

Agenda

Item #1



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

Minutes of the July 30, 2009, 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; Hon. Edward M. Youngblood; Walter F. McKee, Esq.; Hon. Francis C. Marsano. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:10 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the May 28 meeting and June 15 meeting

Mr. Marsano moved that the Commission accept the amendments to the minutes of the May 28, 2009, meeting and to adopt the minutes as amended. Mr. Youngblood seconded. The motion passed unanimously (5-0).

Mr. Marsano moved to adopt the June 15, 2009, meeting minutes as drafted. Mr. McKee seconded.

Mr. Marsano said that, while the minutes accurately reflected the comments made by Ms. Gardiner regarding how Commission meetings were called, he disagreed with her position and hoped that the Commission would not follow her advice. Mr. Marsano said that he had proposed some changes to the procedure for calling meetings because he did not think that the current rules complied with the statute. He said he had concerns about how special meetings had been called in the past and thought that a valid objection could have been raised regarding how a meeting was called.

The June 15 minutes were adopted as written by a unanimous vote (5-0).

Agenda Item #2. Waiver of Late Filing Penalties/Androscoggin Republican County Committee

The Androscoggin Republican County Committee was required to file three campaign finance reports by July 15, 2008, October 24, 2008, and January 15, 2009. The committee filed the reports several months late on May 23, 2009. The preliminary penalties for the October and January reports were \$500 each, for a total of \$1,000. No penalty was appropriate for the July report because it contained no contributions or expenditures.

Hon. Scott Lansley, Chair of the Androscoggin Republican County Committee, explained to the Commission that the committee learned about the late finance reports after a call from Commission staff. He said he took over as Chair in June of 2008 and understood from the two past treasurers that all reports had been filed. He said the new treasurer has been trained by Commission staff and that the committee has established new accounting procedures to ensure that reports will be accurate and filed on time. He requested that the Commission waive the penalties for the late filed reports.

Mr. Friedman asked Mr. Lansley what penalty would be appropriate in his opinion.

Mr. Lansley said he is accepting the responsibility of the late filings and would accept whatever the Commission decided was appropriate.

Mr. Friedman explained that there have been a number of waiver requests before the Commission and historically the Commission has reduced penalties; however, very few were eliminated.

Ms. Gardiner asked for clarity as to when Mr. Lansley became aware the reports had not been filed.

Mr. Lansley said he received the phone call from Commission staff in March 2009.

Mr. Marsano moved that the Commission reduce the penalty to \$100 for each late filing for a total of \$200. The motion failed due to a lack of a second.

Mr. McKee moved that the Commission accept the staff recommendation of \$250 for each violation for a total of \$500, recognizing the mitigating circumstances. Ms. Thompson seconded.

Mr. McKee said significant time had passed before the call from Commission staff and the committee should have had an internal procedure in place to ensure that reports were filed on time. He acknowledged that the committee has initiated a better process to file reports and avoid this problem in the future.

The motion passed (4-1) with Mr. Marsano opposed.

Agenda Item #3. Public Hearing on Proposed Rule Amendments

Mr. Friedman opened the public hearing and stated that written comments may be submitted until August 14, 2009.

Ms. Alison Smith, co-chair of Maine Citizens for Clean Elections, said the MCCE's major concern is how the rules address a shortfall in the Maine Clean Election Fund. She said the statute provides that publicly funded candidates may accept and spend contributions from private sources according to rules adopted by the Commission. She said the proposed rules do not provide sufficient guidance to candidates about how that process would work.

Ms. Smith expressed concern over the proposed Chapter 1 rule regarding contributions from a minor child. She said that the language of the proposed rule mirrors what is already in statute regarding all contributions and is not targeted to a specific issue regarding contributions from minors. For that reason, she did not see the point in the rule unless it were to deal with a specific problem. She said the statute does not indicate that contributions from minors should be handled any differently than any other contribution and thought that the proposed rule should not attempt to create a distinction that had no basis in statute. She said that there may be instances regarding contributions from minors that should be addressed by a rule but the rule should be carefully crafted to address those instances. As an example, she said that the rule could specify that a fiduciary could not make a contribution from funds that were in trust for a minor and not controlled by the minor.

Mr. Marsano asked Ms. Smith whether she agreed that if a trustee gives funds from a trust to a minor, that minor should be allowed to make contributions as they choose.

Ms. Smith agreed that a minor child absolutely has a right to choose; however, she said the concern would be an adult coercing a child to make a contribution in order to evade the contribution limit. The law

already prohibits contributions made in the name of another. She expressed concern that the proposed rule needlessly brought attention to the issue of contributions from minors without addressing an actual problem. Ms. Smith said the proposed rule could be removed unless it can be refined so that it is crisp and helpful and would address an issue unique to minors.

Mr. Friedman said the word “crisp” concerns him because there is no rule that is completely crisp. He said there will always be multiple interpretations of the language. He said no matter how “crisp” the rule is written, there will be someone coming before the Commission challenging its clarity.

Ms. Smith agreed but said if a rule does not help with implementation and understanding of the law, then it should not be written or proposed. She said that this proposed rule begged more questions than answered them.

Ms. Smith made the following comments regarding specific sections of the proposed Chapter 3 rule changes:

Section 2(3)(C): strike “during the qualifying period”

- Sec. 2(4)(F)(3): insert “qualifying” before contributions
- Sec. 3(1)(B): documentation for in-kind seed money contributions is not mentioned
- Sec. 3(1)(C): the difference between a qualifying contribution and a seed money contribution needs clarification
- Sec. 3(1): sections should be reordered for better organization
- Sec. 4(4)(A): seed money contributions should be counted toward the contribution limit in the primary election and the rule should be clear about that
- Sec. 4(4)(A): strike “during qualifying period”
- Sec. 4(4)(C): MCEA guidelines should apply to private funds if candidates are allowed to raise them

Ms. Smith said the law provides for limited, private fund raising if there is a shortfall. She stated that as upsetting as it would be for the fund to run dry, the statute states that the Commission may allow candidates to accept and spend contributions. The challenge will be to make a workable rule to implement that.

