



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

Minutes of the October 20, 2006 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 (Pro Tempore) Hon. Andrew Ketterer; Hon. Vinton E. Cassidy; Hon. Michael P. Friedman. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:05 A.M., Chair (Pro Tempore) Andrew Ketterer convened the meeting. The Commission considered the following items:

Agenda Item #1 – Ratification of Minutes of the September 22, 2006 Meeting

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission adopt the minutes as printed.

Ms. Gardiner said that the minutes should include a description of the discussion and motion that occurred during the transcribed portion of the meeting.

Mr. Wayne asked if the staff should amend the minutes and present them to the Commission at its next meeting.

Mr. Ketterer asked if the ratification of the minutes was necessary for an appeal to go forward. Ms. Gardiner replied that it was not.

Mr. Cassidy moved, Mr. Friedman seconded, and the Commission voted unanimously (3-0) to table Agenda Item #1.

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Agenda Item #2 – Request for Penalty Waiver/Edward Blais

Mr. Wayne said that Mr. Blais was a write-in candidate in the primary election for the position of sheriff in Cumberland County. Mr. Wayne said that Mr. Blais received enough votes in the primary to become the Republican nominee in the general election. Mr. Wayne said that Mr. Blais did not file the 42-day post-primary report that was due on July 25. Mr. Wayne said that Mr. Blais had difficulty with the Secretary of State's office in determining whether or not he was a candidate in the general election. Mr. Wayne said that the Secretary of State's Director of Elections called him to say that the office was counting the votes of regular candidates before counting write-in votes. Mr. Wayne said that Mr. Blais was also confused about having to file financial reports with the Commission when the Secretary of State's office oversees elections. Mr. Wayne said that the preliminary penalty was \$115, but the staff recommended reducing it by half to \$57.50. Mr. Wayne said that this reflected the Commission's vote at its last meeting in regard to a similar situation.

Mr. Friedman moved, and Mr. Cassidy seconded, that the Commission accept the staff recommendation and reduce the penalty to \$57.50.

Mr. Ketterer said that write-in candidates had been treated differently because they were not as visible to the Commission as regular candidates.

The Commission voted unanimously (3-0) to accept the staff recommendation and reduce the penalty to \$57.50.

Agenda Item #3 – Report on Auditing Maine Clean Election Act Candidates

Vincent Dinan introduced himself as the Commission's auditor. Mr. Dinan said that he submitted 11 results from the latest candidate audit, with all of them resulting in no exceptions. Mr. Dinan asked if the Commission would like to see audit results containing no exceptions or if they would only like to see audits that resulted in deficiency findings. Mr. Dinan said that 14 additional audits were in progress.

Mr. Friedman said that it was important for the public to see that the majority of candidates have no issues with their campaigns.

Mr. Ketterer asked Mr. Dinan how he selected campaigns for audit. Mr. Dinan responded that the audits were randomly selected from a list of all Maine Clean Election Act candidates.

Mr. Ketterer asked if Mr. Dinan weighted the results to ensure equal representation from all political parties. Mr. Dinan said that he did not and that the selection was truly random, although statistically more Democrats ran as publicly financed candidates than Republicans. Mr. Ketterer said that the results were valuable to include in the meeting's minutes.

Agenda Item #4 – Request for Matching Funds/Cumberland County Democratic Committee Newsletter

Mr. Wayne said that some of the language within the Cumberland County Democratic Committee newsletter could be considered express advocacy. Mr. Wayne said that the Woodcock campaign requested a determination on whether it was entitled to receive matching funds as a result of the newsletter. Mr. Wayne said that Rep. Lawrence Bliss, treasurer of the Cumberland County Democratic Committee, told him in a letter that the cost of the newsletter was \$784. Mr. Wayne said that the amount spent to expressly advocate the election of John Baldacci was less than \$100, which was the threshold for filing an independent expenditure report. Mr. Wayne said that the staff recommendation was to pay no matching funds to Woodcock or any other gubernatorial campaign. Mr. Wayne said the committee had conducted fundraising and spending in 2006 but was unaware that it had to file regular party committee reports with the Commission. Mr. Wayne said that there was a breakdown in communication with some of the county and town party committees on filing requirements.

Mr. Ketterer said that there seemed to be a problem either with the state party committees communicating with local party committees or high turnover among local party committee

treasurers. Mr. Wayne said that there was still a legal requirement to file the reports and that the reports could effect the election.

Dan Billings, appearing on behalf of the Woodcock campaign, said that the campaign was satisfied with the staff recommendation. Mr. Billings said that while the committee claims that its newsletters were sent to members, some of them were available in public locations.

Mr. Friedman asked Mr. Billings if he was withdrawing his request for matching funds. Mr. Billings replied that he was withdrawing the request and was satisfied with the results of the Commission staff's investigation.

