



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Minutes of the October 28, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq.,
Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 12:30 p.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Request by the Maine Democratic Party concerning Contributions to Paul LePage

Mr. Wayne explained that the Maine Democratic Party has filed a request that the Commission consider whether Paul LePage's campaign has received contributions from donors which exceed the \$750 limitation. He said the LePage campaign has submitted a preliminary response for the Commission's meeting and explained that most of the contributions in question relate to husband and wife contributions.

Benjamin Grant, Esq., counsel for the Maine Democratic Party, responded to the LePage campaign explanations by saying the campaign has not complied with the law and urged the Commission to take further action on the matter. He said the errors were in two categories of contributions, misallocating contributions by family members and counting contributions that were not actually made. He referred to the spreadsheet provided by the LePage campaign and noted some clerical discrepancies as well as tally errors.

Mr. McKee questioned the need for the Commission to be concerned over clerical errors.

Mr. Grant said the clerical errors are of concern because they were deleted and he suggested the Commission investigate whether those were in fact clerical mistakes or not. He said steps need to be taken to be sure this money was not received.

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Mr. Grant said regarding the joint checking accounts and contributions from husband and wife, he said the guidelines state that written documentation should be obtained from the family member who did not actually sign the check to be certain that he or she did in fact wish to make a contribution. He said the LePage campaign has admitted that their process was to shift any funds above the \$750 limit automatically over to the spouse named on the check. He said there is no documentation that proves this was the intent of the contributor named. He said the campaign knew the correct procedure for having documentation because they sought that proof for other contributions.

John Morris, Chief of Staff for the LePage campaign and Erin Sullivan, the deputy finance staff person for the campaign, reviewed the contributions in question. Mr. Morris said the campaign has received over 5,000 contributions. He said Ms. Sullivan has spoken to every person who was listed as husband and wife on the list of questioned contributions. He said when a check came in that was written on a joint bank account, for example, a check for \$200, it was recorded under one of the joint account holders name as a \$200 contribution. He said if that contributor sent another check from the same account, for example for \$600, it was recorded as a contribution from that same contributor/account holder.

Ms. Sullivan explained that if a check for an amount over \$750 was received, the amount would be divided evenly between the account holders that were named on the check. In one instance, a check was received from a couple for \$1,300 and it was divided evenly between the two account holders. That resulted in one contributor being over the contribution limit by \$100 because an earlier contribution for \$200 was attributed to only that contributor and was not divided between the two account holders. In most instances in which the campaign reallocated the contribution amount between a couple, both individuals had previously contributed to the campaign. There were two situations where a contribution was attributed to an individual who had not previously contributed but the campaign contacted those individuals to make sure that they intended to make the contribution.

Mr. Wayne handed out a spreadsheet created by the Commission staff that represented all the contributions from spouses in question.

Mr. McKee asked Ms. Sullivan whether when a check for an amount over \$750 came in, the campaign made an assumption that the contribution was intended to be from both account holders. He asked whether the campaign took any steps to verify whether each contributor intended to make the contribution.

Ms. Sullivan said that in the instance that Mr. McKee was asking about, the campaign knew that each spouse intended to make the contribution because the campaign made the solicitation directly.

Mr. McKee said he wanted to understand the process used by the campaign for accepting contributions. Mr. McKee said his concern was that the campaign just made an assumption that because two names were on the check, each person must have intended to make a contribution. Whereas, it is possible that one spouse may learn that a contribution was made in their name without their consent and they may not have ever had the intention of making a contribution. He asked who the other party was that made calls to contributors to verify.

Mr. Morris said Ms. Sullivan had called every one of the couples listed on the spreadsheet to verify their intent to be honest. He said there have been 5,000 contributions and it appears that the campaign made mistakes on a few. The mistakes were honest, not calculated, he said. Mr. Morris said Kim Lindlof was also helping with the calls.

Mr. McKee clarified that the calls were made by Ms. Sullivan and Kim Lindlof. He asked which people Ms. Sullivan called herself.

Ms. Sullivan said she called most of the people on the spreadsheet and Ms. Lindlof called probably five. She said she spoke to contributors personally.

Ms. Matheson asked if most of the contributions were through online giving.

Ms. Sullivan said some were online, but most of the contributions in question were made by check to the campaign.

Mr. McKee asked if the campaign had a method to track when the amount from a single contributor was getting near the limit.

Ms. Sullivan said the treasurer receives all the contributions that come in through the mail and he makes phone calls when he notices a duplicate contribution. She said the campaign has caught a few that are over the maximum amount and have returned the check to the contributor. She said some were missed.

Ms. Healy asked which document was prepared by Ms. Sullivan and how much time she had to review all the information provided.

Ms. Sullivan said she had 24 hours.

