

Agenda

Item #1



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

Minutes of the October 27, 2008, 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: Michael Friedman, Esq., Chair; Hon. Francis C. Marsano; Hon. Edward M. Youngblood; Hon. Mavourneen Thompson; Walter F. McKee, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:02 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the September 29 and October 10, 2008 Meetings

Mr. Marsano moved to accept the September 29 and October 10, 2008, meeting minutes as drafted. Mr. McKee seconded. The motion passed unanimously (5-0).

Agenda Item #2. Request for Waiver of Late-Filing Penalty/Maine Democratic Party

Mr. Wayne explained that this issue concerned a Senate race between Sen. Lois Snowe-Mello, the incumbent Republican candidate, and Rep. Deborah Simpson, the Democratic candidate. He said the Maine Democratic Party (MDP) had originally planned to send a mailer intended as an issue advocacy piece regarding Rep. Simpson; however, due to vendor error, the mailer contained express advocacy, as defined by the Commission's rules. He said that, as a result of this error, the Maine Democratic Party was required to file an independent expenditure report. He said their report was filed late, resulting in a \$5,000 penalty assessed to the Maine Democratic Party. He said the Maine Democratic Party is requesting a waiver because the mailer was changed by the vendor without their knowledge.

Mr. Daniel W. Walker, Esq., counsel to Maine Democratic Party, explained that MDP filed an independent expenditure report for Senate candidate Deborah Simpson on October 8, 2008. He said the report was late

because the vendor changed the proof to express advocacy by adding the word “for” after it was approved by his office as issue advocacy. He referred to 21-A M.R.S.A. §1020-A(2)(D) regarding mitigating circumstances and said the statute allows the Commission to determine whether the circumstances “warrant mitigation of the penalty based upon relative evidence presented that a bona fide effort was made to file the report in accordance with statutory requirements...” He said as soon as the MDP realized that the mailer contained express advocacy, a report was filed and matching funds were released. He said the Party relies on a level of trust with mail house companies that once a proof is approved, it will be mailed as approved. He said the vendor had written a letter taking full responsibility for the error. Mr. Walker expressed concern that one word in a flyer can result in changing literature from issue advocacy to express advocacy which results in a reporting requirement. He said going forward in the future, this issue needs to be discussed for clarification with regard to reporting.

Mr. McKee asked whether, if a penalty were imposed, the Party would pass the payment of the penalty on to the vendor since they made the mistake. He said that the vendor was an agent of the MDP and that agents will from time to time make mistakes but wondered if that should affect the Commission’s determination of whether the circumstances warranted the mitigation of a penalty.

Mr. Walker said the Maine Democratic Party made a bona fide effort to file the report in accordance with statutory requirements. He said an independent expenditure report was filed within 24 hours of being alerted that the mailer contained express advocacy.

Mr. McKee questioned how the vendor could change the wording after the final proof was approved.

Mr. Walker stated the Party would hold the vendor responsible for any penalty assessed today. He restated that the Party did make every effort to comply with the law.

Mr. Marsano said the evidence presented by the MDP was excellent and concise. He said that as he understood the matter before the Commission, there was no question that there was a violation of the statute and that the only issue for the Commission to consider was whether there were mitigating circumstances that warranted a waiver or reduction of the penalty. He asked Mr. Walker whether he agreed with that characterization of the matter.

Mr. Walker said that the MDP did not dispute that there was violation and that the issue before the Commission was that of mitigation of the penalty.

Ms. Thompson asked Mr. Walker how the Commission could enforce the law, be fair to the opponent who received matching funds 20 days late, and fulfill its responsibility to maintain a level playing field among candidates, but not impose a penalty on the MDP.

Mr. Walker said most laws have exceptions and the Legislature created this law with exceptions for mitigating circumstances. He said he believed this fact of this case fell within the parameters of mitigating circumstances. He said the Legislature intended and allowed for mitigating circumstances.

Mr. Friedman said he was troubled by the Democratic Party's approach to this request. He said the parties have experts on staff who should be overseeing these matters. He said a violation has occurred and the specific mitigating circumstances outlined by the Legislature in the statute do not apply in this case. He said there was no valid emergency, no error by the Commission staff, and no failure to receive notice. He said the circumstance that is being used in this case is the vendor made a mistake. He asked where the oversight should be, if not with the parties who are putting out the mailings. He said the parties are responsible for ascertaining what the final proof looks like when it is mailed. The parties also have the final responsibility even if it was the vendor who made the mistake, even though the Party may have recourse against the vendor. He said that he had doubts whether the circumstances in this case warranted the mitigation of the penalty. Mr. Friedman said that it was within the Party's control to ensure that its oversight would have caught this in time to file a report.