Mr. Friedman moved, Mr. Cassidy seconded, and the Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #5 – Policies Regarding Legislative Mailings to Constituents

Mr. Wayne said that the Commission staff received complaints from candidates stating that their opponents' legislative newsletters were campaign-related. Mr. Wayne said that the Commission decided to take no action on those issues, but did hold a public workshop on July 19. Mr. Wayne said that the staff recommended that the current law was adequate and no changes were needed. Mr. Wayne said that distinguishing between campaign materials and legislative newsletters was not a major problem. Mr. Wayne said that the Commission should be cautious not to impede legislators' ability to communicate with their constituents. Mr. Wayne said that one of the issues brought to the Commission involved a legislator who sent constituent mailings outside his current district. Mr. Wayne said that the Commission could decide to add language to its rules or the candidate guidebook stating that mailings outside a legislator's district could be considered campaign expenditures.

Mr. Ketterer said that the Clerk of the House and Secretary of the Senate had the ability to screen and edit constituent newsletters to avoid sending campaign materials. Mr. Ketterer said that when he served as a legislator, he did communicate with citizens outside his own district who

were affected by specific issues that came before the legislature. Mr. Ketterer said that this was different from conducting a mass mailing outside of one's district. Mr. Ketterer agreed with Mr. Wayne's suggestion that language be added to the candidate guidebook on the issue.

Mr. Friedman said that having information on constituent mailings in the guidebook will inform candidates about what practices may raise an issue with the Commission. Mr. Friedman said that it would also educate the parties. Mr. Friedman said that the problem was not significant enough to justify a change to the Commission rules.

Mr. Cassidy agreed on the need for constituent mailings information in the candidate guidebook.

Mr. Cassidy moved, Mr. Friedman seconded, and the Commission voted unanimously (3-0) to adopt the staff recommendation and include guidance on constituent mailings in the candidate guidebook.

The Commission decided to return to Agenda Item #6 later in the meeting.

Agenda Item #7 – Administrative Question: Posting Statements of Sources of Income

Mr. Wayne said that legislators are required to file a form once a year disclosing their sources of income.

Mr. Ketterer asked if the form required the reporting of specific amounts. Mr. Wayne replied that only the sources of income are reported and not amounts.

Mr. Wayne said that the sources of income forms were kept in the Commission offices, but were not posted on the Internet. Mr. Wayne said that posting the forms online would make them more accessible to the public. Mr. Wayne said that some legislators may be concerned about the availability of personal information such as the receipt of social services benefits. Mr. Wayne said that the staff was generally in favor of posting the forms online. Mr. Wayne said that the matter of posting the forms was raised by the League of Women Voters at a meeting of the

Advisory Committee on Legislative Ethics. Mr. Wayne said that the advisory committee voted unanimously in favor of recommending to the Commission that it post the sources of income forms on its Web site.

Mr. Cassidy said that the forms were already public documents and were not being kept secret.

Mr. Friedman said that the Commission should recognize that most people have access to the Internet and post the forms on the Web site.

Mr. Ketterer asked if past practice had been that legislators filed the sources of income forms with the Secretary of State. Ms. Gardiner said that executive branch employees have a form they must file with the Secretary of State, but legislators file the sources of income form with the Commission.

Mr. Ketterer said that disclosure was part of being a legislator. Mr. Ketterer said that it would go against the spirit of the statute to collect the information and never make it publicly accessible. Mr. Ketterer said that the Commission should not disregard the recommendation from the Advisory Committee.

Mr. Friedman moved, Mr. Cassidy seconded, and the Commission voted unanimously (3-0) to approve the staff recommendation that the sources of income forms be posted on the Commission Web site.

Agenda Item #8 – Sufficiency of Maine Clean Election Fund for the 2008 Elections

Mr. Wayne said that a major source of funding for the Maine Clean Election Act has been a \$2 million transfer every year from the General Fund to the Maine Clean Election Fund. Mr. Wayne said that there was also a check-off on state income tax returns, providing additional revenue. Mr. Wayne said that in 2002 and 2003, the legislature removed \$7 million from the Maine Clean Election Fund to be used for other purposes. Mr. Wayne said that there was an understanding that the money would be returned. Mr. Wayne said that it may be necessary to

request the return of some of the funds during the next legislative session. Mr. Wayne said that the amount of the request is dependent upon the amount of funds distributed to candidates before the election. Mr. Wayne recommended that he e-mail the Commission members when he determined the proper amount to request from the legislature, if any. Mr. Wayne said that the alternative was to wait until the Commission's November meeting.

Mr. Ketterer agreed with Mr. Wayne's suggestion and said that the Commission should report its communication in the minutes of a public meeting.

Agenda Item #9 – Update on LaMarche Appeal

Ms. Gardiner said that oral argument was heard on Wednesday. Ms. Gardiner said that the judge had his own internal deadline for a decision. Ms. Gardiner said that she was unsure whether the LaMarche campaign would appeal the judge's verdict.

Agenda Item #4 – Request for Matching Funds/Cumberland County Democratic Committee Newsletter (continued)

Mr. Wayne said that Rep. Lawrence Bliss was present and may have wished to speak on Agenda Item #4.