Ms. Smith expressed concern with regard to the provision which states private contributions raised by MCEA candidates may count towards matching funds calculations, which is addressed in Section 5(3)(K). She said that the rule needs to be more specific about what amount would be used for the trigger amount for determining when privately financed candidates would have to start filing accelerated reports and what amount would be used to determine whether MCEA candidates are eligible for matching funds.

Daniel I. Billings, Esq., said the proposed rule regarding the use of private funds by MCEA candidates raises questions and creates significant uncertainty for candidates, which is cause for concern. He stressed the importance of having these questions answered before the election season begins. He said it would be best to decide now how to make the cuts to funds distributed to candidates when decisions would have no partisan considerations. Although he initially had concerns about restricting the use of private funds by MCEA candidates, he said that he thought it would be permissible to apply expenditure guidelines because MCEA candidates have voluntarily chosen to participate in a publicly-funded program.

Mr. Marsano asked Mr. Billings to speak on the issue of apportioning cuts between gubernatorial and legislative campaigns which Mr. Billings had addressed in the past.

Mr. Billings said there seems to be more support in the Legislature for the public funding program for legislative campaigns than for gubernatorial campaigns. He said the new changes to the qualifying process for the gubernatorial candidates should result in lower costs since fewer candidates will qualify. He said the decision about which program to cut may depend on the amount of the shortfall. On one hand, he said that it would probably be easier for a statewide candidate to raise private funds than it would for a legislative candidate. On the other hand, if the cut were to be spread out among all candidates, the impact may be slight for each individual candidate. He said that if it remains unclear as to how the shortfall would be distributed, candidates who are undecided about running as a MCEA candidate would more likely choose to run as a privately financed candidate.

Mr. Youngblood expressed concern over the scenario in which a MCEA candidate is running against a privately financed candidate with access to a large amount of personal funds. He said that a MCEA candidate would be at a serious disadvantage if he or she were not able to raise funds to set aside to use as matching funds in the event the opponent started spending large amounts close to the election. He asked

whether a candidate should be able to opt out of public funding to run a competitive campaign if that should happen.

Mr. Billings said the statute would have to be changed in order to allow a candidate to opt out of the program after certification. Matching funds are usually the result of independent expenditures by PACs or party committees which could put both candidates at a disadvantage. He said he would prefer to see the reductions in the initial distributions across the board and let all candidates know up front, as early as June, that they need to raise, for example, \$1000. He said it would be preferable for the Commission to set aside funds to be used as matching funds, which he said was a key component in the program's operations. He advised against altering the matching funds process and having candidates wait until matching funds were needed to raise funds.

Joseph Greenier, a concerned citizen from Stockton Springs, suggested allowing legislative candidates only one chance at the clean election funding in an election cycle.

Mr. Friedman closed the public hearing.

Mr. Wayne stated that the proposed rule for contributions by minors could be withdrawn.

Mr. McKee said that while he was more inclined to take that provision out of the proposed rule, he thought it should stay in for the duration of the comment period.

Mr. Marsano agreed with Mr. McKee and said ultimately he would prefer not to have the provision in the rule.

Mr. Wayne explained the proposed rule was drafted in a way to give the Commission sufficient flexibility in responding to a shortfall taking into consideration the particular factual situation that will be known later this year or early next year. He said that the staff envisioned that, once the extent of the shortfall was known, the Commission would have a separate public meeting to determine how the shortfall will affect payments to candidates.

In response to a question from Mr. Marsano, Ms. Alison Smith said the choices of how to handle the shortfall have not been discussed by the MCCC. She said distributing the shortfall to all candidates across the board may be the fairest solution and may minimize the impact on any single candidate, but that approach may not be practical depending on the circumstances. She agreed with Mr. Billings that the timing of these decisions is critical and should be done sooner than later in order to avoid the appearance of partisanship. She said there are many unknown issues at this point; however, there is a great need for policy decisions to be made now.

Mr. Marsano asked whether Ms. Smith agreed with Mr. Billings' statement that the recent changes to the qualification requirements for gubernatorial candidates would result in fewer gubernatorial candidates qualifying for public funds.

Ms. Smith said that she agreed with Mr. Billings' statement. She said the rule should address the situation in which a candidate has surplus funds after the campaign because the candidate raised more funds than were needed. She said that another issue the Commission could address is how a candidate's own funds could be used if the distribution from the fund were reduced and what restrictions, if any, would apply to the use of a candidate's own funds.

In response to a question from Ms. Thompson, Mr. Wayne said there was discussion during the last legislative session regarding the elimination of the gubernatorial funding but that did not happen. He said Governor Baldacci proposed that funds be put back in the MCEA fund to allow money for both legislative and gubernatorial candidates in 2010. He said there is enough money to fund these races if there were four gubernatorial MCEA candidates in the primary election and two in the general election. He said as long as the Legislature does not dip into the Clean Election Fund again, the program should be solvent.

Mr. McKee said his preferences for a policy for handling a potential shortfall were across-the-board cuts to minimize the impact on candidates, no distinction drawn between legislative and gubernatorial candidates in that regard, and reductions to initial distribution amounts rather than matching funds. He said other issues that needed to be discussed were how MCEA candidates should handle surplus private campaign funds and whether candidates could cover the reduction with their own personal funds.

