

Minutes of the October 6, 2004 meeting of the
Commission on Governmental Ethics and Election Practices
Held in the Commission's Meeting Room,
PUC Building, 242 State Street, Augusta, Maine

Present: Chair James O. Donnelly; Hon. Andrew Ketterer; Hon. Terrance MacTaggart;
Hon. Jean Ginn Marvin. Staff: Executive Director Jonathan Wayne; Counsel Phyllis
Gardiner.

At 9:00 a.m., Chair Donnelly convened the meeting. The Commission considered the
following items:

Agenda Item #1 – Request for Guidance from Trade Associations on Independent
Expenditures

This agenda item was continued from the September 8 meeting. A number of trade
associations have requested guidance regarding the 2003 change in the law of
independent expenditures.

The Commission Director explained the situation regarding the change of the law and the
process in which the staff deals with independent expenditures. He went on to say that at
first this seemed to be a simple issue, but as more and more questions came up it became
much more complicated, which was the reason behind the guidance memo. The
Commission Director explained the guidance memo to the staff and asked their opinion
as to whether or not the memo should be distributed and/or put on the web site for public
viewing. The staff recommendation was that the Commission not create new categories
of communication that would be exempt under the law, and that the Commission deal
with these issues on a case-by-case basis.

Mr. MacTaggart asked how this compared to the federal model, and the Commission
Director replied that the federal law says that voter education is fine so long as it doesn't
expressly advocate the election or defeat of any candidate. He explained that the trade
commissions wanted the Ethics commission to adopt a similar view, but that he felt
Maine wasn't trying to be like the federal example, and that the Commission should
proceed on a case-by-case basis.

Am Pearson of the Maine Citizen Leadership Fund took the floor, and urged the
Commission to go along with what the staff had recommended. He stated that the Maine
law was designed to deal with issues specific Maine. He stressed the importance of
people feeling comfortable participating in MCEA and that this law helps to prevent
electioneering. Mr. Pearson stated that there is no limit on free speech and that triggering
matching funds doesn't constitute harm to any person. He then summarized how the law
actually works in practice. Mr. Pearson went on to say that the McConnell Supreme
Court decision affirmed the decision made by the Legislature. He felt that a verbal

communication should not be counted as an expenditure, and that there was no intent to take into account every conceivable communication. He also said that most voter guides would fall below the \$100 limit and therefore not require an independent expenditure report, and that public information doesn't have a market value.

The Commission Director asked if the Legal and Veterans affairs Committee actually discussed voter scorecards. Mr. Pearson replied that it was discussed in committee and that the intent of the committee was that the scorecards would be covered as an exemption so long as it met the cost threshold of \$100. He also stated his belief that characterizing a voter record in a neutral way. Ms. Gardner asked about the cost of production as compared to the belief that public information has no value. Mr. Pearson replied that you would count the design, production and dissemination of something depending on whether or not it is public information. Mr. Ketterer asked if it would be helpful to send out this memo, and Mr. Pearson replied that he felt it would be, and that this interpretation of the law is consistent to what he felt was the intent of the law. Ms. Ginn Marvin expressed her doubts as to how money used to create an event or function cannot be counted as an expenditure. Mr. Pearson replied that the function itself is not a dissemination. He also stated that the \$100 threshold was the important factor. Mr. Pearson went on to state that the Commission should make clear the definition of design, production and dissemination. The Commission Director felt that he disagreed with Mr. Pearson in that the costs of holding an event could be counted towards an actual dissemination. Ms. Gardiner felt that the costs of an event that allows a dissemination to occur would be on the outer boundaries of what could be considered an independent expenditure

Abby Holman from Alliance for Maine's Future took the floor, and explained that she felt that in previous instances various individuals had made some inaccurate and misleading comments about her organization. She briefly went over her memo with the Commission, which stated that the federal law and the state law were much more in sync then what the Commission staff believed, and guidelines as to how her organization and others feel the law should be interpreted. She cautioned the staff to only consider what was written as to what the intent of the Legislature was and to not take what others say as the exact intent of the Legislature. Ms. Holman summarized the FCC stance on what an expenditure is, and how various unions and trade organizations can communicate with their members. She also stated her opinion that this possible interpretation of the law doesn't meet the McConnell test of the law as suggested by the federal courts. She went on to say that as far as Maine law was concerned she felt there would be inconsistency with interpreting different statutes. Ms. Holman felt that simply just having the names of candidates on a material shouldn't trigger matching funds. She also expressed her opinion that this interpretation would put the Commission in a very difficult position in terms of dealing with these issues. She restated her belief that this would cause a chilling effect, and that it would cause major problems.

Mr. Ketterer asked Ms. Holman as to her recommendation, and she replied that the statute be interpreted in the same way as the federal guidelines. She also felt examples of exceptions should be included. Ms. Gardiner asked what Ms. Holman meant by

electioneering, and Ms. Holman replied that she looked at Maine law for guidance. The Director asked why couldn't you let various businesses know about the independent expenditures, and she replied that they wouldn't respond. The Director then asked why should employers be given an exception, and Ms. Holman replied that they should not get an exception.

Tim Belcher took the floor, and he felt that a case by case approach would be appropriate. He felt that employers could use their position and power to campaign for various candidates, and that this interpretation would help prevent certain "nightmare" scenarios. He then went over various mailings and pointed out that a rating created by various organizations cannot be neutral and that it qualifies as advocacy as opposed to simple voter education. He also felt that based on the McConnell decision it could be considered constitutional to regulate campaign speech in the last few days of the election by looking at the nature of the communication.

Arn Pearson retook the floor, and further explained the differences between the federal and state guidelines. He then outlined the procedures for communications that are not intended to influence the election.

Mr. Ketterer moved, Mr. MacTaggart seconded, and the Commission voted unanimously to send out the guidance memo as drafted. Mr. Ketterer commented on the difficulties surrounding this issue, that it is important to do something, and that guidance should be good enough for right now. Mr. Donnelly commented that he supported the motion but that he felt it would have a chilling effect. He also wanted to discuss this with Veterans Affairs to be able to clear up this issue even further.

Agenda Item #2 – Request for Matching Funds by Green Independent Party

This item was unanimously tabled to the following meeting.

Agenda Item #3 – Scheduling Dates for November and December Meetings

The Commission decided to meet on October 15th, October 28th, November 4th.

The meeting was adjourned.