Mr. Walker discussed the MDP's procedure for sending mailers. He said that he believed it was out of the MDP's control because the vendor changed the wording independent of the Party.

Mr. McKee asked when the Party received notification that the error had occurred.

Mr. Friedman said there were eight or ten days between when the mailer was received by voters and when the report was filed.

Mr. Marsano said he had sympathy for the Democratic Party, since the vendor was at fault. He said he did not believe paragraph D regarding mitigating circumstances was as broad as Mr. Walker suggested. He also said the matching funds paid out to the opponent as a result of the vendor's mistake, despite the MDP's effort to avoid this (by mailing an issue advocacy piece rather than an express advocacy piece). He wondered whether those funds should be recouped and repaid to the State.

Mr. McKee said Ms. Simpson suffered also in this case because she did not get the benefit of the issue advocacy mailer which would not have resulted in the payment of matching funds to her opponent.

Mr. Daniel I. Billings, Esq., counsel for the Maine Senate Republican Committee, said the issue was brought forward to the Commission because of the complaint he filed on behalf of his client. He explained that the required report was not filed for twenty days after the expenditure was made. He said the mistake was made and because there was no system check in place to actually see what was received by voters, a significant amount of time had passed. He also said he has sponsored training sessions for his staff and candidates to go over literature guidelines and he has invited the vendor to send a representative to this training. He said he always sees the pieces before they go out. He further said as another oversight procedure, the names of some Committee members are on the mailing list so that they get the mailer when it is sent out to the voters. He said this is common practice for most political committees to mail their literature to Committee members.

Mr. Billings said he does not believe it matters that the vendor made this error. He said the ultimate responsibility to oversee these mailers lies with the Party. He said the Commission would be setting a bad precedent to excuse violations because a vendor made an error. The MDP has used this particular vendor in the last two election cycles and has spent hundreds of thousands of dollars with this vendor. Given the large volume of work the vendor does for the MDP, it should be well-acquainted with the requirements of the Maine Clean Election Act. He said the Democratic Party should have procedures in place to prevent this type of mistake from happening.

Mr. Billings said the mitigating circumstance section does allow for full or partial reduction in a penalty, but this matter does not fall within those criteria for other mitigating circumstances. He said the facts presented by the Maine Democratic Party do not fit under this statute, because they had no intention of filing this report. He said they intended to produce issue advocacy literature, but due to an error, it became

express advocacy. He also said that due to the size and experience of the Maine Democratic Party and the amount of money they have spent on independent expenditures, over \$200,000 so far in this election cycle, a \$5,000 fine is not unreasonable considering the size of this organization. He also said this is the second violation for this organization this year.

Mr. Friedman asked if the statute allowed the Commission to look back at past violations.

Mr. Billings said because the MDP is relying on mitigating circumstance argument, it is reasonable to look back at past practice. He further stated that the issue the Commission should be considering is whether to impose an additional penalty on the Democratic Party due to delay in matching funds. He said the statute allows for two types of penalties to be imposed - one for late filing of a report and the other for cases in which a late filed report results in a delay in matching funds. He said there was a significant amount of matching funds delayed for a significant amount of time.

He also brought up another issue regarding the recent mailings by the MDP, which neither he nor the Commission have seen. He said there were three pieces of literature that were supposed to go out as issue advocacy and he wondered why only one had been converted to express advocacy. He requested that the Commission get copies of the other mailings to determine whether the vendor made any similar changes to them as well.

Ms. Thompson expressed concern about Mr. Billings introducing issues about which the Commission had no complaint or information. Ms. Thompson said the Commission is not a clearinghouse for campaign literature and this third piece of literature should not be discussed at this time since there has been no complaint filed at this time.

Mr. Friedman said any inquiries about additional mailers should be brought forward in a complaint at a future meeting.

Mr. Marsano stated for clarity that the issue with this mailer was the phrase "Deb Simpson for Senate." He said if that if the intention was to truly advocate for this candidate, he would assume that the strategy would entail more than just putting the word "for" in the wording.

Mr. Billings said that given the way the law reads, determining whether matching funds are triggered by an expenditure turns on a very fine point. The language in this mailer would trigger matching funds. He said the context of the literature is important to keep in mind also. This particular mailer is about Rep. Simpson's record in the Legislature, not a more general issue, and is very similar to the direct advocacy mailings that are going out now.

Mr. Marsano expressed concern that such a slight change to literature ends up costing the public money. He asked Mr. Billings whether he thought that paragraph D of the statute was the only basis upon which mitigation of the penalty could be based.

