

Agenda

Item #1



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

Minutes of the November 24, 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. Mavourneen Thompson; Walter F. McKee, Esq.; Hon. Francis C. Marsano (by phone); Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:01 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

**Agenda Item #1. Ratification of Minutes of the October 17, 2008 Meeting**

Mr. McKee moved to accept the October 17, 2008, meeting minutes as drafted. Ms. Thompson seconded. The motion passed unanimously (4-0).

**Agenda Item #2. Complaint against Rep. Philip A. Curtis/Campaign Signs**

Mr. Wayne explained that John Bertl filed a written complaint stating that the campaign signs of Rep. Philip A. Curtis did not contain the complete disclosure statement as required by law. The signs contained a statement that they were paid for and authorized by the candidate, but did not have the address of the candidate or the candidate's treasurer. Mr. Wayne said the staff agrees that there is a violation since there is no address printed on the signs; however, it is clear from the statement on the signs that they were paid for by the candidate's campaign. He stated that the staff recommendation is to not assess a penalty.

Mr. Bertl was not present at this meeting.

Rep. Philip Curtis explained that he is guilty of not having his address on the signs; however, the signs have been used in his previous campaigns and he was not aware of the law requiring this information. He said

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he believed the wording “paid for and authorized by the candidate” was acceptable and once he found out from the Commission staff that it was not, he took steps to correct most of the signs.

Ms. Thompson asked what percentage of his signs Rep. Curtis was able to correct. Rep. Curtis said he had ten home-made signs and six were corrected.

Mr. Friedman asked if this was Rep. Curtis first term. Rep. Curtis said this was his third term.

Mr. Friedman asked if these signs were used in the past and whether a complaint had been filed before. Rep. Curtis confirmed that they were used in the past but there had not been any complaint before.

Philip Roy, Treasurer of the Maine Republican Party and a recent candidate for county commissioner, said federal election law does not require the address but does require the name of the treasurer and/or the web address of the person who financed the signs. He noted that many large painted signs used during this election did not have the disclosure statement. He said the Commission should look at this law and consider making changes to clarify what disclosure is necessary taking into consideration the size of the sign and the practicality of requiring a printed disclosure statement that is not visible unless a person is very close to the sign.

Mr. Friedman asked what the maximum penalty amount for this violation. Mr. Wayne said \$200.

Mr. McKee made a motion to accept the staff recommendation to find in violation but with no assessment of a penalty. He said attempts were made to correct the signs and the signs were used in previous campaigns without any issue. Ms. Thompson seconded the motion. The motion passed unanimously (4-0).

Mr. McKee recused himself from participating in Agenda Item #3 because he made a contribution to the Dill Leadership PAC.

### **Agenda Item #3. Request for Waiver of Late-Filing Penalty/Dill Leadership PAC**

Mr. Wayne explained that the Dill Leadership PAC was five days late filing its October Quarterly Report due October 10, 2008. Rep. Cynthia Dill requested a waiver of the \$51.25 late-filing penalty because of the sudden death of the PAC treasurer’s husband. The staff recommended the waiver of the penalty.

Cynthia Dill stated she respectfully requested a waiver due to the circumstances described by Mr. Wayne.

Ms. Thompson made a motion to accept the staff recommendation and provide a full waiver of the penalty.  
Mr. Marsano seconded.

Mr. Friedman agreed this situation warranted a full waiver of this penalty.

The motion passed unanimously (3-0, Mr. McKee having recused himself from consideration of this matter).

Mr. McKee returned to the meeting.

**Agenda Item #4. Request for Waiver of Late-Filing Penalty/Fed Up With Taxes PAC**

Mr. Wayne explained that the Fed Up With Taxes political action committee was late in filing two 24-hour reports due October 24 and 25, 2008, for expenditures made over \$500. He said a single report containing the information for the relevant expenditures was filed on the evening of October 27. Mr. Wayne said based on the formula in the Election Law, the penalties for the two late reports are \$96.12 for the report that was due on October 24 and \$10,000 for the report that was due on October 25. The maximum penalty allowed by statute for a late-filed report is \$10,000. He said that William Dale on behalf of the PAC requests a waiver of the \$10,000 penalty because it is disproportionate to any harm suffered by the public from the late disclosure and for other reasons. Mr. Wayne also explained that a letter was received over the weekend from Benjamin Dudley.

