



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Minutes of the October 20, 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; André G. Duchette, Esq.; Hon. Edward M. Youngblood; Margaret E. Matheson, Esq., Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Investigation of Cutler Files (partially discussed in executive session)

Mr. McKee provided Daniel I. Billings, Esq., counsel for the Cutler Files, and Richard Spencer, Esq., counsel for the Cutler campaign, an opportunity to respond to the new information and legal arguments that were raised after the last meeting.

Mr. Billings said that Mr. Spencer made two arguments in favor of continuing the investigation. The first argument was the website should have included a disclaimer identifying the responsible parties who created the site. The second argument was that the Commission should investigate whether more money was spent on the website than the amount claimed. Mr. Billings said that Mr. Spencer was, in effect, telling the Commission to make the Cutler Files prove that they did not spend more than \$100, whereas the standard for starting an investigation is that the complaining party has to provide sufficient evidence that a violation may have occurred. Mr. Billings stated that there has been no evidence provided to substantiate Mr. Spencer's claims that more money has been spent. He said the standard for whether an investigation is

warranted has not been supported. Mr. Billings said speculation and suspicion is not enough to support a further investigation.

Mr. Billings said the Cutler campaign's premise that the research for the website was done and paid for by an unsuccessful primary candidate was faulty. He said primary candidates do not spend large sums of money on staff or consultants to do opposition research on candidates they may possibly face in the general election. He talked with people who have been involved in primary campaigns and all have said that it is not practical to do so when the focus of the campaign is winning the primary election. Mr. Billings said that Mr. Spencer argued that, if the website is considered to be an independent expenditure, the cost of the research should be included in the overall cost of the communication. Mr. Billings said the Commission has never required other entities that made independent expenditures to report research costs. He also said that reporting the site research time as an independent expenditure has not been required by any other entity in the past. He said the Commission has not required filers to report time for any research that is done when making an expenditure.

Mr. Healy asked whether Mr. Billings' clients have waived the attorney/client privilege in order to provide factual information beyond what was submitted in the affidavit.

Mr. Billings said it would depend on the specific information that was requested. General questions have been addressed, he said.

Mr. Billings also stated that the Cutler campaign has indicated that it may file a civil suit. If the Commission does not go further with this investigation at this time, the Commission retains the right to take action in the future should any information provided to the Commission by the Cutler Files turn out to be untruthful or not factual as a result of fact finding in connection with a civil lawsuit.

Richard Spencer, Esq., counsel for the Cutler 2010 campaign, said he believes the affidavit submitted to the Commission is not accurate. He said the research was likely done in conjunction with a gubernatorial primary campaign or someone closely associated with one in preparation for running against Mr. Cutler in the general election. He said he believed the answer to Question 7 in the affidavit to be false. He also

expressed concern over the accuracy of Question 16 in the affidavit regarding the cost of the website and Question 9 regarding research time.

Mr. Spencer said until the Commission establishes for certain how much was spent on the website, one cannot conclude it is a de minimis violation of §1014. The Commission should continue the investigation to determine whether the representations in the affidavit are true.

At 9:30 a.m., Mr. McKee moved that the Commission go into Executive Session to consult with the Commission's counsel concerning pending or contemplated litigation and the legal rights and duties of the Commission. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

At 9:42 a.m., Mr. McKee moved to come out of Executive Session, seconded by Mr. Youngblood. Motion passed unanimously.

Mr. Healy moved that the Commission authorize the staff to continue the investigation of the Cutler Files for possible violations of 21-A M.R.S.A. § 1014 and § 1019(b) and continue the investigation in a confidential manner. Mr. Duchette seconded.

Motion passed unanimously (5-0).

Agenda Item #2. Request by Walter J. Eno concerning Columnist Bill Nemitz

Mr. Wayne explained that the Commission has received a request by Walter J. Eno of Scarborough to consider whether columnist Bill Nemitz has violated election laws because of his advocacy against Paul LePage. Mr. Wayne said the staff recommends taking no action on this matter, because of the exception in the campaign finance law for commentaries appearing in newspapers.

Mr. Duchette moved that the Commission take no action on the request for an investigation. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #3. Request by Maine Democratic Party concerning Paul LePage

Mr. Wayne explained that the Maine Democratic Party has filed a request for the Ethics Commission to investigate whether the 2010 gubernatorial campaign of Paul LePage received an in-kind contribution in the form of a company car which Marden's Surplus & Salvage has provided to the candidate, who is the General Manager of Marden's. In addition, the Maine Democratic Party requests that the Commission investigate whether the LePage campaign made material misrepresentations in its campaign finance reports due to the way travel reimbursements to Mr. LePage were reported.

Daniel Walker, Esq., counsel for the Maine Democratic Party, explained the reasoning for the request. He said it was discovered that Mr. LePage had a vehicle with an expired registration around the time he began campaigning and he received a new company vehicle at about the same time. He said it appeared the vehicle could have been an in-kind contribution. He said the Party learned recently that Mr. LePage has had a company vehicle for over a decade and that the reimbursements were for fuel only.

