



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Approved on: 1/17/2013

Minutes of the November 28, 2012, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Margaret E. Matheson, Esq.; Michael T. Healy, Esq.; Hon. Jane A. Amero
Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:05 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the October 31, 2012 Meeting

Mr. McKee moved to accept the minutes as drafted. Ms. Matheson seconded. The motion passed (5-0).

Agenda Item #2. Consideration of Statute Changes Proposed by Commission Staff

Mr. Wayne said the staff was proposing statutory changes for the Commission to consider for inclusion in the bill it will send to the Legislature in early 2013. The staff distributed the proposed changes to interested parties and received some helpful feedback. He explained that there would be more proposed statute changes to be considered at the December 19 meeting in addition to today's submission. He said that the comments from the public at today's meeting may be preliminary but that there will be another opportunity for the public to be heard at the meeting on December 19.

John Brautigam, Esq., representing Maine Citizens for Clean Elections (MCCE), said he was not prepared to give a final view on the proposed changes at this point and appreciated that they could submit additional comments before the December 19 meeting. He said the MCCE will be submitting its own legislative package for consideration during the next session which will likely contain amendments regarding the Maine Clean Election Act, disclosure, and political action committees.

Mr. Brautigam said the MCCE's goals regarding the changes to the Clean Election Act and the disclosure requirements are to maximize transparency to the public, access to the democratic process for individuals, and clarity and certainty for the regulated community. He said other guiding principles are accountability, legal defensibility, and keeping the system workable for candidates and other political actors.

Mr. Brautigam said the MCCE supported the changes regarding donations to persons considering running for office and would like to be able to comment further on the specifics of how that would play out at a later date. He said also MCCE supports the change that makes the rebuttable presumption regarding independent expenditures applicable to all candidate races even if there is no MCEA candidate in the race. This will result in more disclosure. He said MCCE supports legislation to address the issue of raising funds to pay for inaugural activities and the transition costs of a new administration. They have looked at how other states regulate donations for these activities and would like to comment further on the issue at a later date. Accelerated reporting of large contributions to party committees and political action committees (PACs) is an important part of disclosure and MCCE supports the proposed requirement to report contributions of \$5,000 or more during the last 13 days before the election. He said the PAC registration changes are quite detailed. He said the Commission should consider a bright line rule about where the responsibilities lie in order to eliminate the uncertainty and misunderstanding when someone is named as a PAC officer or treasurer on a registration form. He stated that this clarity may be established without infringing upon a person's right to be politically active.

Mr. Healy asked Mr. Brautigam what the statutory duties of a PAC treasurer were. Mr. Brautigam said that it is a matter of interpretation with respect to what the statutory responsibilities of the treasurer are because they are not spelled out clearly. He said it is implied that the treasurer is responsible for the committee's finances and filing of the reports. Mr. Healy said that it seemed the statute is mostly silent on the treasurer's duties. So if a case comes before the Commission regarding who is responsible, then the determination would be based upon the facts of that case.

Mr. Brautigam agreed that each case may require a factual determination. However, in a case involving coordination, for example, the treasurer is responsible and should be held accountable for activities of the PAC.

Mr. Healy asked about the situation where a treasurer is simply a name on the registration form and has nothing to do with the activities of the PAC. Mr. Brautigam said he did not believe the Legislature intended to create a designation that did not mean anything. He said if the form lists someone as the treasurer, that means something

and that person has some responsibility. He said the degree of responsibility could be interpreted differently but a reasonable interpretation would not relieve the treasurer of all responsibility.

Mr. Healy agreed but said unless that is spelled out, it is very unclear. Mr. Brautigam agreed there needs to be clarification in this area. Mr. Brautigam said MCCE is very concerned about the lack of understanding by the people who accept this responsibility. He said it appears that some believe they can just be listed on the form in name only and that it does not mean anything legally. He said, however, if a treasurer should decide to resign and for whatever reason their name was not removed due to a clerical error, that would be a different scenario. If someone agrees to be treasurer and claims they did not think it really meant anything, he said that is not acceptable.