Mr. Friedman read out loud Mr. Dudley's letter (attached) which advocated against a reduction in the \$10,000 penalty.

Ms. Thompson asked the staff for information regarding the Legislature's intent with regard to the requirement of 24-hour reporting.

Mr. Wayne stated that he had not researched the legislative history and background regarding the 24-hour reporting requirement. He said the last regular campaign report required to be filed before an election is

due eleven days prior to the election and it covers through the fourteenth day before the election. He said the 24-hour report covers large expenditures made by PACs in the final thirteen days before the election. He said that, under the current report filing schedule, if 24-hour reports were not required, these large expenditures would not be disclosed to the public until 42 days after the election when the final campaign finance report is due.

Mr. William Dale, Esq., of Pierce Atwood, LLP, and counsel for Fed Up With Taxes PAC, said he did all the electronic filings for this PAC. He stated that it was his error not to report the two expenditures made after the 11-day pre-general reporting period. He said that he had filed a lengthy 11-Day Pre-General Report on October 24 and logged off the system without filing the reports for the expenditures made after the end of that reporting period. He said he had no excuse except that he forgot.

Ms. Thompson asked Mr. Dale what he believed the Legislature's intent was requiring these 24-hour reports.

Mr. Dale said he could not speak knowingly, except to surmise it would be for the purpose of disclosing large sums of money spent by PACs just prior to an election. He said this PAC was well-funded by national constituencies and those contributions as well as the PAC's expenditures were reported appropriately in the pre-election reporting periods, so it should have been no surprise that a great deal of money would be spent toward the end of the period.

Mr. McKee asked for clarification of the sequence of the filings. Mr. Dale said the 11-day pre-election reporting period covered the period from October 1 to October 21. The expenditures that were made on Thursday, October 23 and Friday, October 24 were made outside of the reporting period covered by the 11-day pre-general report.

Ms. Thompson made a motion to assess Fed Up With Taxes PAC the maximum penalty of \$10,000. Mr. Friedman seconded.

Mr. McKee said he was divided about what the Commission should do. On the one hand, Mr. Dale made extraordinary efforts to comply with the reporting requirements and was sincere in his acknowledgement that a mistake had been made. On the other hand, there were extremely large expenditures made for major

media buys prior to the election and this very important information was not disclosed to the public in a timely fashion.

Ms. Thompson stated this issue is one of the most important issues that has come before the Commission since she has been involved. She said the law requires that campaign finance activity be made transparent for the public. She acknowledged Mr. Dale's sincerity in admitting that a mistake had been made but did not think it was relevant to the Commission's consideration of this matter. She said the reality is that the public was not made aware of an expenditure of nearly three-quarters of a million dollars for a statewide people's veto election.

Mr. Marsano agreed with Ms. Thompson and stated that due to the large amount of the expenditures involved, he said the maximum penalty is appropriate.

Mr. Friedman said that there is no question as to Mr. Dale's integrity and acknowledged Mr. Dale's forthrightness in coming forward and admitting to the problem. Nonetheless, he said that he was not in favor of waiving or reducing the penalty because he did not believe the criteria warranting a waiver or reduction under 21-A M.R.S.A § 1062-A(2) were present in this case. Referring to the statute, he read the first condition for a waiver – "The Commission may waive a penalty if it is disproportionate to the level of experience of the person filing the report...." He said Mr. Dale is not inexperienced. Regarding the second condition for a waiver – "The commission may waive a penalty if it is disproportionate...to the harm suffered by the public from the late disclosure," he said the amount of this expenditure was very large, nearly \$750,000, and any delay in disclosing such an expenditure made so close to the election could be potentially very damaging to the public. Mr. Friedman also said that there were no mitigating circumstances as listed in the statute present in this case such that a waiver in whole or in part was warranted. The report was filed late due to error on the part of the filer, which is not a mitigating circumstance. While he recognized that \$10,000 was a large amount, he said that, under the statute, the Commission has no basis for reducing or waiving the \$10,000 penalty.