Mr. Billings stated that a more appropriate argument in this case would fall under 21-A M.R.S.A. § 1020-A(2), "*the harm suffered by public.*" He said that the better argument would be that the harm suffered by the public is not great because the mailing did not go out a week before the election, for example, but went out more than a month before the election, and the matching funds were distributed to Sen. Snowe-Mello in time to counter the MDP mailing. However, he said in this section, the Commission can only waive the penalty in whole.

Mr. Marsano said the first issue before the Commission is to determine whether this matter falls within the parameters of the section to which Mr. Billing referred regarding penalty mitigation.

Mr. Billings said the Legislature's intent over the past few years has been to expand the matching funds process and the rebuttable presumption clause was added. He said the period has been expanded from 21 days to 35 days. He said these efforts were to level the playing field for all candidates.

Mr. Marsano said if the Commission were to conclude that paragraph D applied in this matter, the other circumstances determined by the Commission that warrant mitigation of the penalty would be a very narrow basis for relief.

Mr. Billings agreed. He further said that if a filer was late filing because the Commission's e-filing system was not working properly, this would create a circumstance out of the filer's control. He said the MDP's case is not the same situation and would not fall within the criteria of this statute.

Mr. Friedman invited Mr. Walker to address the issue of an additional penalty which would be in accordance with 21-A M.R.S.A. §1127(1).

Mr. Walker stated the MDP's procedure has been that after the copy is received from the vendor, it is approved and then mailed out by the vendor. He said the Party had intended to follow this procedure but, in this instance, the vendor changed the ad and did not communicate the change to the MDP. He said the report was filed immediately upon receiving notification that the error had occurred. He said no harm was caused to the public. He referred to the last sentence in Section 1127(1) regarding an additional penalty - *"In determining whether or not a candidate is in violation of the expenditure limits of this chapter, the Commission may consider as a mitigating factor any circumstances out of the candidate's control."* Mr. Walker stated that this circumstance was out of their control.

Mr. Joseph Greenier, write in candidate for Senate District 23, said he was concerned with expenditures that cost tax payers' money. He also expressed concern for purchases that are made out of state and the amount of money the parties spend on candidates.

Ms. Thompson asked whether staff could verify a fine of less than \$5,000 is allowed under law.

Mr. Wayne said the statute says the Commission may waive the penalty in whole or in part if failure to file is due to mitigating circumstances. He said the staff's intention of putting this wording into the statute back in 2004 was in order for the waiver to be reduced in whole or in part if the Commission determined that there were mitigating circumstances.

Mr. Youngblood said the Commission demands accountability of individuals running for office while allowing for mitigating circumstances from time to time. He further said that all the political parties have expertise available to them and are to be held to the very highest level of accountability. He said in this case, the MDP should have known long before the twenty day period that something went wrong with the mailer. He said if the parties are not fined for violations, it becomes difficult to fine the candidates, who have no expertise available to them. He said he would not vote in favor of a reduced penalty.

Mr. McKee stated he was struggling with the fact that the vendor made this error and caused this situation. He said the part that bothered him is the fact that the Party did not pick up on the error. He said this is an

expensive lesson for the Party and perhaps a review of their process will now take place. He said this matter fits within the statutory waiver, and he hoped that the MDP would expect the vendor to cover the cost of the penalty. He said he would be in favor of reducing the penalty to one-half of \$5,000. Mr. McKee said that he would not be in favor of imposing an additional penalty under § 1127.

Mr. Friedman said that he was troubled by the mitigation of the § 1020-A penalty. He said the political party committees have the expertise and ability to institute a procedure to oversee the work product of the vendors they hire and thereby avoid the kind of problem before the Commission today. He said that the regulations involved in this matter are clear and the burden is on the parties to comply with those regulations. He said that the statute does allow for some exceptions to the penalty but he did not think that the facts and arguments in this case were compelling such that the mitigation of the penalty was appropriate. He supports the \$5,000 penalty in order to send a message that the parties must comply with the statute and the Commission's rules. He said, further, there should be a civil fine under § 1127(1). He said the Party did not file the report for at least ten days after the voters had received the mailing. He said that was too long a period of time for an entity with the sophistication of the MDP to be unaware of the issue caused by the mailing and to delay filing the appropriate report. He said a fine of \$100/day for failure to file would be appropriate and recommended a \$1,000 civil fine be assessed in addition to the \$5,000 penalty under § 1020-A.

Ms. Thompson said she would support a full penalty; however, she did not think that there should be a civil fine in addition. She said that it was important for the Commission to protect one of the core elements of the Maine Clean Election Act, which is to ensure that candidates are competing on a level playing field.

Ms. Thompson moved to assess a penalty of \$5,000 against the Maine Democratic Party in accordance with 21-A M.R.S.A. §1020(A). Mr. Youngblood seconded.

Mr. McKee asked whether the intent behind Ms. Thompson's motion was that there be no civil fine imposed under § 1127(1).

