

Minutes of the November 2, 2006
Special Meeting of the
Commission on Governmental Ethics and Election Practices
Held via Teleconference

Present: Chair Andrew Ketterer, Hon. Jean Ginn Marvin; Hon. A. Mauvorneen Thompson, Hon. Michael Friedman

Interested Parties: Dan Billings; Esq.; Michael Mahoney, Esq.; Newell Augur, Esq.; Brian Hawkins; Gregory Olson.

Staff: Executive Director Jonathan Wayne, Counsel Phyllis Gardiner

At 9:50 A.M., Chair Andrew Ketterer convened the meeting. The Commission considered the following item:

Complaint filed by Attorney Dan Billings o/b/o the Maine Senate Republican Victory Fund Alleging Late or Non-filed Independent Expenditure Reports by the Maine Democratic Party and/or Senate Democratic Campaign Committee

Mr. Wayne explained the purpose of this meeting is to determine whether the Maine Democratic Party and the Senate Democratic Campaign Committee file independent expenditure reports on time. Originally the complaint was only about two reports, but late on November 1st, Attorney Billings questioned an additional two reports.

Mr. Wayne explained that independent expenditure reports must be filed within 24 hours once an expenditure has been made aggregating more than \$250 per candidate. It is therefore critical to know when that expenditure has been made. In 2004, the statutory definition of expenditure included a payment, contract, promise or agreement, expressed or implied, whether or not legally enforceable to make any expenditure. In light of late report filings in 2004, the Commission adopted rule changes in 2005 to include obligations as a form of expenditure. Regarding

independent expenditures, the date of the earliest of these events must be reported within 24 hours.

Mr. Billings explained the reason for the complaint was based on a review of the reports of the Senate Democratic Campaign Committee (SDCC) and Maine Democratic Party (MDP) which raised questions about the timing of certain independent expenditures. In addition, it appeared that the SDCC had a fairly large amount of money on hand that the Maine Republican Party (MRP) expected would be spent before the election. The initial independent expenditure report filing caused the MRP to wonder if the reports were timely filed with the Commission, and the MRP wanted to make sure all future filings were done on a timely basis. However, Mr. Billings said there were additional independent expenditure reports filed by the SDCC on November 1st, and it appears that most of the money has been spent, so his concerns about that have dissipated.

Mr. Billings suggested that it would be worthwhile to have a meeting after the election to ask questions of the people who made the expenditures. Mr. Billings referred to an e-mail by Mr. Wayne which suggested that the Commission members not make a final determination until those questions can be answered.

The first matter that raises a question for Mr. Billings is the large transfer of funds from the SDCC to Victory 2006, a sub account of the MDP. The second matter is the filing of independent expenditure reports #48 and #71 shortly after the reports were filed which gives the appearance that the transfer was made with those independent expenditure reports in mind.

Mr. Billings said that the contents of independent expenditure report #71 made it appear that some of the expenditures were made well before 10/30/06. In particular, regarding Senate District 21 the report stated that the vendor started providing services on 10/29/06, but late corrections were not approved until 10/30/06. Mr. Billings said that this caused one to conclude that services were being provided before the 10/30/06 and that the independent expenditure report was filed late. Regarding Senate District 32, the order was placed on 10/25/06, but the changes were not complete until 10/30/06.

Mr. Billings stated that the explanation for the MDP's independent expenditure report #84 being filed late was the postage amount became known on 11/1/06, but it appears some order was made before that date. Mr. Billings said that there is a big impact from large amounts of money being spent late in the race, and that late filings could delay the release of matching funds to the opponents in these races. Mr. Billings said that he would like the Commission staff to seek more information and eventually have the people who were involved in making these expenditures come forward and answer questions.

Regarding SDCC independent expenditure report #83, Mr. Billings said that it appeared to be a TV buy, and asked that Commission staff inquire about when the productions went into place. Mr. Billings said that the filing in and of itself doesn't raise the same questions as the other two. He is not making any allegations regarding independent expenditure #83, but wonders if the report should have been filed sooner.

Chair Ketterer clarified with Mr. Billings that he is not asking the Commission to make a final decision about whether these reports were filed late at this meeting. Additionally, he clarified that Mr. Billings simply questions whether the rules have been followed regarding the timing of the filing of independent expenditure reports #48 and #71. Mr. Billings said that his major point was that people to be put on notice. Although there are several factual questions that need to be addressed, Mr. Billings was agreeable to them being addressed after the election.

Mr. Billings went on to clarify his client's concern is that all of the independent expenditure reports have not been filed, and as of Monday of this week, it appeared that the SDCC was simply sitting on a large sum of money. However, since the filing of the complaint several independent expenditure reports have been filed. He cannot provide the Commission with any proof of an expenditure that has not been reported.

Mr. Mahoney, attorney for the Maine Democratic Party, was the next to speak. Regarding independent expenditure report #71, the party has kept a close eye on several close state senate races, with the general intent to spend money in support of the Democratic candidates. Those discussions were internal as late as 10/25 and 10/26. At that time there were proposed designs

and proposed mail pieces in a number of races, more than were subject of any of the pieces being discussed at this meeting. On 10/27/06, the MDP gave the approval to its mail production company, Ourso Beychok in Louisiana, for mail pieces in three Senate districts (SD 1, SD 15, and SD 19). At that time, MDP filed independent expenditure #48 on 10/28/06.

