Agenda Item #1

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

Minutes of the January 27, 2011, 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 G. Duchette, Esq.; Margaret E. Matheson, Esq., Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne; Counsel, Phyllis Gardiner

At 11:00 a.m., Commissioner McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the October 26, 2010 Meeting

Ms. Matheson moved to accept the minutes as drafted. Mr. Healy seconded.

Motion passed unanimously (5-0).

Agenda Item #2. Reviewing Staff Determination/Cutler Files Website

Mr. Wayne said that at the December 20, 2010 meeting, the Commissioners determined that there were two individuals involved with creating the Cutler Files website. He said the Commission found John Doe #2 in violation of 21-A M.R.S.A. §§ 1014(2) and (2-A) for not including required disclosure information on the Cutler Files website, and assessed a $200 penalty against him. He said it was determined that John Doe #1 had not violated any election law. Since that meeting Dennis Bailey had come forward and identified himself as John Doe #2. Mr. Wayne said the staff drafted a proposed determination as well as an amendment to the determination which was suggested by Commissioner Healy.

Mr. McKee explained that at the last meeting it was decided what the findings should be and the determination proposed in draft today supports that decision.

Mr. Wayne said the Cutler campaign attorney has requested that the Commission disclose the identity of John Doe #1 at this time. This is opposed by counsel for John Doe #1. Revealing the identity of John Doe #1 was not part of the Commission's decision at the December 20 meeting.

Mr. McKee said the reasons for not disclosing the identity of John Doe #1 were that there was no finding of violation of campaign finance law by John Doe #1 and there were legitimate concerns raised regarding the right to engage in anonymous political speech.

Mr. Healy said another important consideration underlying the Commission's determination is that they cooperated with the investigation under the assumption that their identity would not be revealed. They voluntarily came forward and cooperated. Had they not done so, there might never have been an investigation. Mr. Healy asked whether the staff's investigative report would still remain confidential.

Ms. Gardiner said her understanding was that the report would remain confidential. However, she said if the final determination were appealed, that report would become part of the administrative record submitted to the court. In that case, the Commission could propose to the court that the report be kept under seal.

Mr. McKee said the Commission could be sued as a result of either direction it took, whether to disclose the identity or not. He said the best approach for the Commission would be to stand by the original decision to protect the identity. He said in either case, the court can decide what should be revealed, not the Commission.

Mr. Healy moved that the Commission adopt the proposed amendment to the draft findings of fact and determination. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Mr. Duchette moved to accept the draft Commission determination and make it a final determination. Mr. Healy seconded.

Mr. Healy stated that the Commission found no evidence that John Doe #1 made any expenditures to finance the Cutler Files communication. The actual communication was financed by John Doe #2.

Motion passed unanimously (5-0).

Agenda Item #3. Request for Waiver of Late-Filing Penalty/American Cancer Society

Mr. Wayne explained that during 2010, Megan Hannon worked as the Director of Government Affairs and Advocacy for the American Cancer Society. She was registered with the Commission as a lobbyist. She resigned from her position in June 2010 and terminated her 2010 lobbyist registration. The association did not realize that it was required to file an annual report by December 30, 2010. The American Cancer Society requests a waiver of the $200 preliminary penalty.

Hilary Schneider, Maine Cancer Society, explained that she is the successor to Megan Hannon. She said the Society knew it had to file; however, Ms. Hannon said she had filed before she left her position. When the Commission contacted them about the late filing, Ms. Hannon went back on the website and discovered that she had filed the June report but not the annual report due in December. At that point, Ms. Hannon filed the annual report immediately. Ms. Schneider explained that she could not access the site because she did not know Ms. Hannon's user code and password.

Mr. Healy said he thought it may be beneficial for the Commission to have a discussion about granting penalty waivers. He was not commenting on this case or any case in particular, but he noticed that there were a number of requests for a waiver or partial waiver of a small penalty to an even smaller one. He expressed concern over the cost effectiveness of reducing penalties citing staff time and Commissioner's time to review these matters.

Ms. Matheson moved that the Commission accept the staff recommendation and grant a partial waiver and assess a penalty of $100.

Motion passed unanimously (5-0).

Agenda Item #4. Request for Waiver of Late-Filing Penalty/Lewiston Democratic City Committee
Mr. Wayne explained the Lewiston Democratic City Committee was required to file a campaign finance report on October 22, 2010 (11 days before the general election). The committee filed the report seven days late on October 29, 2010. The amount of the preliminary penalty was $119.14, based on the formula in the statute. The committee's treasurer, Andrea Jermain, requests a waiver of the late-filing penalty because she was not informed by other committee members of the duty to file a campaign finance report.