Ms. Thompson said that was her intention and she expanded her motion.

Ms. Thompson moved to assess a penalty of \$5,000 in accordance with 21-A M.R.S.A. § 1020-A and that no civil fine under § 1127(1) be imposed. Mr. McKee seconded.

Mr. Marsano recommended that the motion be divided into two parts – one motion for the late-filing penalty of \$5,000 and a second motion on the civil penalty. He said that, based on the discussion by the Commission members, it seemed to him that there was strong support for the imposition of the late-filing penalty while there was less support for the civil fine. If the Commission's intent is to send a strong message regarding the late-filing of reports, combining the penalty and the fine may diminish that message if some Commission members vote against the combined motion because they also want to impose a civil fine on the MDP.

Mr. Marsano moved to amend the motion into two parts. Mr. McKee seconded. The motion passed unanimously (5-0).

Ms. Thompson moved that the Commission assess a penalty of \$5,000 in accordance with 21-A M.R.S.A. § 1020(A). Mr. Youngblood seconded. The motion passed unanimously (5-0).

Mr. Friedman moved that the Commission impose a civil fine of \$1,000 on the MDP pursuant to 21-A M.R.S.A. § 1127(1). Mr. Youngblood seconded. The motion failed (1-4). (Mr. Friedman in favor and Mr. Marsano, Mr. McKee, Mr. Youngblood and Ms. Thompson opposed.)

Agenda Item #3. Rule-Making on Seed Money Maximum for Gubernatorial Candidates

Mr. Wayne explained that, in June, the Maine Citizen's for Clean Elections had suggested that the Commission change the Commission's rules to increase the maximum amount of seed money contributions which gubernatorial candidates seeking Maine Clean Election Act funding could raise from \$50,000 to \$100,000. He said the public hearing was held at the September 29, 2008, meeting on this proposed rule amendment. He further stated that he has received some informal comments that the Commission should look at whether the MCEA program will be practicable for serious gubernatorial candidates in 2010 even if the seed money amount is raised to \$100,000. The staff researched past gubernatorial campaigns of privately financed candidates and found that those candidates had received a great deal more than \$100,000 in contributions during the same time period that MCEA candidates could raise seed money contributions. In light of this research, the staff recommends increasing the maximum to \$150,000, instead of \$100,000 in

order to assure potential gubernatorial candidates that they will have sufficient funding to run competitive campaigns in 2010. Mr. Wayne said this would be a change from the rule which the Commission previously took public comment on, therefore, may need to be reopened for public comment.

In response to a question from Mr. Friedman regarding the appropriate rulemaking procedure, Ms. Gardiner stated that the Commission is not required to have another public hearing. She said, in these circumstances, a 30 day written public comment period is sufficient under the Maine Administrative Procedures Act. She said after the 30 day period, the Commission would need to decide whether to adopt the rule provisionally, after which, the Legislature would have to approve the rule change.

Mr. McKee stated that due to the amount of the increase and since the Commission is familiar enough through previous public comment, he would prefer to take written submissions and forgo another public hearing process.

Ms. Thompson said she would support a public hearing process in addition to written submissions.

Ms. Gardiner said normally the formal notice of the hearing needs to happen 17 days in advance of the hearing; however since the public hearing is not required and most people involved with the rulemaking are well advised of the Commission's meeting schedule, she said adding the public hearing notice to the agenda would be acceptable.

Mr. Marsano asked if any consideration had been given to increase the individual seed money contribution amount from \$100 to \$200.

Ms. Gardiner said that figure is set in statute and would have to be changed by the Legislature.

Mr. McKee moved to delay the Commission's adoption of the proposed rule change in order to consider an increase to \$150,000 and allow for written and oral comment at the next regular meeting in November. Ms. Thompson seconded. The motion passed unanimously (5-0).

Agenda Item #4. Update on Criminal Prosecutions of Debra Reagan and Bruce Ladd

Mr. Friedman stated that this information provided to the Commission is also public information. The Commission did not have any questions regarding these cases for Ms. Gardiner.

Agenda Item #4A. Complaints regarding Sponsorship Disclosure and Joint Advertising

Mr. Wayne explained the Commission received four complaints from Democratic candidates against Senator Douglas M. Smith and House candidate Paul T. Davis regarding a joint advertisement and missing disclosure on road signs. Most of the complaints have been withdrawn, but the Commission may wish to provide more specific guidance regarding the road sign and joint advertising issues raised in the complaints.

