Agenda Item #1

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

Minutes of the April 29, 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; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq. 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 March 25, 2010 Meeting

Mr. Duchette moved to accept the minutes of the March 25, 2010 meeting as drafted. Mr. McKee seconded the motion.

Mr. Marsano stated, for the record, that his appointment to the Commission expired on April 16 and expressed concern over his authority to vote as a result of the expiration.

Ms. Gardiner explained that there is a general provision in 5 M.R.S.A. §3 which provides that all civil officers appointed in accordance with law, which includes Commission members, "shall hold office during the term for which they were appointed and until their successors in office have been appointed and qualified unless sooner removed in accordance with law." She said even though Mr. Marsano's statutory term has expired, until the Governor reappoints Mr. Marsano, or appoints someone else, Mr. Marsano has authority to continue to serve in full capacity as a Commission member.

Mr. Marsano said he understood no one had been appointed and Mr. Wayne confirmed that.

The motion passed unanimously (5-0).

Agenda Item #2. Complaint by CasinosNO! against Peter Martin

Mr. Wayne explained CasinosNO! filed a complaint against Peter Martin, the spokesperson for Black Bear Entertainment, the proponent of the citizen initiative on the November 2, 2010 ballot that would establish a casino in Oxford County. In the complaint, CasinosNO! asks the Commission to consider whether Peter Martin was required to register and file monthly reports as a lobbyist and whether the campaign finance reports filed by Black Bear Entertainment political action committee (PAC) were incomplete because they did not include a $50,000 expenditure or obligation to Atlantic Strategies for Mr. Martin's service on behalf of the PAC. Mr. Wayne also said Mr. Martin registered as a lobbyist after Dennis Bailey filed the complaint on behalf of CasinosNo!

Mr. McKee expressed concern that the staff had not made a recommendation on the second issue regarding the campaign finance report and questioned whether this issue should be set aside until staff has had a chance to review the report more completely and make a recommendation.

Mr. Wayne said that he did not feel the issue should be put off and explained, that in his view, the omission was significant.

Mr. Dennis Bailey, Executive Director of CasinosNo!, stated that this matter started back in the fall when he noticed the finance report that Black Bear Entertainment had submitted listed its sole contributor as an LLC. He said he called the Commission and questioned whether this was the same kind of reporting problem as the issue regarding contributions from the National Organization for Marriage to the Stand for Marriage Maine PAC. He did not file a complaint at that time because the Commission staff contacted Black Bear and an amendment to the report was filed with regard to contributions and expenditures. He explained that recently he was contacted by several people who told him about the considerable amount of time Peter Martin was spending at the Legislature with regard to the casino measures. He said no one knew for certain whom Mr. Martin was working for because he was not a registered lobbyist and there was no record of payment in the filings by Black Bear Entertainment. He said accurate and timely filings are required by law and everyone should be held responsible for doing so.

Peter Martin, spokesperson for Black Bear Entertainment, the group responsible for proposing a four season resort/casino in Oxford County, stated that his frequent appearance at the State House did not mean he was involved in lobbying. He said the initiative was certified by the Secretary of State's office around January 17 and sent to the Legislature for a vote. Given that the Governor has stated in the past he would veto any casino effort, his group did not see the point in engaging in a substantial lobbying effort and asked the Legal and Veterans Affairs Committee early in the review process to vote the bill out of committee ought-not-to-pass. He said the public hearing was March 11 and the time he spent on the bill was minimal. He said he testified at the public hearing for approximately 15 minutes in support of the initiative even though they were asking the Committee to vote ought not to pass. He said during the public hearing, two other groups (Penn National Gaming and the Passamaquoddy Tribe) expressed an interest in a competing measure, which could split the support for the initiative and would not benefit the casino measure. He explained that at the end of the hearing, the LVA Committee asked the three groups to come together and develop a competing measure solution to bring it back to the Committee. He said discussions among the stakeholders began and two work sessions were held. He said he spoke again to the LVA Committee on March 17 for about 15 minutes. He said ultimately the Committee voted the bill ought-not-to-pass and the bill was defeated on the floor of the Legislature.