Mr. Brautigam said MCCE supports the Commission's proposal regarding attributions on paid communications for ballot questions as well as the proposal to allow electronic filing of independent expenditure reports and would like to work on the details further with staff. He explained that there was some concern regarding the amendment to provisions on contributions to defray a candidate's expenses related to recounts since it appears that the proposal would allow for unlimited contributions from any entity.

Mr. Brautigam said MCCE generally supports but has a few questions about the remainder of the proposed changes. With regard to reporting the source of funding for independent expenditures, he said this is an important improvement but would phrase it slightly differently. He said if the requirement is limited to contributions for a certain purpose, they feel the proposal is legally justifiable and would support keeping it in the changes. He said if there is a chain of contributions by several entities for a specific purpose to influence an election, the public should have the ability to know about them.

MCCE supported the proposal to require separate campaign accounts for ballot question committees and PACs. Mr. Brautigam said they were concerned about the phrase "organizations may pay employees to influence the election through their own treasury rather than separate accounts with the committee." He was concerned that this wording could have the potential to hamper full disclosure.

Mr. Brautigam said MCCE supported closing the loophole regarding in-kind contributions from organizations to ballot question committees, retention of account statements by PACs and ballot question committees, as well as increased fines for failing to register and failing to keep records. He said MCCE is of the philosophy that good

enforcement as well as clarity of the statute for the regulated community is the best way to achieve transparency rather than assessing large fines.

With regard to lobbyist disclosure, Mr. Brautigam said they support including direct communications with the Governor-elect as reportable lobbying. The proposed changes exempt communications with candidates for the Legislature. He suggested it would be good to retain the provision on reportable lobbying of candidates for the legislature under the current lobbying rule.

Mr. Healy asked for some guidance on where the line is drawn with regard to the First Amendment and the right to anonymous independent expenditures.

Ms. Gardiner said these proposals before the Commission do not raise any First Amendment concerns for her. Mr. Healy asked whether it was a concern that any communication costing more than \$500 to influence a ballot question will require disclosure. Ms. Gardiner said the \$500 amount would still leave enough room for someone to pay for flyers or communications on the internet without having to place a disclaimer on the communication. In addition, this disclaimer proposal is narrow and applies only to communications advocating expressly for or against an initiative or referendum on the ballot. She said this wording makes it clear that it does not apply to general issue advocacy, but only to express advocacy in a ballot question election. She said this proposal is consistent with other states' statutes that have been deemed constitutional in courts around the country.

Mr. McKee said he was comfortable with the six areas of the staff's proposals and supported going forward with the process to the December 19 meeting. He said if there are any issues at that time, they can be discussed and revised then.

Mr. Wayne said that he wished to bring a couple of issues to the Commission's attention. One was with regard to the proposed PAC registration and the requirement that individuals who are named as an officer of the PAC sign an affirmation stating they understand the legal responsibilities of their office. He said the proposal also includes a statement that they could be financially liable for any penalties assessed against the PAC. He wanted to know what the Commissioners thought about this provision, especially whether there would be any adverse impact of individual involvement in political campaigns.

In response to Mr. Duchette's question regarding how the current statute dealt with this issue, Mr. Wayne said it is not addressed in the law now. Mr. Duchette asked what would happen in a scenario where the Commission assessed a penalty and the PAC terminated.

Mr. Wayne said that has never happened. A large penalty has never been assessed and not paid. He said the proposed provision clears up an area of ambiguity.

Mr. Healy said that if the Commission were to find someone "jointly and severally" liable for the penalty, the Commission would have to find out who was responsible for the violation. There could be three or four people involved in the PAC. One person could be responsible for the violation but the others may not have known anything about the violation. Making them jointly liable would be making the innocent liable with the guilty party. He agreed with the concept of holding the responsible person liable for the penalty but was unsure about making all PAC officers jointly liable.