Mr. Daniel I. Billings, Esq., on behalf of Senator Smith and Rep. Davis, said there were two separate issues. He explained one issue involved joint advertising and Rep. Davis was seeking advice from the Commission. He said that four candidates shared the expense equally. Mr. Billings thought the best practice would be for all four candidates to write a check to the vendor for their share of the expense and for the ad to have a disclosure statement for each candidate. He said that, in this case, the ad could not list all four disclaimers of each candidate because of space constraints in the ad. He said, therefore, one candidate – Senator Smith - paid for the ad and the other three are reimbursing Senator Smith's campaign for their portion. The disclosure statement said that Sen. Smith paid for the ad and that all four candidates authorized the ad. Mr. Billings said that he did not think that there was any violation of the law in handling the payment and the disclosure in this manner.

Mr. Billings said the second issue is regarding the large wooden signs produced by Senator Smith and Rep. Davis. He said Senator Smith's signs were commercially produced and did not hold up well from the last election, so a wooden frame was added for support which covered up the disclosure statement. He said a hand written disclosure was put on them. Though that may not be best practice, it does comply with the law. Mr. Billings said that though the disclosure statement is required by law, these issues regarding the disclosure statement should be looked at on a case by case basis, keeping in mind the intent of the law. He said quite often common sense will dictate who is responsible for these signs, even when the disclosure is not obvious. He said there may be a violation, but the question should be what harm is caused to the public when the person who is responsible for the sign is otherwise obvious. He said that he has discouraged some Republican candidates from filing complaints with regard to this particular sign disclosure issue

because it is petty and wastes resources. He said that he asks the candidate if he or she has any doubt who put up the sign and usually they do not. He said he did not feel there was a violation in this case.

Mr. Friedman asked if there was a complaint or a request for advice.

Mr. Wayne stated that at this point there is only a request for advice regarding the sign issue, which the staff had drafted for the meeting today.

Mr. Friedman requested that the staff develop a final version of the advice and bring it back for consideration at the next regular meeting.

Agenda Item #4B. Complaint regarding Campaign Literature and Signs

The consideration of this matter was postponed to the next meeting.

Agenda Item #4C. Request for Additional MCEA Funds as a Contested Candidate/Rep. Patsy Crockett

Mr. Wayne explained that Rep. Patsy Crockett is running for re-election as a Maine Clean Election Act candidate in District 57, who until recently was unopposed. She is now opposed by a write-in candidate, Jarody. She requests additional Maine Clean Election Act funds as a contested candidate.

Rep. Crockett said that she believed a discussion needed to take place regarding a write-in candidate who creates a contested race. She said she would not spend any additional funds should the Commission decide that she was entitled to more money as a contested candidate; however, she stated the matter should be brought forward for discussion purposes. She said the wording in the rule on determining whether a write-in candidacy creates a contested race established a standard based on whether the write-in candidate has “spent substantial campaign funds.” She said that standard is vague. She said an amount needs to be defined. She said when an individual files papers with the Commission, registers with the Secretary of State as a write-in, places signs in the district, submits a letter to the editor in the local newspaper stating they are a candidate, and spends money, these are signs that they are a legitimate opponent. She further said it is a disservice to a write-in candidate not to be recognized as a contested opponent when all of these actions have taken place. She said when a write-in candidate enters the race so close to the election and the

other candidate has no way of knowing what that write-in candidate will spend, it is important to have a clear amount established what would constitute a contested race under the MCEA.

Mr. McKee asked what amount would be appropriate.

Rep. Crockett said perhaps \$100. She said write-in candidates need to be given credit if they run a real campaign.

Jarody, write-in candidate for District 57, said awarding funds at this point would not be fair to taxpayers. He said he has stated that he would not spend more than \$366 and most likely will not spend that much. He said giving Rep. Crockett more funds at this point would be a misuse of public funds because she stated she would not use them.

Ms. Thompson asked what Jarody had spent so far.

Jarody said he has spent, to-date, \$140.32. He said he would not spend more than \$366 in his campaign account.

Joseph Greenier said there are 11 or 12 write-in candidates registered with the Secretary of State. He said he was against setting amounts to determine when a write-in candidate creates a contested race.

Philip Roy, treasurer of Maine Republican Party, said when a write-in candidate, who is registered with the Secretary of State and spends money on a campaign, enters a race, the MCEA candidate should get the MCEA distribution for a contested race.

Mr. Friedman asked Mr. Roy how much he thought a write-in candidate should spend in order for the amount to be considered substantial.

Mr. Roy said any amount. He said if a candidate is not an exempt candidate, the race should be considered contested. He said a write-in could come into the race at the last minute and spend \$4,000 - \$5,000. He said in fairness, the race should be deemed contested – no matter what the amount.

Alison Smith, co-chair of Maine Citizens for Clean Elections, said the intent of the MCEA program was for all contested candidates to receive the contested candidate amount. She further said that the Secretary of State has required write-in candidates to register since the MCEA laws were drafted. She said candidates need to have certainty that if they are involved in a contested race, they will get the funds needed to run a credible race.

