Agenda

Item #1

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

Minutes of the February 25, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André Duchette, Esq.; Hon. Francis C. Marsano (by phone).
Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the January 28, 2010 Meeting
Mr. Marsano moved to accept the minutes as drafted. Mr. Duchette seconded.

The motion passed unanimously (3-0).

Agenda Item #2. Advice on Legislative Ethics/Rep. Jon Hinck
Mr. Wayne explained that State Representative Jon Hinck is the House Chair of the Joint Standing Committee on Utilities and Energy. He seeks advice from the Commission concerning whether he would have a conflict of interest with respect to future legislation on wind energy issues because his wife, Juliet Browne, is a partner at Verrill Dana and does environmental permitting and works on legislation that could possibly come before his committee.

Rep. Jon Hinck said media reports have given rise to his request for advice from the Commission. Since a sufficient number of people have raised questions about this matter, he felt he should have an independent review of the facts by the Commission and seek its advice. Rep. Hinck said that the key facts relate to his position in the Legislature and his wife's law practice. He said most of the questions at issue involve energy matters, and specifically wind power. His wife has been representing clients, including those in the energy business, for several years, even before he was elected to the Legislature. Her practice usually

involves reviewing the environmental laws for her clients and assisting them in obtaining the necessary governmental permits for their projects. He said many matters she deals with involve state agencies, such as the Department of Environmental Protection, that are not overseen by his committee but are instead under the jurisdiction of the Committee on Natural Resources. However, a bill regarding wind power was submitted to his committee for review by the Governor's Task Force on Wind Power Development, of which Ms. Browne was a member. The bill changed some procedures regarding the permitting of wind power projects in Maine. The bill was voted "ought to pass" by his committee unanimously and was passed unanimously by both chambers of the Legislature. Rep. Hinck said neither he nor his wife experienced a change in their financial prospects or compensation as a result of his vote on this bill or any other bill.

Mr. McKee referred to an opinion of the Attorney General on a very similar situation in 1983, regarding a Legislator's spouse providing legal representation to a client. In that opinion, former Attorney General James Tierney wrote that if there is no personal financial benefit to the Legislator or spouse resulting from the passage or defeat of a bill and the spouse is merely being compensated for providing legal representation to the client, the spouse's representation of the client does not raise a conflict of interest issue under §1014(1-A) of Title 1. He said that if the Commission were to accept that the Attorney General's opinion is applicable in this matter before the Commission, then there would not be a conflict of interest arising from Ms. Browne's representation of her clients. He said although the public may think this as a conflict of interest, as that term is generally understood, when the narrow definition of conflict of interest as interpreted by the Attorney General is applied, there is no conflict due to his wife's representation.

Rep. Hinck agreed that the Attorney General's opinion was on point. Furthermore, Rep. Hinck said the Legislature's rule is that if there is no conflict as defined by law, then Legislators should participate. Legislators are not encouraged to step aside because others may think there appears to be a conflict. He also stated that he has spent considerable time during his career and legislative service trying to understand Maine's energy needs. Because this is such an important issue for Maine, he would not want to step aside from dealing with energy issues that come before the Legislature as these are precisely the issues he feels he should be involved with due to his experience.

Mr. Duchette asked whether Rep. Hinck's spouse would be testifying in front of his committee.

Rep. Hinck said this was possible. He said Ms. Browne typically does not lobby; however, she has spoken at other hearings in front of other committees to provide testimony.

Mr. McKee said any guidance given today by the Commission is based upon the facts provide by Rep. Hinck. He said the opinion provided is only as good as the facts upon which it is based. If facts or circumstances change, the opinion may no longer be applicable.

Rep. Hinck said he took great care to provide accurate facts and was pleased to know that the information has been posted publicly. He said if anyone had contrary facts to those, they could come forward.

Mr. Marsano said he was pleased the Commission has an opportunity to review and reaffirm Attorney General Tierney's opinion. He said he appreciated Rep. Hinck's concern and desire to keep the public aware. He said Maine is fortunate to have such a dedicated individual willing to serve in the Legislature.

There being no further comments by the public, Mr. Marsano moved that the Commission find there is no conflict and reiterate the opinion of Attorney General James Tierney. Mr. Duchette seconded.

The motion passed unanimously (3-0).

Agenda Item #3. Request for Waiver of Late-Filing Penalty by Candidate Eliot R. Cutler

Mr. Wayne explained that on January 19, 2010, the campaign staff of independent gubernatorial candidate Eliot R. Cutler attempted to file a campaign finance report, but encountered difficulties uploading the data electronically. The Commission's electronic filing system recorded that the report was filed one day late. Due to mitigating circumstances, the staff recommended a complete waiver of the late filing penalty and that there not be a finding of violation. He said that the Cutler campaign was diligent in seeking advice and help from the staff and made a bona fide effort to file on time, He said this was the first time this campaign filed a report with the Commission and the campaign did not have any experience with the technology it had chosen to use to file its reports. Additionally, there was no harm suffered to the public with the late disclosure since it was filed at 8:30 a.m. the following day.