Rep. Bliss said that he did not need to speak on the issue if it was going to be addressed at a future meeting.

Mr. Ketterer told Rep. Bliss that the Commission had already adopted the staff recommendation that the committee was not required to file an independent expenditure report. Mr. Ketterer said that other issues were raised during the discussion and will be addressed by the Commission staff. Mr. Ketterer said that there was an ongoing issue with party committees communicating about reporting requirements. Rep. Bliss said that he was aware that there was a problem that the committee will address. Mr. Ketterer said that the problem was due to a lack of

communication and ignorance of the filing requirements rather than an intent to hide information from the public.

Mr. Friedman said that the Woodcock campaign withdrew its claim that the printed materials were express advocacy. Mr. Friedman said that the only action the Commission took was to approve the staff's recommendation on the reporting issue.

Mr. Wayne said that the committee already conceded that it was late filing the July report, resulting in a penalty matter. Mr. Wayne said that he was uncertain whether the committee was required to file reports from years before 2006. Mr. Wayne said that it would be a reasonable burden on the committee to ask it to determine whether it owed reports from 2005.

Mr. Friedman said that it would be easier for the Commission staff to look at one year than to go back further. Mr. Wayne said that he was more concerned with the burden on the committee than on the staff.

Rep. Bliss said that his committee was gathering information on both 2005 and 2006.

Mr. Ketterer said that the Commission seemed to agree that it would only request reports from 2006.

The Commission decided to return to Agenda Item #11 later in the meeting.

Agenda Item #12 – Request for Inquiry Regarding Endorsements/Reginald W. Arsenault, Jr.

Mr. Wayne said that Ben Gilman of the State Republican Party filed a request that the Commission consider an endorsement issue regarding Reginald Arsenault. Mr. Wayne said that both candidates in the race received positive ratings from the Maine Credit Union League and the Sportsman's Alliance of Maine. Mr. Wayne said that both candidates received an "A" rating from the Sportsman's Alliance. Mr. Wayne said that Mr. Gilman's complaint referred to a press

release sent out by Reginald Arsenault claiming that he received endorsements from the Sportsman's Alliance and Maine Credit Union League. Mr. Wayne said that Randy Hotham received the endorsements and not Mr. Arsenault. Mr. Wayne said that the Arsenault campaign has publicly stated that it made an error and misinterpreted the letters it received. Mr. Wayne said that the Arsenault campaign sent a letter of apology to the local newspaper recognizing Rep. Hotham as the proper endorsee. Mr. Wayne said that it seemed that Mr. Gilman and Rep. Hotham wanted to get a correction on the record rather than a finding of violation. Mr. Wayne said that the staff recommended not finding a violation and not assessing any penalty. Mr. Wayne said that this case was similar to the issue of Michael Mowles' use of an endorsement, where Mr. Mowles challenged the constitutionality of the statute. Mr. Wayne said that given Mr. Mowles' appeal, it would be best not to take any action against Mr. Arsenault.

Mr. Friedman asked if the Republican Party made the complaint and was satisfied with no further action after hearing about Mr. Arsenault's apology. Mr. Wayne said that he heard that from the Republican candidate in the race, not from the Republican Party staff. Mr. Wayne said that he had not talked to Mr. Gilman about their current view.

Mr. Cassidy moved to accept the staff's recommendation to find no violation and impose no civil penalties.

Mr. Friedman questioned whether the Commission should pass the motion when it did not discuss the matter at length.

Mr. Wayne said that Rep. Hotham left a voicemail message stating that he would like an admonishment from the commission but did not wish a monetary penalty to be imposed on Mr. Arsenault.

Mr. Friedman seconded Mr. Cassidy's motion and the Commission voted unanimously (3-0) to accept the staff's recommendation to find no violation and impose no civil penalties.

Mr. Ketterer said that Mr. Arsenault had apologized and Rep. Hotham was being reasonable with his request.

The Commission decided to take up the following items out of order and return to Agenda Item #13.

Agenda Item #6 – Administrative Question: Payment of Matching Funds to Gubernatorial Candidates

Mr. Wayne said that there were two ways that the staff could pay matching funds resulting from independent expenditure reports. Mr. Wayne said that the staff could calculate matching funds once a day, which may result in some independent expenditures offsetting others. Mr. Wayne said that this method would keep all gubernatorial candidates on a level playing field while saving money.

Mr. Ketterer asked what the past practice had been. Mr. Wayne said that it was not an issue in 2002 due to only one candidate receiving matching funds. Mr. Wayne said that additional staff members were now available to make matching funds authorizations, providing the option of making several authorizations a day.

Dan Billings, speaking on behalf of the Woodcock for Governor campaign, said that the issue was a reasonable one. Mr. Billings said that the staff proposal took into consideration the Maine Clean Election Act's purpose of providing a level playing field. Mr. Billings said that the Woodcock campaign requested that matching funds calculations be done on at least a daily basis. Mr. Billings said that having a set time to calculate matching funds may allow those making independent expenditures to take advantage of the system. Mr. Billings said that overall, the campaign had no objections to the staff proposal.