Mr. Mahoney said that there was a lot of internal discussion subsequently about where the remaining resources should be spent. He said that it was not until 10/30 that the leadership determined which races to spend its money (SD 1, SD 21, and SD 32). Of note, significant decisions were made internally on 10/30 regarding pieces in those districts, such as number of pieces to be mailed and the content of ads. In addition, the candidate was endorsed by the Kennebec Journal which lead to a redesign. These factors explain why they made a verbal agreement to the mail production company on 10/30, and why the expenditure was subsequently reported on 10/31. Mr. Mahoney was unable to speak with all of the individuals, and like Mr. Billings, would like to have the individuals involved to discuss the circumstances surrounding the situation to be questioned by the Commission at a later date.

Regarding independent expenditure #84 and the postage amount for the mail pieces, Mr. Mahoney was unable to uncover any facts regarding when communications took place, when commitments occurred, or any other information prior to the Commission meeting, but would welcome the chance to follow-up at a later date.

Mr. Friedman said, regarding independent expenditure #71, that it seemed like there was an underlying order for something that was made before the changes. Mr. Mahoney clarified that all of the decisions to target Senate districts 1, 21 and 32 were made at the leadership meeting of 10/30. He went on to state that there were several designs that were put together by an outside consultant without a decision being made as to which were going to be sent out. The party really just wanted to have options to make decisions quickly. Mr. Mahoney said that the question becomes if a piece is designed, but never sees the light of day beyond the MDP, is it still an expenditure to influence the outcome of the election? If there is a nominal amount of money spent designing a piece, should matching funds be issued to the opponent of the candidate who is featured in that piece?

Mr. Friedman said that it seems that Ourso Beychok has an expectation that he will be paid for the work done. Mr. Friedman stated that he thought that a critical point in the analysis was not whether a piece saw the light of day but whether the vendor had an expectation of payment.

Ms. Thompson asked for clarification about the terms “contract, promise or agreement” as contained in the definition of “expenditure.” Specifically, Ms. Thompson asked whether those terms would apply to internal agreements within a party or whether it applies to an agreement between the party and a commercial vendor. Chair Ketterer and Mr. Wayne confirmed that it would be the latter.

Mr. Wayne asked Mr. Mahoney about the designs made as early as 10/25 and 10/26 regarding independent expenditure #71, and whether the designs related to specific candidates or were they interchangeable designs that could be used for any number of candidates. Mr. Mahoney was unsure of the exact answer, but his recollection was that those pieces were very different from one another. The pieces were prepared as options, but they weren’t sure until 10/30 that they would be used, prior to that it was unknown if they would be used to influence the outcome of the election.

Mr. Wayne asked Mr. Mahoney whether the party’s interpretation of the law was that although candidate-specific pieces were designed and prepared for distribution, it was not until the decision was made to use those pieces to influence an election that a reportable expenditure occurred. In other words, if the designed piece did not see the light of day, it was not intended to influence the outcome of the election and not reportable as an independent expenditure. Mr. Mahoney said that, as far as the expenditure for the design is concerned, he does not believe that an independent expenditure report is due until that piece is out influencing the outcome of the election.

Mr. Wayne stated that this interpretation may put the Commission in a difficult position by having to weigh the credibility of filers and by having to rely heavily on trust that independent spenders would report expenditures in an appropriate and timely fashion. Mr. Mahoney said that perhaps the design of pieces should be reported separately.

Chair Ketterer said that an expenditure is reportable once the group decides to do the mailing, not than when the piece is finalized. Mr. Mahoney said that the MDP was looking at nine Senate races on 10/25 and that not until 10/30 was the decision made to influence the outcome of those three Senate races.

Mr. Friedman asked Mr. Mahoney whether Ourso Beychok expects payment when the design is made or only when the design is used. Mr. Mahoney understands that Ourso Beychok was on a long term, flat-fee monthly retainer to provide consulting services and the design of pieces may have been part of that flat-fee. Mr. Mahoney was unsure if there was a broken out, separate fee for a piece chosen for dissemination.

Chair Ketterer questioned Mr. Mahoney about the group called Victory 2006, to which he responded that it is an account of the MDP which has no legal standing.

At the conclusion of the public comment, Commission Counsel Phyllis Gardner articulated the legal issue for the members. She said that the Commission is being asked to provide guidance based on its understanding of the statute regarding the obligation to report and all other matters relating to this issue can be put off until a later date.

Ms. Ginn Marvin stated her concern about people buying things ahead of time and not reporting them; however, without more information it is difficult to make any further action on the matters today. She said that if a group pays a vendor for services which never are distributed publicly that matching funds might be due because those services help you put your campaign together as Mr. Friedman suggested.

Ms. Thompson stated that she agreed with Ms. Ginn Marvin's comments.

Mr. Friedman said the Commission needs a clear and concise rule which will enable the staff to provide the best advice possible. He said that the definition of "expenditure" should be

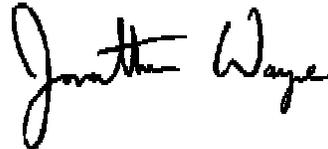
interpreted broadly, and that it would be preferable for reports earlier rather later, and that the Commission should not try and determine the thoughts of others.

Chair Ketterer echoed the sentiments of his colleagues and said that he believes in honest, candid, timely and accurate filings.

Mr. Wayne was hopeful that the late filing aspect of this matter be considered at the November meeting and that the statutory and rule changes be considered at the December meeting.

There being no further business, the Commission adjourned at 10:55 a.m.

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