip Soucy
Katherine R. Knox, Esq., attorney for the Maine Democratic Party

On July 22, 2013, the Commission received a written objection, filed on behalf of Rep. Michael Nadeau, to the alleged "expansion" and "clarification" of the "Legal and Factual Issues" listed in the Notice of Hearing for July 29, 2013, issued on June 21, 2013. In his objection, Rep. Nadeau asserts that one specific issue noted in paragraph 2(A) of the notice of this hearing should not be considered by the Commission because it was not listed in notices for the January 17, 2013 hearing and was added only after Rep. Nadeau and others testified at that hearing. He also objects to the Commission relying at all on the second sentence of 21-A M.R.S. § 1015(5)¹ or the provisions of Chapter 1, §6 of its rules in this proceeding. The purpose of this memorandum is to provide you with the staff's analysis of these objections.

BACKGROUND

The first part of Rep. Nadeau's objection focuses on the potential violations associated with the newspaper advertisement placed by James Majka in the Fiddlehead Focus on October 31, 2012, promoting the election of Mike Nadeau as Representative of House District 1. The

¹ The references to 21-A M.R.S. §1505(5) in Rep. Nadeau's objection reflect a typographical error.

Commission's revised Notice of Hearing, issued on December 18, 2012, listed as the fifth issue or topic to be addressed at the January 17, 2013 hearing:

(5) whether James Majka made an expenditure of \$420 for an advertisement in the Fiddlehead Focus newspaper independently of Michael Nadeau, his committee, and their agents.

Staff distributed this Notice of Hearing via email and highlighted in a cover memo to all attorneys and other hearing participants that this "fifth topic" had been added since the original hearing notice was issued on November 15, 2012. The memo also indicated that the Commission staff expected to receive testimony at the hearing from two employees of the Fiddlehead Focus— Dennis Michaud and Julie Daigle.

The same notice listed as a relevant statutory provision 21-A M.R.S. § 1015(5), which provides in full:

5. Other contributions and expenditures. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate.

The financing by any person of the dissemination, distribution or republication, in whole or in part, of any broadcast or any written or other campaign materials prepared by the candidate, the candidate's political committee or committees or their authorized agents is considered to be a contribution to that candidate.

As Rep. Nadeau's attorney correctly notes, the Commission did not conclude its investigation on January 17, 2013. Instead, the Commission authorized staff to continue the investigation and indicated that the Commission would conduct further hearings if needed to consider additional relevant testimony or documents before making any final determinations. (1/17/13 Transcript at 166-168.)

By mid-June, 2013, the staff had concluded its further investigation and determined that the matter was ready to be re-scheduled for a final hearing to consider some additional testimony and exhibits. Staff reached out to Rep. Nadeau's attorney on June 11, 2013 (along with attorneys

for the other participants) to inform him of this and to inquire about possible dates when he and his client could be available. Mr. Woodcock responded the same day and included a request that the Commission “specify what charges are currently under consideration against ... Representative Nadeau and/or his ‘campaign.’” (Email from Timothy Woodcock to Jonathan Wayne, dated June 11, 2013.) The staff agreed to provide Mr. Woodcock with a staff memorandum within a couple of weeks outlining the specific violations that the staff “suggests the Commission consider” so that he would have sufficient time to prepare for the Commission hearing. (Email from Jonathan Wayne, dated June 12, 2013.)

The Notice of Hearing for July 29, 2013 was distributed to Mr. Nadeau’s attorney and other interested parties on June 21, 2013, after all participants had indicated their availability and willingness to proceed on that date. It includes a detailed listing of “factual and legal issues” that the Commission “will likely address” at the hearing and in deliberations following the receipt of all the evidence. Issue #5 in the previous hearing notice, concerning whether James Majka had made an expenditure of \$420 for an advertisement in the Fiddlehead Focus newspaper “independently of Michael Nadeau, his committee, and their agents” was expanded in this notice to include a more detailed list of factual and legal questions relevant to making a determination whether this expenditure was made “independently” of the candidate, his committee and their agents. These are listed as sub-issues 2(A) through 2(D) on page 3 of the Notice. As indicated in footnote 2 on page 3 of the Notice, the original issue #5 was expanded to include all these sub-issues in order to provide “clarification” concerning all of the potential grounds upon which a violation could be found.

