



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

Minutes of the December 29, 2008, Meeting of the  
Commission on Governmental Ethics and Election Practices  
Held in the PUC Hearing Room, PUC Building,  
242 State Street, Augusta, Maine

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

Mr. Youngblood was nominated by Ms. Thompson to chair today's meeting. Mr. McKee seconded the nomination. The nomination was approved.

At 9:03 a.m., Acting Chair Edward Youngblood convened the meeting.

The Commission considered the following items:

**Agenda Item #1. Ratification of Minutes of the October 27, 2008 Meeting**

Mr. Marsano moved to accept the October 27, 2008, meeting minutes as amended. Ms. Thompson seconded. The motion passed unanimously (4-0).

*Mr. McKee recused himself from the discussion of this agenda item since his mother-in-law serves as a lobbyist for this organization and he knows Cindy Butts personally.*

**Agenda Item #2. Late Independent Expenditure Report by the Maine Association of Realtors PAC**

Mr. Wayne explained that the Maine Association of Realtors PAC was required to file an independent expenditure report on Saturday, October 11, 2008, disclosing expenditures made to support Senate candidates Lois Snowe-Mello and Christopher Rector. Instead, the PAC filed the report 20 days late on Friday, October 31, 2008. The PAC paid a routine penalty of \$1,231.20. The late filing of the report delayed the payment of matching funds to Senate candidates Deborah Simpson in the amount of \$3,186 and

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David Miramant in the amount of \$2,969 three weeks before the election. Mr. Wayne said the Commission staff recommends the assessment of an additional penalty under 21-A M.R.S.A. § 1127(1) in the amount of \$10,000 because the late reporting delayed the payment of matching funds.

Ms. Thompson asked why a penalty had already been paid.

Mr. Wayne explained that any time a report is filed beyond the deadline a penalty is calculated based on a statutory formula, which takes in account the number of days late, the amount of financial activity, and any previous filing violations. This is an automatic process administered by the staff. The penalty may be paid at that point or a waiver may be requested. Mr. Wayne said in this case the PAC realized their error and paid the routine penalty. He said the MCEA authorizes the Commission to assess an additional penalty if the late filing of an independent expenditure report delayed matching fund payments to a candidate. He said the staff is recommending an additional penalty because political action committees need to be reminded how important it is for them to be on time and accurate with these required reports so that opposing candidates receive matching funds in a timely fashion.

Ms. Thompson asked what, if any, the formula for the second penalty has been.

Mr. Wayne said the first automatic penalty is determined strictly by formula. He said that there is no formula or specific guidance in the statute for determining the amount of an additional penalty. Mr. Wayne read the relevant portion of the statute: “The Commission may assess a fine of up to \$10,000 for a violation of the reporting requirements of section 1017 and section 1019 (B), if it determines that the failure to file a timely and accurate report resulted in the late payment of matching funds.” He stated that there are very few past cases to which to refer regarding assessing additional penalties under this provision of the statute.

Cindy Butts from the Maine Association of Realtors apologized for this error and stated that this was an administrative mistake, not intentional. She said her organization has followed the rules for the past thirty years and this is their first offense.

Mr. Marsano stated that he felt a substantial penalty should be assessed in this case. He recognized the difficulty in assessing the impact of this failure, but he considered this to be a gross failure even though it may have been an administrative one.

Mr. Youngblood said there is nothing more important than ensuring that the candidates have a system on which they can rely to receive matching funds in a timely manner. Mr. Youngblood asked if there had been past occurrences of this nature.

Mr. Wayne stated perhaps five or six previous violations have occurred. He stated that the Commission has assessed penalties under this statute in the past which ranged from \$1,000 to \$5,000.

Mr. Youngblood stated that from his recollection, those occurrences happened early in the election cycle and did not have a large impact on the campaigns. However, in this case, it is difficult to measure the effect of the late filing.

Mr. Wayne agreed. He said that there may have been one case in the past when the Commission was concerned that the late filing may have had an impact on the election but for the most part it has been difficult to tie the late filing to the election results.

Ms. Thompson moved to assess a penalty in the maximum amount of \$10,000 against the Maine Association of Realtors PAC under 21-A M.R.S.A. § 1127(1). Mr. Marsano seconded the motion.

Ms. Thompson said this violation, even though inadvertent, is very serious. She said the core of the Clean Election Act is to level the playing field among candidates. She said the Commission must enforce this basic principle of the MCEA.

