

Agenda

Item #4



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: May 17, 2010  
Re: Request for Waiver of Late Filing Penalty

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This brief memo discusses the request by Black Bear Entertainment LLC political action committee (PAC) for a waiver of a late-filing penalty. Late-filing penalties for PACs are governed by 21-A M.R.S.A. § 1062-A (attached).

At your meeting on April 29, 2010, you determined that the January 19, 2010 campaign finance report filed by Black Bear Entertainment LLC PAC was late, because it did not include an October 22, 2009 payment of \$50,000 to Atlantic Strategies for consulting services. This payment came to light because of an April 7, 2010 complaint filed by Casinos*NO!* in which it questioned whether Peter Martin was uncompensated for his work representing Black Bear Entertainment.

Following the meeting, the Commission staff sent its routine penalty letter to Black Bear Entertainment LLC PAC. The letter explained that the preliminary penalty was \$10,000, based on the statutory maximum in 21-A M.R.S.A. § 1062-A(4). The staff is viewing the report as 87 days late because the report was due on January 19, 2010 and it was amended to include the payment to Atlantic Strategies on April 15, 2010. Without the \$10,000 maximum, the preliminary penalty would be \$418,129 based on the formula in § 1062-A(3).

Black Bear Entertainment has asked for a waiver of the \$10,000 penalty through a letter from its counsel, Daniel W. Walker of Preti Flaherty Beliveau & Pachios LLP. Mr. Walker explains that in preparing the January 19, 2010 report, the PAC officials and he discussed with Key Bank employees all expenditures that had been made from the LLC's checking account. However, he was unaware that Black Bear Entertainment had made the \$50,000 payment to Atlantic Strategies from the LLC's money market account, which

was contrary to the LLC's regular practice. As a result, the expenditure was not included in the January 19, 2010 campaign finance report.

*Mitigating Circumstances*

Black Bear Entertainment argues that it made a bona fide effort to file the report in accordance with statutory requirements, which is a mitigating circumstance under § 1062-A(4). In addition, you may wish to consider that the omitted expenditure of \$50,000 was about 11% of the total expenditures (\$439,979), so the harm to the public from the missing financial disclosure was significantly less than if the PAC filed no report.

*Staff Recommendation*

The staff believes that the omission of the payment to Atlantic Strategies was significant because the expenditure identified to the public a consulting firm that would have a significant role in the presentation of the Oxford County casino to the Legislature and to the public. Nevertheless, we view Mr. Walker's explanation of the omission as credible. We recommend assessing a penalty of \$500, which is a significant reduction (95%) of the preliminary penalty amount of \$10,000.

## 21-A MRSA §1062-A. FAILURE TO FILE ON TIME

**1. Registration.** A political action committee required to register under section 1053 or 1053-B or a ballot question committee required to register under section 1056-B that fails to do so or that fails to provide the information required by the commission for registration may be assessed a fine of \$250.

[ 2009, c. 190, Pt. A, §28 (AMD) .]

**2. Campaign finance reports.** A campaign finance report is not timely filed unless a properly signed or electronically submitted copy of the report, substantially conforming to the disclosure requirements of this subchapter, is received by the commission by 11:59 p.m. on the date it is due. Except as provided in subsection 6, the commission shall determine whether a required report satisfies the requirements for timely filing. The commission may waive a penalty in whole or in part if it is disproportionate to the level of experience of the person filing the report or to the harm suffered by the public from the late disclosure. The commission may waive the penalty in whole or in part if the commission determines the failure to file a timely report was due to mitigating circumstances. For purposes of this section, "mitigating circumstances" means:

A. A valid emergency of the committee treasurer determined by the commission, in the interest of the sound administration of justice, to warrant the waiver of the penalty in whole or in part; [1999, c. 729, §9 (AMD) .]

B. An error by the commission staff; or [1999, c. 729, §9 (AMD) .]

C. Other circumstances determined by the commission that warrant mitigation of the penalty, based upon relevant evidence presented that a bona fide effort was made to file the report in accordance with the statutory requirements, including, but not limited to, unexplained delays in postal service or interruptions in Internet service. [2007, c. 443, Pt. A, §38 (AMD) .]

[ 2009, c. 190, Pt. A, §29 (AMD) .]

**3. Basis for penalties.** The penalty for late filing of a report required under this subchapter is a percentage of the total contributions or expenditures for the filing period, whichever is greater, multiplied by the number of calendar days late, as follows:

A. For the first violation, 1%; [1995, c. 483, §21 (NEW) .]

B. For the 2nd violation, 3%; and [1995, c. 483, §21 (NEW) .]

C. For the 3rd and subsequent violations, 5%. [1995, c. 483, §21 (NEW) .]

Any penalty of less than \$10 is waived.