Mr. Healy asked Ms. Sullivan whether, of the contributions she reviewed, there were any contributions that came in by a check drawn on a joint account that exceeded \$1500 and when was the discovery made.

Ms. Sullivan said there was one such contribution discovered when the report was given to them yesterday. She said it was a case where an online contribution had been made as well as a check sent in. She said the Dwight contribution was over the contribution limit by \$550 and it will be refunded.

Mr. Healy asked how many times the campaign had to refund contributions because they were over the limit.

Ms. Sullivan said she did not know.

Mr. Morris said it has not happened very often. He stated that the campaign has done nothing dishonest. He said they have been truthful with the Commission. He said what had been a problem in the past was when a contributor uses PayPal and also a check with a different address, it has not been caught as a duplicate contribution.

Mr. McKee said the issue was the incomplete disclosure of contributors. Mr. McKee said the report filed by the campaign appears as one person making an over-the-limit contribution. He said the public does not have accurate information looking at the report.

Ms. Sullivan said when the campaign receives an RSVP card from a couple for a fund raising event with both names on the card and a check for \$1500, they assume that amount is for both people on the card.

Ms. Matheson asked how and who checks the contributions for accuracy and whether someone has gone over the limit, and she also asked how the ones in question were missed.

Ms. Sullivan said in the past someone scrolled down the pdf file downloaded from the Commission's website to see if anyone was over the \$750. She said it was difficult to be certain using that method, however. She said since she has come onboard, she has been downloading the reports into an excel file and sorting by name. She said some of these errors were made when she was new in her position and she was not sure what to be looking for. Ms. Sullivan said the timeframe between reporting periods was extremely short this time and she does all the checking manually with excel. She said she did not spend enough time reviewing the report this time because of the short turnaround time for filing the last report before the election.

Benjamin Grant expressed concern over the contributions that allegedly did not occur. He said some contributions listed have been deleted without knowing for sure whether money came in to the campaign. He said with regard to the spousal issue, using the Dwight family as an example, the campaign's explanation is where the problem lies. He said it appears that three payments of \$750 were made and the family requested that one installment be put under the daughter's name. He said that is a violation under Maine law to make a contribution in the name of someone else. He said moving funds from one column to another does not show what the contributor's intent was. He said the Commission should not leave it up to the LePage campaign to ascribe intent to the contributors. He said an e-mail or a note from the contributor would be preferred.

Mr. Healy asked whether there was a presumption under the law that when a contribution is made by check from a joint account belonging to a husband and wife, the contribution is intended to be from both spouses.

Mr. Grant said he did not believe that to be the case. He said looking at the Commission's guidebook, it is advised that candidates "*receive something in writing from the non-signing spouse confirming that it was their intent to make part of the contribution.*"

Mr. Morris explained that there is a notation on the spreadsheet provided by the campaign that the \$550 Dwight contribution will be refunded and the campaign is not going to allocate that to the daughter.

Ms. Matheson asked Ms. Sullivan if she did make all calls on the duplicate contributions.

Ms. Sullivan reviewed the names of the people she did contact personally.

Mr. McKee asked what the Commission's past practice had been with regard to the written intent on joint contributions.

Mr. Wayne explained that the staff has written guidance which expresses what the staff view as the best practice in this situation, but there are no requirements to use that procedure. Mr. Wayne said he believed the campaign's intentions were honorable; however, the bookkeeping could have been better. He also said there were three contributions received after the primary election with no explanation in the Commission's e-filing system as to what they were for. They did not have any record of these contributions. However, he acknowledged that, despite the best intentions, mistakes do happen. He said overall the campaign is complying with the requirements, but the recordkeeping could be better.

Mr. Wayne said that the campaign did have a good argument that most of the questioned contributions were in fact correctly allocated to each spouse because each spouse had previously made contributions to the campaign. It was not simply a matter of redistributing the contribution solely to avoid an over the limit contribution.

Mr. Youngblood said in the best interest of the Commission, he thought it would be advisable for the staff to contact a random sample of the donors.

Mr. McKee said that an investigation process would mean any action would be deferred until the next meeting.

Mr. Wayne referred to the statute language regarding filed complaint requirements be decided within 24 hours of filing. He said, however, when additional fact finding is required that is impractical.

Mr. McKee suggested that the Commission make a final determination that there is no violation but that if the staff's investigation found that there were other potential violations, the staff would bring that to the Commission at another meeting.

Mr. Wayne said that would be acceptable, procedurally. However, he said that he believed there was a violation regarding the Dwight contribution.

Mr. McKee moved that the Commission find no violations except regarding the Dwight contribution. Ms. Matheson seconded.

Motion passed unanimously (4-0).

Mr. McKee moved that the Commission find a violation with respect to the Dwight contribution which was in excess of \$750. Ms. Matheson seconded.

