

Minutes of the October 28, 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 Donnelly; Hon. Andrew Ketterer; Hon. Jean Ginn Marvin; Hon. A. Mavoureen Thompson (by telephone); Hon. Terrance MacTaggart. Staff: Executive Director Jonathan Wayne; Counsel Phyllis Gardiner.

At 9:07 a.m., Chair Donnelly convened the meeting. The Commission considered the following items:

Agenda Item #1 – Request for Matching Funds Based Upon Mailings by State Republican Party

The Senate Democrats had requested matching funds based on a number of mailings of cards by the State Republican Party. The Senate Democrats had submitted two cards that spoke about the issues of health care and regionalization of government services. One side of each card suggested that Democrats will reduce services in the areas of health and education. The other side of the card described a Republican approach to the issues, and referred to a Republican Senate candidate and four Republican candidates for the House of Representatives. No independent expenditure report was filed regarding the mailings because the State Republican Party believed that the cards were within the "slate card exception." This exception was defined as "It only applies to the party committees and it's the payment by the party committee for the preparation, display or mailing or distribution of a printed slate card, sample ballot, or other listing of three or more candidates for political office. The Director explained that if it is exempted from expenditures, the Commission has always taken the position that it is recorded as an independent expenditure and it doesn't get matching funds. It has been a vehicle for promoting party candidates, but it doesn't qualify for matching funds.

The Director then explained that the question was: Is this an independent expenditure or is it exempted because it is a slate card? If the Commission found that this item was qualified for matching funds, then presumably there would be a significant increase in matching fund distribution.

Ms. Ginn Marvin asked if the Director had a recommendation. The Director replied that he would like to hear from the parties, that the Republicans moved forward thinking this would be covered, and that he felt there should be predictability on this type of expenditures. Ms. Thompson asked what was the area of dispute was as well as to how the picture of Rep. Mills impacts the decision as to whether it is a slate card or not. This was deferred until after the discussion.

Ben Grant, representing the State Democratic Party, took the floor. He stated that the Republicans did not follow Jonathan's recommendations when he indicated that everything was not covered by the slate card exemption. Mr. Grant said that the piece being discussed showed only the picture of one of the candidates and at least in the case of the Julie O'Brien piece it used the campaign's logo and it didn't use similar treatment for the other candidates. Mr. Grant felt that, to be qualified as a slate card exception, it should be the same for all candidates. Mr. Ketterer asked if Mr. Grant or anyone in his group had a specimen of what he considered to be a slate card. Mr. Grant replied that he did not have one with him.

Dan Billings, representing the Maine Republican Party, took the floor. He spoke to the exception and expressed his concern that the Commission should focus on the portion of the law pertaining to the "Other Printed Listing." Mr. Billings had two points concerning the advice by the staff: The first was that it was the staff's opinion, not the law. The second was that the former Director had previously indicated this was a broad exemption. Mr. Billings presented a letter, dated November 5, 2000, as an example, that the Commission had previously let this stand under the broad exemption. Mr. Billings felt that there should be more guidance as to what fits in this exemption and that the Legislature should take action for future reference, but that it should not affect this issues, due to staff opinion, Mr. Billings understanding of the law and past practice.

Mr. Ketterer asked, in reference to the Julie O'Brien pieces, what was the harm if, hypothetically, it was not a slate card or a sample ballot, but another type of printed listing? Mr. Ketterer remarked that it seemed like fairness would dictate the opponent of Ms. O'Brien would be entitled to matching funds because it was not prohibiting Mr. Billing's client from getting her message out. Mr. Billings replied that his group made strategic decisions on how to use resources based on the law and what we thought the results of the law would be and that, in our opinion, they would not trigger matching funds. If we thought they would trigger matching funds, Mr. Billings said, decisions would have been made differently. The Director asked about the other side of the card which appeared to have a very anti-democratic message, and how that fit with legal interpretation. Mr. Billings stated that he disagreed with the interpretation that it cannot have other issues listed, and that an issue message had been incorporated with the printed listing of the candidates. Mr. Ketterer then asked about, in reference to the letter concerning past practices which stated the Commission took no further action, could it not be possible that no further action was taken because it was well past the election date? Mr. Billings replied that while that was true, if the Commission was concerned some action would have been taken. Phyllis asked if this mailing was taken within the 21 days before election, and that if you are within the 21 day limit, would there be any limitation on what the rest of the card could say. Mr. Billings stated that the way the laws are written now, it is not an issue.