Mr. Martin said he was aware of the registration requirements for lobbyists and had consulted on several occasions with Daniel Walker, the attorney for Black Bear Entertainment about them. He said that he knew he was getting close to the threshold but that he had not crossed it. He said when the complaint was filed, he was sure he had not reached the threshold but to be safe, he did register as a lobbyist. After he registered, he went back over his materials and tallied his time spent, to the best of his recollection. He said at that point, he realized he may have reached ten hours of lobbying, which would put him over the threshold. He said that he registered on April 7, and counting 15 business days from that date, it would mean he crossed the threshold on March 18. He said there was no way that he reached eight hours of lobbying time between March 1 and March 18. He said he recently reviewed the statute for lobbyist disclosure, specifically the definition of "lobbying," and he believes he did not go over the threshold. He referred to the phrase, "*lobbying does not include time spent by any person providing information to or participating in a subcommittee, stakeholder group, task force or other work group regarding a legislative action by the appointment or at the request of the Governor, Legislator or legislative committee....*" He said Black Bear Entertainment did not propose the competing measure, the LVA Committee requested the

stakeholders to work on a competing measure to the initiative. As a result, he said, some of the hours he logged in as lobbying, should not have been counted in his tally because it was work requested by the Committee and he did not reach the threshold, as he originally believed. He said he registered for the sake of transparency even though he did not believe he had reached the threshold amount and his review of this statute confirms this for him.

Mr. McKee clarified that Mr. Martin was part owner of the consulting firm Atlantic Strategies. He said his interpretation of time spent for the work session regarding a legislative action is separate from participating in meetings with other stakeholders. He said providing any testimony upon the request of Committee members at a work session, in his view, would be part of lobbying.

Mr. Martin said participating in a work session by responding to questions and requests of Committee members would not be viewed as lobbying as he understands the statute. However, he said if the Commission determines that it is lobbying, that would only add a half hour of his time to the tally since he only spoke 15 minutes at each session.

Mr. McKee noted that Mr. Martin's original estimate in his letter of April 13 acknowledged he had approximately ten hours of lobbying time.

Mr. Martin said that was before he looked at the statute last night regarding work performed at the request of the Committee. He believes his actual lobbying time would be less.

Mr. McKee asked Mr. Martin whether he had any comments concerning the second issue regarding the filing made without record of a $50,000 payment.

Mr. Martin referred the issue to Daniel Walker, Esq., and stated that PAC reporting was not under his umbrella of responsibility.

Mr. McKee stated he understands that things are amiss from time to time and expenditures do get overlooked. However, the issue is whether that error has resulted in the report being nonconforming under

the statute. He said the amount is significant. He asked whether Mr. Martin thought the omission made the reporting substantially not conforming.

Mr. Martin said he did not believe the omission was intentional. He said a casino venture garners a great deal of scrutiny. He said Black Bear Entertainment has been very transparent since the beginning of this process. He said he believes it was just an error.

Mr. McKee said that all the while Mr. Martin was up at the State House, important information about where the money was coming from to pay Atlantic Strategies was missing from the PAC report. Mr. McKee said providing information to the public about where the money is coming from to influence elections and legislation is the very basis for disclosure laws.

Daniel Walker, Esq., attorney for Black Bear Entertainment, spoke briefly about the lobbying issue and said the entire definition needs to be looked at, not only a particular section. He pointed out the section of the definition of "lobbying" that includes the phrase, "*at the request of*" and said that phrase is important in understanding what counted as lobbying.

He said the PAC's first report included treasury transfers from Black Bear Entertainment LLC as contributions. He said Mr. Wayne called and indicated that the information needed to be more detailed than just "treasury transfers" on the report. Mr. Walker said the LLC has separate components, real estate and the campaign, so they attempted to track only the campaign side of the business in the PAC reports. The PAC amended the report to show that the contributions to the PAC were made by the individual investors in the LLC.

Mr. McKee asked whether the contributions were made from the LLC to the PAC and asked for a clarification about the equity interest listed in the April report.

Mr. Walker confirmed that the contributions were from the LLC. He said the equity interest was an expenditure for compensation to Atlantic Strategies for their services. Because there was no way to report this equity interest in the electronic filing system, the PAC submitted a letter of explanation to the Ethics Commission. He said the omission of the cash payment to Atlantic Strategies in the January report was a

mistake. He said the LLC has a checking account and a money market account with Key Bank. Contributions are deposited into the money market account and transferred to the checking account, which is used for the PAC's campaign expenditures. Prior to filing campaign finance reports, the PAC treasurer and the LLC's Key Bank contact review the checking account statement to account for contributions and expenditures made in the reporting period. In preparing for the January report, there was no payment to Atlantic Strategies listed on the checking account statement. After the complaint was filed, Mr. Walker contacted Key Bank and asked for a further review of the payments from the LLC's accounts. As a result, it was discovered that the payment was made from the money market account instead of the checking account. Mr. Walker reviewed all the money market account statements and the payment to Atlantic Strategies was the only PAC expenditure made from that account.