Mr. John Morris, Chief of Staff for the LePage campaign, explained that Mr. LePage has had a company car provided by Marden's since 1999. He said the Chief Financial Officer wrote a letter confirming this. He also confirmed that Mr. LePage does purchase his own fuel for the vehicle. He summarized by saying there is nothing to this case.

Mr. McKee moved the Commission not investigate this matter any further since no probable cause exists. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #4. Request by Maine Democratic Party concerning Poll

Mr. Wayne said the Commission staff wishes to provide an update to the Commissioners of a staff investigation of a poll conducted by Target Point Consulting and Western Wats of Maine to residents concerning Democratic candidates for the State Senate. He said he contacted Target Point Consulting directly and confirmed that it was a real research poll testing negative themes for use by their clients in

communications to voters. He said the poll included demographic questions and the results were tabulated after the poll. Mr. Wayne said it was not a push poll as the Democratic Party had suspected.

Daniel Walker, Esq., counsel for the Maine Democratic Party, said he agreed that there is no longer an issue about whether these entities were engaged in push polling. He said the question now remains who did the poll and do they need to register as a political action committee if they spent more than the threshold. He also said that the Commission should determine whether the poll contained express advocacy which would require that an independent expenditure be filed.

Mr. Wayne said there are numerous organizations, such as the state party committees, that are using polls to test negative themes about candidates. He said none of those communications with voters has ever been reported to the Commission as express advocacy. He said further investigation would hold this organization to a standard that no other entity has.

Mr. Healy moved that the investigation requested by Mr. Walker on September 29, 2010 (on behalf of the Maine Democratic Party) be terminated in light of the report from Mr. Wayne. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Agenda Item #5. Request by Maine Republican Party concerning Elizabeth Mitchell Campaign

Mr. Wayne explained that the Maine Republican Party requests that the Commission consider whether a television ad run by gubernatorial candidate Elizabeth Mitchell featuring her family used Maine Clean Election Act funds improperly to assist the campaigns of two of her children and her husband, who are also candidates for office.

Daniel I. Billings, Esq., counsel for the Maine Republican Party, said the issue is the possible improper use of Maine Clean Election Act (MCEA) funds. He said that after the District Court struck down the rebuttable presumption in Maine election law, the Commission cannot do the kind of subjective analysis of the context of communications that was allowed in the rebuttable presumption provision as written. He said the Commission's guidelines state that MCEA funds cannot be used to assist another campaign in any way. He said this ad identifies and depicts Emily Mitchell, therefore it could be seen as promoting her

campaign in House District 58. He referred to a 2008 matter very similar to this issue regarding then Senate candidate Valerie Carr-Winocour. At that time, the Commission analyzed the communication and determined that it was as an independent expenditure.

[Mr. Billings' presentation was paused so that the Commission could look at the Mitchell ad at issue.]

Mr. Billings said if you apply the independent expenditure definition to this ad, all the requirements are there. The public policy behind the rebuttable presumption was to close a loophole for communications made close to the election that did not have the exact language of express advocacy but which did have an impact on the election. The impact on MCEA candidates was particularly hard because they were given a small amount of public funds to campaign with and could not adequately respond to last-minute ads that did not contain express advocacy. Mr. Billings did not agree with the staff's analysis that the independent expenditure statute does not apply because Emily Mitchell cooperated in making the ad, therefore the issue is whether the ad should be considered to be a contribution to Emily Mitchell. He said even many would presume that, for the independent expenditure statute to apply, the communication must be made independently of the candidate. However, the independent expenditure statute does not say that.

Mr. McKee said that we can all agree that the ad does identify and depict Emily Mitchell and that the ad was disseminated within the 35 days before the election, the question, however, is whether this expenditure was made to "design, produce or disseminate a communication..."

Mr. Billings said that there was money spent to design, produce, and air the ad. The analysis should be based on the simple objective standard of whether there is a communication that was disseminated in which a candidate is clearly identified and depicted.

Mr. Duchette asked if the ad were negative against Emily Mitchell whether that would change the decision.

Mr. Billings said in the Commission's Rules there is a provision that allows the Commission to determine for whom the communication was intended to benefit. He said the subjective analysis comes into play in the determination of which candidate would get the matching funds. He said the objective analysis is whether the communication is an independent expenditure.

Mr. Healy stated that although Emily Mitchell was identified, the ad did not state she was running for any office.

Mr. Billings said anyone living in her district would recognize her and know she was running for office. He said, also, that the intent of the statute was to capture communications that did not identify candidates.