Ms. Gardiner reviewed some procedural options for the Commission. She said one option would be to extend the comment period and ask specifically for comments on how the rule should address private fund raising by MCEA candidates in the event of a shortfall, or she said the Commission could request the staff to present the Commission with a revised, expanded rule at the next meeting. This second option would require another 30-day comment period because the proposed rule would be substantially different from the original proposed rule.

Mr. Marsano said that he would like to see the Commission proceed with its analysis and rulemaking using the information it already has and enhanced by the information that it received from public comment at the meeting.

Mr. Friedman said the consensus of the Commission was to stay on course and let the current written comment period run as scheduled until August 14, while staff works with interested parties to establish a revised draft to be presented at the September meeting.

Agenda Item #4. Final Adoption of Major Substantive Rule Changes

Mr. Friedman said on March 26, 2009, the Commission provisionally adopted changes to Chapter 3 of the Commission's Rules. He said since the rules are major substantive, the Commission's amendments were reviewed by the Maine Legislature who authorized the Commission to finally adopt the rule amendments if it amends the proposed rule regarding the requirement of Maine Clean Election Act candidates to sell property or equipment purchased with public funds for at least 40% of the original value.

Mr. McKee moved that the Commission finally adopt the proposed rule as amended; the motion was seconded by Mr. Marsano.

Motion passed unanimously (5-0).

Agenda Item #5. Proposed Update to Commission's Policy on Candidates' Payments of Campaign Funds to Family and Household Members

Mr. Wayne explained that this law was amended during the last legislative session with regard to payments to family or household members and the staff has drafted proposed changes to the Commission's policy. He said some comments have been received from the Maine Citizen's for Clean Elections which suggested more clarification on the procedure. He said candidates would not be submitting evidence before the expenditure was made. They would report the expenditure in their regular campaign finance report during the regular reporting cycle. He said upon review by the staff, the evidence would be requested from the candidate as was outlined in the 2008 Candidate Guidebook to be sure the payment met with these requirements.

Ms. Alison Smith, co-chair of Maine Citizens for Clean Elections, submitted written comments (attached). She said the guidance was not clear as to the timing of the submission of the evidence. She suggested alternative language which would say, "a candidate shall provide documentary evidence that the expenditure complies with the statute at the time the expenditure is reported or when the Commission requests such evidence, whichever is sooner." She also recommended clarifying what documentation was required and suggested the following language, "this evidence must consist of documentation that the payee currently is employed by or engaged in a business that provides the goods or services provided, justification for the amount of the expenditure including the usual price paid by other clients and an explanation of why the expenditure is campaign related." She also recommended removing the language about the Commission's process for reviewing these expenditures because this should be treated like any other issue of compliance or enforcement. She said if the evidence submitted satisfies the requirement, then there would be no need for further action. She said if the evidence did not comply with the requirement, then the Commission staff would move forward with bringing the issue to the next Commission meeting. She cautioned against detailing a specific process for this issue when it falls under the regular process of compliance and enforcement for all other requirements.

Mr. McKee asked why a special procedure would be needed for this situation and wondered whether it needed to be spelled out in the policy at all.

Ms. Smith said the Legislature intended for this to be a ban on payments to family or household members in order to avoid public funds going to family or household members for personal enrichment. She said

this narrow exception was created in order to account for certain expenditures which require specific supporting evidence. She said the policy should be clear that this evidence will always be required for these expenditures.

Ms. Thompson requested more background information as to the rationale for this procedure for those Commission members who were not involved in the 2006 election.

Ms. Smith explained the Legislature acted in response to a situation in 2006 in which candidate Barbara Merrill paid her husband large sums of money during her campaign for Governor. She said the desire was to have a ban on payments to family or household members but in the course of the discussions, the eventual policy was more nuanced to allow for payments to household or family members under certain circumstances. She said the language was clarified to state there does not need to be pre-approval of payments; however, the question of when the evidence would be required was left unclear. She said the policy needs to be clear that the evidence is always required under all circumstances at the time of filing, unless there is a complaint, in which case the evidence would be required sooner.

Ms. Gardiner said the MCCE suggestion for language does make sense and it is procedurally consistent with the statute. She said the statute does not require review and decision by the Commission of every family or household payment to determine its legitimacy. She said normally it would be up to the staff to review and flag issues of noncompliance or if there were a complaint.

Mr. Marsano said the original issue around this statute was a desire for pre-disclosure as a result of the Merrill situation. He said the problem was not what was done but how it was disclosed to the public. He said the earlier the disclosure takes place, the better for public awareness. He said he does not agree with this recommendation by the MCCE. He said disclosure is in the public's best interest and if it does not happen until an ordinary reporting cycle, it will not receive the immediate attention it may deserve.

Mr. McKee stated he understood Ms. Smith's recommendation was to require more disclosure initially when the expenditure was being made.

Mr. Wayne explained that the statute requires that the payment be disclosed. The issue is when the supporting documentation for the expenditure should be submitted. The MCCE is suggesting that the

candidate be required to provide the documentation at the time they file their regularly scheduled campaign finance report, rather than when requested by the Commission staff after the report has been filed.

Mr. Friedman supported having the information submitted at the time of the filing, as the MCCE has suggested, instead of having the Commission staff request it at a later date. He said this timing would require less work by everyone.

Mr. Wayne reviewed the language of the statute before it was amended and explained the interpretation was that the documentation should come to the staff before the expenditure was made. The Legislature changed the statute so that is no longer required. He explained the issue before the Commission now is when that supporting documentation should be submitted.

Mr. Marsano said he supported immediate disclosure of the payment and does not see that in the language proposed by MCCE. He does not support waiting for the regular campaign finance report to be filed. He said as soon as a family payment is made, it should be disclosed immediately at the time of payment.