Ms. Matheson moved to accept the Commission staff recommendation and decline the waiver request and assess a penalty of $119.14 against the committee.

Motion passed unanimously (5-0).

Agenda Item #5. Request by Joseph Baiungo Concerning Leadership Political Action Committees
Mr. Wayne explained that while Maine Clean Election Act candidates are prohibited from raising private funds for their own campaign, they are allowed to form political action committees (PACs) to raise private money for various other purposes. He said concerns about this issue have been raised before and bills have been submitted to the Legislature to address it. However, there has not been any success in developing an acceptable solution. He explained that there are essentially two types of PACs that are at issue. Some MCEA candidates form leadership PACs which they solely control. Some candidates participate in a PAC organized by a legislative caucus, such as the House Republican Fund or the House Democratic Campaign Committee. He said these types of PACs are controlled by the senior members of a legislative caucus in order to get their selected candidates elected. He said successful fundraising by Legislators to support their candidates or caucus is viewed as an important part of becoming a leader in the Legislature. Some have expressed concern that if restrictions are placed on MCEA candidates regarding their PAC involvement and fundraising, it could unfairly disadvantage them if they aspire to a leadership role. He said this restriction could deter candidates from becoming a Maine Clean Election Act candidate.

Joseph Baiungo from Belfast explained his concern that a Clean Election Act candidate who is supposed to be free from influence of money is allowed to solicit and receive contributions for a PAC. In speaking to Legislators who approached him for contributions, he discovered that they did not assert that this practice was in compliance with the spirit of the Maine Clean Election Act. He said the people he spoke with only

gave excuses as to why it was acceptable. Candidates and Legislators justified it by saying that "everybody does it." Another common excuse was that Legislators felt they had a duty as a leader to fundraise this way. He said this reason is not acceptable in his view. Neither political ambition nor pressure from others inside the candidate's party to raise money justifies circumventing the true intent of the citizens who voted for the Act – that candidates should be able to be free from the influence of special interests and money. He said if someone has political ambitions to be a leader and feels they are required to fundraise and ask for money, that candidate should run traditionally. He said MCEA candidates who supposedly run free from influence of money must be held to a higher standard which would prohibit them from asking for money under the guise of a PAC.

Mr. Baiungo said he would like to see the Commission take a position on this issue and make a recommendation to the Legislature that this practice is not acceptable in the Commission's view. He said he would like to see the Commission make this acknowledgment to the Legislature.

Mr. Healy asked whether the candidate who solicited Mr. Baiungo had his own PAC of which he was the sole decision maker for the PAC.

Mr. Baiungo said he was.

Mr. Healy asked if the matter would be less offensive to Mr. Baiungo if the candidate was raising money for a local party committee.

Mr. Baiungo said that if one accepts the premise that money buys influence or, at least, accepts that there is an appearance of impropriety, then it is reasonable to prohibit Clean Election candidates from soliciting contributions for any political purpose.

Mr. Duchette asked whether Mr. Baiungo had also considered another intent behind the Act, which was to give people who would not otherwise be able to afford to run a campaign the ability to do so. He asked whether Mr. Baiungo thought that these candidates would be at an additional disadvantage.

Mr. Baiungo said a first-time candidate would probably not be forming a leadership PAC. He said candidates have the option of running traditionally financed or publicly financed and if someone agrees to run a publicly financed campaign free of outside influence, they have to agree to the limits. He said he thought that was a reasonable condition to place on a candidate accepting public funds.

Mr. Joseph Greenier, concerned citizen from Stockton Springs, said he and his wife have expressed concern over this very issue for several years. He said this behavior goes against the intent of the Act because of the money influence. He said the definition of "clean elections" should be established. He also said a candidate seeking leadership should not try to run as a publicly funded candidate.