Ms. Thompson asked whether staff considered Rep. Crockett a contested candidate.

Mr. Wayne said a rule was adopted as a reaction to a 2004 primary election for a write-in candidate. He said the rule is written so that the Commission can decide whether Rep. Crockett has rebutted the presumption that the race is uncontested because Jarody has received or spent “substantial” campaign funds.

Ms. Thompson asked the “substantial” standard in the rule has been tested in the past.

Mr. Friedman said the word has been defined in other areas of the law and in his experience it covers anything other than de minimis. He said the rule states that if a person is not listed on the ballot, then it is presumed to be an uncontested race; however, the presumption is rebuttable. He said if a contested race is funded at \$4,144 and an uncontested race is funded at \$1,658, it would seem that 25% of the contested amount would be reasonable to consider as a substantial amount. He said, in this case, that would mean a write-in candidate would have to raise or spend \$1,036 in order for the race to be considered contested. He said he didn’t feel substantial should be defined as a dollar or even \$100.

Ms. Thompson said the MCEA candidates should not be surprised by an unexpected candidate. She said the rules need to be clearer to define substantial.

Mr. Youngblood said once a write-in candidate registers with the Secretary of State, they become a legitimate candidate. He said the money amount does not matter. If someone is registered, knocking on doors, putting up signs, then they are contesting for a seat as a candidate.

Mr. McKee said he did not feel this race qualified as a “substantial” amount. He said that the write-in candidate has said that the maximum amount he would spend is only \$366. Mr. McKee said that he would

read “substantial” as more than a few hundred dollars. He said the current wording leaves the determination flexible.

Ms. Thompson said the law cannot be enforced by trusting what someone says they will or will not do. She said she agrees with Mr. Youngblood, if someone is registered, they are a serious candidate. She said the rule should be revisited in the future to define “substantial” amount.

Mr. Friedman said the rule as written is fine, in his opinion. He said it allows for determination on a case-by-case basis. He said in this case, the amount the write-in candidate will spend is not a “substantial” amount.

Ms. Thompson moved to determine that Rep. Crockett has proven herself to be a contested candidate under Chapter 3 of the rules, Section 8, subsection 3(D). Mr. Youngblood seconded.

Mr. McKee stated that this race may look contested in the general sense; however, he did not think that there was adequate evidence that there has been the substantial receipt or expenditure of funds as required under the rule. He said he would not vote in favor of the motion.

Mr. Friedman said the motion does not address the issue of “substantial” so he would not vote in favor.

The motion failed by a vote of 2-3. (Mr. Youngblood and Ms. Thompson in favor; Mr. Marsano, Mr. McKee and Mr. Friedman opposed.)

Mr. Friedman moved to find Rep. Crockett has not rebutted the presumption by showing that her opponent Jarody has received or spent substantial campaign funds. Mr. McKee seconded.

The motion passed (4-1). (Mr. Marsano, Mr. McKee, Mr. Youngblood and Mr. Friedman in favor; Ms. Thompson opposed.)

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 item was taken out of order:

Agenda Item #8. Complaint Regarding Use of Somerset County Resources for Filing Independent Expenditure Reports with the Ethics Commission

Mr. Wayne explained that Chuck Quintero has filed a complaint that the Maine Republican Party (MRP) filed three independent expenditure reports with the Ethics Commission using a facsimile machine belonging to the Somerset County Jail. He asks that the Commission consider whether this is an appropriate use of public resources.

Chuck Quintero said he would stand on his written testimony and further agreed with an earlier statement that Party Committees filing reports need to be held to the highest standards.

Ms. Thompson asked for more detail due to the short notice of the complaint.

Mr. Quintero said he was reviewing the MRP's independent expenditure report which was sent by fax from the Somerset County Jail and signed by Philip Roy who is an employee of the Somerset County Jail. He said it was his understanding that this is in violation of Title 5, Section 7056 (3) and relates to A, B and C of the statute "officers or employees of the executive branch may not engage in federal activity when an employee is on duty," noting the MRP faxes were sent while Mr. Roy was at work. He said Mr. Roy violated these three criteria within the statute.

Mr. Friedman said he believed the statute referred to only applied to state employees in classified or executive branch of government and not county employees.

Mr. Quintero said he was not aware of that fact. He said if that is the case, he would withdraw his complaint. He said he would change his complaint to say that county officials using county property for political purposes is unethical.

Mr. McKee questioned whether this matter should be considered because it is not within the Commission's jurisdiction.

Mr. Friedman asked counsel whether this statute affected county employees or just state employees.

Ms. Gardiner stated that her interpretation of this statute is that it relates to state employees and does not fall within the Commission's jurisdiction.