Doug Clopp, representing the Maine Citizen Leadership Fund and Clean Election Fund, took the floor. He urged the Commission to provide matching funds in this case. He stated that just by putting names on the card does not make the card exempt. Mr.

Ketterer asked if matching funds should be triggered for any opponent of Julie O'Brien or all the candidates. Mr. Clopp answered that the matching funds should be only for the Julie O'Brien piece. Mr. Donnelly asked that if mailings went out in Kennebec County and it had three or more Democrats on the other side with a phrase concerning where the party stands and Penobscot County had three or more Republicans on it and that said do something positive, should matching funds be triggered. Mr. Clopp responded that would be the definition of a traditional slate card. The Director asked if the Commission had the right to police the right of what message someone chooses to put on the card. Mr. Clopp's replied that the Commission did not have that right. The Director asked if there was a past instance where Mr. Clopp had been at a Commission hearing where the verbiage of the message had been policed. Mr. Clopp replied that he felt this was an attempt to get around the disclosure laws. Ms. Ginn Marvin asked that if the piece in question was looked upon as an "other printed listing," would it be considered the same way that a slate card is. Mr. Clopp answered that he thought it was not the intent of the law for any listing to be exempt.

Senator Douglass took the floor, and stated that she had received a mailing from her opponent that was also similar with a listing of other candidates on the piece in black and the opponent's name also in color and larger font. She said she was a MCEA candidate and if this was considered an exception then she couldn't respond. She said if this had come out during the election and not after she could have better judged how to use her money.

Mr. Grant took the floor again, and urged the Commission to consider the wording in the Statute concerning the printing listing of similar treatments.

Mr. Ketterer stated that the purpose behind the statute was disclosure, and that various exceptions were listed within the statute. However, he didn't feel that the exceptions cover any or all printed listings, and that the Julie O'Brien piece should be considered an exception. However, he felt that matching funds should not be issued to any of the House candidates. Mr. Ketterer motioned and Ms. Thompson seconded to issue matching funds in an amount determined by staff for opponents of Lois Snow-Mellow, Julie Ann O'Brien and Peter Mills and not issue matching funds to any of the house candidates. Mr. MacTaggart did not feel the Commission would be policing free speech, and that he would support the motion. Ms. Ginn Marvin felt the law was not written clearly, that she agreed with the staff recommendation and would not support the motion. Mr. Donnelly brought up the importance of past decisions made by the Commission, and that the ad in question should not trigger matching funds. He also strongly recommended looking into this issue again in the future. The Commission voted 3-2 to issue matching funds in an amount determined by staff for opponents of Lois Snow-Mellow, Julie Ann O'Brien and Peter Mills and not issue matching funds to any of the house candidates. (Mr. Ketterer, Mr. MacTaggart and Ms. Thompson voted for the motion, Mr. Donnelly and Ms. Ginn Marvin voted against.) Due to time constraints concerning Mr. MacTaggart, Mr. Donnelly was made, seconded and was passed unanimously that Item #3 be considered out of order.

Agenda Item #3 - #6 – Missing “Paid for” Disclosure on Campaign Communications.

The Director explained that the election law requires that on campaign literature and advertising, there must be disclosure as to which person paid for the advertising, including the address, and that the candidate approves the advertising. He indicated that he had spoken to the four candidates in question, and that he felt they had complied and that he recommended a finding of violation and no civil penalty.

Kim Davis took the floor. She stated that, in terms of the violation of her advertisement in the Kennebec Journal, she had her disclosure in it and she must have missed the disclaimer when she submitted the ad. Mr. Ketterer asked that, in the proof that you looked at in the KJ, did it have the disclosure in it Ms. Davis said it did not have the disclosure, but it was not a complete proof. She admitted that she just missed it.

Mr. Ketterer moved and the Commission voted unanimously to adopt the staff recommendation and find a violation but assess no penalty in light of good faith efforts made by candidates and staff to resolve the problem (5-0).

There was a brief recess, during which Commissioner MacTaggart left for the rest of the meeting.