Mr. Marsano reemphasized that the \$10,000 amount is actually a reduction of the amount that the statute calls for in penalties that could have been 3% of the amount of the expenditure (\$750,000). He agreed with Mr. Friedman's interpretation of the statute.

The motion passed unanimously (4-0) to impose the \$10,000 penalty.

**Agenda Item #5. Request for Waiver of Late-Filing Penalty/Teri McRae**

Mr. Wayne explained that Teri McRae was a candidate for re-election to the office of Register of Probate for Cumberland County. She filed her 11-Day Pre-General Election Report one day late on October 25, 2008. This was a second late-filing violation for Ms. McRae. The preliminary penalty amount is \$132.10. Ms. McRae requests a waiver of the penalty.

Mr. McKee made a motion to accept the staff recommendation against granting a waiver and assess a penalty in the amount of \$132.10. He stated that Ms. McRae's circumstances as outlined in her letter do not justify a waiver. Ms. Thompson seconded.

Mr. Marsano said that he believes that Ms. McRae's letter provides a reason for waiving the penalty in that there was no significant harm suffered by the public due to the late filing.

Mr. Friedman said he was struck by McRae's interpretation of a previous violation for the late filing of an earlier campaign finance report. This penalty was waived because it was under \$10, which means the penalty is automatically waived. He said because she was found in violation previously, he would support the penalty amount for a second violation.

Mr. Marsano stated that the provisions that apply to a waiver in 21-A M.R.S.A. § 1020-A(2) involve the question of the harm suffered by the public from late disclosure. He said in his view there was no harm suffered in this case given the nature of the election. He said that even though the filing requirement may have been violated, the facts of this case support the grant of a waiver based on the lack of any harm suffered by the public.

Mr. McKee said after listening to Mr. Marsano's comments, he would agree and be inclined to vote against his motion. He said in her letter, Ms. McRae stated, "As Register of Probate, I deal with people filing things individually and through attorneys all of whom make errors in their filings and procedures, and I always try to respect their effort and not be too punitive for honest errors. I know most people try their best to get it right, I'm hopeful that you can take a similar position here." He said he supports that position in this case.

Mr. Friedman restated that his concern was the fact that this was Ms. McRae's second violation.

Mr. Marsano said that he can understand why Ms. McRae would think that the penalty should not be based on the 3% for a second violation. He said that the waiver of the penalty for the earlier violation could reasonably have been interpreted by Ms. McRae to mean that the violation had been waived also.

Ms. Thompson said she agreed with Mr. Friedman that this was a second violation and stated that she was struck by Ms. McRae's comment in her letter suggesting that the reporting deadlines do not matter. She said that the Commission cannot make assumptions about whether the public was or was not looking for the information contained in a late-filed report. She said that in her view the Commission has to uphold the law, which requires the report be filed by a certain time.

The motion failed (2-2), with Mr. Marsano and Mr. McKee opposing and Ms. Thompson and Mr. Friedman supporting the motion to assess a penalty.

Mr. Marsano made a motion to waive the penalty. Mr. McKee seconded.

The motion passed (3-1), with Ms. Thompson opposing.

#### **Agenda Item 6. James Martin's Complaint against Tom Mooney**

Mr. Wayne explained that House candidate James Martin filed a complaint against his opponent, Tom Mooney, alleging misleading endorsements in Mr. Mooney's palm card, missing disclosure on his campaign signs and palm card, and use of Maine Clean Election Act funds for purposes unrelated to his campaign. Mr. Mooney complains that he has suffered from harassment, false statements, and damage to campaign property by members of Mr. Martin's campaign committee. Mr. Wayne noted that the Commission staff received additional information from Mr. Mooney regarding the trip to Plantation 21 and the Bangor Daily News subscription and after review with the Commission's auditor, the staff has determined those expenditures are acceptable under the Clean Election Act. Regarding the cell phone issue, the staff would like the Commission to determine whether more information is necessary in order to make a determination as to whether the expenditure is acceptable after hearing Mr. Mooney's oral presentation.