Mr. McKee said he would support having the flexibility to assess each situation on a case-by-case basis to determine how much the individuals involved with the PAC knew. He said the claim by PAC officers that they really did not have any involvement in the PAC was very disturbing for him. He said people should not be allowed to sign a form saying they are a decision maker and then claim no involvement. If you sign on as a player then you will be assumed to be playing. He said the Commission needs to be able to assess involvement on an individual basis.

Mr. Healy said the real problem in his view was the statute is very unclear as to the duties and obligations of the treasurer. He said the statute does not make it clear whether the treasurer and officers of a PAC have a fiduciary duty or to whom is owed. He said the treasurer should be responsible for writing the checks and making sure expenditures are legal and should not be able to avoid that responsibility. He said the statute needs to be clear and state that if someone is a treasurer or decision maker, they are legally responsible for these matters.

In response to Mr. Duchette's question, Mr. Wayne explained that a Clean Election Act candidate cannot be their own treasurer. Mr. Duchette noted in the case of a Clean Election candidate, there are checks and balances.

Mr. Healy said a Clean Election Act candidate needs to be sure their treasurer understands that they have fiduciary responsibility because they are handling public funds. He said the candidate should have to go through the treasurer to make expenditures to be sure that the funds are being used for the proper purpose.

Mr. McKee asked where in statute this matter would be addressed. Ms. Gardiner explained that section 1016 states that the treasurer has an obligation to keep the records for the campaign, but does not go so far as to say the treasurer is the only one who can write checks. She said this language could be made clearer and stronger. Ms. Gardiner referred to section 1057 of the PAC statute where it states the treasurer must keep record of all contributions and record a detailed account of expenditures. She said the language relates to recordkeeping only.

Mr. McKee asked why the candidate and PAC provisions regarding the treasurer's obligations were different. Ms. Gardiner said that they were not quite parallel but were very similar. The difference could be just how the statute developed over time.

Ms. Gardiner said there currently is no provision with language as Mr. Healy stated with regard to the treasurer's responsibility for ensuring that Clean Election funds are spent appropriately for campaign-related purposes.

Mr. Duchette said the question for him was should the entire burden be placed on the treasurer.

Ms. Matheson said decision makers and officers in PACs also need clarity about what their duties are, just as the treasurer does. Even though the statute lacks clarity in that regard, she said that the concept of naming "place holders" for officers and decision makers on the PAC registration is, at best, inappropriate, and at worst, can let things spin out of control. She said making them financially liable is one approach but it does not take into consideration how the PAC makes its spending decisions. The issue of holding PAC decision makers and officers accountable almost rises to the level of a presumption.

Mr. Wayne said there could be a presumption that the treasurer, decision makers and officers of a PAC are involved in the PAC's spending decisions. Mr. McKee said that it does add a level of accountability not currently in the statute but it may be too easy to rebut the presumption.

Mr. Healy said he would like to get away from a situation where it is a factual determination. If there were a statutory obligation and the obligation was not met, there would be a finding of violation. Mr. Healy said if a decision maker does not participate and something goes wrong, they would be responsible in his view.

Mr. Duchette asked whether the term “decision maker” was defined in statute and Mr. Wayne said it was not. He said the staff is encouraging that this be proposed. He explained that decision makers should have some financial responsibility as well.

Mr. McKee said the Commission will consider the proposed statute changes, as modified by the staff in light of the comments at this meeting, and will accept additional public comment at the December 19 meeting.

Agenda Item #3. Request for Waiver of Late Filing Penalty by L PAC (postponed until December 19)

Agenda Item #4. Request for Waiver of Late Filing Penalty by the National Organization for Marriage Maine PAC

The National Organization for Marriage Maine PAC is a registered PAC in Maine that opposes the same-sex marriage citizen initiative. It was required to file an 11-Day Pre-General Report on Friday, October 26, 2012. NOM PAC filed the report one day late on October 27. In the report, NOM PAC disclosed contributing \$800,000 to another PAC, Protect Marriage Maine, opposed to the initiative. The preliminary penalty amount is \$8,001.11. In a letter, NOM’s attorney stated that the PAC knew of the deadline and failed to timely file due to an oversight, but contended that the public suffered little harm from the late disclosure.