Agenda Item #2 – Request for Matching Funds by Senator Neria R. Douglass

The Director explained that Ms. Douglass made the Commission staff aware that a company in Auburn by the name of Tambran had sent out a mailer to its employees. The company said it sent it via mail, but there are conflicting comments suggesting it came via company mail. At the time of the meeting, the Director took the company's word that it was mailed. The company had 597 employees. Each employee received the Maine Economic Research Voter Guide and a form letter addressed to all employees. Ms. Douglass also sent an email which raises a number of issues. The question was whether the law was amended to cover only expenditures that cost more than \$100 to the candidate. The company sent information that 26.1% of their employees live within the Senator's new district. The Director also said that the company had been very cooperative during this investigation, and that the cost of the mailing (\$686.55) was provided by the company. A breakdown of the employees was also attached. Ms. Ginn Marvin asked if the Director had a recommendation. The Director replied he was very concerned that the Senator felt this was done to influence the election, and that it was fair to calculate the cost representing both the Senate and House districts.

Senator Douglass took the floor. She stated that a letter and a brochure went out naming her and her opponent and that there was a star by her opponent's name. She felt that this mailing did not have proper disclosure. Senator Douglass pointed out that most Republicans had a star by their name and most Democrats had a red mark by their names. She stated that this mailing had gone out to 156 of my constituents at a cost of \$179.00. She said that she felt the Commission should count the entire cost of the ad. She stated that she was a MCEA candidate and that she didn't have enough funds to counter the ad

in question. Senator Douglass expressed her opinion that the ad was advocating for her opponent and against her. She then indicated that she was prepared to speak about the monetary issue and that she felt that she should be awarded matching funds.

Ms. Thompson asked about the cost of the ad if the Senator had bought the ad. Senator Douglass responded that if she bought less than 200 it would cost her \$1.00 per piece. The Director asked if Ms. Douglass would view a Legislature score card in the same way as she viewed the brochure. Senator Douglass responded that anyone could go out and buy the brochure, but that it would come out of their campaign budget. If someone else bought the ad instead of the candidate handed it out, then she felt it was an independent expenditure. The Director asked why people would put credence in this brochure and letter. Senator Douglas replied that she thought that people would respect the company that mailed the brochure and would therefore make an assumption that the company was correct.

Phyllis asked, in regards to the expenditure portion only, that since the mailing did not go to just her constituents, was Senator Douglass asking for funds for all people on the mailing or just for people in her district. Senator Douglass replied that she was only asking for funds based on the people in her district and figured that to be a minimum of \$179.00. (.55 for postage, \$1.15 for each brochure times the 156 people in Senator Douglass district). The Director asked if it was fair to ask for each 156 voters instead of calculating the cost for half of that number, due to the fact that the brochure indicates other candidates that it might also adversely affect. Senator Douglass replied that it had a direct effect on her race and it should have a full value for each of the 156 voters, and that others could ask for funds of they wished.

Abby Holman took the floor. She stated that she had looked at score cards from other organizations. Some organizations used plus and minus, some used a letter grade, some used other similar methods to do scoring on the Legislators. Ms. Holman felt that the people who created the score cards and were responsible for addressing legal concerns had decided that \$100 per person would be a fair amount.

[Due to a technical malfunction, the connection with Commissioner Thompson was lost. After repeated attempts to re-establish communication, the Commission decided to continue the hearing.]

Ms. Holman pointed out the difficulty in precisely figuring out how to determine the cost associated with this kind of situation.

Doug Clopp took the floor, and stated that he would like to see consistency and predictability with regards to this issue. He felt that the Legislature was clear on what an employer could do. Mr. Clopp felt the cost of the ad divided by the number of candidates involved was the way the guideline was intended to be interpreted and followed.

Mr. Donnelly asked the Director for a recommendation. The Director replied that there were 3 methods to calculate the appropriate amount of matching funds to be awarded. One method was to take the total cost of the ad and divide that total by the 186 races. He noted that Senator Douglass wanted the amount of matching funds to be determined according to the number of people that live in her district. The director stated that he felt both the House and the Senate should be taken into account, and that by doing so there was no way that the figure would come out to \$100 per person. He said that as long as the cost of the ad didn't add up to \$100 per candidate, matching funds should not be awarded.

Mr. Donnelly asked about the third way to calculate matching funds. The Director explained that the third way was to determine how many towns do the 600 employees that received the mailing live in. From there, you could break down the districts involved, and from that number you could figure out the amount of matching funds.