Mr. Friedman questioned the harassment and other issues that Mr. Mooney has brought forward and understood this area to be out of the Commission's jurisdiction. Mr. Wayne agreed and said that the staff views the claims that Mr. Mooney has made against Mr. Martin as police matters, not issues to be considered by a campaign finance agency.

Mr. Jeffrey Martin said the letter he submitted on October 20, 2008, outlined his concerns regarding Mr. Mooney's campaign. He said this is the third time Mr. Mooney has run for office and he should be fully aware of the requirements for disclosure. He said other people brought some concerns to him regarding Mr. Mooney's previous campaigns so he took it upon himself to keep a close look at Mr. Mooney's campaign finance reports. He said the travel reimbursement to Plantation 21, the cell phone expenditure for over \$300, and the subscription to the Bangor Daily News raised concerns for him.

Mr. Thomas Mooney said his signs were made during his first run for office and because he was living in an apartment and moving soon, he did not put an address on those signs since it would not be accurate. He also said the company that produced the signs which has experience in this area told him the disclosure would be sufficient without an address. He said Mr. Michael Dunn, who was on his committee during his first campaign and currently is Mr. Martin's treasurer, told him the signs were acceptable. He said he understood the intent of the rule is to identify the sponsor of the advertisement and his signs clearly identify the candidate as being the sponsor. He said cell phone use is an allowable campaign expense and the cell phone was used for campaign business only. He said his phone receipts provided to the Commission indicate what the charges were for but he was not comfortable providing the phone numbers of people he called due to privacy issues. He said he has never received any penalties or complaints during his previous campaigns.

Mr. McKee asked Mr. Mooney to clarify whether he was asking the Commission to rely on his word to the Commission that the cell phone usage was only campaign-related since he would not be providing any detail of the calls.

Mr. Mooney said he did not feel comfortable releasing a phone log of numbers called due to respect of the privacy of those listed in the detail.

Mr. Friedman asked whether Mr. Mooney had a land line through his campaign period and whether this cell phone was purchased for the campaign.

Mr. Mooney stated that he began the cell phone service in June 2008 with a new phone number. He said it was used from June until the end of October. He confirmed that he has always had a land line.

Ms. Thompson asked staff to justify the recommendation regarding these four expenditure items.

Mr. Wayne explained that the staff requested the cell phone details from Mr. Mooney and was told by Mr. Mooney that he did not wish to provide a detailed list of phone numbers. He said it is not unreasonable to ask for more detail from Mr. Mooney regarding his cell phone but it is up to the Commission to determine whether that is necessary.

Ms. Thompson asked what other candidates have provided when requested to provide documentation for cell phone usage.

Mr. Wayne said when it has been necessary to ask for records, which he only recalled happening one time, the information was provided by the candidate. He also said that he believed Mr. Mooney did not have a land line, which is not the case.

Mr. Mooney stated for clarity that he has never been without a land line and he uses it for personal calls. He said the primary reason the phone number changed was due to harassment by a member of Mr. Martin's staff.

Mr. Friedman summarized the staff recommendations as follows:

1. Omission of an address on campaign signs – staff recommends finding a violation, no penalty;
2. Palm card endorsements – Supreme Judicial Court invalidated this statute, staff recommends taking no action;
3. Payment of \$65.28 to Bangor Daily News for subscription – staff concluded this was campaign-related;
4. Payment of \$80.22 for June 11 trip to Plantation 21 – staff concluded this was campaign-related;
5. Cell phone usage – staff requests Commission's input.

Mr. McKee questioned the Bangor Daily News subscription as being a valid MCEA expenditure since it falls under personal, ordinary expense.

Mr. Mooney said he has had a subscription in the past, but did not in the year prior to his campaign. He stated that this expenditure was necessary to stay abreast of the local news and politics in order to run an effective campaign. He said online sources do not provide the depth of information necessary to operate his campaign. He said he was able to get the lowest rate for the campaign period.