Mr. McKee asked whether transfers are usually made from the money market account to the checking account rather than direct transfers to Atlantic Strategies.

Mr. Walker said that, in this instance, it was easier for Key Bank to make a direct transfer to Atlantic Strategies from the money market account rather than cutting a check because Atlantic Strategies is also a Key Bank account holder.

Mr. Walker said that the Commission must determine whether the report was substantially nonconforming. He stated that the amount omitted is significant but the report was filed on time. Mr. Walker said the PAC has met with the Commission staff to make sure it was reporting everything correctly; however, this payment slipped through the cracks due to a clerical error. He said that he believes the underlying report is substantially conforming despite the omission of the $50,000 payment.

Mr. Joseph Greenier, a concerned citizen from Stockton Springs, Maine, said he attended several meetings where he saw Mr. Martin attending. He said the general public does not have the right to participate unless asked to by the Legislature. He said his primary concern is that the wishes of the 100,000 people who signed the petitions are protected, which the Legislature ultimately did.

Mr. McKee asked Mr. Wayne for additional information with regard to Mr. Martin's registering as a lobbyist.

Mr. Wayne explained that very shortly after Mr. Bailey's complaint was filed, Mr. Martin visited the Commission office. On April 7, while at the Commission office, Mr. Martin told Mr. Wayne that he had been a lobbyist in the past and knew the requirements for registering. He said Mr. Martin was relatively sure he had not exceeded eight hours but decided he would register just to be safe. Mr. Wayne said Mr. Martin told him he had not reached the eight-hour threshold but apparently, after reviewing his time, Mr. Martin indicated in his letter to the Commission that he had reached ten hours in March.

Mr. McKee stated the second issue is more alarming, since $50,000 is concerning.

Mr. Marsano suggested separating the issues to make a determination on each one since they are substantially different issues.

Mr. Marsano moved that the Commission find that Peter Martin was required to register and file monthly reports as a lobbyist. Ms. Matheson seconded.

Mr. McKee asked Mr. Marsano whether the basis for that motion was the information provided by Mr. Martin regarding his time that put him over the threshold for the month.

Mr. Marsano stated that he did not find Mr. Martin's testimony or letter to the Commission credible.

Mr. Duchette and Mr. McKee asked for clarification about how the requirement to register within 15 business days of exceeding the eight-hour threshold would apply in this instance.

Mr. Wayne said Mr. Martin contends that he knows he did not go over the eight-hour threshold during March until after March 17, the day of the first work session. He said by registering on April 7, he registered as a lobbyist within 15 business days (or 21 calendar days), which is plenty of time for some one to register as a lobbyist. He said Mr. Martin claims that it was the latter half of March when he went over the threshold, therefore, by registering on April 7 he is in compliance.

Mr. Duchette said that the question then is whether Mr. Martin went over the eight-hour threshold between March 1 and March 17.

Mr. Marsano said Mr. Greenier's comments were relevant and significant. He said when people see a lobbyist in the legislative arena, they assume that the lobbyist is there for certain purposes related to lobbying. He said that Mr. Martin's activity was of a nature that suggests to him that it was reportable.

Ms. Gardiner suggested that, while Mr. Martin had provided a record of the amount of his time in direct communications with Legislators and legislative staff, it may be useful if the Commission had a record of the actual dates on which those interactions occurred in order to determine the date on which Mr. Martin actually crossed the threshold.

Mr. McKee noted that Mr. Martin stated in his letter that most of his lobbying occurred after the first work session on March 17. He said that Mr. Martin did not provide any more specific information about the dates on which he lobbied.

Mr. Youngblood said that there was no evidence presented to contradict Mr. Martin's statements about the timing of his lobbying activities. Therefore, Mr. Youngblood believed that by registering as a lobbyist within the fifteen-day period, Mr. Martin is in compliance.

Mr. McKee said it depends upon what happened before March 17. He said Mr. Martin stated that most of his lobbying took place after the first work session on March 17. Mr. McKee said Mr. Martin had the burden to prove that he did not cross the threshold before March 17 by providing the Commission with something more than a statement that most of his lobbying took place after March 17. He said that Mr. Martin did not provide that information in his testimony today.