The particular one challenged by Mr. Nadeau is issue 2(A):

(A) Did publication of the advertisement disseminate written material prepared by Michael Nadeau, thereby resulting in the expenditure for the advertisement constituting a contribution to Mr. Nadeau under 21-A M.R.S. § 1015(5)?

This issue relates to the second sentence of section 1015(5):

The financing by any person of the dissemination, distribution or republication, in whole or in part, of any broadcast or any written or other campaign materials prepared by the candidate, the candidate's political committee or committees or their authorized agents is considered to be a contribution to that candidate.

The Notice of Hearing for July 29, 2013 also included a list of statutes and rules deemed "relevant to the proceeding." It omitted certain statutes listed in the notices for the hearing on January 17, 2013 (namely, the material false statement statute which relates to Philip Soucy), and added others in an effort to include all of the statutory and regulatory provisions that could be relevant to making a determination whether the Citizens for Effective Government mailing and/or the Fiddlehead Focus ad constituted independent expenditures. Section 1015(5) on coordinated expenditures was listed in this notice, as it was in the initial hearing notice. Chapter 1 § 6(9) of the Commission's rules was listed as well, since it does relate to the procedures to be applied by the Commission in determining what constitutes a coordinated expenditure versus an independent expenditure.

On June 28, 2013 – a week after distributing the detailed Notice of Hearing – the Commission staff provided Mr. Nadeau's attorney with a copy of the staff memorandum to the Commission. This is the same memorandum that was distributed to you and posted on the Commission's web site on July 19, 2013 (only the date in the header was changed). The purpose of providing it to Rep. Nadeau's attorney a month early was to satisfy his request that he be given notice of all the potential violations under consideration.

RESPONSE TO OBJECTIONS

1. Alleged Due Process Violation

Rep. Nadeau contends that he is now being “charged” with a new violation based on the framing of issue # 2(A) in relation to the second sentence of §1015(5), and that to consider such a violation would violate his due process rights because it was added only after he acknowledged, in testimony on January 17, 2013, that the handwritten document which James Majka gave to the Fiddlehead Focus newspaper staff to create the \$420 newspaper ad was written by Rep. Nadeau himself.

Contrary to his first contention, the notices of hearing in this matter do not set forth a list of “charges” as Rep. Nadeau’s attorney suggests. The hearing that was held on January 17 and the one scheduled for Monday, July 29, 2013, are investigative hearings held pursuant to the Commission’s authority under 21-A M.R.S. § 1003(1) “to undertake audits and investigations to determine the facts concerning,” in this case, certain expenditures made to promote the candidacy of Michael Nadeau for House District 1 in the general election of November 2012. The Commission’s Chapter 2 rules provide that the notice of hearing “shall specify the time and place of the hearing and matters to be considered at the hearing.” The Administrative Procedure Act requires that a notice of hearing include “a short and plain statement of the nature and purpose of the proceeding and the matters asserted.” 5 M.R.S. § 9052(4). In accordance with these requirements, the Commission’s notices of hearing identify *potential violations* to be considered by the Commission. Indeed, all of the factual and legal issues in the Notice of Hearing for July 29 are framed in question form precisely because these are *merely factual and legal questions that the Commission may wish to consider* when it evaluates all the evidence presented.

Moreover, as in any investigative proceeding, the evidence discovered during the course of the investigation may generate new factual issues relevant to determining whether violations

have occurred. The factual and legal issues concerning whether the Fiddlehead Focus ad was a coordinated or independent expenditure were clearly a focus of the January 17 hearing, and were specifically addressed in the testimony of the two Fiddlehead Focus employees as well as James Majka. Rep. Nadeau simply confirmed in his testimony that the handwritten text on Exhibit 22 was his handwriting.

The Supreme Court found a due process violation in *In re Ruffalo*, 390 U.S. 544 (1968), based on completely different circumstances than those presented in this case. *Ruffalo* involved proceedings to disbar an attorney for “conduct unbecoming a member of the bar of the court.” The attorney had been charged with several counts of misconduct, including a charge that the attorney had solicited clients for employment liability cases through a hired agent. At the formal disciplinary hearing, the attorney testified that the agent he hired did not solicit clients, but merely investigated cases for the attorney. Some of those cases were against the agent’s own employer. Based solely on that testimony, the Board then added a new misconduct charge alleging that the attorney’s hiring of this agent to investigate cases against the railroad company that employed him was conduct “deceptive in nature and morally and legally wrong.” 390 U.S. at 547. The Supreme Court found that attorney had no notice before the disciplinary hearing that the testimony he offered in defense to one charge of misconduct would subject him to this new charge of misconduct. Indeed, he may even have been “lulled ‘into a false sense of security’ that he could rebut the charges by proving that his agent was an investigator rather than a solicitor of clients.” 390 U.S. at 551 and n. 4 (internal citations omitted). *Ruffalo* rests on the premise that the proceedings became an “impermissible trap” since, at the time of the hearing, the attorney could not have known that the defense he asserted would subject him to disbarment.