Michael Saxl said that he agreed with Mr. Billings.

Mr. Ketterer said that due to the volume of independent expenditure reports, it may become problematic in the few days before the election to only authorize matching funds once a day.

Mr. Wayne said that the staff would change its policy for the last three days before the election and use its discretion to decide when to authorize matching funds.

Mr. Friedman suggested that the staff consider extending the three-day policy to a longer period of time before the election. Mr. Friedman asked Ms. Gardiner if the statute referenced batch processing of matching funds authorizations. Ms. Gardiner said that it did not and that there was room for discretion.

Beryl Leach, campaign manager for Barbara Merrill, asked if subsequent independent expenditure reports would result in an adjustment to a previously made authorization.

Mr. Wayne said that the authorization amounts given to the campaigns would not change after the next matching funds calculation. Mr. Wayne said that he proposed that the staff would still have discretion over batch processing matching funds if multiple reports are received within a short span of time.

Ms. Gardiner said that an independent expenditure report offsetting another report would affect the next matching funds authorization but would not affect or revoke authorizations that have already been made.

Michael Saxl recommended batch processing matching funds at two different times each day.

Jon Bartholomew, representing Common Cause Maine and the Maine Citizens for Clean Elections Coalition, said that independent expenditure reports must be filed based on when an obligation is made. Mr. Bartholomew said because of this, the Commission may not need a different policy for authorizing matching funds four days before the election.

Mr. Ketterer said that there seemed to be a consensus in support of daily batching of matching funds authorizations.

Mr. Friedman moved, Mr. Cassidy seconded, and the Commission voted unanimously (3-0) to permit the staff to consider independent expenditure reports in batches rather than independently and to give the staff discretion to establish a time of day to consider matching funds authorizations and discretion to use alternative methods in the days before an election.

Agenda Item #11 – Matching Funds Questions/Douglas Smith

Dan Billings spoke on behalf of Douglas Smith, a Senate candidate. Mr. Billings said that Douglas Smith was in a contested primary, obligating more in expenditures than he had raised in contributions at that time. Mr. Billings said that it was not appropriate to pay \$7,000 in matching funds to Mr. Smith's general election opponent based on the money raised after the primary to pay pre-primary obligations. Mr. Billings asked that the Commission consider these to be pre-primary expenditures that are not used to calculate general election matching funds. Mr. Billings recommended separate primary election finance reports that only cover the primary election rather than the current 42-day post-primary report that includes activity from both elections.

Mr. Friedman asked if it mattered that Mr. Smith was involved in a hotly contested primary election. Mr. Billings said that the Democratic gubernatorial primary was an example of a primary that was not hotly contested. Mr. Billings said that in that case, the Baldacci campaign's expenditures were made toward the general election more so than toward the primary.

Mr. Friedman asked if the Commission should make an exception for Mr. Smith. Mr. Billings said that the Commission should consider when the expenditures were made and materials used. Mr. Billings said that Mr. Smith purchased 400 signs before the primary that were used in the general election, so that portion of the expenditure should be included in matching funds calculations made for the general election. Mr. Billings said that his request was in keeping with the statute and rules, since the issue resulted from an administrative procedure.

Mr. Wayne said that the campaign treasurer originally said that \$7,350 should be attributed to the primary election. Mr. Wayne said that this amount included a payment to Creative Printing, but 60% of that payment was used toward the general election. Mr. Billings said that the \$7,350

amount was not correct, but he did not have the correct figures available. Mr. Billings said that the Commission should deal with the policy issue rather than the specific number.

Michael Saxl said that it was possible to report loans and unpaid debts on finance reports. Mr. Saxl asked that the Commission verify that any loans were reported accurately by the campaign. Mr. Saxl said that attributing money to the primary election may have affected matching funds to Mr. Smith's primary opponent. Mr. Saxl said that separate reporting for each election was a good idea.

Mr. Friedman asked what the staff recommended.

Mr. Wayne said that Sharon Libby Jones did not contest Mr. Smith's claim that a portion of his general election fundraising was used toward the primary election. Mr. Wayne said that Ms. Libby Jones had already obligated some of the matching funds that she had been authorized. Mr. Wayne said that with the exception of those obligations, he recommended that her authorization be reduced based on Mr. Smith's general election funds used toward the primary election.

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff recommendation.

Mr. Friedman asked what the staff recommendation would be if there was not a strongly contested primary election. Mr. Wayne said that under the current system, all activity before the primary election is presumed to be used toward that election and is not included in calculating matching funds for the general election.

Ms. Gardiner said that it would be difficult for the Commission to determine whether an expenditure was for the primary or general election using any criteria other than when the goods and services were actually used. Ms. Gardiner said that the Commission's rules allow for an expenditure made before the primary election to be considered a general election expenditure if a preponderance of the expenditure was used in the general election.

The Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #13 – Request for Matching Funds/Benjamin Meiklejohn

Jon Bartholomew said that there was no other reasonable interpretation of the mailer sent by the Democratic Party than as advocacy for the election of Anne Rand.

Mr. Ketterer asked Mr. Batholomew what he would recommend. Mr. Bartholomew said that the Commission should consider the mailers to be express advocacy and trigger matching funds.

Michael Saxl said that the Commission decided that some of the advertisements aired in the gubernatorial election were not express advocacy. Mr. Saxl said that the party designed its mailers based on that decision.

Benjamin Meiklejohn joined the meeting by telephone.

Mr. Meiklejohn said that the mailer included the words “Anne Rand, State Representative.” Mr. Meiklejohn said that considering that Anne Rand was not at the time a state representative, the mailing must have advocated for her election. Mr. Meiklejohn said that the mailer fit the “other language” provision of the statute.

Mr. Wayne said that the staff recommendation was based on the Commission’s ruling on the Republican Governors Association ads. Mr. Wayne said that it was hard to consider the Democratic Party mailings express advocacy when the Commission determined that the RGA ads were not.

Mr. Meiklejohn said that based on the Commission’s decisions, the parties could put up signs that do not contain express advocacy without triggering matching funds.

Mr. Ketterer said that Mr. Meiklejohn’s comments were well received and there may be statute changes in the future.

Mr. Meiklejohn said that his matter was a separate issue from the ads in the gubernatorial race.

Mr. Wayne said that the Republican Governors Association ad displayed Chandler Woodcock's name and office sought at the very end. Mr. Wayne said that the Commission determined that the other language in the ad related to issues. Mr. Wayne said that a sign or bumper sticker with just the name of a candidate and the office sought could be considered to be express advocacy because it would not contain any other language.

Ms. Gardiner said that the Commission's September 22 decision should not be taken to mean that mentioning the name of the office does not make a communication express advocacy. Ms. Gardiner said that the ads were considered in context.

Mr. Cassidy asked Mr. Wayne how he determined the staff recommendation. Mr. Wayne said that both of the mailers contained enough issue content so that they were not express advocacy.

Mr. Cassidy asked if a lawn sign stating only "Anne Rand, Representative" would be considered express advocacy. Mr. Wayne said that it would be express advocacy because there would be no discussion of issues. Mr. Wayne said that the Commission's rules have specific examples of express advocacy, including signs and bumper stickers.

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff's recommendation and pay no matching funds.

Mr. Friedman said that the mailers contained express advocacy. Mr. Friedman said that there was little discussion of issues in the mailers and they should trigger matching funds.

Mr. Cassidy said that the mailers were similar to the ads discussed at the September 22 meeting.

The Commission voted 2-1 to accept the staff recommendation. Mr. Cassidy and Mr. Ketterer voted for the motion; Mr. Friedman voted against the motion.

Agenda Item #14 – Request for Matching Funds/W. Bruce MacDonald

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff recommendation and pay no matching funds.

Mr. Friedman said that unlike the mailers discussed in the previous agenda item, the materials seemed to be issue-oriented. Mr. Friedman said that they did not include the name of the office sought by the candidate.

The Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #15 – Request for Matching Funds/Jayne Crosby Giles

Jayne Crosby Giles said that she received both campaign and non-campaign mailers relating to Walter Ash on the same day. Ms. Crosby Giles said that the mailers contained overlapping themes, causing confusion among voters as to which of the mailings were advocating for Walter Ash's election.

Mr. Friedman asked if it would have made a difference if Ms. Crosby Giles had not received the mailings all at the same time. Ms. Crosby Giles said that receiving them at the same time resulted in the mailings being a different issue from her previous complaint and clearly express advocacy.

Jon Bartholomew said that he disagreed with some of the Commission's previous decisions and supported Ms. Crosby Giles' complaint. Mr. Bartholomew said that the Commission should consider the context of the mailings and not just look for the "magic words" to determine express advocacy.

Dan Billings said that Patricia LaMarche's appeal of the Commission's decision on the Republican Governors Association ads was currently before the court. Mr. Billings said that if

the court were to strike down the Commission's earlier decision, it should revisit the items discussed at the present meeting.

Mr. Ketterer asked Mr. Billings for his opinion on the issue of campaign and non-campaign mailings arriving at the same time. Mr. Billings said that it was likely a coincidence and not a coordinated act.

Mr. Cassidy said that he didn't see a connection between the mailings. Mr. Cassidy said that if they were coordinated, they probably wouldn't have been mailed at the same time.

Mr. Cassidy moved, and Mr. Friedman seconded, that the Commission accept the staff recommendation and pay no matching funds.

Mr. Friedman said that the mailing was express advocacy because despite some mention of issues, the ultimate purpose of the mailing was to advocate for Walter Ash's election.

Mr. Ketterer said that he agreed with Mr. Cassidy but the Commission should consider each case individually and in context.