Mr. McKee questioned the need to have a unique set of procedures for this particular situation and cautioned against using each egregious case of misuse of funds to develop policy and procedure.

Mr. Marsano said he thought the fact that the payment was made to a family or household member is significant and the public deserves to be made aware of the use of public funds for that purpose. He said that he favored the original statute's procedure of pre-approval for that reason.

Mr. Friedman agreed with Mr. Marsano and said he would support getting the documentation sooner rather than later.

Mr. McKee said he would not support a special filing separate from the regular expenditure report and agreed with Mr. Friedman that the documentation be submitted at the time the report is filed.

Mr. Wayne asked whether reviewing these documents at the staff level would be acceptable to the Commission. If the documentation did not meet the approval of the staff, the matter would be brought before the Commission for further action.

Mr. Friedman said his preference would be for staff to review and make the determination; if there were a problem, it would be submitted to the Commission at that point. He said he would not support having the Commission approve or disapprove every expenditure made to a family member.

Mr. Marsano said that given how the statute has changed to remove the pre-approval process, which he favored, he would be satisfied with the staff review of the expenditures.

Ms. Thompson asked how many weeks could possibly pass before a questionable payment was made to a family member and reported by a candidate.

Mr. Wayne said it could be a matter of weeks and reviewed the reporting dates. Mr. Wayne asked Ms. Gardiner how much latitude the Commission had with regard to the timing of the documentation requirement.

Ms. Gardiner stated that the Commission could make a global request that all documentation come with the regularly required report. She said that requiring the evidence to be submitted at the time the payment is made is more questionable because there is no current statutory or regulatory requirement to submit evidence at the time a payment is made for any other expenditure.

Mr. McKee said he would support the MCCE proposed language which states all evidence would be submitted at the time of the regular report. Mr. Youngblood and Mr. Friedman agreed.

Mr. McKee moved to adopt Maine Citizens for Clean Election's proposal contained in their July 30, 2009, memorandum with respect to the paragraph regarding timing and content of evidence submitted, in lieu of the original proposed change provided in the packet. Mr. Youngblood seconded.

Mr. Marsano said, in his opinion, the original statute has been watered down repeatedly. This proposed guidance further waters it down and he opposes it.

Motion passed 4-1 with Mr. Marsano opposed.

Agenda Item 6. Proposed Changes to Maine Clean Election Act Expenditure Guidelines for 2010

Mr. Wayne reviewed for the Commission the major updates to the 2010 guidelines for candidates' expenditures of Clean Election Act funds and changes as to what records should be kept by MCEA candidates.

Mr. Youngblood moved that the Commission accept the proposed updated guidelines for 2010 regarding MCEA expenditures. Mr. Marsano seconded.

Motion passed unanimously (5-0).

Agenda Item #7. Proposed Legislation for 2010

Mr. Wayne explained that the Commission staff received a memo from the Revisor of Statutes Office that stated the deadline for submitting legislation for the next Legislative session is September 23, which happens to be the day before the next regularly scheduled Commission meeting; therefore, he wanted to present a statutory proposal today. He explained that the proposed amendment would require PACs and party committees to report large contributions received in the last 13 days before an election. He said these committees currently only have to report large expenditures of \$1,000 or more, so if a PAC or party committee receives a large amount of money prior to the election, the public will not know about this contribution until after the election. He said the staff is proposing to amend this statute to promote better disclosure of last-minute contributions to these committees. He also advised that the staff wishes to withdraw the previously proposed seed money provision regarding § 1125 (2)(B), which would allow an additional week for gubernatorial candidates to submit documentation required for certification. If this piece of the bill is removed, it no longer would be required to be drafted as emergency legislation. He suggested withdrawing this piece of the provision and submitting the proposal as regular legislation.

Alison Smith cautioned against submitting legislation unless it is significant and important. She said the MCCE supports adding the requirement that large contributions received in the two-week period before an election be reported within 24 hours and also agreed with removing the provision regarding extending the gubernatorial seed money provision. However, she would not support submitting another proposal regarding expenditures of \$500 or more paid by a MCEA candidate for services to the campaign. She said the law that just passed is acceptable and does not warrant revisiting.

Mr. Friedman asked Mr. Wayne whether issues brought up by Ms. Smith would influence submitting these proposed changes.

Mr. Wayne explained there are only three concepts of the bill. First is the reporting of large contributions by PACs and party committees in 24-hour reports; second, the clarifying for when a party committee is required to report a contributor who has given more than \$200; and third, requiring documentation regarding expenditures for campaign services of \$500 or more by MCEA candidates. He said due to issues raised during the 2008 election, e.g., significant amounts of money spent on campaign staff and consultants, he would support submitting these documentation requirement changes. He said although the amended language is not significantly different from the existing statute, it seemed warranted.

Ms. Thompson moved that the Commission accept the Commission staff's proposed legislation for the 2010 session with the staff recommended omission. Mr. Marsano seconded.

Mr. McKee expressed concern over changing and re-changing legislation due to the risk of losing credibility with the Legislature.

Motion passed unanimously (5-0).

Agenda Item #8. Developing Ethical Standards for the Executive Branch

Mr. Friedman explained that in the 2009 session, the Maine Legislature adopted Resolve Chapter 88, which requires the Ethics Commission to develop proposed ethical standards for the executive branch of Maine state government.

Mr. Marsano questioned the Commission's jurisdiction in this area due to the separation of powers. He stated that he did some research on this Resolve to learn why it was drafted but could not find any background information. He suggested proposed language for a statute should it become necessary, "*All members of the executive branch of the Maine state government must act ethically and in accordance with the ethical standards adopted by the Maine State Legislature.*" He cautioned against treading into an area where the Commission has questionable jurisdiction.