The circumstances of *Ruffalo* contrast sharply with this case in many respects. First, the activity giving rise to the misconduct standard in *Ruffalo* was not described in any statute or rule.² In contrast, all of the potential violations at issue in this proceeding are described in statute – a fairly simple, two-sentence statute (§1015(5)) that has been listed in all the notices of hearing. Unlike *Ruffalo*, there is no “additional charge” being leveled here; the Commission is in the midst of an investigative hearing and the notice of the continuation of that hearing, scheduled for July 29, 2013, simply added a specific factual and legal question based on the second sentence of the same statute previously cited. The second sentence of §1015(5) does not create a separate violation – it simply describes a specific activity that the statute defines as a coordinated expenditure or contribution. Finally, as noted above, Rep. Nadeau’s testimony does not provide the only basis upon which the Commission could find a violation of §1015(5), based on the second sentence of that provision.

The other case relied upon by Rep. Nadeau is similarly inapposite. In *Board of Overseers of the Bar v. Lefebvre*, 1998 ME 24, ¶¶ 14-16, the Maine Supreme Judicial Court found that the attorney did not have fair notice of the possibility that he would be sanctioned for “lack of good moral character” because that was not even listed as one of the identified and agreed upon issues to be litigated. The attorney thus had never had an opportunity to present evidence or argument to refute the particular theory of misconduct upon which he had been sanctioned. Rep. Nadeau, by contrast, has had sufficient notice and has an opportunity on Monday to add any further evidence or argument in response to all potential violations set forth in the Notices of Hearing and addressed in the staff memorandum.

² Indeed, as Justice White noted in his concurrence, not only was the disbarment standard unspecific (“conduct unbecoming a member of the bar of the court”) but the specific conduct for which the attorney was disbarred was not a type that most responsible attorneys would even recognize as improper. 390 U.S. at 555-556.

2. Objections to Chapter 1 Rules

Rep. Nadeau also contends that the Commission should not rely on Chapter 1, section 6(9) of its rules because that rule was not cited in the notice of the January 17 hearing and was added in the most recent notice of hearing. He also challenges the validity of the rule.

Chapter 1, section 6(9) specifically relates to interpretation and implementation of 21-A M.R.S. § 1015(5). (A copy of this rule is in your July 19 packet of materials.) It is not specific to the second sentence of § 1015(5), nor did this rule become relevant only as the result of testimony presented at the January 17 hearing. Moreover, the rule itself does not create a separate potential violation; it simply interprets §1015(5), which has been referenced throughout these proceedings. Accordingly, Rep. Nadeau's arguments under *Ruffalo* and *Lefebvre* do not appear to be germane. (*See* Objection at bottom of p. 9)

With regard to Rep. Nadeau's argument in footnote 7 of his Objection, the definition of "candidate" in Chapter 1, §6(9) simply creates a shorthand reference for purposes of reading that subsection of the rule – hence the instruction "[a]s used in this subsection, the term 'candidate' means..." The rule does not purport to change the meaning of the terms "candidate" or "committee authorized by the candidate" as used in Title 21-A.

The evidentiary presumptions set forth in Chapter 1, §6(9)(B) and (C) offer guidance to candidates and others with regard to the Commission's starting point for interpreting and applying §1015(5). They are rebuttable presumptions, however, and thus afford the candidate an opportunity to present facts and argument to persuade the Commission that the expenditure in question was not coordinated within the meaning of § 1015(5) and is not a contribution. These presumptions do not create regulatory requirements or impose burdens on the First Amendment rights of candidates or others, as argued in footnote 8 of Rep. Nadeau's Objection.

CONCLUSION

Rep. Nadeau has been provided with adequate notice of the potential violations of campaign finance law at issue in this investigation, and he has been given an adequate opportunity to prepare for hearing and to present any relevant evidence for the Commission to consider in making a final determination.

Thank you for consideration of this memorandum.