Mr. McKee moved that the complaint be dismissed since the Commission has no jurisdiction. Ms. Thompson seconded. The motion passed unanimously (5-0).

Mr. Roy said he wanted to set the record straight. He is not an employee of Somerset county or the Somerset County Jail. He said he is an elected official, a sitting county commissioner of Somerset county.

Agenda Item #9. Complaint by Maine Democratic Party Concerning Business Advertising

Mr. Wayne explained that the Maine Democratic Party filed a complaint against House candidates William C. Dow and Les Fossel. The complaint argues that advertising featuring the names and photographs of the candidates paid for by their businesses should be considered contributions to their political campaigns, and should result in matching funds to the Democratic opponents. He also said Daniel Billings was representing William Dow.

Daniel Walker, counsel for the Maine Democratic Party, said the concern is where the line falls between promoting a business in advertising and promoting a candidate. He reviewed the law and how it applies to the advertising. He said the expenditure definition in Section 1012 3(A)1, says for "the purpose of influencing the nomination or election of any person to political office." Mr. Walker reviewed the elements in the so-called business ad that were different from other ads that Dow Investments used in newspapers and which he thought were made for the purpose of influencing the election. He said this ad should be considered an expenditure in Mr. Dow's campaign.

Mr. Walker reviewed Mr. Fossel's direct mail piece in which he refers to energy conservation and low cost energy assistance programs. He said Mr. Fossel has a home restoration business and is using the same picture for his business advertisements that he uses for campaign ads. Mr. Walker stated that Mr. Fossel is using his business to promote his candidacy. He further stated that when a business ad is purchased only during the campaign season, it is obviously for campaign purposes.

Mr. Friedman asked how a small business owner who purchases ads for his business could run for the Legislature and not be exposed to this type of complaint. He said looking at the advertisements under

discussion, he does not see them as political ads. He also said candidates should not be required to purchase a different photo from their business ads for their political ads. He said a business owner running for the Legislature should be able to run political ads without being subject to a complaint.

Mr. Walker said there is a fine line and these ads cross that line.

Dan Billings, Esq., on behalf of Mr. Dow and Mr. Fossel, said his view of the law is the same as Mr. Walker's; however, based on information provided, these advertisements are in keeping with past practices of both businesses. Mr. Billings referred to Mr. Dow's response in which Mr. Dow provided a detailed invoice from the media vendor dated January 7, 2008, which does work for his company, Dow Investments. He said the media plan goes through the entire year and was put together before Mr. Dow considered running for office. He said these ads are part of their general business practices and were not intended to influence the election. Mr. Billings also stated that Mr. Walker has brought forward this complaint on behalf of the Democratic Party and he would be interested to know whether the opponents in these races have taken issue with these ads. Mr. Billings said he has noticed Mr. Fossel's business ads in the Lincoln News for years.

Ms. Thompson said Mr. Dow's letter indicated an advertising budget but it did not state when the ads were run.

Mr. Billings could not confirm the dates of the ads; however, he said the ads were placed for the entire year.

Mr. Fossel read from a prepared statement (attached) and passed out some campaign literature and business ad examples. He said that his opponent has not raised any objection to his advertisements. He said he sends out business newsletters periodically throughout the year to people in his district and beyond. He said his concern with being involved in this complaint is that it will negatively affect his business. He said newsletters are the most effective forms of advertising available.

Mr. Billings stated that these expenditures are businesses expenditures and are not intended to influence the election.

Mr. Phil Roy, treasurer of the Maine Republican Party, said a small business owner who does advertising on a normal basis should not be found in violation. He further said new legislation should be looked at with regard to this issue. He recommended the Commission take this up for discussion after the election.

Ms. Alison Smith, MCCE, said regarding the Dow complaint, the Commission needs to decide whether this could be considered a coordinated expense which would be an independent expenditure.

Mr. Friedman said if these are strictly business ads, then the rebuttable presumption phase would not come in to play.

Ms. Smith said rebuttable presumption is a safety valve for business owners to be able to run for office and still run business ads. She said the issues raised by the Dow ad are different because he is not the sole proprietor in the business.

Mr. McKee stated that the presumption has been rebutted by the statements today. He said he does not see political ads here.

Mr. McKee moved that the Commission find that regarding the Dow communication, Mr. Dow has rebutted the presumption that this expenditure was not made to influence the election. Mr. Marsano seconded. The motion passed unanimously (5-0).

Mr. McKee moved that the Commission find that regarding the Fossel communication, Mr. Fossel has rebutted the presumption that this expenditure was not made to influence the election. Mr. Marsano seconded. The motion passed unanimously (5-0).