Mr. Friedman suggested that staff meet with the executive branch representatives to discuss the legal concerns presented by this Resolve.

Mr. McKee said it appears the request requires the Commission to come up with a draft proposal, which basically puts all the work on the Ethics Commission staff and relieves the executive branch from the task.

Mr. Marsano stated the Legislature has a vast array of people with expertise who are capable of writing laws of this nature.

Mr. Wayne explained that what he gathered from a Legal & Veterans Affairs Committee work session he attended was a concern that if a member of the public had an ethical concern about an employee of a State agency, there is no place to go other than the agency itself. He said the question is, should there be a place for the public to be able to go with ethical concerns about executive branch employees.

Mr. Friedman expressed concern that the Commission has been assigned the task of writing proposed ethical statutes for state government employees when these employees do not fall under the Commission's jurisdiction for ethical complaints.

It was decided that Mr. Wayne would report back to the Commission in September regarding the status of this issue.

Agenda Item #9. Audits of 2008 Maine Clean Election Act Candidates

Mr. Wayne said the Commission staff completed eight audits in May and June by the Commission's former auditor and no exceptions were found.

Mr. Marsano moved that the audit reports be accepted as presented. Ms. Thompson seconded.

Motion passed unanimously (5-0).

Agenda Item #10. Carl Lindemann/Maine Heritage Policy Center: Completeness of Financial Report concerning 2006 TABOR Initiative

Mr. Friedman explained that Carl Lindemann has requested the Commission investigate the accuracy of a campaign finance report filed by the MHPC regarding its activities in support of the 2006 Taxpayer Bill of Rights citizen initiative. He asked the Commission staff whether, in the staff's opinion, Mr. Lindemann's most recent documentation provides sufficient grounds to warrant an investigation of MHPC.

Mr. Wayne said, in broad terms, Mr. Lindemann's complaint has two components: that MHPC underreported expenditures for staff time spent on TABOR and underreported contributions received to influence the ballot question. He said that he did not think that Mr. Lindemann had established that there are sufficient grounds for believing that the report filed by MHPC in 2006 was inaccurate. He stated that MHPC claimed that their fundraising activities did mention TABOR and that the funds went to their general mission, not solely to the TABOR initiative, so it was not reportable under the 2006 statute regarding contributions.

Mr. Wayne said that MHPC was one of several public policy organizations active in the 2006 TABOR issue that were unaware of all reporting requirements and as a result did not structure their activities and fundraising accordingly. He expressed concern over examining this organization's books three years after the fact, when the requirements at the time were not clear and holding them to an interpretation of the law that they probably did not get notice of. Mr. Wayne said he did not feel further investigation was warranted.

Ms. Thompson asked for further explanation with regard to other organizations that were not aware of the reporting requirement.

Mr. Wayne said until the 2006 election, organizations that did not have their major purpose influencing elections, but spent more than \$1500 influencing a ballot question were required to report. Many organizations thought that since they did not qualify as a PAC because their major purpose was not influencing an election, they did not need to report their activity with regard to ballot questions. He said MHPC was only one of a few organizations that fell into this category and did not file reports. Mr. Wayne said these requirements were improved and clarified in 2008 to assist these organizations in understanding the reporting requirements.

Mr. Carl Lindemann from Austin, Texas, commended the Commission staff's work on the improvements to the ballot question initiative's disclosure requirements. He shared his concerns as follows:

- The Chair of the Maine Ethics Commission was treasurer of the MHPC during the 2006 election and there was an enhanced duty to be aware of the campaign finance laws;
- Smaller public relations organizations, such as Katahdin Institute, understandably were not familiar with the disclosure law, but MHPC was;
- The law has been modified; however, MHPC's report filed in 2006 was done in accordance with the new law;
- Material false statements and inaccurate information were made by MHPC under Bill Becker's signature;
- There was an inherent conflict of interest when a Commission member is involved with a regulated political entity;
- Public relations firms posing as public policy organizations need to be regulated;
- MHPC expressly advocated for TABOR.

Mr. Friedman asked Mr. Lindemann if there were any facts that he could provide that proved sufficient grounds that contributions or expenditures were made and not reported.

Mr. Lindemann said his 350 page submission to the Commission included these facts. He discussed the interaction of the tax laws for 501c(3) entities, the 1056-B report and PAC laws in relationship to MHPC. He said, for example, a fundraiser for TABOR included Bill Becker as a speaker and was not reported on the in-kind portion of the report.

Joseph Greenier, a concerned citizen from Stockton Springs, referred to Governor John McKernan's executive order, 10 FY88-89, dated April 1, 1989. He expressed concern that reporting may not always be truthful and should be investigated when doubts arise.

Mr. Daniel Billings, Esq., on behalf of the MHPC, requested the Commission adopt the staff recommendation. He said he hoped the Commission would focus on its own jurisdictional issues, not the broader areas which Mr. Lindemann brings up such as IRS regulations. He said the expenditure issues Mr. Lindemann mentions have not proven to be in violation nor have there been grounds provided to warrant further investigation. He said both sides on the TABOR ballot question reported staff time in the same

way. Regarding Mr. Lindemann's contention that MHPC added more staff people in 2006 to support TABOR, Mr. Billings pointed out that those staff are still with MHPC and that more staff positions have been added since. He said under the law in 2006 the triggers for reporting is the intent of the person making the expenditure or receiving the contribution and MHPC's stated intent for the funds was for general operational purposes, not solely for TABOR. In 2006, the law put the emphasis on the purpose of the entity, he said, and MHPC's report was consistent with that law because its major purpose was not TABOR.

