Agenda Item #1

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

Minutes of the July 25, 2012, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Margaret E. Matheson, Esq.; Michael T. Healy, Esq.; Hon. Jane A. Amero
Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 10:05 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the May 30, 2012 Meeting

Mr. Duchette moved to accept the minutes as drafted. Ms. Matheson seconded.

The motion passed (5-0).

Agenda Item #2. Complaint/Contributions to 2010 Campaign of Rosa W. Scarcelli

Karl S. Norberg submitted a complaint against the 2010 gubernatorial campaign of his step-daughter, Rosa W. Scarcelli. Ms. Scarcelli reported receiving two contributions of $750 each in December 2009 from Mr. Norberg and his son, Hillman Norberg, as well as another contribution of $750 from Ms. Scarcelli's mother, Pamela Gleichman, who is Mr. Norberg's wife. Mr. Norberg stated in his complaint that he and his son did not make or authorize any contributions. Ms. Scarcelli responded that the donors agreed to make the contributions and their contributions were properly reported. She referred to several detailed conversations she had with her mother in December of 2009 regarding the three contributions and that Karl and Hillman Norberg clearly indicated that they agreed to make the contributions at a family Christmas dinner in 2009. She also said that the funds were the personal funds of the contributors and came from the account of a family business which is used for their personal support.

Mr. McKee stated the question before the Commission was whether to conduct additional fact-finding in the form of a hearing with sworn testimony. He explained that the Commission could not judge credibility based solely on the documents received to-date and was unsure how anything could be resolved without sworn testimony from the parties.

Mr. Healy disclosed that, in his capacity as an attorney, he represented Ms. Gleichman and Gleichman & Co, for a period of time on a number of matters but has had no attorney-client relationship with either for well over ten years. He also noted that he has met and knows Ms. Scarcelli but has never represented her. Mr. Healy explained further that the firm with which he is affiliated currently represents Ms. Scarcelli's company, Stanford Management, on some matters. Mr. Healy said he will seek advice from the Commission's counsel as to whether these facts present a disqualifying conflict of interest. Mr. Healy also said that he would review the Bar Rules with respect to his participation in this matter. If the Commisison decides to hold a testimonial hearing, he will decide at that time whether to participate based on the comments of the parties and the resolution of the issue regarding his previous attorney-client relationship with Ms. Gleichman and her company.

Russell B. Pierce, Jr.,Esq., representing the campaign committee, Rosa for Maine, and Rosa Scarcelli, said that he wished to state for the record that this was not a situation where the campaign was trying to circumvent the contributions limits. The campaign did not need these contributions since Ms. Scarcelli donated close to $500,000 from her personal funds to support her campaign. In retrospect, it would have been easier for Ms. Scarcelli to write a check from her personal account for the amount of these contributions if the campaign needed the funds. Mr. Pierce explained that the problem with this case is that it is deeply entrenched in inter-family personal relationships. He explained that discussions about the contributions had taken place over several months and that at the family gathering at Christmas in 2009 everyone agreed to make the contributions. He said the holiday gathering was witnessed by others, such as Thom Rhoades, Ms. Scarcelli's husband, and her children. A few days later on December 28, Ms. Scarcelli had a specific conversation over the telephone with her mother asking if the donations were in fact going to be made, which was witnessed by her campaign finance director, Emily Mellencamp Smith, at least as to Ms. Scarcelli's side of the conversation.

Mr. McKee said it would be impossible for the Commission to settle this matter with the record before it because each side holds a view of events that is completely opposite of the view held by the other side.

Mr. Pierce said it was possible because the standard is whether the campaign knowingly and intentionally accepted a contribution in the name of another that was not authorized. He said that his view of the campaign finance laws was that if the campaign took all the proper steps to be sure the donation was authorized at the time the donation was made, there was no violation.

Mr. McKee said this matter really comes down to one of credibility and he did not see any other way for the Commission to proceed other than a testimonial hearing.

Mr. Pierce said that if the matter is going to proceed to the testimonial hearing level, his client be allowed to proffer additional witnesses. He said challenging someone's credibility is often determined by several witnesses and documents so there needs to be a full fledged hearing which requires several witnesses.

Mr. McKee said the Commission would limit the hearing to certain witnesses under oath and then receive affidavits from others since the Commission is not ready to spend several days hearing from a list of witnesses.

