



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

Minutes of the October 10, 2008, Special Meeting of the
Commission on Governmental Ethics and Election Practices
Held in Room 208, Burton M. Cross Office Building,
111 Sewall Street, Augusta, Maine

Present: Hon. Edward M. Youngblood, Acting Chair; Hon. Francis C. Marsano; Walter F. McKee, Esq.; and Hon. Mavourneen Thompson, by teleconference. Staff: Executive Director Jonathan Wayne and Phyllis Gardiner, Counsel.

Mr. Youngblood was nominated by Mr. Marsano to chair today's meeting. On motion by Mr. Marsano, seconded by Mr. McKee, it was unanimously decided to have Mr. Youngblood chair the meeting.

At 12:05 a.m., Acting Chair Edward Youngblood convened the meeting.

The Commission considered the complaint by Rep. Emily Ann Cain regarding a campaign communication by Valerie Carr-Winocour. Mr. Wayne said Rep. Emily Ann Cain has filed a complaint regarding a mailing sent by Senate candidate Valerie Carr-Winocour, who is a Maine Clean Election Act candidate for the State Senate, District 30. He said there are two issues to this complaint. He said the mailing includes the names and pictures of four members of the House of Representatives, along with Ms. Carr-Winocour's opponent and Governor John Baldacci. The first issue, he said, is Rep. Cain argues that the mailing represents an impermissible expenditure of Maine Clean Election Act funds by a Senate candidate to influence House races. Secondly, she believes the mailing should be viewed as an independent expenditure, which would influence the matching funds calculation in one of the House races. Mr. Wayne said Rep. Cain was being assisted today by Michael Mahoney, Esq. He said Valerie Carr-Winocour, participating by phone, was being represented by Daniel Billings, Esq.

Rep. Emily Ann Cain said she represents House District 19, which is within Senate District 30. She explained that she is running unopposed in this election as a Maine Clean Election Act candidate. She said her campaign is trying to spend as little public funding as possible. She said she received this flyer in her

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mailbox a week ago and again today as an insert in her Bangor Daily Newspaper. She called the newspaper this morning to find out what the time frame was for pulling an insert from the paper and was told at least two or three days notice was required. Rep. Cain said she had filed her complaint three days ago. Rep. Cain filed her complaint because she was certain the law did not allow spending MCEA funds outside of a candidate's own campaign. She said even though she is running unopposed, her colleague Richard Blanchard, who is pictured on the flyer, is running a three-way race in his district as is Senator John Martin who is running for the House and is pictured in the mailer as well. She said the content of the mailer concerns her; however, that is not what her complaint is focused on. She said her complaint is regarding the expenditure guidelines as stated in the Candidate Guidebook which she quoted, referring to what she thought were violations made by the Carr-Winocour campaign in this flyer. She said the Guidebook explicitly states, "*MCEA funds may not be spent to make independent expenditures supporting or opposing any candidate, ballot measure or political committee, assist in anyway to the campaign of any candidate other than the candidate for whom the funds were originally designated, contribute to another candidate or political committee or party committee, other than an exchange for goods and services.*" She said the Guidebook also states under Best Practices, "*MCEA funds must be spent only to promote the election campaign of the candidate, expenditures made for any other purpose, personal uses or to promote another candidate or candidate's party or charity are not permitted.*" She also referred to another page of the Guidebook that stated, "*MCEA candidates may spend public funds only on campaign related expenses and not for other purposes such as the candidate's personal benefit, party building or to promote another candidate's campaign.*"

Rep. Cain said this mailer sent out by the Carr-Winocour campaign, in her opinion, clearly does promote another campaign using MCEA funds. She said because it refers to other people running for office on the flyer and advises readers to take the flyer to the voting poll in order to know who not to vote for. Ms. Cain says this wording is a blatant violation of the MCEA rules. She stated that she will win her race on Nov. 4 because she is running unopposed; however, she struggled over whether to file the complaint because she does not have an opponent. She said she cannot counter the Carr-Winocour mailer and flyer because she has limited MCEA funds as an unopposed candidate and she will not get matching funds as result of the Carr-Winocour ads. Rep. Cain stated that Ms. Carr Winocour as a first time candidate running for office should have done more homework and research on what is allowed and not allowed under the Maine Clean Election Act if she intended to run as a candidate under this program. Rep. Cain stated that there are 18 people running in unopposed House campaigns. She further stated she encourages unopposed candidates

use their public funds sparingly when running without an opponent so that they can return funds to the State. However, if this mailer is acceptable under the MCEA, then it means that public funds can be used for ads in other candidates' races. She said that she would be able to use her funds to run an ad against Ms. Carr-Winocour, for example. She expressed concern over publicly funded candidates being allowed to use tax dollars to run campaigns in this manner.