Mr. Billings also referred to the number of organizations that filed 1056-B reports with regard to the TABOR initiative. He said many groups reported no contributions but did report several expenditures; for example, AARP. He said it is not unusual for these organizations to have more expenditures than contributions. He said that while MHPC was accused of being a political action committee for the purpose of advancing TABOR, it is important to note that MHPC still exists and continues to work in many other areas. This fact supports the Commission's determination that it was not a PAC with the purpose of influencing the TABOR ballot question. However, some of these other organizations on the other side of the TABOR referendum have disbanded shortly after the election.

Mr. Marsano asked Mr. Billings' view about whether express advocacy is related to the issues raised by Mr. Lindemann.

Mr. Billings stated it was not related, and that the Commission needed to interpret the Maine statute in the context of the federal court cases dealing with express advocacy. MHPC's view was that only express advocacy as it relates to a referendum campaign should trigger reporting. He said, ultimately the Commission rejected this argument and found that Maine law included communications that would not be considered express advocacy. He said that MHPC considered the Commission's rule and requirement and decided not to argue a constitutional matter, put that issue aside and filed the 1056-B report which was based on guidelines provided by Commission staff. He said after many hours were devoted by MHPC staff to accurately as possible recreate history the 1056-B was filed as requested.

Mr. Marsano asked whether, regardless of what the Supreme Court may decide in the Citizens United v. F.E.C. case, that decision would have any impact on the position Mr. Billings holds regarding this matter.

Mr. Billings said no, however, depending on what the Court determines, the ballot question reporting requirements may have to be visited but that is separate from MHPC's 1056-B filed report in 2006.

Mr. Lindemann spoke to the issue of national funders that want to enter into Maine politics. He said reporting in this area is critical for public transparency. He said the public needs to be aware of the large sums of out of state money which are being spent in Maine on political issues and he questioned whether Maine's regulatory framework can capture this information.

Ms. Thompson asked whether staff has heard any new information today.

Mr. Wayne said his view has not changed and he would not recommend an investigation. He said currently there is an on-going investigation with regard to a similar issue. He said the law has been improved since 2006 and more efficient use of staff resources would be to focus on recent matters that need investigating, such as the Maine Leads matter that is currently being reviewed. He said that case will be presented to the Commission in September and would be a better vehicle for examining the statute and policy as it is now.

Mr. Friedman said the focus today is to determine whether there are sufficient grounds for believing a violation may have occurred and whether it warrants further investigation. Mr. Friedman said he did not see any evidence that would support further investigation of MHPC's 1056(B) report filed in 2006.

Mr. Youngblood said there was no information today that show there may have been a violation, only speculation. He would not support further investigation.

Ms. Thompson said information brought to the Commission needs to be looked at very closely and asked staff again, if any information brought forth today indicated a further investigation would be necessary to establish the accuracy of the 1056-B report.

Mr. Wayne said MHPC searched its records for contributions that were to be used for TABOR and that was what they reported. He said whether that reporting is complete is an issue for the Commission to examine and decide.

Ms. Thompson moved that the Commission authorize an investigation of the credibility of the 1056-B report provided by MHPC on January 22, 2007. Mr. Marsano seconded.

Mr. Marsano said each side has presented substantial evidence with regard to this matter; however, he has suspicions which could be cleared up by an investigation. He said an investigation would clear the air on this narrow issue. He recognized that an investigation would result in additional cost to Mr. Billings' client and to Mr. Lindemann and require the staff to undertake this issue analysis for a result that may have marginal value. Nevertheless, he agrees with Ms. Thompson's motion.

Mr. McKee said he does not see sufficient information to support the motion.

Mr. Friedman said the issue was a narrow one and the Commission has limited jurisdiction. He said the Commission's task is to determine whether the evidence is sufficient to show a violation may have occurred and he does not believe this evidence does that.

Motion failed by a vote of 2-3, with Mr. Marsano and Ms. Thompson in favor and Mr. Youngblood, Mr. Friedman, and Mr. McKee opposed.

Agenda Item #11. Carl Lindemann/Maine Heritage Policy Center: Alleged Material Misrepresentations in 2006

Mr. Friedman explained that Carl Lindemann requests that the Commission consider whether the Maine Heritage Policy Center made material misrepresentations to the Commission when responding to Mr. Lindemann's 2006 request for an investigation. Mr. Friedman said this is different than Agenda Item #10 because there is no formal process to take when an individual alleges false statements of another person have occurred.

Mr. Lindemann recognized that there is no formal structure to bring this to the Commission; however, he felt a separate agenda item was the best way to move forward. He expressed concern over the following issues:

- The Commission accepting material false statements from a non-reliable source;
- The treasurer of MHPC also being the Chair of the Ethics Commission and the conflict of interest issue that created;

- There was express advocacy by MHPC in 2006 for the TABOR referendum.

Mr. Friedman reviewed some history of the issues Mr. Lindemann brought up and said it appeared the Commission had already discussed them back in 2006 and voted on them. He said there may have been some definitional problems back then and some may have been cleared up by now; however, as he recalled, the Commissioners could not agree on the definition of express advocacy.

Mr. Lindemann reviewed the material false statements previously addressed in 2006. He said the only investigation done in 2006 was when Ms. Thompson asked the staff to fact check an assertion made by Mr. Becker that his group neither supported or opposed any measures; but he said that was not addressed. He stressed that he was bringing forth fresh complaints, not rehashing old issues.

Ms. Thompson asked how staff handles the issue of material false statements.

Mr. McKee said by statute the Commission is allowed to deal with these issues of material false statements. This would be similar to a court addressing false statements made during a case. However, he asked whether the Commission really wants to take this extraordinary step to take up a separate enforcement action. He said that the Commission has the ability to make a preliminary decision, based on the information before it, as to whether it will take up this issue or exercise its discretion and move beyond this issue. He said that the Commission could exercise its discretion appropriately and not take action on this request.