Mr. Pierce said even with only three witnesses it could take up to half a day for their testimony to be heard. He said he would defer to the Commission's counsel on the scope of the hearing and due process rights that would apply.

Mr. Pierce noted that up to this point, they have tried to be respectful of the complainant, Mr. Norberg, and the candidate's mother, and other family members as well as information about their finances which is relevant to circumstances surrounding this donation. Mr. Pierce stated some credibility issues could be determined immediately simply by looking at what Mr. Norberg said in his initial complaint in April. He claims he had no association with the account where the donation came from, whereas there is documentation that Mr. Norberg received wire transfer of up to $129,000 from that account over the course of that year. He also never mentions that he is the candidate's stepfather or that he is married to Pamela Gleichman in his initial letter. He said Mr. Norberg claimed to have discovered the donation by accident in

the *Huffington Post*. Mr. Pierce said these critical details could have been disclosed in Mr. Norberg's initial complaint, especially since Mr. Norberg did have access to and use of that account. The initial letter leads one to believe that Mr. Norberg is a completely unrelated donor and fails to disclose central, vital information. He said these are significant omissions that relate directly to Mr. Norberg's credibility.

Mr. Healy said for reasons previously stated he would not participate in the vote.

Noting that the contributions were made nearly three years ago, Mr. Duchette asked if there was any limitation period on bringing a complaint. Mr. Wayne said there was no statute of limitation.

Mr. McKee said that the Commission would decide today whether to hold an evidentiary hearing and asked whether the procedure for the conduct of the hearing is something that should also be decided today or whether that could be done in the interim.

Ms. Gardiner said the rules indicate that once a matter is reached on the agenda, the Commission controls further investigation and proceedings. She said the Commission may authorize the Chair to conduct further investigative proceedings on behalf of the Commission in the interim before the hearing. She said the Commission could appoint the Chair or someone else on the Commission to conduct a pre-hearing conference.

Mr. McKee suggested that the Commission decide at today's meeting what the rough construct of the hearing would be regarding whether there will be additional witnesses beyond the complainant and Ms. Scarcelli, how much time will be allowed for testimony from the parties, and whether to allow additional documentary evidence in addition to the live testimony.

Ms. Gardiner said under the APA (Administrative Procedures Act) a witness submitting an affidavit must be available for cross examination. However, there may be some issues which the parties could stipulate to or agree that an affidavit is sufficient. She said the Commission should determine what the scope of the hearing will be in terms of the fact issues to be addressed.

After a discussion about various procedural considerations relevant to the hearing, it was agreed that the Commission should appoint one Commission member to be the presiding officer and the Commission's representative at a pre-hearing conference.

Mr. Duchette moved to find there is sufficient information in the complaint and response for the Commission to conduct further investigation and hold a hearing on the alleged violations. Ms. Amero seconded.

Motion passed (4-0) with Mr. Healy abstaining.

Ms. Matheson moved to appoint Chairman McKee as the presiding officer for the hearing and the Commission's representative for the purpose of deciding any pre-hearing procedural issues. Ms. Amero seconded.

Motion passed (4-0) with Mr. Healy abstaining.

Agenda Item #3. Update on Criminal Prosecution of former State Representative David R. Burns
On June 14, 2012, former State Representative David R. Burns of Alfred, Maine pled guilty to three counts of forgery and three counts of theft, in connection with his 2010 campaign for office. The criminal sentence included 364 days of imprisonment, which was suspended except for six months. Mr. Burns agreed to pay $2,384 in restitution to the Commission, in addition to amounts he has returned previously. The question before the Commission was whether to impose any civil penalties against Rep. Burns for the misuse of Maine Clean Election Act funds.

William Logan, Esq., attorney for David R. Burns, explained that it would be appropriate and consistent with past decisions of the Commission not to impose additional penalties in this case. This case is similar to the 2006 case against Rep. William Walcott who was also found guilty of using Clean Election funds for personal use. In that case, the Commission did not impose any additional penalties after the court decision. Mr. Burns was handed a 364 day sentence which he believed to be the maximum for these crimes and is currently serving six months of that sentence. Mr. Logan said this was a very stiff sentence given that Mr. Burns had no prior criminal history. He said that as a part of the negotiated plea agreement, Mr. Burns also

has agreed to repay to the Clean Election fund the entire claimed mileage reimbursement, even though some of that travel time was legitimate. This will save the Commission any further fact finding on that issue. In addition to the prison sentence and the return of funds, there are other negative consequences that have befallen Mr. Burns. Mr. Logan said this case was highly publicized and required Mr. Burns to resign from his seat in the House of Representatives. He is currently unemployed. It will, most likely be very difficult for Mr. Burns to find employment with this criminal record. Mr. Burns also is required to repay $2,384 in restitution to the Clean Election fund within one year from following his release from jail. Additional penalties beyond this will be very difficult for him to honor, he said.