Mr. Friedman said he would like Mr. Mooney to be more forthcoming with documentation for his cell phone records; however, he was satisfied with Mr. Mooney's explanation.

Mr. Friedman made a motion to adopt the staff recommendation regarding:

Item #1, the lack of address on campaign signs, to find a violation but assess no penalty;

Item #2, the palm card endorsements, to take no action given the Law Court decision;

Item #3, the expenditure for the Bangor Daily News subscription, to allow as campaign-related;

Item #4, the expenditure for the trip to Plt.21, to allow as campaign-related; and

Item #5, the expenditure for cell phone use, to allow as campaign-related.

Mr. Marsano seconded.

Mr. McKee agreed with all those findings except the Bangor Daily News subscription, stating that this item seemed too much like a personal expense. He said Maine newspapers are available online and he has difficulty supporting the use of taxpayer money for a newspaper subscription. He said this expenditure may meet the statutory criteria; however, he finds it difficult to accept that this is a legitimate campaign expense rather than an ordinary personal expense.

Ms. Thompson agreed with Mr. McKee and suggested changing the motion to three separate items instead of combining them.

Discussion took place regarding how to separate the items within the motion.

Mr. Friedman said the staff has reviewed the evidence and determined this recommendation and he cautioned against micro-managing a candidate's campaign.

Mr. McKee agreed with Mr. Friedman regarding micro-managing campaigns but also expressed his concern with the personal nature of the newspaper subscription. He said that he would support separate motions for each item.

Mr. Friedman withdrew his motion and Mr. Marsano withdrew his second.

Mr. Friedman made a motion to adopt the staff's recommendation to find a violation but assess no penalty with respect to the missing address on the disclosure statement and to take no action with respect to the palm card endorsements in light of the Law Court's decision Mr. Marsano seconded.

The motion passed unanimously (4-0).

Mr. Friedman made a motion that the Commission adopt the staff recommendation to allow the expenditure of \$65.78 for a 22-week subscription to the Bangor Daily News as a campaign-related. Mr. Marsano seconded.

Mr. Marsano said a newspaper purchased by a candidate who does not usually purchase a subscription on a regular basis should be viewed as a campaign-related expense. He said being familiar with articles in the newspaper regarding current events is important for a candidate's campaign.

The motion failed 2-2, with Mr. Marsano and Mr. Friedman in favor; Mr. McKee and Ms. Thompson opposed.

Ms. Thompson made a motion to find the Bangor Daily News subscription is not campaign-related and require Mr. Mooney to reimburse the Clean Election fund for that amount. Mr. McKee seconded.

The motion failed 2-2, with Ms. Thompson and Mr. McKee in favor; Mr. Marsano and Mr. Friedman opposed.

Mr. Friedman made a motion to adopt the staff recommendation that the expenditure for Mr. Mooney's trip to Plantation 21 was campaign-related. Mr. Marsano seconded. The motion passed unanimously (4-0).

Mr. Friedman made a motion to find the cell phone usage campaign-related. Mr. Marsano seconded. The motion passed unanimously (4-0).

Mr. Friedman asked staff whether there was any other investigative information that could be provided regarding the newspaper subscription that would help the Commission reach consensus.

Mr. Wayne said in the past there have been candidates who have opted to spend their MCEA funds towards newspaper subscriptions; however, he said staff would be willing to look to the Commission for guidance as to whether this is an acceptable use of funding. He said an argument may be made for the benefit of having the newspaper to learn about the community and current events which would be helpful to a candidate. He said the guidelines have allowed this expenditure in the past but the Commission could change the policy and revisit the guidelines if they wish to do so.

Ms. Thompson asked how to recall her vote on the previous motion. Discussion took place regarding parliamentary rules.

Mr. Friedman restated a new motion that the Commission accept the staff recommendation that the Bangor Daily News subscription expenditure is campaign-related. Mr. Marsano seconded.

The motion passed (3-1), with Ms. Thompson, Mr. Friedman and Mr. Marsano in favor; Mr. McKee opposed.

Mr. Friedman stated that he believed that the substance of Mr. Mooney's complaint against James Martin regarding misleading statements by Mr. Martin and harassment by members of Mr. Martin's campaign committee, including video surveillance of Mr. Mooney, was outside of the Commission's jurisdiction.