Mr. McKee asked Justin Schair, of the Cutler campaign, whether the problems had been worked out with this company.

Mr. Schair said the campaign has been working very diligently with this company to resolve all issues to make the technology compatible with the state's e-file system. He said the campaign will be sure there is adequate time before the next filing deadline to be sure the program will act appropriately.

Mr. Duchette moved that the Commission accept the staff recommendation of a complete waiver of the late filing penalty and that the Commission not make a finding of violation. Mr. Marsano seconded.

Mr. Marsano noted the similarities between this matter and the late filed annual lobbyist report by John O'Dea, which the Commission considered at its meeting last month. He said in situations where there has been no harm to the public due to the late filing and a bona fide attempt to file has been made, a penalty waiver may indeed be appropriate. He said would support the motion for the same reasons as he supported the motion to waive the late filing penalty for Mr. O'Dea.

Mr. McKee said he agreed with the motion as well because there was a bona fide attempt to file on time, the campaign did not have experience in using the data upload feature of the e-filing system, and there was no harm to the public because the report was available to the public at 8:30 the next morning.

The motion passed unanimously (3-0).

Agenda Item #4. Seed Money Contributions over $100 Received by Hon. Elizabeth H. Mitchell

Mr. Wayne explained that four contributors gave donations to the gubernatorial campaign of Elizabeth Mitchell via the internet that exceeded the $100 limit for seed money contributions. He said these were unintentional over-the-limit contributions that came through ActBlue, a company that provides online services for Democratic candidates nationally to raise contributions. He said the company is not willing to customize the contribution website for different states which caused some contributors to unintentionally contribute over the $100 limit. The campaign has returned the amounts over $100. *Staff recommendation: the staff recommends waiving the seed money restrictions for these four contributions.*

Kate Knox, Esq., on behalf of the Mitchell for Governor campaign, stated that in an effort to fix the problem the campaign is obtaining a nightly contribution reports which are manually checked to be certain no one goes over the limit. If there are contributions over $100, then Act Blue is called and the transfer of the funds to the Mitchell campaign is prevented.

Mr. McKee said the amounts look fairly small. No large over-the-limit contributions have been made.

Mr. Duchette said the alternative to the problem would mean prohibiting the use of Act Blue and he would not support that. He said this is a good service for candidates to be able to use to raise funds.

Ms. Knox said the process takes about two weeks from the time the donation is made online to the time the campaign receives a check from Act Blue. She said the nightly report seems to be the best solution at this point and that terminating the deal with Act Blue would not be easy or economical. She said other companies would not change their program for seed money contribution limits as well.

Mr. Duchette said he did not see the harm in just returning the funds, once the error had been discovered.

Mr. Wayne said the staff feels the same.

Mr. Greenier, a citizen from Stockton Springs, expressed concern over seed money for a gubernatorial race coming from out of state contributors.

Alison Smith, co-chair for Maine Citizens for Clean Elections, provided a historical perspective for the rule. She said that the main concern was that while the seed money contribution limits were necessarily strict, there also had to be a safety mechanism at the outset of the program so that candidates would not be disqualified due to an inadvertent violation. She said the staff was not given the authority to correct the mistakes because the seed money limit was important to the integrity of the program and there needed to be strict procedures to uphold that integrity. Therefore, the waiver process was created in order for the candidate to remain eligible for public funds by showing that there was no benefit to the campaign from the over-the-limit contribution. She said the procedure should be re-visited at this point to keep up with the

different ways money comes into the campaigns. She said whatever the new process is, it should be designed to ensure that if mistakes are made regarding seed money contributions, campaigns do not benefit from the excess contribution.

Mr. McKee asked whether the Commission needs to weigh in on every small, minor over payment each time.

Ms. Smith said in the majority of these matters over the years, the campaigns have come forward in a responsible fashion similarly to the Mitchell campaign to explain how the issue came up and what the campaign has done to rectify it. She said that as long as the campaign can show that it did not benefit from the over-the-limit contribution and corrected the problem and as long as the integrity of the program was not compromised, she did not see what the harm would be in allowing the staff to handle these kinds of matters.

Mr. Marsano moved that the Commission waive the seed money restrictions for these four contributions in the request. Mr. Duchette seconded.

The motion passed unanimously (3-0).

Mr. McKee noted the staff memo with regard to authorizing the staff to waive future seed money violations.