Michael K. Mahoney, Esq., stated the two legal issues facing the Commission: first, whether there was improper use of MCEA funds for non-campaign related purposes; and second, whether this literature constitutes an independent expenditure which would result in matching funds to any qualifying opponents. Mr. Mahoney said regarding the first issue, the statute and the Guidebook both state very clearly that MCEA funds may not be used to make an independent expenditure supporting any other candidate or to assist the campaign of any candidate other than the candidate for whom the funds were given. He said Ms. Carr-Winocour should be familiar with the Guidebook. He said her flyer spells out who the voter should not vote for, which is in violation of the statute.

Mr. Mahoney said the second issue is whether this literature qualifies as an independent expenditure under section 1019-B of the statute. He said this is where the harm to other candidates could be a factor. He said, in his opinion, it does qualify as an independent expenditure since it names a candidate and it expresses the defeat of a candidate(s). Mr. Mahoney said he disagreed with Ms. Carr-Winocour's counsel's, Mr. Billings, position that since it was a Senate race being depicted in the flyer and not a House race, it would not qualify as an independent expenditure. Mr. Mahoney stated that the most reasonable interpretation of the staff's memo, on which Mr. Billings relies for his argument, is that if a candidate or a candidate's committee makes an expenditure for a communication in that candidate's own race, it would not be considered an independent expenditure. Mr. Mahoney pointed out that the Commission's advice is clear that MCEA funds cannot be used for independent expenditures. Mr. Mahoney said Mr. Billings' interpretation would mean that a Senate candidate could make an unlawful independent expenditure that expressly advocates for or against a candidate in the House race because it would not fall under the independent expenditure statute and would not entitle a candidate to matching funds. He said that it would be unfair if a lawfully made independent expenditure would entitle the affected candidate to matching funds but an unlawfully made independent expenditure did not.

Mr. Daniel I. Billings, Esq., representing Ms. Carr-Winocour, said this literature should not be considered an independent expenditure since it is a common tactic for candidates to associate themselves with other candidates, public officials, or issues that will portray their candidacies in a positive light, as well as associating their opponents with people or issues that will portray the opponents in a negative light. He gave some examples of campaign strategies in state and federal elections that associate other candidates in both a positive and negative fashion. He said this literature is no different. He cautioned the Commission not to second-guess what campaign strategies a candidate should or should not employ when running a campaign. Mr. Billings said Ms. Carr-Winocour was using the Democratic candidates' records while in office as an example of what she as a Republican candidate, would not support. He said this is a common tactic in campaigning. He further stated that adopting a position in favor of the complainant would affect the MCEA candidates negatively since it would limit their options for campaign communications.

Mr. Billings referred to a previous complaint back in 2006 against another candidate, David Babin, who stated his position on several issues in newspaper ads, including the Tax Payer Bill of Rights referendum. He said the Commission, at that time, decided in favor of Mr. Babin because the statements were looked at in the context of the ad and how it promoted his campaign. Mr. Billings said because the ad referred to the referendum issue along with other language to promote Mr. Babin's own campaign, the Commission felt it was not in violation. He said the Commission should view Mr. Carr-Winocour's ad in the larger context of the ad itself which, while it does mention other candidates, it does so in a manner that is clearly aimed at promoting Ms. Carr-Winocour's election. He said if the flyer were mailed to only Rep. Blanchard's district and referred only to Rep. Blanchard, then the situation would be different. He said because it was mailed to a wider group of people and referred to more than one candidate makes the context and associations more general in nature, so this flyer does not expressly advocate against anyone in particular. He said the primary purpose of the flyer is to advance Ms. Carr Winocour's own campaign. He expressed concern that this could be considered a misuse of MCEA funds for non-campaign purposes. He said that finding would damage the Clean Election system for future candidates. Mr. Billings also spoke about the insignificant amount of money and the affect it would have in either campaign.

Mr. Billings said Rep. Cain and her counsel are not reading the statute in an obvious fashion. He said the guideline does not intend for an independent expenditure every time another candidate is mentioned in a piece of literature. Mr. Billings stated his view that the guideline should be interpreted to mean that a candidate should not spend his or her funds only for promoting or opposing another candidate. It does not

mean a candidate cannot make reference to another candidate. He also said he was unaware of a previous circumstance where a candidate communication had been considered an independent expenditure. He said in looking at Clean Election Act expenditures, the analysis should be the same as if it were a traditionally funded candidate's expenditure. He said in the past, the Commission has looked at whether the expenditure was to promote a candidate's campaign.