The Commission voted 2-1 to accept the staff recommendation. Mr. Cassidy and Mr. Ketterer voted for the motion; Mr. Friedman voted against the motion.

Agenda Item #16 – Request for Matching Funds/John N. Frary

Mr. Wayne said that John Frary, chair of the Franklin County Republicans, brought the request on behalf of Republican candidate Lance Harvell. Mr. Wayne said that the literature was handed out at the University of Maine at Farmington. Mr. Wayne said that the literature contained Mr. Harvell's responses to a survey from the Maine Economic Research Institute. Mr. Wayne said that it was not clear whether the literature was intended to oppose Mr. Harvell.

Mr. Frary said that the document contained no disclosure statement. Mr. Frary said that both the College Democrats and Mr. Harvell's opponent, Janet Mills, claimed not to be responsible for the flyers.

Mr. Friedman asked how Mr. Frary obtained the flyer. Mr. Frary said it was given to him by a student at UMF. Mr. Frary said it was being handed out at the college.

Mr. Wayne asked if the flyer was distributed on or before October 18. Mr. Frary said that he obtained the flyer on October 17.

Mr. Wayne said that since the flyer was distributed before the 21-day presumption period and contained no express advocacy, it should not trigger matching funds.

Mr. Ketterer asked what the result would be if the flyers contained no disclaimer and were distributed more than 21 days before the election. Mr. Wayne said that if the flyers contained express advocacy and lacked a disclosure, there would be a violation resulting in a civil penalty.

Mr. Wayne said that the Commission could direct him to investigate further into who distributed the flyer and whether it was distributed after October 18. Mr. Wayne said that no report would be required unless the flyers cost more than \$100. Mr. Wayne said that based on what was currently known, there was no reason to award Mr. Harvell matching funds or find anyone in violation for lack of a disclosure statement.

Mr. Friedman said that college students with no connection to the Democratic Party may have created the flyers.

Mr. Friedman said that he was unable to determine whether the flyer was in support of or opposition to Mr. Harvell.

Mr. Cassidy moved, Mr. Friedman seconded, and the Commission voted unanimously (3-0) to take no further action.

Agenda Item #17

Mr. Wayne said that a political action committee, Alliance for Maine's Future, reported an independent expenditure on behalf of Rep. Jeremy Fischer in the amount of \$2,400. Mr. Wayne said that Rep. Fischer questioned whether \$2,400 was the true cost of the mailer. Mr. Wayne said that the address for AMF's Web site was included in the mailer, which then linked to the Web site for the Maine Economic Research Institute. Mr. Wayne said that Rep. Fischer said that MERI gave him an unfavorable rating.

Mr. Ketterer asked whether the staff notified candidates when their opponents received matching funds. Mr. Wayne said that they were copied on the authorization letter.

Paul Brunetti with the House Democratic Campaign Committee said that the \$2,400 in matching funds represented a substantial amount of money available to Rep. Fischer's opponent within 21 days of the election. Mr. Brunetti said that the mailing discussed the Maine Prosperity PAC, so not all of the value of the mailing benefited Rep. Fischer. Mr. Brunetti said that Rep. Fischer had been attacked in the media for the ranking he received from MERI.

Jon Bartholomew said that unless they were the same organization, the link to MERI from AMF's Web site was not relevant. Mr. Bartholomew said that the cost of the mailing may be worth considering.

Mr. Ketterer asked Mr. Bartholomew what action the Commission should take. Mr. Bartholomew said that it was up to the candidates' opponent to bring forward a complaint to the Commission and look at the documentation provided.

Mr. Wayne said that the staff recommended not reconsidering the awarding of matching funds.

Mr. Cassidy moved, and Mr. Friedman seconded, a motion to accept the staff recommendation.

Mr. Friedman asked if there was any mechanism for requesting documentation of an expense filed on an independent expenditure report. Mr. Wayne said that the Commission staff could ask for an explanation of the amount, but the Commission may want a more formal procedure in its rules. Mr. Wayne said that the burden is ultimately on the candidates to bring a complaint, at which time the Commission staff would investigate.

Tony Payne, executive director of the Alliance for Maine's Future, provided a copy of the check used to pay for the mailings in question.

Mr. Ketterer said that while it was understandable that the candidate was concerned over his opponent receiving matching funds, it was the nature of independent expenditures that the candidate being supported does not have the ability to approve or disapprove.

The Commission voted unanimously (3-0) to accept the staff recommendation.

Agenda Item #18

Mr. Wayne said that the issue was whether a mailer that was sent out by the Oxford County Democratic Committee was a party candidate listing or whether it was an independent expenditure. If it was a party candidate listing, it would be exempt from independent expenditure reporting. The criteria for party candidate listings has become much more rigorous than it was in the past and the statute lays out very specifically what elements can and cannot be in a party candidate listing. Upon reviewing the mailer, the staff thought that there were some elements in it that fell outside the party candidate listing. The staff communicated that to Cathy Newell from the Oxford County Democratic Committee. Mr. Wayne said that one particularly important issue was what advice the staff gave to Ms. Newell regarding this mailer. The staff suggested to Ms. Newell that she may want to consider filing an independent expenditure if there was any doubt. The committee did file an independent expenditure report. The staff did question whether the report should have been filed because the staff believes it is the responsibility of the filer to know whether it has to file an independent expenditure report. Additionally, there was enough language in the mailer that suggested that it contained express

advocacy for the named candidates. The independent expenditure triggered matching funds for Republican candidates in Oxford County, including \$2,000 each to two Senate candidates. One of those candidates had already begun to obligate some of those matching funds.