Violations accumulate on reports with filing deadlines in a 2-year period that begins on January 1st of each even-numbered calendar year. Waiver of a penalty does not nullify the finding of a violation.

A report required to be filed under this subchapter that is sent by certified or registered United States mail and postmarked at least 2 days before the deadline is not subject to penalty.

A required report may be provisionally filed by transmission of a facsimile copy of the duly executed report to the commission, as long as an original of the same report is received by the commission within 5 calendar days thereafter.

[ 2007, c. 443, Pt. A, §39 (AMD) .]

**4. Maximum penalties.** The maximum penalty under this subchapter is \$10,000 for reports required under section 1056-B or section 1059.

[ 2009, c. 190, Pt. A, §30 (AMD) .]

**5. Request for a commission determination.** If the commission staff finds that a political action committee has failed to file a report required under this subchapter, the commission staff shall mail a notice by certified mail to the treasurer of the political action committee within 3 business days following the filing deadline informing the treasurer that a report was not received. If a political action committee files a report required under this subchapter late, a notice of preliminary penalty must be forwarded to the treasurer of the political action committee whose report is not received by 11:59 p.m. on the deadline date, informing the treasurer of the commission staff finding of violation and preliminary penalty calculated under subsection 3 and providing the treasurer with an opportunity to request a determination by the commission. The notice must be sent by certified mail. A request for determination must be made within 14 calendar days of receipt of the commission's notice. The 14-day period during which a determination may be requested begins on the day a recipient signs for the certified mail notice of the proposed penalty. If the certified letter is refused or left unclaimed at the post office, the 14-day period begins on the day the post office indicates it has given first notice of a certified letter. A principal officer or treasurer requesting a determination may either appear in person or designate a representative to appear on the principal officer's or treasurer's behalf or submit a sworn statement explaining the mitigating circumstances for consideration by the commission. A final determination by the commission may be appealed to the Superior Court in accordance with Title 5, chapter 375, subchapter 7 and the Maine Rules of Civil Procedure, Rule 80C.

[ 2009, c. 302, §8 (RPR) .]

**6. Final notice of penalty.** After a commission meeting, notice of the final determination of the commission and the penalty, if any, imposed pursuant to this subchapter must be sent to the principal officer and the treasurer of the political action committee.

If a determination is not requested, the preliminary penalty calculated by the commission staff is final. The commission staff shall mail final notice of the penalty to the principal officer and to the treasurer of the political action committee. A detailed summary of all notices must be provided to the commission.

[ 2009, c. 302, §9 (AMD) .]

**7. List of late-filing committees.** The commission shall prepare a list of the names of political action committees that are late in filing a report required under section 1059, subsection 2, paragraph B, subparagraph (1) or section 1059, subsection 2, paragraph C or D within 30 days of the date of the election and shall make that list available for public inspection.

[ 2007, c. 443, Pt. A, §41 (AMD) .]

**8. Failure to file.** A person who fails to file a report as required by this subchapter within 30 days of the filing deadline is guilty of a Class E crime, except that, if a penalty pursuant to subsection 8-A is assessed and collected by the commission, the State may not prosecute a violation under this subsection.

[ 2003, c. 628, Pt. A, §8 (AMD) .]

**8-A. Penalties for failure to file report.** The commission may assess a civil penalty for failure to file a report required by this subchapter. The maximum penalty for failure to file a report required under section 1056-B or section 1059 is \$10,000.

[ 2009, c. 190, Pt. A, §31 (AMD) .]

**9. Enforcement.** A penalty assessed pursuant to this section that has not been paid in full within 30 days after issuance of a notice of the final determination may be enforced in accordance with section 1004-B.

[ 2009, c. 302, §10 (RPR) .]

SECTION HISTORY

1995, c. 483, §21 (NEW). 1999, c. 426, §34 (AMD). 1999, c. 729, §9 (AMD). 2003, c. 628, §§A7-9 (AMD). 2007, c. 443, Pt. A, §§38-41 (AMD). 2009, c. 190, Pt. A, §§28-31 (AMD). 2009, c. 302, §§8-10 (AMD).

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May 12, 2010

Maine Commission on Governmental Ethics  
and Election Practices  
135 State House Station  
Augusta, Maine 04333

**Re: Request for Waiver of Penalty for Late January Quarterly Report for Black Bear Entertainment LLC PAC**

Dear Commissioners,

On behalf of the Black Bear Entertainment (“BBE”) LLC PAC, I would like to request a waiver of the penalty of \$10,000.00 for the amendment to the January Quarterly Report to include a \$50,000.00 payment to Atlantic Strategies on October 22, 2009, which the Maine Commission on Governmental Ethics and Election Practices (the “Commission”) has determined to be a late filed report. In this case, a clerical error between Key Bank and the PAC officials led to the \$50,000.00 expenditure not being reported in the January Quarterly Report.