Mr. Billings said with regard to the timing of the flyer in the newspaper, the second distribution was already in the pipeline and paid for and did not occur to the candidate to pull it. He said there was no intent of disrespect to the Commission by running it a second time.

Ms. Thompson asked Mr. Billings if he believes the flyer meets the restrictions of the law, why then did he consider removing it from the Bangor Daily newspaper distribution.

Mr. Billings said the only reason it occurred to him to have the flyer removed was it could be considered by the Commission as a lack of respect for the process or that the complaint was not being taken seriously.

Mr. McKee referred to the statute, 21-A M.R.S.A. § 1019-B, with regard to independent expenditures. He said based on the standards outlined in the statute, this literature appeared to qualify as an independent expenditure. It is an expenditure by a person, which is one of the criteria, and it appears to advocate against the election of clearly identified candidate. Mr. McKee asked Mr. Billings whether he would say that those criteria were met.

Mr. Billings stated that the Commission needs to look at the law in larger context and also consider the purpose of the law. He said the definition of person does not specifically include the terms "candidate or candidate committee" and the Commission could consider that also. He said the purpose of the law is to regulate spending by outside groups which would then trigger matching funds when groups are influencing campaigns. He said the law is not intended to regulate the content of candidates' political communications.

Mr. McKee raised the issue of the presumption period. He said as far as he could see there has been no rebuttal in this case.

Mr. Billings said that a rebuttal statement was not filed because no one considered this to be an independent expenditure. He said it was believed to be an expenditure to advance the candidate's campaign but not an independent expenditure. He said the Commission could consider the evidence and information it has at this point to decide whether the presumption was rebutted.

Mr. Marsano said the point Rep. Cain made regarding the 18 House candidates who are running unopposed in this election is a very good one. He said these candidates are holding a great deal of the public's money, and if Mr. Billings' views were to prevail, those unopposed candidates would have the ability to use their MCEA money on communications that would affect a number of other candidates' races, even though they are not involved in those races.

Mr. Billings said the Commission needs to look at the context of the communication. He said it would depend on how incidental the references to other candidates are. He stated that it is not the job of the Commission to second guess candidates, nor micro-manage candidates' communications. He also stated that each communication should be looked at on a case-by-case basis.

Mr. Marsano stated that this type of communication is a safety cover for the underlying antagonistic attitude towards a particular candidate mentioned in the flyer.

Mr. Billings said it was not a cover-up; it was intended to be Ms. Carr-Winocour's expressions of disagreement with a larger group of candidates who she believes are not doing a good job in the Legislature.

Senator Elizabeth Schneider, by phone, stated that this hearing is very important to the integrity of the Clean Election system. She said in an election referred to as the "clean election," a candidate should not be allowed to perpetuate lies about other candidates, especially candidates running outside their own race. She said the law is very clear regarding the use of wording such as "who not to vote for." She said it is not right to use public funds to influence a race that is not a candidate's own. She stated it is very sad that someone would stoop to this level in order to garner votes. She said tax payers do not want their money spent to sling mud and lies.

Joseph Greenier, Stockton Springs, stated he is a write-in candidate. He said the Maine Code of Fair Campaign Practices means nothing. He said the Commission has candidates sign this form, but it carries no weight when put to the test. He said because the form is meaningless, he refused to sign it. He said he would like to see the Commission make enforcement a priority.

Mr. Marsano said the letter Rep. Cain wrote was brilliant, succinct and accurate. He said he is concerned that the people's tax money might be spent needlessly by candidates running unopposed who would otherwise not need to spend their funds if it were not for this type of communication. He said the violation of the independent expenditure requirements is not egregious; however, as such, it provides the Commission the opportunity to consider these issues and make a determination that will prevent candidates from acting in a more egregious fashion. He also said the people of Maine need to be sure their money will not be used for the purposes of denigrating other people. Mr. Marsano commented that perhaps Rep. Cain may consider Mr. Greenier's statement regarding the Code of Fair Campaign Practices and the Commission's ability to enforce it.

Mr. McKee said the content of the mailer should be left to the candidate's judgment. Even though most people may bristle at ads like this one and even though he does not like them, it is not his job to judge the general propriety of the ads. He said that there was no question in his mind that the communication met the criteria for an independent expenditure as laid out in the statute, since it was a communication that advocated for the defeat of clearly identified candidates. Additionally, he did not hear or see any evidence that rebutted the presumption that it was an independent expenditure.