Mr. Wayne said that the Oxford County Democratic Committee objected to the characterization that the mailer constituted express advocacy. He said that there was a lot of information about the candidates, their platforms and their histories, but there were no words of express advocacy. However, there was content that suggested that the mailer was promoting the candidates. The staff does not have a strong recommendation for the Commission.

Mr. Ketterer asked whether there was anyone present who wish to speak on this agenda item. Newell Augur introduced himself as counsel for Senate candidates Bruce Bryant and Marjorie Medd.

Mr. Augur said that the mailer was an insert to local newspapers. He said that Ms. Newell consulted with counsel about the mailer regarding whether the mailer constituted express advocacy. After reviewing the mailer, it was decided that it did not constitute express advocacy and did not require an independent expenditure report. However, at some point in time, Ms. Newell received a call from the Commission staff saying that the committee may be in violation because of the mailer if it did not file an independent expenditure report. Mr. Augur said that it was in response to that call that Ms. Newell filed the report. The committee's interest is that the award of matching funds be reversed or, if the funds have been obligated or used, that they be used as an offset against future matching funds. Mr. Augur said that since the mailer went out prior to the 21-day rebuttable presumption period, whether the mailer constituted a party candidate listing was not even an issue. The question was whether the mailer contained words of express advocacy. He said that it did not.

Mr. Ketterer asked Mr. Augur to explain the party candidate listing. Mr. Augur said that if a communication was a true party candidate listing, it was not considered an expenditure and would not have to be reported in an independent expenditure report. But since the mailer was

distributed prior 21 days before the election, the party candidate listing was not a factor in deciding this issue.

Cathy Newell introduced herself as the chair of the Oxford County Democratic Committee and the person who prepared the mailer. She said that she consulted with counsel in September and was assured that it did not constitute express advocacy. She said that she intended to report the expenditure on the committee's regular campaign finance report. However, she did get a call from the staff which questioned whether the mailer was a party candidate listing or an independent expenditure. She said that she was told by Commission staff that if it was an independent expenditure, the report was already late. Because she was concerned about avoiding penalties for a late filed report, she filed the report the same day.

Mr. Wayne asked Ms. Newell why she did not question the staff when she was told that the mailer should have been reported as an independent expenditure since she had received a legal opinion on this matter. Ms. Newell said that she realized now that she should have contacted her attorney but she thought that there was no alternative and that the report had to be filed.

Daniel Billings, on behalf of Senator Hastings, stated that Senator Hastings had already committed some portion of the matching funds. He said that he was concerned about the larger effect of a Commission's decision to require the return of obligated or spent matching funds under circumstances such as these. He recommended that the Commission consider the alternative that Mr. Auger suggested that obligated or spent matching funds be considered an offset against future awards of matching funds.

Mr. Billing referred to a previous Commission meeting at which Ms. Ginn Marvin said that the Commission had to rely on the information that was provided in reports. He said that he was not suggesting that this be applied rigidly but that it deserved consideration in this case. He also stated that whether the content of the mailer was free from express advocacy was not as black and white an issue as had been portrayed to the Commission. He cited some examples of language, e.g., "voter guide," and other content, e.g., a table comparing Democrats and Republicans. He maintained that the mailer was not a party candidate listing. He also

questioned whether, if the mailer was an independent expenditure, it was truly independent of candidate involvement and input.

Jon Bartholomew from Common Cause and the Maine Citizens for Clean Elections said that he thought the mailer was a party candidate listing. He said that he believed that the person who filed the report did so in good faith and was trying to cover all the bases. He also stated that the mailer was sent outside the 21-day period and therefore should not result in matching funds.

Mr. Wayne recommended that the Commission adopt the suggestion that Senator Hastings be allowed to use the matching funds to pay for the obligations that he has already incurred and use that amount as an offset against future matching funds. He explained that he thought that the Commission's needed to determine whether the mailer contained express advocacy. If the Commission decided that it was not, Mr. Wayne suggested that the awards of matching funds be undone. Mr. Wayne said that it was regrettable how this matter came up. However, even though it was understandable that people generally defer to Commission staff regarding filing requirements, it was the responsibility of the filer to know which reports to file and the Oxford County Democratic Committee had the benefit of advice from counsel on whether the mailer contained express advocacy.

Mr. Ketterer said that he could understand why someone would file a report if a government official told them that penalties would be accruing if the report was not filed. Mr. Cassidy said that the county chair of a party committee was not an ordinary person and should know better. Mr. Cassidy went on to say that the content in the mailer crossed the line into express advocacy.