Ann Luther, co-chair of Citizens for Clean Elections (MCCE), said her organization has been concerned about this issue for a while also. She said in her capacity with the League of Women Voters, she wrote a research paper on the affects of leadership PACs, caucus PACs, and candidates fundraising for PACs. She said Maine is one of the few states nationally that has no limits on contributions to PACs. She said the problem arises not only with respect to Clean Election candidates but traditionally financed candidates as well. When Maine citizens passed the Maine Clean Election Act, they also established low contribution limits for privately financed candidates. Even though a candidate may be privately financed, Maine citizens clearly wanted to reduce the influence of money on those candidates also. However, privately financed candidates can also raise unlimited contributions through their own PACs. She said leadership PACs are used as a fundraising tool most commonly by one party and the money flows down to caucus and party PACs. She said an important consideration is whether MCEA candidates, who agree to limits on how much they can spend and restrictions on raising private funds, should also be restricted from raising funds for their caucus PAC or political party. The problem is broader than just MCEA candidates and leadership PACs. She said the Maine Citizens for Clean Elections believes that a solution may be to limit contributions to all PACs. She said although it has not been popular, they have introduced legislation in the last two sessions and will continue to submit legislation regarding this issue.

Mr. McKee shared the concern regarding publicly funded candidates soliciting for the candidate's PAC. Perhaps it is less problematic when the situation involves MCEA candidates fundraising for caucus PACs and party committees which will benefit a larger group of candidates. The staff has proposed some

changes to § 1015 regarding contributions to single-candidate PACs. It may be that this issue has to be approached in an incremental fashion.

Ms. Luther re-stated that, at least for one party, leadership PACs are a means to raise and channel money to the caucus PACs and party committees. She emphasized again that the corrupting moment is not when the money is spent but when the solicitation and contribution are made. That is why the focus of any solution needs to be on contributions.

Mr. Healy stated, in his opinion, PACs are driven to fundraise because contribution limits are low. He said he lobbied at the Legislature from the 1970s to 1983 and it was not until the mid-1980s that any Legislator solicited him for a campaign contribution. He said, for him, the ethical problem arises when Legislators solicit during the legislative session. He also said Clean Election candidates should be allowed to raise funds for a gubernatorial candidate in the same party.

Ms. Luther said research has been done by the U.S. General Accountability Office regarding whether the Clean Election Act has caused an increase in PAC fundraising activity in Maine. She said they found no evidence to show that to be the case. She said there has been an increase in independent spending and PAC fundraising nationwide, even in those states that do not have clean election laws. She said more PAC contribution limits should help prevent the appearance of corruption.

Agenda Item #6. Consideration of Statute Changes Proposed by Staff

Mr. Wayne summarized the proposed changes regarding the new requirement that municipal candidates and committees report to the Commission rather than the municipal clerks. The proposal would reverse the 2009 law, which requires the Commission to take over the campaign finance reporting from the municipal clerks. Under the proposal, the municipalities would continue to receive the reports and provide support to the municipal candidates. But the Commission would be responsible for making electronic copies of the reports available to the public on the Commission's website. He said that the original issue that the bill sought to address was to increase the accessibility and availability of those reports for the public.

Ms. Matheson noted the cost factor associated with having the Commission staff taking on the reporting process for municipal elections as well.

Mr. McKee asked whether the Commission wanted to address the issue Mr. Baiungo raised earlier regarding clean election candidates fundraising for PACs in the proposed statutory changes submitted to the Legislature.

Mr. Wayne explained that a bill may be submitted within 90 days from the general election which would be February 2. He said a proposal could be drafted and submitted if the Commission wished. The Commission could also express their concerns about this issue in a letter to the Veterans and Legal Affairs Committee.

Ms. Matheson said that if the Commission did decide to address this issue with proposed legislation, her preference would be that it be done in a separate bill rather than including it in the Commission's bill.

Mr. McKee suggested a bill that would prohibit Maine Clean Election Act candidates from soliciting for their own PACs which are controlled by them solely.

Mr. Duchette said he would prefer a letter from the Commission rather than submitting a bill. He said he was not comfortable setting limits on where money should come from. He said a letter stating the concern by the Commission would be his preference and then let the Legislature's policy makers iron out the details.

Ms. Matheson agreed with the approach suggested by Mr. Duchette.

In response to a question from Mr. Healy, Mr. McKee said that he was proposing that the limitation be for MCEA candidates. He would have some concerns about extending the limitation to traditionally financed candidates as well.

Mr. Healy asked whether there would be a constitutional problem with prohibiting all Legislators from fundraising while the Legislature is in session.

Mr. Wayne explained that Legislators, the Governor, and the other constitutional officers are prohibited from soliciting or accepting contributions from lobbyists and their clients during the legislative session.

But the prohibition does not extend to others who may want to contribute to a leadership PAC or other PAC in which the Legislator is involved. This was not as broad a ban as Mr. Healy was suggesting but it has reduced the amount of fundraising during the session.