Mr. Youngblood said this may be a common method of campaigning for some, but public money is not intended to be used for this type of communication. He also agreed this qualified as an independent expenditure.

Ms. Thompson agreed this was an independent expenditure. She asked whether staff has been inclined to change the recommendation after hearing testimony today.

Mr. Wayne said the flyer does contain express advocacy and would qualify for an independent expenditure. He said this type of communication is the only one of its kind he has seen. He said Clean Election Act

candidates generally do not use their MCEA funds to influence other candidate races and the staff does not support the use of public funds for this type of expenditure.

Mr. McKee moved the Commission find this piece of communication an independent expenditure. Mr. Marsano seconded the motion. The motion passed (4-0).

Mr. Billings addressed the remedy issue. He said the total amount of the expenditure was \$3,857.87. He also said when calculating matching funds, the rules allow for taking into account multi-candidate communications. He said in this case the additional amount of contributions above the trigger amount that Rep. Blanchard would be permitted to raise would be very minimal since his district represents approximately one-third of the area that was affected. He said the calculation should also be based on a subjective, qualitative assessment of how much the communication itself is related to a particular race. He cautioned the Commission not to use a simple mathematical formula of dividing the cost of the communication evenly by the number of candidates mentioned. He said doing so could open a loophole for outside organizations to exploit by making incidental reference to some candidates whereas the bulk of the communication is directed at one particular race. He also expressed concern about imposing any financial penalty on Ms. Carr-Winocour because she is a first-time candidate who lacks experience and realizes she made a mistake. He said she never intended to influence the outcome of any other race but her own.

Mr. Mahoney told the Commission, having found the communication qualifies as an independent expenditure, the logical next step to consider is whether it constitutes an improper use of MCEA funds. He said the guidelines state very clearly that, "*MCEA funds may not be used to make independent expenditures supporting or opposing another candidate...*" He said it is important for the Commission to send a message and make a finding of that violation for the sake of precedent. He said MCEA funds should only be used for a candidate's own race.

Mr. McKee offered the option of dividing the total amount \$3,857.87 by three for the purpose of determining the amount of the independent expenditure. He also said he would support finding in violation of Section 1127(1).

Mr. Marsano said he would support a finding of violation; however, he suggested taking ten percent (10%) of the total amount since the impact was not that large to each candidate. He said he would support a civil

penalty of \$50 under Section 1127(1) and said this would send a clear message. He also recommended that candidates who wish to run as Clean Election Act candidates get educated with regard to the guidelines and procedures and what is allowed under those guidelines.

Mr. Youngblood asked if there were a formula used in the past with calculating independent expenditures by more than one candidate or person.

Mr. Wayne said the Commission has not had many cases such as this; however, in the 2004 election a rule was adopted which states that when a person is required to report an independent expenditure for a communication in support of multiple candidates, the cost should be allocated among the candidates in proportion to the benefit received by or detriment to each candidate.

Ms. Thompson asked whether the flyer was limited to only District 30.

Mr. Billings stated that the newspaper does allow for zoning; however, the zone is not exactly the same as the district, so there may be some overlap.

Mr. Marsano stated that it would benefit all parties to have a decision arrived at today. Mr. Marsano asked for clarification regarding the process of imposing a penalty under Section 1127 after finding a violation.

Mr. Wayne said in order to assess a penalty under Section 1127, the Commission would have to specifically refer to the provision in the statute that was violated.

Mr. Marsano moved to find a violation of 21-A M.R.S.A. § 1125(6) and further find the impact was 10% of the total amount of the independent expenditure, \$3,857.87. The motion was seconded by Mr. McKee.

Ms. Gardiner asked for clarification of the motion as to whether 10% of the impact was in reference to the cost to be considered for matching funds.

Mr. Marsano confirmed that to be the case.

The motion passed (4-0).

Mr. Marsano moved to find Ms. Carr Winocour in violation of 21-A M.R.S.A. § 1125(6) and assess a penalty of \$50. The motion was seconded by Mr. McKee.

The motion passed unanimously (4-0).

Mr. Wayne reminded the Commission about meetings scheduled for October 17 at 1 p.m. and October 27 at 9 a.m. to be held in Room 208 of the Cross Office Building in Augusta.

Mr. Marsano moved to adjourn and Mr. McKee seconded the motion. All in favor (4-0).

Respectfully submitted,

Jonathan Wayne, Executive Director