Joseph Greenier, of Stockton Springs, said he was in favor of further investigation.

Mr. Billings, on behalf of the MHPC, reviewed the timeline of Mr. Lindemann's complaint. He said back in 2006, Mr. Lindemann claimed MHPC had expressly advocated for TABOR, and that issue was heard before the Commission at a meeting. He said if the Commission had evidence in 2006 which warranted further investigation, it should have been handled then by the Commission hearing the main case, not three years later with a different Commission. He said Mr. Lindemann has had several opportunities to bring information and evidence to the Commission and he has done so several times in the past.

Mr. Billings said there were no intentional misrepresentations by MHPC on the 1056-B report. He said that if something was intended to be hidden, it would not have shown up at all on the report. He said Mr. Becker may have made errors when reporting but nothing was hidden intentionally by Mr. Becker.

Mr. McKee moved that the Commission take no action with respect to Mr. Lindemann's request and not commence any procedure as authorized under 21-A MRSA § 1004(A) to initiate procedures to determine whether a violation has occurred. Mr. Youngblood seconded.

Mr. McKee stated for clarity that Mr. Lindemann requested the Commission consider undertaking that procedure which would require written notice, etc. He said for reasons he stated earlier, the appropriate course for the Commission to take would be to take no action.

Motion passed unanimously (5-0).

EXECUTIVE SESSION

At 2:35 p.m., Mr. Friedman moved to go into executive session in accordance with Section 405, subsection 6(E) of Title 1 for the purpose of discussing the compensation of an employee at the Commission. The motion was seconded by Mr. Marsano. The motion passed unanimously (5-0).

At 2:39 p.m., it was moved to come out of executive session.

Meeting adjourned at 2:40 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director

Attachment: MCCE Handout



July 30, 2009

To: Maine Commission on Governmental Ethics and Election Practices

Re: Agenda Item #5, Proposed Update to Commission's Policy on Candidates' Payments of Campaign Funds to Family and Household Members

This proposal does not adequately clarify the timing of submission of evidence that would demonstrate that a payment to a family or household member is in compliance with the statute.

We suggest that documentation be submitted when the expenditure is reported unless the Commission requests it sooner – if there was a complaint, for example. We also suggest dropping the language explaining the Commission's process. Compliance with and enforcement of this statute should proceed just like any other. We don't see any problem with the Commission staff dealing with the report or a complaint and bringing it to the Commission if appropriate just as they do with other matters of compliance and enforcement.

We offer the following language as replacement for the two sections titled, "Timing of Submitting Evidence; Procedure for Commission Action" and "Evidence Submitted."

Timing and Content of Evidence Submitted

The candidate shall provide documentary evidence that the expenditure complies with the statute at the time the expenditure is reported or when the Commission requests such evidence, whichever is sooner. This evidence must consist of documentation that the payee currently is employed by or engaged in a business that provides the goods or services provided; justification for the amount of the expenditure including the usual price paid by other clients; and an explanation of why the expenditure is campaign-related.

Thank you for your consideration.

Alison Smith
Co-chair

Member Organizations

AARP Maine, Common Cause Maine, EqualityMaine, League of Women Voters of Maine, League of Young Voters, Maine AFL-CIO, Maine Council of Churches, Maine People's Alliance/Maine People's Resource Center, Maine Women's Lobby, NAACP-Portland, Natural Resources Council of Maine, Peace Action Maine



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

Minutes of the September 8, 2009, Meeting of the
Commission on Governmental Ethics and Election Practices
Held in the Burton M. Cross Office Building, Room 208,
111 Sewall Street, Augusta, Maine

Present: Michael Friedman, Esq., Chair; Andre Duchette, Esq.; Walter F. McKee, Esq.; Hon. Francis C. Marsano; Hon. Edward M. Youngblood. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 1:10 p.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

Agenda Item #1. Final Adoption of Proposed Rule Amendments

Mr. Wayne explained that at a special meeting on June 15, 2009, the Commission decided to accept public comment on changes to the Commission Rules proposed by staff. Several of the proposed rule changes were in response to statutory changes made during the 2009 legislative session. On July 30, 2009, the Commission held a public hearing to receive oral comment. Written comments were accepted through August 14, 2009. The Commission staff has amended the proposed rules in response to comments received, and recommends final adoption of the amendments with the following changes:

- Removing the proposed rule regarding contributions from minors;
- Removing the proposed rule regarding the procedures for private fundraising by MCEA candidates in the event of a shortfall in the Clean Election Fund and initiating in a new rulemaking regarding this issue instead (see Agenda Item #2); and
- Additional minor changes in response to public comment.

Mr. Friedman confirmed that all changes have been provided to the public for comment.

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Mr. Wayne stated that these changes have been provided to the public on the Commission's website for approximately ten days.

Mr. Marsano commented on the changes to the rules regarding the procedures for calling meetings that he proposed and that had been incorporated into the proposed rule. His purpose in making the changes was to avoid a situation in which a person could object to a meeting because it was not properly called.

Ms. Alison Smith, co-chair of Maine Citizens for Clean Elections, expressed concern that the proposed rule regarding the required cash seed money contributions for gubernatorial candidates may result in some confusion regarding in-kind seed money contributions. She suggested including a sentence in the proposed rule stating that an individual can only make a \$100 seed money contribution whether in cash or in-kind.

Mr. Marsano asked Ms. Smith whether she thought there was a greater need for the rule or for her proposed clarification, which could mean another postponement of the final adoption of the rule.

Ms. Smith said that she thought the rule was critical and should not be postponed.