Ms. Gardiner suggested that in the section of the types of communications that would be exempt from the disclaimer requirement, the Commission may want to consider excluding communications by individuals who acted with the authorization of a political action committee or party committee as well as a candidate or candidate committee.

Mr. Duchette moved to adopt the proposed changes with the amendment in the additional materials and the change to include Ms. Gardiner's suggestion in § 1014(6). Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Mr. McKee asked whether the Commission wished to propose a separate bill regarding MCEA candidates soliciting for their own PACs.

Mr. Wayne suggested that a draft could be done quickly and submitted to Commissioners through e-mail.

Mr. McKee said the other option would be to submit a letter from the Commission to the Veterans and Legal Affairs Committee in which the Commission expresses its concerns on this issue in connection with one of the PAC bills already submitted.

Mr. Wayne suggested sending a letter as well as having him follow up with the co-chairs of the Veterans and Legal Affairs Committee to express that the Commission believes that this is an important issue and that the Commission will assist the VLA Committee in any way if the Committee decides to take up this issue in a bill.

Mr. McKee said, and Commissioners agreed, a letter may be a better way to go which would allow more time to think through the details. Mr. Wayne will draft a letter from the Commission to the VLA

Committee expressing the Commission's concerns about this issue for the Commission's review at the next meeting.

In consideration of the Commission's practice to address agenda items out of order to accommodate the attendance of public participants regarding particular items, the following agenda items were taken out of order:

Agenda Item #8. Exceeding Spending Limitations for MCEA Candidates/Brian Hale

The campaign of Brian Hale inadvertently spent more than was permitted under the Maine Clean Election Act program, because the candidate did not tell his treasurer of two purchases he made in July and August 2010.

Mr. Hale explained a purchase was made after the death of his first treasurer and did not get listed on the expenditures. He said he takes full responsibility for the error.

Mr. Healy moved that the Commission accept the staff recommendation and find the campaign in violation of 21-A M.R.S.A. § 1125(6) and assess a civil penalty of $50. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #9. Exceeding Spending Limitations for MCEA Candidates /Sen. Roger Katz

Mr. McKee recused himself from consideration of this matter and left the meeting room.

The campaign of Senator Roger Katz inadvertently spent more than was permitted under the Maine Clean Election Act program, because his campaign did not receive an invoice from a printing company for signs ordered by a campaign volunteer. Sen. Katz showed good faith by contacting the Commission staff and looking for guidance on how to proceed and how to pay the bill. Even though the amount of the over-spending may seem large, the staff sees this as similar to past instances of over-spending.

Senator Roger Katz said that he accepted responsibility for what happened. He said he paid every bill as it came in. Although the bill is dated in September, he did not believe he received the bill until after the election and become aware of it then.

Mr. Duchette commented that Sen. Katz may have received an advantage over his opponent in that he had the benefit of additional signage shortly before the election, which was not paid for with MCEA funds.

Sen. Katz said that he would not be able to assess what impact it may have had.

Mr. Healy asked what percentage of his campaign total this expenditure constituted.

Mr. Katz said the total campaign was approximately $22,000. He said the only independent expenditure made in opposition was approximately $375. He received that amount in matching funds.

Mr. Youngblood said that he would vote in favor of the staff recommendation but that he was concerned that such a low penalty amount for significant overspending may lead some candidates to think that possible benefits of overspending outweigh the risk. If a candidate is only going to get a $50 penalty, it may be worth it to spend more than he or she is allowed to spend.

Joseph Greenier, concerned citizen from Stockton Springs, said he opposed the $50 fine because it was too low and sends the wrong message. He referred to a former unenrolled House candidate in 2004 who did not pay back $800 of his Clean Election funds and was penalized nearly $10,000 for the same type of issue that Mr. Katz is facing. He said candidates who have been given more money, like Senate candidates, have a greater obligation to account for their funds.

Mr. Wayne explained that this matter has been viewed in the same fashion as other previous cases of unintentional overspending in 2006 and 2008 and falls within past practice. He explained that this issue was not intentional and Mr. Katz self-reported his error.

Mr. Youngblood moved that the Commission accept the staff recommendation and find the campaign in violation of 21-A M.R.S.A. § 1125(6) and assess a civil penalty of $50. Mr. Healy seconded.

Mr. Healy expressed concern again over the Commission levying small penalties. He said the cost of administering small penalties is not cost effective to the State or Commission.

Mr. Duchette said he would support raising the penalty to $100.

Motion passed (3-1). Mr. Duchette opposed.

Mr. McKee rejoined the meeting. The Commission resumed the scheduled order of agenda items at this point.