Mr. Duchette asked if consideration could be given to the past violations by NOM in determining the penalty.

Mr. Wayne said the Commission will be considering the 2009 activities of NOM at a future meeting and the staff felt this matter should be looked at separately.

Ms. Matheson suggested tabling this issue in order for staff to determine through further investigation whether there was a bona fide effort to file this report on time.

Mr. McKee said he was reluctant to table the matter because NOM PAC had an opportunity to state their case and they did not provide any additional information to support their case. He said NOM has a history in Maine concerning this particular issue and it was likely that people were very interested in monitoring its financial

activity, especially so close to the election. However, fourteen hours was not a significant amount of time and it is unlikely that there was much harm to the public. He said staff has been very generous with NOM and there will be another opportunity to review NOM's past actions here in Maine to determine if there were past violations. He said the amount of the penalty is not significant for NOM and they have to be treated fairly and consistently with others.

Mr. McKee moved to adopt the staff recommendation and reduce the penalty by 75% to \$2,000 because the public suffered little harm from the report being filed 14 hours late. Mr. Healy seconded.

Motion passed (5-0).

Agenda Item #5. Request for Waiver of Late Filing Penalty by the Sagadahoc County Republican Committee

The Sagadahoc County Republican Committee was required to file an 11-Day Pre-General Report on Friday, October 26, 2012. The committee treasurer was removed three days before the filing deadline. Other committee members took the treasurer's records in order to file the report, but the committee filed the report 11 days late on November 7 (one day after the general election). The preliminary penalty amount is \$729.60. The committee chair requests a waiver of the assessed penalty by letter.

Diane Simmler, state committeewoman for the Sagadahoc County Republican Committee, said she became familiar with campaign finance reporting requirements only recently because she was the treasurer for a candidate. However, she did not know there was a report required for the county committee because she is new in her role as committeewoman. She said the treasurer was replaced on the Tuesday before the filing deadline and the report was due on Friday. She said the next treasurer who was recruited looked at the committee's paperwork and decided not to be treasurer. She said she had some idea of what information was needed in order to file the report but there was not enough time for her to gather and organize all the information to file properly. She said three people pulled together the paperwork and just could not make sense of it. She said the original treasurer did not keep good records and the chair had not checked in with the treasurer to make sure that he was doing his job.

Mr. McKee said he had two concerns. First, this issue did not arise just before the filing deadline. It happened over a period of time and steps should have been taken to make sure that the correct records were kept and reports would be filed on time. Second, the report was filed on the day after the election which defeats the purpose of filing because the public wants to know what is going on before the election.

Ms. Simmler said all the committee members most likely were involved with candidate campaigns during the election, and trusted that the chair and the treasurer were following through with the reporting requirements. She said the information was being kept but it was not organized in a way that would be helpful in filing reports. She said it took several hours and people to figure out what needed to be reported. She said the full penalty amount would clean out the committee's checking account.

Mr. Duchette asked if she had any objection to the staff recommendation and Ms. Simmler said she did not.

Ms. Amero moved to adopt the staff recommendation and reduce the penalty by 70% to \$218.88, in light of the removal of the treasurer and the inexperience of the other committee members who worked on the report. Mr. Duchette seconded.

Motion passed. (5-0)

Agenda Item #6. Request for Waiver of Late Filing Penalty by the Somerset County Republican Committee

The Somerset County Republican Committee purchased radio and television advertising to promote ten Republican candidates for the Legislature, and was required to file two independent expenditure reports on October 22 and 25. Instead, the committee filed a single report late on October 29. The preliminary penalty amount is \$407.40. The committee treasurer requested a waiver of the penalty because it was the first time he was responsible for performing a substantial amount of independent expenditure reporting.