Mr. Wayne said the staff sent Mr. Walker an e-mail long before the complaint was filed, putting Black Bear Entertainment on notice that anyone lobbying on the initiated bill would have to register and file reports as a lobbyist if they crossed the threshold. The staff did this as a courtesy so that the PAC was aware of this requirement. Mr. Wayne said Mr. Martin expressed a high degree of certainty that he did not cross the

threshold at all, but he registered anyway. He did not give Mr. Wayne any additional detail about his lobbying activities at that meeting.

Ms. Matheson said that it was important to take into consideration all parts of the definition of "lobbying" in the statute and noted that the definition also includes the time spent preparing oral and written proposals, analyses and testimony regarding legislative actions. Mr. Martin has not addressed that aspect of his lobbying activities. Given the nature of lobbying, some amount of preparation is necessary and that time should be counted as well as time spent in direct communication.

Motion passed (4-1) with Mr. Youngblood opposed.

Mr. McKee moved that the Commission find that the nondisclosure of a $50,000 expenditure rendered the January report filed by Black Bear Entertainment substantially nonconforming pursuant to 21-A M.R.S.A. § 1062-A(2). Mr. Marsano seconded.

Mr. Duchette stated that he found Mr. Walker's testimony credible. He said the omission caused by a clerical error, as described by Mr. Walker, is understandable. This is a significant omission; however, the Commission should consider the precedent it will set in determining a penalty.

Mr. Marsano also found Mr. Walker's testimony credible. He said Mr. Duchette raised a good point, which could be better addressed at the penalty phase of this matter. At that time, it is possible that the Commission will find grounds for a minimal penalty while also establishing that this type of clerical error is not acceptable.

Mr. McKee said there are two significant factors that should be considered in determining whether the report conforms. First of all, the amount is significant. Second, the nature of the payment, a payment to the spokesperson for the initiative, is also a primary factor. He agrees with Mr. Marsano that the penalty should be addressed at a later date. He said an omission of a $50,000 payment to Mr. Martin rendered the report nonconforming in his view.

The motion passed unanimously (5-0).

Mr. Wayne explained that the next step will be for the staff to send out a standard penalty letter advising the PAC of the preliminary penalty amount. He said the PAC could pay the penalty or request a waiver or reduction of the penalty. He said that waiver request from the PAC would be on the agenda for the next Commission meeting.

Agenda Item #3. Appeal by Matthew Boucher for Certification as a Clean Election Act Candidate

Mr. Marsano expressed concern that Mr. Boucher received the letter of denial this morning and wondered whether Mr. Boucher had enough time and opportunity to prepare an appeal on such short notice. He said Mr. Boucher should have an opportunity to prepare and to have the benefit of counsel.

Mr. McKee agreed. He said the hearing was set quickly because time is of the essence in order for Mr. Boucher to receive campaign funding. However, if Mr. Boucher feels the need to continue the hearing, he should have that opportunity.

Mr. Marsano said the question to be addressed at the hearing is whether Mr. Boucher should be certified to receive public funding for his campaign. In the meanwhile, Mr. Boucher can continue to campaign as a candidate. Mr. Boucher needs to be aware of his right to seek counsel in this matter if he wishes to do so.

Mr. Marsano suggested that Mr. Boucher be allowed to have an opportunity to review the statute and perhaps consult with counsel, and then decide whether he would prefer to continue the matter.

Mr. Boucher left the meeting to review the statute and to consult with his counsel by phone.

Mr. Boucher returned to the meeting and stated that he would like to continue the hearing.

This hearing was continued and will be heard at a special meeting on Thursday, May 6 at 1:00 p.m., when Mr. Boucher will have the benefit of counsel.

Agenda Item #4. Update on Constitutional Challenge by National Organization for Marriage

Ms. Gardiner reviewed several recent filings in the cases in Superior Court and Federal District Court.

OTHER BUSINESS

Mr. Wayne advised that the Commission has contracted with Vincent Dinan to perform audits of Maine Clean Election Act candidates.

Mr. Wayne also advised that gubernatorial candidate John Richardson has decided not to appeal the staff determination regarding funding as a Maine Clean Election Act candidate and the staff has referred the conduct of the campaign workers to the Attorney General's office for investigation.

EXECUTIVE SESSION

At 10:25 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 a personnel matter. Mr. Marsano seconded the motion. The motion passed unanimously (5-0).

At 10:40 a.m., it was moved to come out of executive session.

Mr. Marsano moved to adjourn. Mr. Duchette seconded. The motion passed. The meeting adjourned at 11:00 a.m.

Respectfully submitted,

Jonathan Wayne, Executive Director