In response to Mr. Healy, Mr. Logan explained that restitution was deferred because Mr. Burns did not have the funds and he is serving one year administrative release in order to ensure that he makes the complete restitution. Mr. Logan explained that Mr. Burns would have to go back to jail if he does not pay the restitution within that year.

Ms. Amero asked whether the Commission had to take any action if it found that the criminal penalties were sufficient and Mr. Wayne said no action was required which the staff was recommending.

Mr. McKee stated that the six month sentence was significant on a misdemeanor for someone with no previous record which proves the court considered the seriousness of Mr. Burn's misconduct.

Mr. Duchette moved to impose no further penalties as a result of the violations. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #4. Request for Waiver of Late-Filing Penalty/Maine Senate Republican Majority PAC
The Maine Senate Republican Majority PAC was required to file a 24-Hour Report on Friday, June 1, 2012 of three payments over $500 that it made to consultants on May 31. The PAC filed the report four days late on Tuesday, June 5, after discovering that a report was due. The preliminary penalty was $317.80. He said due to the inexperience of the treasurer, the staff recommendation was to reduce the penalty by half to $158.90 and because the late filing resulted in minimal harm to the public.

William Logan, representing the Maine Senate Republican Majority PAC, said the person filing had just begun this role in April and this was a bona fide mistake on her part. He explained that there is a dichotomy in the law where PACs are required to file reports of expenditures of $500 or more within a 13 day period but a party committee is not required unless it is an expenditure to support or oppose. He said because of the inexperience of the filer, this was not clear.

In response to Mr. McKee, Mr. Logan said the staff recommendation to reduce the penalty by half was fair but he would also support a full waiver given the small expenditure.

Ms. Matheson moved to adopt the staff recommendation and reduce the penalty by half to $158.90 because of the level of experience of the filer and minimal harm to the public. Mr. Healy seconded.

Ms. Amero asked whether this PAC had any other penalties assessed for similar reporting errors. Mr. Wayne said it had not and this PAC has generally complied with reporting requirements in the past.

Motion passed unanimously (5-0).

Agenda Item #5. Late Candidate Registration/Ronald E. Usher

Ronald E. Usher is a candidate for the Maine House of Representatives, District 131 who previously served in the Legislature some time ago. His campaign began receiving contributions in February 2012, and he qualified for the ballot on March 7, 2012. He registered as a candidate with the Ethics Commission on May 21, 2012 after receiving two reminder letters and a message from the Commission staff. The Commission received a complaint alleging that Mr. Usher was late in registering as a candidate. Mr. Wayne explained that the Commission does have candidates who are delinquent in registering but this case is different because Mr. Usher was fundraising a while before he qualified for the ballot and registered with the Commission. Mr. Usher explained to Mr. Wayne in a telephone conversation that he began filling out the registration form some time ago but did not have his treasurer's information, put the form aside and just forgot about it.

Ms. Matheson moved to adopt the staff recommendation and find that Mr. Usher violated 21-A MRSA § 1013-A(1) by registering late and assess a civil penalty of $10 against the candidate for the violation. Ms. Amero seconded.

Motion passed unanimously (5-0).

Agenda Item #6. Request for Waiver of Late-Filing Penalty/Carol Gutekunst

Carol Gutekunst is a candidate for Registrar of Probate for Oxford County. She was required to file her first campaign finance report on June 1, 2012. She filed the report one day late. The report showed that the campaign has received $1,504 in loans from the candidate and $683 in cash contributions from others. The amount of the preliminary penalty is $21.88 (one percent of total receipts for the period). Her campaign requests a waiver due to its lack of experience.

Ms. Amero moved to assess the $21.88 penalty. Mr. Duchette seconded.

Motion passed unanimously (5-0).