Mr. Duchette moved to adopt the staff recommendation and reduce the penalty by 50% to \$203.70 because the amount of the preliminary penalty is disproportionate to the level of experience of the treasurer. Mr. Healy seconded.

Motion passed. (5-0)

Agenda Item #7. Request for Waiver of Late Filing Penalty by the Washington County Republican Committee

The Washington County Republican Committee was required to file an 11-Day Pre-General Report on Friday, October 26, 2012. The committee filed the report five days late. The preliminary penalty amount is \$114.45. The committee chair requested a waiver of the penalty, contending that, due to inexperience, the treasurer

overlooked the filing deadline. He also contended the amount of the penalty is disproportionate to the size and sophistication of the committee.

Mr. McKee said the problem began in February 2012 when the committee's treasurer resigned. There was sufficient time for the new treasurer to become acquainted with the reporting requirements. With this large amount of money coming into an organization, more care needed to be taken.

Mr. Healy moved to adopt the staff recommendation and assess a penalty of \$114.45. Mr. Duchette seconded.

Motion passed. (5-0)

Agenda Item #8. Request for Waiver of Late Filing Penalty by the Aroostook Democratic County Committee

The Aroostook County Democratic Committee was required to file an independent expenditure report on Sunday, October 21, 2012. The committee filed the report eight days late on Monday, October 29, 2012 after the committee received a communication from the Commission staff that the report was late. The preliminary penalty amount is \$64.24. The committee treasurer requested a waiver of the penalty, because he was not aware that an independent expenditure report was expected from county committees, having never before made an expenditure which required an independent expenditure report.

Mr. Duchette moved to adopt the staff recommendation and assess a penalty of \$64.24. Ms. Amero seconded.

Motion passed. (5-0)

**Agenda Item #9. Request for Waiver of Late Filing Penalty by the National Association of Social Workers
Maine PAC**

The National Association of Social Workers Maine PAC is a PAC registered with the Commission. It was required to file an 11-Day Pre-General Report on Friday, October 26, 2012. The committee filed the report three days late. The preliminary penalty amount is \$21.75. By letter dated October 29, 2012, the committee executive director requested a waiver of the penalty.

Mr. Duchette moved to adopt the staff recommendation and assess a penalty of \$21.75. Ms. Amero seconded.

Motion passed. (5-0)

Agenda Item #10. Request for Waiver of Late Filing Finding by the Orono Democratic Committee

The Orono Democratic Committee was required to file an 11-Day Pre-General Report on Friday, October 26, 2012. The committee filed the report three days late (the following Monday). Because the preliminary penalty amount was less than \$10, the financial penalty was automatically waived. The committee treasurer requested a waiver of the finding of violation, contending that the committee made a good faith effort to file on time by sending the report by regular mail two days before the deadline.

Mr. McKee moved to adopt the staff recommendation and find the committee in violation because the report was late. Mr. Healy seconded.

Motion passed. (5-0)

Executive Session

Pursuant to Title 1 of the Maine Statutes, section 405(4), at 10:10 a.m. Mr. McKee moved to go into executive session pursuant to Title 1, section 405(6)(E) to consult with the Commission's counsel concerning pending or contemplated litigation. Mr. Duchette seconded.

Motion passed unanimously.

At 10:25 a.m., Mr. McKee moved to come out of executive session. Mr. Duchette seconded.

Motion passed unanimously.

Other Business

Mr. Wayne explained that the Commission was getting updates from Rosa Scarcelli's counsel regarding mediation with her step-father, Mr. Karl Norberg, to resolve some family business disputes. He said this has been delaying the Commission's proceeding on this issue. He said the last update was approximately ten days ago and has heard nothing since that time.

Mr. Duchette said the mediation really has no influence on the Commission's procedures.

Mr. McKee suggested notifying all parties that the Commission will have the hearing in January and make a determination at that time.

Mr. Healy moved to adjourn and Ms. Amero seconded the motion, which passed unanimously. The meeting adjourned at 10:35 a.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director