Mr. Marsano said he agreed with both staff recommendations in the memo. He said more attention should be paid to the contributors in this process. The policy needs to recognize that the contributors are trying to do the right thing and the process needs to be simple and easy for the contributors so that contributors will not be discouraged from participating and contributing to clean election candidates. The process should make is easy for the campaign to deal with these kinds of issues at the time they arise. For those reasons, he supports the staff recommendation that the staff be authorized to approve the waiver without the matter coming to the Commission and report on these matters to the Commission at a subsequent meeting.

Mr. McKee moved the Commission authorize the Commission staff to use its discretion to waive future violations and report to the Commission any such waivers at the next Commission meeting, or by mail or e-mail. Mr. Marsano seconded.

The motion passed unanimously (3-0).

Mr. McKee said he would support allowing the candidate to right a check back to the contributor refunding the excess amount.

Mr. Marsano said the candidate could enclose a letter in appreciation of the contribution and the contributor's support of the MCEA with the check.

Mr. Marsano said that the record should reflect that as a result of the Commission's motion, the staff had the ability to determine how candidates should handle the return of contributions in excess of the seed money limit to the contributor.

Mr. Wayne asked whether the delegation of the ability to grant waivers was limited to online contributions.

Mr. McKee, Mr. Duchette and Mr. Marsano said the authorization was not limited.

Agenda Item #5. Draft Guidance on Reporting Independent Expenditures

Mr. Wayne stated this is a difficult issue that arises every election cycle. He said each Commission member views the process differently, some taking a more narrow view than others with regard to express advocacy. The staff has met with a working group and as a result has provided an updated Advice Regarding Independent Expenditures for the 2010 elections.

Mr. McKee asked whether the working group developed and agreed to the language or whether the staff condensed the materials and developed the language.

Mr. Wayne said the staff condensed the materials. He said the working group felt the line had been unintentionally moved in 2006 as a result of the Commission's determination regarding an campaign

communication supporting House candidate Anne Rand during the 2006 election. He said the group felt that the line needed to be moved back in order to clarify what would constitute express advocacy. He said going forward, the staff feels that having the candidate's name next to the office sought would be a factor in favor of a determination that the communication was express advocacy.

Mr. McKee said the express advocacy issue is always perplexing and one word can change the interpretation of the materials. He said it is very important that the guidelines be very clear. He said no matter what the Commission does, there will continue to be questions regarding express advocacy; however, the guidelines need to provide a line for candidates to start from.

Mr. Marsano said the staff's proposal is going in the right direction and supports the language change in the advice memo. He said the language creates the ability to identify a candidate who is not well known to the public in a way that was not express advocacy.

Mr. McKee moved to adopt the proposed advice memo. Mr. Marsano seconded.

The motion passed unanimously (3-0).

Agenda Item #6. Petition by the National Organization for Marriage to Vacate or Modify Subpoenas
Mr. Wayne said there were no representatives present at the meeting from the National Organization for Marriage (NOM). He explained that NOM's executive director Brian Brown, and Stand for Marriage Maine PAC request that the Commission vacate or modify the two subpoenas that were served in the investigation of NOM. He explained that their bases for their requests to vacate or modify are First Amendment privilege, over-breadth, relevance, and materiality.

No public comments were received.

Mr. McKee said if the Commission were to grant this petition by NOM, it would put a stop to the investigation. He said any decision today by the Commission will most likely be appealed which is NOM's right to do so. He said in order to have a meaningful investigation, this basic discovery needs to be

allowed. He added that the information gathered will be confidential during the litigation and investigation. He said he would support denying all aspects of the petition in order for the investigation to move forward.

Mr. Duchette agreed since the confidentiality issue has been addressed and NOM's counsel was not concerned about the Commission's ability to keep the information confidential when he addressed the Commission at last month's meeting.

Mr. Marsano said originally he was concerned with the cost to the State to pursue this issue; however, he no longer feels this way. He said he was impressed with the brief prepared by staff and counsel and believed that the position taken by the District Court will be upheld. He said he favors the denial of all five petitions as well.

Mr. McKee moved that the Commission deny the five petitions requested by NOM, Brian Brown and Stand for Marriage Maine PAC and that any documents or testimony to be provided by NOM, or Brian Brown, in response to the subpoenas will be subject to the confidentiality procedures under section 1003(3-A) . Mr. Duchette seconded.

The motion passed unanimously (3-0).

OTHER BUSINESS

Mr. Wayne gave a brief updated of the Maine Clean Election Act fund. He explained that one of the five possible MCEA participant, Lynne Williams, has decided to run as a privately financed candidate. He said there are now four participants which significantly decreases the chances that the Fund could run short. He said, however, the Legislature could alter the Fund when going through the budget process.

Mr. Duchette moved to adjourn. Mr. Marsano seconded.

The motion passed. The meeting adjourned at 10:30 a.m.

Respectfully submitted,

Jonathan Wayne, Executive Director