Mr. McKee made a motion to dismiss the complaint due to lack of jurisdiction. Mr. Marsano seconded.

The motion passed unanimously (4-0).

Mr. Friedman recused himself from the following agenda item because an attorney from his office is a treasurer for the Bangor City Republican Committee. Ms. Thompson was nominated to chair the Commission for this item by Mr. Marsano. Mr. McKee seconded. The nomination was approved.

**Agenda Item #7. Missing Disclosure Statement on Letter by Bangor City Republican Committee**

Mr. Wayne explained that on October 27, 2008, Democratic House candidate Steven Butterfield requested that the Commission investigate a mailing in support of the Republican nominee in his race to determine the identity of the person who paid for the mailing. He explained that the mailing was a letter signed by Fred and Lucille Hallsworth that expressly advocated for the election of the Republican candidate, Doug Damon, but the letter did not have a disclosure statement stating who had paid for the mailing and whether it had been authorized by the candidate. That same day, the Commission received an independent expenditure report filed by the Bangor City Republican Committee in the amount of \$1,198 for a mailing. The mailing of the Hallsworths' letter in support of Mr. Damon was financed by the Bangor City Republican Committee. The independent expenditure report was filed three days late. Mr. Wayne said the Committee admitted the error and paid the late-filing penalty of \$34.44. He said that the issue before the Commission was the lack of a disclosure statement on the letter. The staff recommendation is to assess a \$200 penalty, which is the maximum amount, allowed under the law because there was no disclosure statement.

Mr. Butterfield stated that the letter was brought to his attention by some members of his district. He originally thought the letter was sponsored and paid for by the Hallsworths who are neighbors of Doug Damon; however, the Bangor Republican City Committee paid for the mailing, not the Hallsworths, as the Commission staff discovered.

Mr. Daniel Billings, Esq., spoke on behalf of the Bangor Republican City Committee since Mr. Weston could not attend. He agreed the letter is in violation of the law and a penalty of some amount is appropriate. He explained that the Committee is completely voluntary and had new participants and leadership during this election cycle. The members responsible for filing reports were unfamiliar with the required procedures because it was their first time in this role. He said this was simply an oversight on the part of the Committee. He said looking back at previous cases similar to this, he found there has only been one case where the maximum penalty was imposed because of intentional false reporting. He said in most

cases, the penalties have not been assessed. He said under these circumstances, he urged the Commission to assess something less than the maximum amount of \$200.

Mr. Wayne said this situation is different from the candidate-sponsored communications to which Mr. Billings referred, which do not have the disclosure statement. This communication was created and paid for by a third party and disseminated over a large area. He said the people receiving it did not know who paid for it, which could have an affect on the election. He stated that if the recipients had known who paid for the communication, it could have influenced how the communication was perceived. He said staff feels this is more serious than a candidate's missing disclosure statement.

Mr. McKee agreed in part with Mr. Wayne's assessment of the issue. He said a letter from a neighbor is quite different than a letter from a political party committee. He said a penalty of \$100 would be appropriate taking into account the inexperience of the committee's new members as a mitigating circumstance.

Mr. Marsano shared this view.

Mr. McKee made a motion that a violation be found and a penalty of \$100 be assessed to the Bangor City Republican Committee. Mr. Marsano seconded.

The motion passed unanimously (3-0).

Mr. Friedman resumed as Chair.

*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 #10. Policy Issue: Candidates' Appearance in Third-Party Advertising**

Mr. Friedman explained that in September 2008, the Maine Republican Party requested that the Commission consider advertising in which Maine House candidate Alexander Cornell du Houx appeared and which was sponsored by VoteVets.org regarding U.S. Senator Susan Collins' record on funding the

war in Iraq. At its meeting on October 17, the Commission took no action with respect to the advertisement and postponed consideration of any policy change to address the broader issue of a candidate receiving free exposure to voters by appearing in third-party advertising.