The motion passed unanimously (3-0).

*Mr. McKee returned to the meeting.*

**Agenda Item #3. Provisional Adoption of Rule Amendment Regarding Seed Money Maximum**

Mr. Wayne said that, at its July meeting, the Commission agreed to accept public comment on a proposed rule change to increase the maximum amount of seed money that a gubernatorial candidate seeking Maine Clean Election Act funding can collect from \$50,000 to \$100,000. After further research, the staff suggested that the amount be increased to \$150,000 and the Commission agreed at its October 27 meeting to accept public comment on increasing the seed money maximum to \$150,000. On November 24, the Commission held a public hearing to receive comments on the \$150,000 proposal. He said the Commission can now decide whether to increase the seed money maximum to \$100,000 or \$150,000. Because this would be a change to a major substantive rule, it would need to be submitted to the Legislature for its consideration.

Mr. McKee stated he would support the increase to \$150,000 and questioned what the next procedure is at this point.

Ms. Gardiner stated that the public comment period has ended, so the next administrative step would be for the Commission to provisionally adopt a final rule which would then be reviewed by the Legislature.

Mr. McKee moved to provisionally adopt the final rule changing the seed money maximum amount to \$150,000. Mr. Marsano seconded.

Mr. McKee said this change is modest and makes sense in order to attract the most qualified candidates and give campaigns the best opportunity to compete at the gubernatorial level.

Mr. Youngblood agreed and said this issue will most likely need to be addressed again in the future.

Ms. Thompson said this change should increase participation of gubernatorial candidates and reduce the special interest money in these campaigns.

The motion passed unanimously (4-0).

**Agenda Item #4. Proposed Statutory Changes**

Mr. Wayne said the staff has drafted proposed changes to the statutes for consideration by the Commission members which may be submitted to the Legislature in the form of a bill no later than February 2, 2009.

Mr. Youngblood asked for clarification regarding section 21-A M.R.S.A. § 1012(5) with regard to definitions.

Mr. Wayne explained that this provision is a special privilege that applies to party committees. He said the committees may send out mailers to members or place newspaper ads that can list three or more candidates and they do not have to file an independent expenditure report for these types of activities. He explained that the staff is proposing to add an additional category under paragraph 8 to give the party committees more flexibility in providing information to and communicating with their members.

Mr. Youngblood asked if the committees had requested this provision be drafted.

Mr. Wayne said the committees had not requested the provision be added, but had shown an interest in including other communications in their party candidate listings. He said this allows more flexibility for the party committees.

Mr. Marsano said the provision seems too vague.

Mr. Youngblood said the current provision is quite open as to what is allowable.

Mr. Marsano agreed and further stated that this new language is so vague it has no limits.

Mr. Wayne said the staff could draft a more specific provision for the January meeting.

Mr. McKee asked whether there will be public comment on these changes.

Mr. Wayne stated that it would be the Commission's decision on how to handle public comments. He said the staff could receive comments or the Commission could hear comments at its January meeting.

Mr. Marsano expressed concern over some of the provisions. He outlined the sections as follows:

- 21-A M.R.S.A. § 1125(6) and (6-B): He said he understands what the staff is trying to do; however, he thought the way in which it was done was confusing. In fact, Mr. Marsano said the two sections were in conflict with each other.
- 1 M.R.S.A. § 1012(6): Mr. Marsano said this provision fails to define domestic partner. He said the Commission should not adopt this change unless the term is defined.
- 1 M.R.S.A. § 1013(3-A): Mr. Marsano disagreed with this proposed change regarding the confidentiality of complaints against Legislators that the Commission does not act upon. He thought that the current statute is correct in its treatment of complaints that the Commission decides not to consider. He does not think that those complaints should be made available to the public; rather it should be left up to the Legislator whether to release that information.
- 1 M.R.S.A. § 1014(2): He said the term “conflict of interest” is universally understood and should not be redefined as a “violation of legislative ethics.”
- 3 M.R.S.A. § 312-A(10): Mr. Marsano was very much opposed to this change that makes an exception to the definition of lobbyist for individuals who are reimbursed to travel expenses but who are not compensated for lobbying. He said it would open a very wide door that would be harmful to the disclosure purposes of the statute.

Ms. Thompson said there needs to be an opportunity for public input on these suggestions and she questioned whether there were other areas that need policy changes.