Pursuant to 21-A M.R.S.A. § 1020-A, the Ethics Commission “may waive the penalty [for late filing of a report] in whole or in part if the commission determines the failure to file a timely report was due to mitigating circumstances.” “Mitigating circumstances” include “circumstances determined by the commission that warrant mitigation of the penalty, based upon relevant evidence presented that a bona fide effort was made to file the report in accordance with the statutory requirements.” 21-A M.R.S.A. § 1020-A(2).

In this case, BBE LLC PAC made a bona fide effort to file in accordance with statutory requirements. As its normal procedure, the PAC officials and I discussed with the LLC’s bank all expenditures that had been made from the PAC checking account in preparing to file the January Quarterly PAC Report. However, the expenditure at issue in this case was made from another bank account, and, thus, was missed in our review of the checking account expenditures and not timely reported. As soon as this expenditure came to the attention of the PAC officials, we fully vetted the issue and then amended the January Quarterly PAC Report.

As background, the BBE LLC maintains two bank accounts – a money market account which holds the contributed funds and a checking account from which expenditures are made. The normal course of business when making an expenditure is a two-step process: first, the transfer by the bank of the funds necessary for the expenditure from the money market account to the checking account, and second, the cutting of the expenditure check from the checking account. In reviewing the expenditures of the PAC in preparation of filing a PAC report with the

**Preti Flaherty Beliveau & Pachios LLP** Attorneys at Law

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Commission, the statements of the BBE LLC checking account are fully vetted with the bank and the PAC officials.

In this case, the bank cut the \$50,000.00 check to Atlantic Strategies on October 22, 2009 directly from the money market account and not from the checking account. In our review with the bank of all expenditures of the PAC for the reporting period, the bank only provided us with the expenditures made directly from the checking account, which did not include the expenditure at issue. As a result, the January Quarterly Report failed to report this \$50,000 expenditure.

I have since reviewed all the bank statements of both the money market account and the checking account to ensure that no other payments were made directly from the money market account and learned that this \$50,000.00 expenditure was an anomaly. At no other time has the bank made a payment directly from the money market account.

In summary, BBE LLC PAC has made every effort to timely comply with all statutory requirements of the Commission and has independently reached out to the Commission regarding other situations where it was unclear on how best to report and to be as transparent as possible. As a result, we believe we have developed a very open and honest relationship with the Commission. In the case at hand, BBE LLC PAC made a bona fide effort to file its April Quarterly Report in accordance with statutory requirements. The original report was filed in a timely manner and amended as soon as the non-reporting of the \$50,000.00 expenditure came to our attention. However, an error in our communications with the PAC's bank led to the missed reporting of the \$50,000.00 expenditure at issue. As stated, we have reviewed all of the bank statements, and this has proven to be a one-time occurrence.

We respectfully request that the Ethics Commission waive the penalty that has been imposed on the BBE LLC PAC by the Commission for the late reporting of the \$50,000.00 expenditure.

Thank you for your attention to this matter.

Sincerely,

/s/

Daniel W. Walker  
Attorney

DWW:ryp

cc: Steve Barber  
Robert Lally

April 15, 2010

Ms. Cindy Sullivan  
Maine Commission on Governmental Ethics  
and Election Practices  
135 State House Station  
Augusta, Maine 04333

**Re: Amendment to January Quarterly PAC Report for Black Bear  
Entertainment LLC PAC**

Dear Cindy,

As we discussed, please consider this letter as an explanation of the amendment to the January Quarterly PAC Report of Black Bear Entertainment (“BBE”) LLC PAC that was made today. Recently, in a review of the PAC records, BBE LLC uncovered a payment in an amount of \$50,000 that had been made in October to Atlantic Strategies for consulting services that was mistakenly not reported in the January Quarterly Report.

As background, the BBE LLC maintains two bank accounts – a money market account which holds the contributed funds and a checking account from which expenditures are made. The normal course of business when making an expenditure is a two-step process: first, the transfer by the bank of the funds necessary for the expenditure from the money market account to the checking account, and second, the cutting of the expenditure check from the checking account. In reviewing the expenditures of the PAC in preparation of filing a PAC report with the Commission, the statements of the BBE LLC checking account are fully vetted with the bank and the PAC officials.

In this case, the bank cut the \$50,000 check to Atlantic Strategies on October 22, 2009 directly from the money market account and not from the checking account. In our review with the bank of all expenditures of the PAC for the reporting period, the bank only provided us with the expenditures made directly from the checking account, which did not include the expenditure at issue. As a result, the January Quarterly Report failed to report this \$50,000 expenditure.

I have since reviewed all the bank statements of both the money market account and the checking account to ensure that no other payments were made directly from the money market account and learned that this \$50,000 expenditure was an anomaly. At no other time has the bank made a payment directly from the money market account.