Mr. Philip Roy, Treasurer of the Maine Republican Party, expressed concern that PACs, party committees or other organizations can assist the campaign of a MCEA candidate or a privately financed candidate by having that candidate appear in an ad or a communication as a spokesperson for a national issue and the communication will not be treated as an independent expenditure because the communication ostensibly was not made to influence that candidate's election and matching funds for the candidate's opponent will not be triggered. However, the candidate does derive a benefit from the ad because of the voter identification that results from the communication. This could also create a situation in which the candidate receives an impermissible in-kind contribution. He said that he did not have a specific recommendation to address this issue but hopes that the Commission can tighten up the statute and rules to cover these kinds of situations.

Mr. McKee asked Mr. Roy for his view of whether there should be different rules for this kind of communication as opposed to business advertising by candidates running for office. He said that this situation seemed unique and did not know whether it required a new set of rules.

Mr. Roy said a business owner regularly advertises his business and does so as normal business practice. He said a political action committee is strictly political in nature and does not run ads for business. He also recognized the First Amendment issue with regard to political speech.

Mr. Roy said a political entity, a private entity and business entity are all completely different and should be treated differently. He said using a national organization's money to promote a state candidate's campaign is not acceptable. He said that it was obvious that Mr. Cornell du Houx was using the ad to benefit his campaign or else he would not have put the ad up on his website.

Mr. Dan Billings said that this situation with the VoteVets.org ad does raise a lot of questions and potentially opens a loophole in the law. However, he said that he was confident that the Commission and its staff are capable of pursuing a line of questioning to develop the facts in a particular case and make a determination on a case by case basis as to whether an expenditure should be considered a contribution or

not. He said the way the Commission handled the recent complaints regarding business advertising by MCEA candidates proves this. He said his concern is that issue advocacy could be considered a contribution to a candidate. He said that the Commission could provide guidance in the candidate guidebook that alerts candidates that their appearance in an issue ad could be a contribution depending on the facts regarding that ad. He said that he would be concerned that candidates could use a referendum campaign to promote their candidacy. Though he did not think it would be unconstitutional to limit MCEA candidates' involvement in ads for referenda campaigns, he questioned whether that would be a good policy decision. He said the Commission could instead consider expanding the rebuttable presumption period to 45 or 60 days before the election. It could limit these kinds of communications from happening without imposing any restrictions on what MCEA candidates could do.

Ms. Alison Smith, co-chair of Maine Citizens for Clean Elections, said she agreed with Mr. Billings. She also added that the extension of the rebuttable presumption period is an area they have supported for a while. She said that an important criterion of independent expenditures to keep in mind is that they cannot be coordinated with the candidate. She gave an example of an organization that supported a referendum question using video of a candidate that the organization had obtained independently of the candidate. In that case, the communication could likely be an independent expenditure and if aired during the rebuttable presumption period, the organization and the candidate could likely successfully rebut the presumption. If the candidate volunteered to be taped for the ad, it would not be an independent expenditure. She said that she thought the Commission ably considered the constitutional issues and election law issues in the matter concerning the Cornell du Houx ad and thought the Commission was well equipped to tease out the issues that may come up in the future. She suggested establishing a work group for discussion and exploration of this issue.

Ms. Thompson agreed with Ms. Smith's idea of a work group that could develop statutory changes to go before the Legislature. She said that her concerns about making any changes involved any negative impacts on the free speech rights of political candidates, whether they be appearing in a referendum ad or a business ad and putting the Commission in the position of trying to determine the intent or motivation of candidates.

Ms. Ann Luther, co-chair of Maine Citizens for Clean Elections, raised the issue of a candidate appearing in an ad by chance as opposed to actively participating in the creation of the advertisement. She said if the

candidate cooperates in the making of the ad, it is not an independent expenditure so rebuttable presumption would not apply. She said the convening of a work group to explore this issue and to propose new legislation, if necessary, was the way to proceed.

Ms. Smith said business ads are different from political ads and believes that the two should not be considered together. She said the issue here is whether a candidate running in a statewide office can coordinate with referenda campaigns and appear in advertising and not be in violation of a statute or rule. She stated that political speech is highly protected and it is not the Commission's place to regulate it.