Agenda Item #11. Request for Advice Regarding Use of Maine Clean Election Act Funds to Rent a Shuttle Bus for Transporting Voters

Mr. Wayne explained that House candidate Belinda Gerry inquired whether she and other Maine Clean Election Act candidates in the Auburn-Lewiston area may use public campaign funds to rent a shuttle bus to transport voters to polling places. He said the MCEA guidelines state that funds are to be used for the purpose of promoting an individual candidate. He stated that the Commission staff recommends against permitting this use of Maine Clean Election Act funds.

Mr. Marsano said this is an obvious misuse of MCEA funds. He said clean election money should not be used for getting people to the polls.

Mr. Marsano moved that such an expenditure is an improper use of MCEA funds. Ms. Thompson seconded. The motion passed unanimously.

Agenda Item #12. Complaint Regarding Use of Recreational Vehicle with Advertising to Promote Candidate's Campaign

Mr. Wayne explained that House candidate Stanley Ginish filed a complaint stating that advertising on a motor home or trailer that he alleges was purchased or rented for campaign purposes constitutes a contribution to the campaign of his opponent, DeAnne Rogan. Ms. Rogan responded that her mother put two signs purchased by the campaign on her recreational vehicle, and the advertising involved no further expenditures. Mr. Wayne said Mr. Ginish based his complaint on statements a third party made to Mr. Ginish. Mr. Wayne stated that unless the complainant provides further evidence of expenditures made to promote Ms. Rogan's campaign, the staff recommends dismissing this complaint.

Mr. Marsano moved to dismiss this complaint. Mr. McKee seconded.

Mr. Marsano said this seems to be within normal campaign practices. He said the only question that could arise would be whether the mother had transportation expenses that exceeded \$100 which should be reported.

The motion passed unanimously (5-0).

Agenda Item #10. Complaint by Maine Democratic Party Concerning Expenditures by Maine Senate Republican Committee and Others

Mr. Daniel Walker, Esq., said that the issues raised in these complaints regarding campaign expenditures by the Maine Senate Republican Committee (MSRC) are not very egregiousness; however, he stated that they should be brought forward. While he acknowledged Mr. Dan Billing's response to these complaints, he reviewed the areas on the reports that needed more information to be clear as to what the expenditures

were. He also brought up the issue that the correct name of the Senate Republican Victory Fund is now the Senate Republican Committee.

Mr. Friedman said Mr. Walker knows Mr. Billings and Mr. Billings knows Mr. Walker. He asked whether the two of them ever pick up the phone and discuss these issues among themselves instead of bringing them before the Commission. He said that he thought that some of Mr. Walker's questions could be answered by Mr. Billings without coming before the Commission.

Mr. Daniel Billings, Esq., responded orally to each item in the order presented by Mr. Walker. He also said that the Party takes great care to maintain a firewall between the individuals who are working with the candidates and those who are involved in sending out campaign communications to support candidates in order to make sure that there are no coordinated expenditures that could be considered contributions to the candidate. Because he stresses the importance of maintaining that separation, the people who handle the payment for those communications treat issue ads the same way they would treat an independent expenditure. He said that was the reason why the notation "IE" was on the check and ultimately on the campaign finance report. He said that he can understand why the questions about the expenditures were raised, but he said the important thing for the Commission to consider is that no one has come forward to say that there was an independent expenditure made that was not reported as there was in the case of the mailer for Deborah Simpson. Mr. Billings also explained the issue regarding the names of the PAC and that the Maine Senate Republican Victory Fund and the Maine Senate Republican Committee are the same.

Mr. Phil Roy, MRP treasurer, said the standard operating procedure is to record into the database what is written on the check. He recommended having the PAC number on the Commission's website for clarity.

Ms. Thompson asked that this matter be reviewed by the Commission staff in the next week and provide the information to the Commission members regarding any resolutions between the parties.

The Commission resumed the remainder of agenda items at this point.

Agenda Item #7. Schedule for Commission Meetings in 2009

Mr. Friedman suggested having meetings every other month after upcoming non-election year. He provided the following dates: January 29, March 26, May 28, July 30, September 24 and November 26 (or 19, in the case of the Thanksgiving holiday)

Agenda Item #6. Supreme Judicial Court Decision on Constitutionality of Endorsements Statute

Mr. Wayne explained that on October 21, 2008, the Maine Supreme Judicial Court issued a decision on the appeal brought by Michael Mowles, striking the State's endorsements statute (21-A M.R.S.A. § 1014-A) as unconstitutional. This item was informational purposes only.

Agenda Item #5. Update on 2008 Audits

The Commission accepted Mr. Sumner Field's written testimony on audits performed.

By motion from Mr. McKee and seconded by Mr. Youngblood, the meeting adjourned at 1:05 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director

Attachment (Fossel statement)