Mr. Wayne thanked the Commission for their careful review of these provisions. He said that the staff would be prepared to make the changes that Mr. Marsano suggested and other changes that the Commission members thought would improve the statute prior to the January meeting. He suggested that the staff send the Commission a revised version of the statutory changes that would incorporate the changes discussed at this meeting. Mr. Wayne stated that staff could format these changes in a more organized manner for easier reference to statutes.

Mr. Youngblood stated that these are the Commission's recommended changes and therefore would mean no public hearing is necessary at this point. He said when the changes go before the Legislative committee, the public will have an opportunity to speak at that time.

Mr. McKee said that he was fine with members of the public and interested parties conferring with the Commission staff and having the staff filter through any comments it receives.

Mr. Marsano said that a unanimous vote by the Commission on the bill it submits would give the Legislature a signal of the Commission's strong endorsement and recommendation.

Ms. Thompson supported Mr. Marsano's comments regarding endorsements by the Commission. She said the Legal and Veterans Affairs Committee does rely on the Commission's recommendations when considering proposed changes and expressed concern over not having sufficient public input in order for the Commission's proposed changes to be completely vetted. She said she would prefer the staff receiving comments and presenting them to the Commission in addition to an opportunity for public input.

Mr. Marsano expressed concern over meeting the deadline for submission to the Legislature.

Mr. Wayne said an e-mail could go out to interested parties within one week requesting written comments.

Mr. McKee said he had no objections to opening the process up to written comments from the public. He said that the Commission members may not all agree with each of the proposed changes; however, these issues could be dealt with at the January meeting.

Ms. Gardiner said that she did not have an opportunity to review the proposed changes with staff prior to the meeting due to her schedule, but would do so in preparation for the January meeting.

Mr. McKee moved that the Commission allow written comments from the public which would be concluded within the next fourteen days; have the staff review the written comments along with other information received by the staff on an informal basis; and have the Commission make a final decision on

the changes at the meeting on January 29 after reviewing staff recommendations and addressing the concerns raised by Mr. Marsano as well. Mr. Youngblood seconded the motion.

Mr. McKee asked if the Commission's desire was to have an actual public hearing on these proposals in order to go through each change. He said there will be an opportunity for public comment at the LVA Committee level; however, if Commission members wanted such a hearing before going to the Legislature, he cautioned there may not be enough time for this extra step in the process.

Ms. Thompson said more input is needed and there are some proposals that will require more information. She said in keeping with the Commission's reputation of being open and transparent to the public, a public hearing should take place before submission to the Legislature as a matter of general practice.

Ms. Gardiner said there is no legal obligation for the Commission to have a public hearing regarding these proposed statutory changes. It is entirely discretionary for the Commission to do so. She said written comments could be received within fourteen days in order for Commission members to review and consider them and still allow for public input at the January 29 meeting. She said many interested parties receive the information about the meetings through the Commission's website so the public would have access to the comments received by staff and could comment at the meeting on the January meeting.

Ms. Thompson said there may be a few items on which the Commission cannot reach consensus and perhaps those items would not be included in the bill. She suggested that the Commission receive written comments from the public and also have a public comment period at the next meeting.

In a response to a question from Mr. Marsano, Mr. Wayne said the minutes for the November and December meetings will be ready for the January meeting.

Mr. McKee proposed amending his motion to allow for additional live public comment at the January meeting. However, he stated that he was concerned about the effectiveness of such a procedure given the time constraints the Commission was under. He thought a better method would be to have the comments in advance of the meeting in order to have the time to consider them thoughtfully.

Mr. Youngblood questioned whether an amendment to the motion was needed since all Commission meetings allow for public comment on agenda items as a general rule.

The original motion passed unanimously (4-0).

#### **Agenda Item #5. Proposed Changes to Commission Rules**

Mr. Wayne explained that the staff has drafted proposed changes to Chapters 1 and 3 of the Commission's rules for consideration by the Commission. He said any changes to the Chapter 3 rules would have to be submitted to the Legislature because the rules affecting the administration of the Maine Clean Election Act are considered major substantive rules. Mr. Wayne outlined the procedure under the Maine Administrative Procedure Act for major substantive rule changes. He also said that the Legislature should receive them in the middle of the session rather than later in the session.

Ms. Gardiner expressed a concern that some of the proposed rule changes were linked to the proposed statutory changes. She said timing is an issue because the rule-making procedure for those particular rule changes cannot go forward until the statutory change is finalized.