Mr. Friedman stated that the issues raised in agenda items 9, 10 and 11 are likely to rise again and affect the 2010 election. These important issues need to be discussed and researched to look for improvements or loopholes that may exist. He recommended that a work group be established with individuals and groups who have the expertise to resolve these issues. He said staff discussions and public discussions need to take place in order to get all sides involved and have resolution in time for the next election.

Ms. Smith agreed with this suggestion but cautioned that to get changes through the Legislature in time for the next election in 2010, it has to happen in this session because the gubernatorial campaigns will be well under way later in 2009.

Mr. Wayne suggested that meetings be scheduled within the next four weeks in order to provide some proposals at the Commission meeting in December or January. He said this would allow time for a proposal to be submitted to the Legislature by the February deadline for the Commission to submit its bill.

Ms. Thompson expressed a concern that everyone who wanted to have some input into the bill has a chance to do so but given the short time frame that may not be possible. She asked whether it was possible to put in a concept bill and then add to it after the deadline.

Mr. Wayne said the Commission has a special exception in its laws that exempt it from normal agency deadline for submitting legislation. He said suggestions for improving campaign finance reporting may be submitted within 90 days of the general election, but he said he believed that it has to be a fully drafted bill.

Ms. Thompson asked that the staff make every effort to solicit input and comments not only from the usual groups that come before the Commission but from as wide a group as possible.

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

**Agenda Item #8. Rule-Making on Seed Money Collected by Gubernatorial Candidates**

Mr. Wayne explained that after receiving public comment on increasing the maximum amount of seed money which a gubernatorial candidate seeking Maine Clean Election Act funding can collect from \$50,000 to \$100,000, the Commission agreed at its October 27 meeting to accept public comment on a proposed increase to \$150,000. He said the Commission has not received comments on the \$150,000 proposal.

Mr. Friedman stated that this issue had been discussed in detail at previous meetings but the Commission would be willing to hear new points and issues concerning this increase.

Ms. Alison Smith stated that the MCCE does not object to the proposed higher limit and said this will attract the strongest candidates to the program. She made four points with regard to tripling the seed money cap:

- Out of state contributions should be limited.
- Seed money contributions should not be allowed to rollover and commingle with MCEA funds after the candidate has been certified.
- Looking at the fundraising efforts of privately financed candidates should not be used a reference point. First, it is more helpful to look at how much a privately financed candidate spends in the time period before the certification deadline. Second, privately financed candidates have to establish an on-going fundraising effort early in the campaign and much of the money raised early goes towards that effort. Clean election candidates do not have similar needs.
- Fair Elections Now Act (the federal publicly financed campaign act now pending before the U.S. Senate) contains lower seed money limits - \$75,000 plus an additional \$7,500 per congressional district within the state.

Joseph Greenier, Stockton Springs, stated that he is opposed to increasing the cap to \$150,000. He raised concerns over keeping costs of the program down. He said the more money given to candidates, the more matching funds will rise. He also said this public campaign money should stay within the State of Maine.

Mr. Friedman asked for a timeframe for this issue. Mr. Wayne stated the rulemaking should be concluded at the December meeting in order for submission to the Legislature as a major substantive rule in January.

Ms. Gardiner said the appropriate procedure would be to allow public comments to be received until the deadline. That deadline was an extension of the original deadline since the Commission made a substantial change to the original proposed rule by increasing the proposed seed money maximum from \$100,000 to \$150,000. At the December 29 meeting, the Commission could make a final determination as to the amount and provisionally adopt the rule. The Commission could revert back to the originally proposed \$100,000 if that was its decision without additional public comment since that rule had already gone through a hearing and comment period.

Meeting adjourned at 12:15 p.m. on the motion by Mr. McKee, which was seconded by Ms. Thompson and passed unanimously (4-0).

Respectfully submitted,

Jonathan Wayne, Executive Director

Attachment: Benjamin Dudley letter



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

OFFICE LOCATED AT: 242 STATE STREET, AUGUSTA, MAINE  
WEBSITE: WWW.MAINE.GOV/ETHICS

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