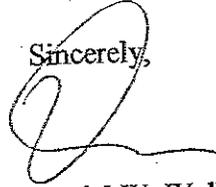
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April 16, 2010

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We apologize for any inconvenience. Thank you very much for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'D. Walker', written over the word 'Sincerely,'.

Daniel W. Walker  
Attorney

DWW:ryp



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

April 30, 2010

Dan Walker  
Black Bear Entertainment  
Preti Flaherty  
PO Box 1058  
Augusta, Maine 04332

Re: Penalty for late filing for Black Bear Entertainment

Dear Mr. Walker:

At the Commission meeting on April 29, 2010 the Commission determined that the omission of the \$50,000 payment to Atlantic Strategies would be considered a late filed report. Black Bear Entertainment filed the amendment to its January campaign finance report on April 15, 2010, 87 days late. Under the Commission's statutes, the late filing of a report by a political action committee triggers an enforcement process. (21-A M.R.S.A. § 1062-A(3)) The Commission staff has calculated the amount of a preliminary penalty for the late filing, based on the amount of the financial activity in the report, the number of calendar days the report was late, and the PAC's previous violations. The preliminary penalty for the late filing is \$418,129.83. (Please see attached penalty matrix for the calculation.) Under (21-A M.R.S.A. § 1062-A(4) the maximum penalty imposed for late filed reports is \$10,000.00.

The PAC may pay the penalty or request that the members of the Commission waive the penalty in whole or in part. Any request for a waiver must be made within 14 calendar days of your receipt of this notice (or attempted delivery by the U.S. Post Office). The request must be notarized and contain a full explanation of the reasons the committee filed late. Upon receiving your request, the Commission staff will schedule your request for an upcoming Commission meeting.

Under 21-A M.R.S.A. § 1062-A(2), the Commission may waive the penalty if it determines that the report was late due to 'mitigating circumstances,' which are defined as: (1) a valid emergency of the committee treasurer; (2) an error made by the Commission staff; or (3) other circumstances determined by the Commission that warrant mitigation of the penalty, based upon relevant evidence presented that the committee made a bona fide effort to file the report on time, including, but not limited to, unexplained delays in postal service or interruptions in Internet service. Also, the Commission may waive the penalty if it is disproportionate to the level of experience of the person filing the report or the harm suffered by the public from the late disclosure.

The Commission requests that the committee pay the preliminary penalty within two weeks, if it does not intend to request a waiver. Please call me at 287-6221 if you have any questions.

Sincerely,

Cindy Sullivan, PAC Registrar,  
Enc.: PAC penalty matrix

**COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES  
PENALTY MATRIX FOR LATE POLITICAL ACTION COMMITTEE REPORT FILINGS**

**BASIS FOR PENALTIES  
21-A M.R.S.A. Section 1062-A**

**Committee Name:** Black Bear Entertainment      **Report Title:** January Quarterly  
**Previous Violation(s):** 0 this quarter      **Due Date:** January 19, 2010  
**Filed Date:** April 15, 2010

The penalty for late filing of a required report is a percentage of the total contributions or expenditures for the filing period, whichever is greater, multiplied by the number of calendar days the report is filed late, as follows:

For the first violation, 1%  
 For the second violation, 3%  
 For the third and each subsequent violation, 5%

**A penalty begins to accrue at 11:59 p.m. on the day the report is due.**

<b>Penalty Example:</b>		<b>Your Penalty is calculated as follows:</b>	
The treasurer files the PAC's report two (2) days late. The PAC has not had any previous late violations this biennium. The PAC reports a total of \$2,500 in contributions and \$1,500 in expenditures for the filing period. The penalty is		Contributions / Expenditures:	<u>\$480,608.65</u>
\$2,500	Greater amount of the total contributions received or expenditures made during the filing period	x	
		Percent Prescribed:	<u>1%</u>
X .01	Percent prescribed for first violation		<u>\$4,806.09</u>
\$25.00	One percent of total contributions	x	
		Number of days late:	<u>87</u>
X 2	Number of calendar days late		
\$50.00	Total Penalty	Total penalty accrued:	<u><u>\$418,129.83</u></u>

**Any penalty of less than \$10 is waived.**

Violations accumulate on reports with filing deadlines in a 2-year period that begins on January 1st of each even-numbered year. Waiver of a penalty does not nullify the finding of a violation.

**A required report that is sent by certified or registered United States mail and postmarked at least 2 days before the deadline is not subject to penalty.**

**MAXIMUM PENALTIES**

21-A M.R.S.A. Section 1062-A(3)

\$10,000 for 11-Day Pre Election reports, 42-Day Post-Election reports, 24-Hour reports  
and for Quarterly reports