Motion passed unanimously (4-0).

Ms. Matheson moved the Commission assess no penalty with regard to the Dwight violation. Mr. McKee seconded.

Motion passed unanimously (4-0).

2. Request by the Maine Democratic Party concerning the Republican State Leadership Committee

By phone, Craig Engle, Esq., national counsel to the Republican State Leadership Committee, and colleague Brett Kappel, Esq., both of Arent Fox, Washington, D.C.

Mr. Wayne explained that on Saturday, October 23, 2010, the Republican State Leadership Committee (RSLC) filed an independent expenditure report just before 1:00 p.m. reporting an expenditure of almost \$400,000 that was made relating to five State Senate races. He said the expenditures were all dated the previous day and if accurate the report was filed on time within 24 hours. However, the Maine Democratic Party filed a complaint challenging the reported dates. He said the party contends that the mailers and television ads required expenditures to be made before the Friday, October 22 reported date in order to produce the ads on the days which they appeared. He said the mailers required printing and postage fees to be reported earlier than the RSLC reported date as well since they were delivered in mailboxes as early as Saturday, October 23. He said the party also requests that the Commission assess civil penalties against the RSLC for the late filing.

Mr. Healy asked whether any new information had been obtained by the Commission staff since the Commission authorized an investigation at the October 26 Commission Meeting.

Mr. Wayne explained that on the evening of October 26 he sent a letter by e-mail to Scott Ward at the RSLC posing five questions regarding the timing of the television ads and mailers as well as payment dates. Mr. Wayne said he had not had any response back from Mr. Ward. He said his letter also put the RSLC on notice that the Commission may consider whether a violation had occurred and assess a penalty if determined so.

Daniel Walker, Esq., counsel for the Maine Democratic Party and Andrew Cashman, Esq., both from Preti Flaherty, represented the Maine Democratic Party. Mr. Walker reviewed the statute requiring the Commission to make a decision within 24 hours of a complaint being filed. He said there is evidence in this matter to determine that a prima facie violation had occurred. He asked the Commission to take time for investigation if necessary, but find in violation immediately.

Mr. McKee said the basis for the 24 hour statute requirement was for decisions to be made quickly. He said a further investigation can take place later if needed. He said otherwise the perpetrator of the violation is rewarded.

Mr. Healy asked what the date of filing should have been, in the party's view.

Mr. Walker said fully-produced TV ads were at stations on Friday morning at 11:00 a.m. He said the report was filed at 1 p.m. the next day which was two hours late, at minimum. He said, also, Target Point Communications conducted polling in September for the RSLC in the same Senate races. The RSLC reported that it had no activity in the October Quarterly and the 11-Day Pre-General Reports. So it is possible that those reports were filed late because they were substantially non-conforming because it is obvious that the RSLC did make expenditures in those reporting periods.

Mr. Healy said Mr. Walker made a good case that there is probable cause that the RSLC filed the report late. He said, however, Mr. Walker was also asking the Commission to adjudicate when the RSLC should have filed the report.

Mr. McKee said that he understood Mr. Walker to be saying that there was no possible way that a television ad could be produced and delivered immediately to the station, and that the production had to occur some time before the station got the ad. He said that the actual date of when the report should have been filed can be determined later when more facts have been developed. But at present, the Commission can decide that a violation had occurred. However, the issue that Mr. Healy brought up is whether the Commission should or must adjudicate the entire matter immediately.

Mr. Walker said the party has sufficient evidence for the Commission to determine the entire matter including the penalty today. He said it takes at least a week to produce a TV ad and three or four days to produce direct mail.

Mr. McKee asked what was in the record to prove those assertions and for the Commission to base its determination, if the entire matter had to be decided today.

Mr. Walker said that the RSLC could provide that information.

Mr. Healy asked Mr. Walker what the purpose was in finding a violation and then having another hearing to determine the penalty.

Mr. Walker said the purpose of the provision for meetings within 24 hours of a complaint is to give information to the public that a violation of Maine law has occurred. It creates a disincentive to those who would try to circumvent campaign finance laws if the Commission has the ability to decide quickly whether there has been a violation of those laws. He said the violation determination needs to be dealt with as soon as possible but assessing the penalty can wait until later.

Mr. Walker reviewed the materials he provided the Commission which he said clearly indicated that the stations had received the fully produced ads on Friday morning and that the RSLC made media buys starting on Friday morning as early as 10:30 a.m. Generally speaking, it takes a week to produce an ad. Therefore, the RSLC made its first reportable expenditure at least a week before October 22.