Ms. Gardiner cautioned against basing a determination that merely a label of "voter guide" did not necessarily mean that something was express advocacy.

Mr. Friedman asked whether the staff presumed that the mailer contained express advocacy. Mr. Wayne responded that in looking at the mailer, he thought it was a close call. But that the mailer was not a party candidate listing.

Mr. Friedman said that based on previous discussions regarding express advocacy he thought that the mailer was not express advocacy but was implied advocacy for the candidates in the mailer.

Mr. Ketterer said that it was clear that the mailer was not a party candidate listing.

Mr. Cassidy said that he thought there was enough evidence to support a finding.

Mr. Friedman moved that the Commission find that the mailer did not constitute express advocacy, that matching funds not be generated; however, if matching funds have already been obligated, the candidate be allowed to use the amount, but the staff would use that amount as an offset against future matching funds. Mr. Cassidy seconded.

Mr. Cassidy agreed with the second half of the motion but still thinks that the mailer constituted express advocacy.

Mr. Ketterer called for a vote. Mr. Ketterer and Mr. Friedman voted to adopt the motion. Mr. Cassidy voted against it. The motion carried by a vote of 2 to 1.

Agenda Item #19

In introducing the issue, Mr. Wayne said this matter only came to the Commission staff at the end of business on the day before the meeting. His oral recommendation to the Commission was that this matter be postponed to the next meeting because it deserved a response from the Maine Heritage Policy Center (MHPC) and more consideration by the Commission staff. Mr. Wayne explained the reports that are required for entities involved in supporting or opposing ballot initiatives. He said that they would either file as a PAC or, if the entity was not a PAC, on a §1056-B form. He said that the issue raised by Carl Lindemann was that the Maine Heritage Policy Center was very directly involved in actively supporting the Taxpayers' Bill of Right initiative but had not filed any reports disclosing its financial activities in that regard.

Mr. Ketterer asked Mr. Lindemann (attending via telephone) whether he wanted to address the Commission on this matter.

Mr. Lindemann said that the Maine Heritage Policy Center, a research organization, had taken on the role of advocating on behalf of and providing public relations support to the PAC which sponsored the initiative but there was no disclosure of what the MHPC was spending. He said that this introduced a new dynamic in the political process by which many expenditures can be hidden. He said that he was concerned that this dynamic could become the accepted norm.

Mr. Ketterer invited members of the public to comment.

Jon Krasnick, Executive Director of Democracy Maine, said that his organization supported Mr. Lindemann's complaint. He said that his organization contacted the Commission staff to find out what it needed to report in terms of its involvement opposing TABOR. He said that the MHPC has played an integral role in supporting TABOR for quite some time. Mr. Krasnick expressed his belief that Maine voters deserved to know where funds and resources come from that allow MHPC to do its work in support of TABOR. Mr. Krasnick offered the Commission copies of articles by MHPC that showed how involved it was.

Mr. Lindemann said that he also sent the Commission materials that would support his contention that MHPC is very involved in influence the election.

Dan Billings, counsel for the Maine Heritage Policy Center, said that it was important to address the role of MHPC. It is not acting as a PAC on behalf of TABOR. There is a separate organization which is a PAC which is working on behalf of TABOR. MHPC has not run advertisements, or solicited funds in support of TABOR. MHPC did draft the original legislation and wrote the initiative and has been vocal in support of TABOR. He said that the language in §1056-B was very broad and questioned whether it would withstand constitutional scrutiny. Mr. Billings said that with such a broad statute there should be many other entities, like the Roman Catholic Church, some municipalities, would fall within this provision but are not filing.

Jon Bartholomew said that his organization was in support of organizations disclosing any funds over \$1,500 to influence a referendum should disclose that activity.

Mr. Ketterer posed to the Commission whether this matter should be tabled in order that the issues be fully briefed by the parties and considered by the staff. Mr. Cassidy made a motion that the matter be tabled until the next meeting. Mr. Friedman seconded. The motion carried unanimously. He told the interested parties to submit in writing their arguments to the staff by 5:00 p.m. on October 31st.

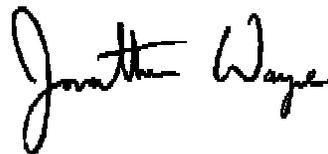
Agenda Item #1 (continued)

Mr. Ketterer returned to this item, the ratification of the minutes. The minutes had been amended during the meeting and were ready for re-consideration by the Commission. Mr. Cassidy moved that the minutes be ratified as amended. Mr. Friedman seconded. The motion carried unanimously.

Mr. Cassidy moved that the meeting be adjourned. Mr. Friedman seconded. The motion carried unanimously.

The meeting adjourned.

Respectfully submitted,

A handwritten signature in black ink that reads "Jonathan Wayne". The signature is written in a cursive, flowing style.

Jonathan Wayne

Executive Director