Agenda Item #7. Report from Commission Auditor

Mr. Vincent Dinan presented the first two audits of 2010 Maine Clean Election Act candidates in the general election, Representatives Denise Harlow and Adam Goode. No violations were found in the audits.

Mr. Dinan said that there were four specific areas of focus in the compliance reviews: media buys, payments to family members, independent contractor payments over $500, and travel reimbursement. He said these are areas that have been affected by recent statutory or regulatory changes or areas that candidates had had trouble complying.

Mr. Dinan said there was more money spent by Legislative candidates on media buys than in the past. However, not one campaign reported the media buys correctly or had all the required documentation. The usual practice is that the candidate will make a payment to a media buyer who then purchases ads from various media outlets. He explained that those payments to the media outlets must be itemized on the campaign finance reports. It is not enough to report the payment to the media buyer. The required documentation needs to prove that payments were made by the buyer to the specific radio/television. As a result of the new legislation regarding payments to family members, Mr. Dinan said very few candidates used family members to provide services during this election. For those that did, roughly half were able to provide evidence that the payment complied with the statute. If a candidate pays an independent contractor $500 or more in the aggregate, there must be some documentation that specifies the service provided and the amount and basis for compensation. Legislative candidates who used independent contractors, e.g., campaign managers, usually did have the proper documentation to support the payment. This was not always true in the case of gubernatorial candidates who use a great deal more independent contractors in

their campaigns. These campaigns were able to provide the documentation but only after the fact when the staff requested the documentation.

Mr. Dinan said the other area of concern was documentation needed for travel reimbursements. He said candidates just do not bother to use the travel log and although the requirement has been explained to them, there are still a few that do not use it to document their travel.

Mr. Healy asked if there were substantial amounts of Clean Election funds going towards travel by candidates.

Mr. Dinan said it is not a hugely significant amount compared to other types of expenditures such as advertising and mailing.

Mr. Healy stated his view that candidates ought to be willing to forego their mileage expenses. He said he does not support using public money for one's own personal expenses since that could be abused and would be difficult to discover.

Mr. Youngblood said consideration has to be given to candidates that have large districts that may be comprised of 60 communities, while other candidates down in southern Maine, such as Portland, do not have to travel outside of their town.

Mr. Dinan confirmed this. He said senatorial candidates in the northern part of the state have larger expenditures for mileage, while those in the southern part of the state have smaller expenditures for travel reimbursement, if any.

Ms. Matheson asked what the ramifications were if candidates did not comply with the reporting and documentation requirements for media buys.

Mr. Wayne explained that the Commission does have a rule that specifies how payments to vendors and sub-vendors are to be reported. The guidelines are spelled out in the Candidate Guidebook. However, this has been a difficult requirement for candidates to comply with. It will take more education to increase

compliance. The staff does not view reports as late-filed reports if the required itemization is not done but, as part of the compliance review, the staff will contact the candidate to get more information and to help the candidate complete the report correctly. Even though the report may not have the itemization of the expenditure, the staff has not seen any evidence of misuse of funds in these cases. Mr. Wayne said the guidelines do state that if the required travel log cannot be produced, the Commission *may* require the money be repaid to the Fund. He said that is an option the Commissioners may want to take for future cases.

Ms. Matheson suggested that, if the intent of the statute and rule is that the documentation to support a payment to an independent contractor be created in advance of or contemporaneous with the provision of services, the statute should be amended to make that requirement clearer.

Mr. Wayne explained that when the bill was submitted, the Legislature preferred that it not require documentation prior to the services rendered. If the Commission thought it would be an improvement to the program, it can be added to the Commission's bill.

Mr. McKee said he did not think that it would be too much of a burden for the candidates. The document itself can be a simple handwritten statement of what the independent contractor is going to do and how much he will get paid.

The Commission agreed that the requirement that the document be contemporaneous with the agreement to provide services be added to the Commission's bill.

Agenda Item #10. Update on Republican State Leadership Committee

Mr. Wayne explained that he received some investigative information concerning the enforcement matter and is expected to have some final information for the Commission's meeting on February 17, 2011.

Mr. Healy said he would like the Commission to have a discussion in the future regarding the penalty for unintentional overspending of MCEA funds. He suggested that the penalty assessed be equal to the amount overspent, up to the statutory maximum of $10,000.

Mr. Healy moved to adjourn. Mr. Duchette seconded. The motion passed unanimously.

Meeting adjourned at 2:00 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director