Mr. Marsano said that in his review of these items he did not see where this would be a problem and stated that he would be in favor of approving all the proposed rule changes.

Mr. Youngblood questioned the proposed rule regarding purchased equipment and expressed concern over the Ethics Commission repossessing these items that cannot be sold.

Mr. Wayne said the Ethics Commission does not intend to take back any property. He said as a general rule, most candidates purchase the items themselves or find a buyer on their own.

Ms. Thompson said this issue has not been a major problem in the past and that there have been only a few candidates who have tried to abuse the program.

Mr. Wayne said that, in proposing this change, the staff has tried to strike a balance between ensuring that the public funds are accounted for on the one hand and not making the process too burdensome for candidates on the other.

Mr. Youngblood also raised concern regarding the unpaid debts issue. He asked whether the candidate would be subject to a violation or fine if the debt was greater than the contribution limit.

Mr. Wayne said candidates could be subject to a fine, but that would be at the Commission's discretion.

Mr. McKee said a proposed rule change could be withdrawn after the Commission receives public comment if the Commission did not agree with the changes.

Mr. Wayne asked Ms. Gardiner for clarification of the procedure for the staff to propose changes to the Commission if there has been no public comment received on a particular rule change.

Ms. Gardiner said the staff is not restricted on providing recommendations to the Commission at any point in the public comment period. If there were substantial changes to the proposed rules, then those new changes would be subject to a new thirty day public comment period.

Mr. McKee made a motion to start the rulemaking process and accept these proposed rule changes for public comment, have a public hearing at the January 29 meeting, and decide after that whether to adopt or withdraw the rule changes. Ms. Thompson seconded.

The motion passed unanimously (4-0).

Mr. Youngblood noted the receipt of a memorandum from Carl Lindemann regarding proposed statutory changes.

### **Agenda Item #6. Presentation of Audit Reports**

Mr. Wayne presented the reports for the first five audits of Maine Clean Election Act candidates in the 2008 general election. The audits were conducted by the Commission's former Auditor, Sumner Field. No exceptions (violations) were noted.

Ms. Thompson asked Mr. Wayne if he could estimate what percentage of candidates were in compliance.

Mr. Wayne said it was too early to tell; however, he explained that in 2006, after auditing candidates who did not return their Clean Election Act funds within the proper timeframe, the staff did find some inappropriate spending and those candidates have been subject to civil enforcement actions and some have been criminally prosecuted. He said during this election cycle there seems to be greater compliance.

At 10:37 a.m., Mr. McKee moved to go into executive session in accordance with Section 405, subsection 6(E) of Title 1 for the purpose of discussing pending or contemplated litigation. The motion was seconded by Ms. Thompson. The motion passed unanimously (4-0).

At 11:37 a.m., Mr. McKee moved to come out of executive session. Ms. Thompson seconded the motion. The motion passed unanimously (4-0).

### **Other Business**

Mr. Wayne explained that Representative Paul Davis wants to submit a bill to the Legislature regarding campaign sign disclosure requirements on large homemade signs and has asked for the Commission's opinion on his idea. Mr. Wayne said that the Commission has not previously provided an opinion on bills that come before the Legislature other than the Commission's own bill.

Mr. McKee, Ms. Thompson, and Mr. Youngblood agreed that it was not appropriate or within the Commission's responsibilities or jurisdiction to provide advice on bills a Legislator planned to introduce. Mr. Marsano said that he did not intend to make a motion.

Mr. Wayne requested a review by Commission members of the formatting for the proposed statutory changes and snow dates for future meetings. Mr. Wayne agreed to send an email requesting alternate dates.

Ms. Gardiner advised that only two Commission members are required to be present at a public hearing on rule changes.

Ms. Thompson expressed her appreciation of the Commission staff.

Mr. Marsano moved that the matter of attorneys' fees with regard to the Michael B. Mowles vs. State of Maine, Commission on Governmental Ethics and Elections Practices be left to the Court. Ms. Thompson seconded.

Ms. Thompson explained that she agreed with this motion, and realized it will reveal a split consensus of the Commission.

The motion failed. (Mr. Marsano and Ms. Thompson in favor; Mr. Youngblood and Mr. McKee opposed.)

Meeting adjourned at 11:45 p.m. by a motion by Mr. McKee, which Ms. Thompson seconded. The motion passed unanimously (4-0).

Respectfully submitted,

Jonathan Wayne, Executive Director