Ms. Ginn Marvin moved to not award matching funds to Senator Douglass on the basis that the ad in question did not meet the \$100 threshold, and Mr. Ketterer seconded for the purpose of discussion. Ms. Ginn Marvin said that it was not clear how you determine the amount matching funds, but it is clear that this ad doesn't meet the \$100 threshold. The Commission voted unanimously to not award matching funds to Senator Douglass on the basis that the ad in question did not meet the \$100 threshold.(4-0)

#### Other Items

There were two other items concerning matching funds. Mr. Grant requested matching funds based on a radio ad which had been running during the 21-day period. The ad would have covered all 186 candidates in the General election, because every voter has a House and Senate candidate in their district. The Director asked Mr. Grant if he felt the identity of the candidate was clear. Mr. Grant replied that he felt that the identity of the candidate is clear. The Director asked if the Commission should take into account the fact that due to the nature of the radio ads that a lot of matching funds should be issued. Mr. Grant replied that it depended on if the ad met the \$100 threshold.

Mr. Ketterer asked what it was that Mr. Grant wanted the Commission to do. Mr. Grant replied he was asking for matching funds to every Democratic House and Senate candidate for the radio ads if the \$100 threshold is reached.

Dan Billings took the floor, and pointed out that in his earlier argument. he. I made a distinction of a finite group of candidates, and when talking about 186 candidates, that doesn't specifically reference the Republican leadership which is only four. He went on to say that the issue of consistency is terribly important, and if you accept that argument then the \$100 threshold needs to be considered.

The Director said there is an argument in favor of Mr. Grant's position. He asked if Mr. Billings thought if "clearly identified" had any meaning in this case. Mr. Billings

stated he thought that it meant the language before the identification is important and the identifications are important because they don't want to use specific names.

Ms. Gardner stated that the issue was whether it was an unambiguous reference to a candidate or candidates. Ms. Ginn Marvin asked if there was a way to find out how much the actual funds were and once the total costs were found, the staff could divide between all the candidates regardless of party and get the right information. The Director replied that a little investigation would be required in order to get that information, but that the staff could get it. Mr. Ketterer stated that he didn't agree with the earlier decision, that one candidate should get funds and not the others. Therefore, he found issues being consistent with the earlier decision, when he didn't vote for the original decision in the first place.

Mr. Ketterer moved and Mr. Ginn Marvin seconded a motion to deny the request on the grounds that it was a generic ad and did not identify any specific candidate. Mr. Donnelly stated that in the last case, the evidence that was presented indicated specificity for the members involved in that ad. In this case, in his opinion, this ad doesn't meet the criteria for triggering matching funds. Ms. Ginn Marvin stated that she agreed with the previous case and that she would vote against the motion. The Commission voted 2-1, and the motion passed. (Mr. Ketterer and Mr. Donnelly voted for the motion, Ms. Ginn Marvin voted against.)

With the regards to the second item, The Director explained that he had received a fax the following evening from Donald Lewis and Carey Tupax regarding what they said were flyers that were handed out, addressed to parents, guardians and citizens. According to the Director these ads speared to be against the Tax Cap. The provision in the law states that individuals or organizations, who are other then PAC's, who collect or spend more than \$1500 to influence a ballot question still have to file a report with the Ethics Commission. The Director asked the Commission if the report is necessary. Mr. Donnelly directed the Director to send a letter requesting the information, along with the report, so that if a report is required they can fill it our and send it back to the Commission. Mr. Donnelly asked about when the report is due, and the Director replied that if they had gone over \$1,500 before October 27<sup>th</sup>, the report was due October 27<sup>th</sup>. If that amount had been reached after that, the report was due December 14<sup>th</sup>. Ms. Ginn Marvin stated she thought they should be told because it was likely they were unaware of the rule. The Director said he would get a letter out today.

Joseph Green took the floor, and spoke to an issue where people were not using their full name on the ballots. The Director replied that this was a Secretary of State issue. Mr. Green stated that one candidate has signed his name in three different ways. The Director said that as long as the variance is not confusing, the Commission accepts it.

There being no further business, the Commission adjourned.

Respectfully submitted,

**Jonathan Wayne**  
**Executive Director**