Mr. Walker reviewed the materials regarding the direct mail sent by the RSLC. He said according to information received by the MDP, the mailers were delivered as early as Saturday, October 23. There was no way the expenditure could have been made on Friday. He said it takes three or four days to produce a mailer, although that may not be the determining factor as to when the report should have been filed but the cost does need to be reflected in the report. But it does take time to print the mailers and since they were sent with a bulk mail permit, it had to take at least a few days after the expenditure for the mailers to be delivered. He said the expenditure should have been reported much earlier. He also reviewed the Target Point polling expenditure and explained that this poll could have been done as early as September. The RSLC did not report the Target Point expenditure in either of the two regular campaign finance reports that were due since September. In fact, the RSLC affirmatively stated that it had no financial activity in those reporting periods. Mr. Walker also stated that he did not think that it was a coincidence that the filing happened the day after the U.S Supreme Court decided not to take up the plaintiffs' motion to enjoin matching funds in the *Respect Maine PAC v. McKee* case.

Mr. Walker summarized by saying it was clear a violation had occurred although the exact date the report or reports should have been filed is still not clear. He said the late reporting did delay matching funds to candidates and therefore delayed their ability to respond to these negative ads by RSLC. If the Commission did not find a violation in this case, it would create an incentive for others to file independent expenditure reports late.

Mr. Youngblood asked where can someone find information about what triggers the requirement to file an independent expenditure report and how would someone know what the Commission decided at a meeting two years before.

Mr. Walker said the statute and the Commission's rules provide a definition of an expenditure.

Mr. Healy asked Mr. Walker what the date of filing should have been for the television ads.

Mr. Walker said at least by 11 a.m. on Saturday, October 23, two hours earlier.

Mr. Engle said this was the first independent expenditure done in Maine and the process was new to RSLC. He said in response to Mr. Walker's comment that the RSLC engaged in a willful, intentional delay is incorrect. He said the RSLC does not act in willful disregard of any law nor would it intentionally delay any report for any reason. He said the political committee has been active for many years and takes its obligations very seriously. If one looked at its record from across the United States, you would never find any allegation that it operated in any manner that willfully or intentionally disregarded any law. He said the majority practice in other states defines an independent expenditure as being made at the date of the release or payment of an ad or mailer because at any point before that, the expenditure may not occur. He said from looking at the Maine law, it is possible an expenditure which may not happen could trigger matching funds for the opposing candidate before the expenditure actually was made.

Mr. McKee explained this was the Maine law and entities doing political business in this state need to be aware of the laws and the risks when doing business in Maine.

Mr. Engle said his experience has been that no ad or mailer is final until the actual expenditure had been made and that means when the piece has gone. He said that was what the RSLC was trying to do when filing, however, it was two hours over the 24 hour requirement.

Mr. McKee said the Commission understands that other states do things differently than Maine and that relates to whether the RSLC's actions were willful or negligent. At this point, the Commission was more interested in the specifics of when the expenditures were made.

Mr. Engle said the RSLC filed the reports in Maine in what they believed was a timely fashion. He also said the timing of the projects had nothing to do with the *Respect Maine PAC vs. McKee* lawsuit. He said these were done on the schedule set by RSLC and with no regard to any Supreme Court case. He explained that he was not currently in a position to provide exculpatory or explanatory evidence beyond what he has already stated and will have to take his lumps.

Mr. Healy asked if the dates of the contracts could be provided by RSLC.

Mr. Engle said the only dates he had were the actual payment dates to the vendors.

Ms. Gardiner asked the purpose of the polling expenditure and if it had anything to do with the mailings of television advertisements.

Mr. Engle stated knowing the RSLC's past practice, the polling did not relate to the ads. He said polling is done for a variety of reasons but he did not have the actual questions used or what the results were. He said he did not have an expenditure date for the polling.

Mr. Walker said that it was still important and necessary to determine the actual dates on which the orders were placed and when the mailers were mailed.

Mr. McKee asked if that information could be gathered going forward when dealing with the penalty phase.

Mr. McKee reviewed the procedure the Commission would follow with this matter. He said the first matter would be to make a determination whether a violation had occurred and at a later time determine what the appropriate penalty would be. He asked Ms. Gardiner whether the motion should specify each expenditure that was reported late.

Ms. Gardiner said the issue was whether the independent expenditure report was filed late and it was not necessary to go through each expenditure listed.

Mr. McKee moved that the Commission find there was a violation due to the late filing by RSLC of Independent Expenditure #142 and defer the penalty decision until the next regularly scheduled meeting. Ms. Matheson seconded.

Mr. Healy stated that he would vote for the motion because Mr. Engle admitted that RSLC was two hours late getting the report filed. He said the factual record is not clear enough to make a determination beyond that.

Motion passed unanimously (4-0).

Mr. McKee confirmed that the investigation into this matter was on-going.

Ms. Matheson moved to adjourn. Mr. McKee seconded. The motion passed unanimously.

Meeting adjourned at 2:50 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director