Mr. Wayne said the Legislature's intent was to require candidates collect \$40,000 in cash contributions from Maine registered voters as an additional measure of public support for getting public funding for their campaign. He said he did not believe the Legislature intended in-kind contributions to count toward this requirement. Mr. Wayne said that the staff could revise the guidance given to gubernatorial candidates to emphasize that individuals may only contribute up to \$100 in cash or in-kind.

Ms. Gardiner said rules do not answer every question that may arise over the interpretation of a statute. The proposed rule only deals with the required cash seed money contributions for gubernatorial candidates and is not intended to cover other seed money issues. She agreed that the issue Ms. Smith raised could be handled within the guidance established for candidates instead of adding language to the rules.

Mr. Marsano moved that the Commission adopt the rules as proposed by staff. Mr. McKee seconded.

The motion passed unanimously (5-0).

Agenda Item #2. Proposed New Rule-Making/Procedures for Authorizing Maine Clean Election Act Candidates to Collect Contributions in Case of a Budget Shortfall

Mr. Wayne explained that in response to testimony at the July 30, 2009 public hearing, the Commission staff proposes a substantial revision to the Commission's rule regarding the procedures for authorizing Maine Clean Election Act candidates to accept campaign contributions should there be insufficient money in the Maine Clean Election Fund. He said since the revised rule is substantially different from the rule proposed on June 15, 2009, consideration of the revised proposed rule would require an additional comment period relating to the revised rule alone. Mr. Wayne reviewed the possible dates for the notice requirements in order for the public to make written and oral comments.

Mr. Marsano expressed concern over the amount of authority given to the Commission staff with regard to matching fund distributions.

Mr. Wayne explained that currently the staff's role is to authorize and distribute matching funds to candidates based on reports filed with the Commission. The Commission would decide whether the fund was short, how much payments to candidates would be reduced as a result of that shortfall and also how much private fund raising would be allowed. He said these decisions would be discussed and determined at a public meeting held by the Commission. He said these discussions would likely take place in the spring after the primary election. He said the staff would be guided by the procedures established by the Commission.

Ms. Alison Smith said the Maine Citizens for Clean Elections would be providing comments when the criteria have been established.

Ms. Gardiner said the next step would be for the Commission to decide whether to propose this draft rule for comment and whether to accept written comments only or to hold a public hearing to receive oral comments as well as written comments.

Mr. Youngblood said a public hearing is very important when establishing any rule changes and he would not support having only written comments received.

Mr. McKee and Mr. Friedman agreed the process should include written and oral comment at a public hearing.

Mr. Wayne said a public hearing could be held at the Commission's November 19 regular meeting which would push final adoption of the rule back to January unless a special meeting was held to adopt the rule before January. Another option would be to hold a public hearing in October in addition to the regular meeting on October 1 and finally adopt the rule on November 19.

Mr. McKee moved that the Commission send the proposed rule out for public comment, written as well as oral testimony, and have the public hearing on November 19 with final adoption in January. The motion was seconded by Mr. Marsano.

The motion passed unanimously (5-0).

Agenda Item #3. Investigation of Maine Leads/Testimony of Roy Lenardson

At its May 28, 2009 meeting, the Commission directed its staff to investigate whether Maine Leads was required to register and file campaign finance reports as a political action committee or as a ballot question committee. As part of the investigation, the Commission heard testimony from Roy Lenardson, the Executive Director of Maine Leads.

At the conclusion of Mr. Lenardson's testimony, the Commission established a schedule for the submission of memoranda of the staff and the two parties. The Commission will take up this investigation again at its meeting on October 1.

The transcript of Roy Lenardson testimony is attached to these minutes. [NOTE: For the packet of materials, this transcript is attached to Agenda Item #2.]

EXECUTIVE SESSION

At 4:00 p.m., Mr. McKee made a motion to go into executive session in accordance with Section 405, subsection 6(E) of Title 1 for the purpose of discussing the compensation of an employee at the Commission. The motion was seconded by Mr. Marsano. The motion passed unanimously.

At 4:08 p.m., Mr. Duchette made a motion to come out of executive session. The motion was seconded by Mr. Marsano. The motion passed unanimously.

Mr. Marsano moved to adjourn, Mr. McKee seconded. Meeting adjourned at 4:10 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director

Attachment: Roy Lenardson Testimony



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

To: Commissioners

From: Jonathan Wayne, Executive Director

Date: September 28, 2009

Re: Carl Lindemann's Proposed Changes to Draft Minutes

I received the attached e-mail from Carl Lindemann proposing changes to the draft minutes for the July 30, 2009 meeting at which he testified.

The Commission staff is unaccustomed to receiving comments on the draft minutes from sources outside the Commission.

Our suggestion is to decline making the changes proposed by Mr. Lindemann because they are not material to the summary of his presentation. His full comments are available in the audio of the meeting which is posted on the Commission's website.

Thank you.

Wayne, Jonathan

From: Carl Lindemann [carl@cyberscene.com]
Sent: Monday, September 28, 2009 9:46 AM
To: Wayne, Jonathan
Cc: Lavin, Paul
Subject: Agenda Item #1 - minutes from July 30

Dear Executive Director Wayne,

I've just had a chance to review the minutes from the July meeting. There are two omissions that should be added in the minutes for item #10 in the bullet points found on page 17::

- * MHPC received a \$50,000 donation from Howie Rich via the Cato Institute; indications of similar sums also from Mr. Rich donated via the Atlas Economic Institute.
- * Roy Lenardson, who led the pro-TABOR PAC, was simultaneously employed at MHPC for what appears to be a technical job that, apparently, he lacked the requisite skills to perform. This may have served as a means to provide unreported funding for the PAC from MHPC.

Thank you.

-CL

Carl Lindemann
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"Who seeks gold
digs much earth
and finds little"

-Heracleitus