Agenda Item #7. Request to Investigate Mailing in Senate Republican Primary, District 33

Irv Marsters, a resident of Glenburn, Maine received an anonymous flyer in the mail urging him to vote against Rep. Andre Cushing and for James Emerson in the June 12, 2012 Republican primary election for State Senate, District 33. The flyer had a simple design and may not have been printed commercially. Mr. Marsters requests that the Commission investigate whether the flyer is in violation, because the flyer did not identify who paid for it. The Commission staff has not yet verified who sent the mailing and whether it cost more than the threshold amount to require a disclaimer.

Mr. Wayne explained that in 2011 the Legislature enacted an exception to the disclaimer requirement that allows certain literature that is distributed for less than $100 and prepared by one or more individuals acting independently of candidates and political parties or groups. He said included in the complaint was a copy of an e-mail by Rep. Andre Cushing where he talks about an issue in the Hampden area that has upset a number of people and some of whom had organized a website called, "Vote the Cockroaches Out." On that

website, there was language similar to the language in the flyer which led Rep. Cushing to believe that the flyer could be related to the website.

Mr. Wayne said he had conducted some preliminary fact-finding and spoke to Rep. Cushing's opponent, Mr. Emerson and some other individuals involved in the local group. Mr. Emerson did not know anything about the mailer and did not authorize it. Mr. Wayne said the other individuals he spoke to from the local group said they had received the mailing and did not know who was responsible for it. The person responsible for the Facebook page said she received the post from someone and approved it for posting on the Facebook page but she does not know how to determine who sent it.

Mr. McKee said this issue may fall under the disclaimer requirements exception but even if it did not, there really was no way to determine who was responsible for the flyer.

Mr. McKee moved to take no further action regarding an investigation. Mr. Duchette seconded.

Motion passed unanimously (5-0).

Agenda Item #8. Anonymous Request for Investigation/Sara Gideon

Sara Gideon was a candidate for the Democratic nomination for the Maine House of Representatives, District 106. The Commission received an anonymous letter asking it to investigate whether her financial reporting was complete. The staff consulted with Commission counsel and ultimately decided that despite the lack of specificity in the request, the request for an investigation was clear enough that the candidate could respond to the allegations. Indeed, Ms. Gideon has provided a detailed response.

Daniel W. Walker, Esq., representing Sara Gideon, said none of these allegations has any merit. He explained that the campaign went to great lengths to communicate with the Commission staff throughout the reporting period to be sure everything was done correctly.

Mr. Healy asked Mr. Walker if the Commission should disregard anonymous complaints. Mr. Walker said that he thought that complaints should be signed by the individual making the complaint. He said that the Commission's proposed rules would require that.

Mr. Healy stated, and Mr. Walker, agreed that these requests create a time and financial burden in order for the candidate to respond.

Mr. Healy moved the Commission take no further action regarding an investigation. Ms. Amero seconded.

Motion passed unanimously (5-0).

Agenda Item #9. Adoption of Amendments to Chapter 1 Rules

The Commission decided in January 2012 to accept public comments on proposed amendments to Chapter 1 of the Commission Rules. In March and May, the Commission decided to invite additional comments. Mr. Wayne said this proposal is the third proposal after three rounds of comments. He said the two major issues are the press exception, especially with respect to candidate-owned media, and how financial activity is regulated when a candidate is still in the exploratory stage of whether to run for office. He said regarding further comments, at this point the deadline has passed and the comment period is closed.

Ms. Gardiner explained that the Administrative Procedures Act provides for a comment period which in this case has been extended more than once and ended on July 11. She also said she spoke with some of her colleagues in her office regarding how other agencies handle the comment period deadline and they all agreed unanimously once the period closes that is the end of the comment period.

Mr. Healy asked how the right to anonymous speech and the proposed rule on the press exemption interacted.

Ms. Gardiner explained the current law exempts certain communications costing less than $100 from disclosing who is responsible for the communication. However, there is also strong case law supporting disclosure requirements to find out who is spending money to influence voters in both candidate elections and referenda. She said disclosure is the most limited amount of regulation currently and is subject only to exacting scrutiny. She stated that disclosure laws and cases have not been contradicted by anyone since the McIntyre case. She said she believed this rule to be constitutionally sound.

Ms. Matheson moved to adopt the final proposed rule amendments and the related basis statement. Mr. Duchette seconded.

Motion passed unanimously (5-0).

Ms. Amero moved to adjourn and Mr. Healy seconded the motion, which passed unanimously. The meeting adjourned at 11:45 a.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director