Kate Knox, Esq., counsel for Mitchell campaign, said Mr. Billings' analysis was irrelevant to the question before the Commission. She said the definition of an independent expenditure says the expenditure is done independently of the candidate, without the candidate's knowledge or cooperation. She said Emily Mitchell knew about the ad and there was nothing independent about it. She said the independent expenditure analysis does not apply in this case. She suggested the Commission determine first, whether the expenditure was for a campaign-related purpose and whether it was a contribution to Emily Mitchell's campaign. She said that the ad was a valid campaign expenditure. It was one of a series of biographical ads about Libby Mitchell. It is extremely common to use family members in these kinds of ads. The theme of this particular ad was about education and children coming back to Maine to live. She said no other candidate was highlighted in the ad. She said the subject of the ad was entirely about Libby Mitchell running for Governor. Regarding whether the ad was a contribution to Emily and Will Mitchell, she said Emily and Will Mitchell appear for no more than three seconds in a 30 second ad. Jim Mitchell appears in the ad for even less time and is not identified by name. Because the connection between Emily, Will and Jim Mitchell and their candidacies is so attenuated, the ad has no value to their campaigns. She also said the campaign contacted the Commission office in July to review the rules and be sure all the family members could be part of the family-oriented ad. She said the way the ad was written is entirely within the statute guidelines.

Mr. Healy said having Emily Mitchell and Will Mitchell, who is running for a municipal seat, featured in an ad with their names printed very obviously and speaking is a benefit to both of their elections because they are getting the benefit of the ad running repeatedly in their districts.

Ms. Knox said the theme of the ad was having children come home to Maine to live and work. She said what made the message more powerful was having Libby Mitchell's children speaking with that message.

If they had not been identified as Libby Mitchell's children, they would have just been viewed as random people and the strength of the message would have been diluted. She said simply having someone appear in an ad does not necessarily mean that person receives a benefit from that ad.

Mr. Youngblood agreed the other candidates appeared for a short period of time and the benefit may have been limited. However, he asked what the standard the Commission should use to determine whether an ad becomes a contribution based on the amount of time the candidate appears in the ad.

Ms. Knox stated that the period of time may not be as important as the content of what is said in the ad. She said the question should be whether the indicia in the ad are enough for the viewer to make the connection between the content of the ad and the candidate.

Mr. McKee said the first step with regard to this ad is determining whether it was "done in cooperation, consultation, or concert with" Therefore, if the Commission decides it was not, the other issues may be interesting but are irrelevant. He asked if there was anything else for the Commission to look at if it made that determination.

Ms. Gardiner said that was a legitimate argument. The person filing an independent expenditure report must sign an affidavit affirming that the expenditure was made without any communication, cooperation or coordination with the candidate. She said this situation does not exactly fit the definition of an independent expenditure. The Commission has to look at the entire statutory scheme to see where it fits. That includes the prohibition against the use of MCEA funds to make a contribution. Mr. Billings may also have a legitimate point that not viewing this as an independent expenditure opens up a loophole; however, that is a matter for the Legislature to deal with.

Mr. Wayne said that Mr. Billings may have a reasonable policy question. If the Commission decides that the expenditure is not an independent expenditure, the Commission could still decide whether Maine Clean Election Act funds were used to assist another candidate. Mr. Wayne said that the independent expenditure statute should be administered as it was intended. That intention was that it would apply to certain expenditures that were made independently of the candidate and without the involvement of the candidate. The applicable standard under the rebuttable presumption provision of the statute for an expenditure made

independently of the candidate is whether the expenditure is campaign-related. For an expenditure made with candidate involvement, it is appropriate to use a purpose test. For legal and policy reasons, the Commission needs the ability to look subjectively at the ads on a case by case basis. Mr. Billings contends that the Commission has no option other than saying that this ad is directly related to the election of Emily Mitchell. Mr. Wayne said that there is room for argument on that point.

Mr. Healy asked whether Mr. Wayne agreed with Mr. Billings' point that the U.S. District Court eliminated the rebuttable presumption.

Mr. Wayne said that Judge Hornby did sever the provision that allowed the presumption to be rebutted from the independent expenditure statute. Mr. Billings argues that the presumption in 21-A M.R.S.A. § 1019 (1)(B) applies in this case because the ad mentions other candidates and was disseminated within 35 days before the general election. This presumption cannot be rebutted due to the Court's decision. However, Mr. Wayne said that section did not apply in this case because the expenditure was not made independently of the other candidates.

In response to a question from Mr. Healy, Mr. Wayne explained that the Commission had promulgated a rule that states explicitly that any expenditure that is made with the cooperation or coordination of a candidate is not an independent expenditure. Mr. Wayne reiterated that the Commission needs to have the discretion to look at an expenditure and question what its purpose was.

Mr. Healy said there are potentially two issues – whether there was an illegal contribution to another campaign and whether Emily Mitchell's opponent should receive matching funds.

Mr. Wayne said that if the Commission decided that Emily Mitchell received an in-kind contribution, that would be taken into consideration in calculating matching funds for her opponent. However, Mr. Wayne recommended against finding that the Mitchell for Governor campaign was in violation because the law and guidance are unclear and the campaign sought advice from the staff early on regarding this ad.

Alison Smith, co-chair of Maine Citizen's for Clean Elections, said the first issue to decide was whether there was an independent expenditure made. She agreed with Ms. Gardiner's view that the Mitchell

campaign could not sign the required affidavit stating the expenditure was made without Emily Mitchell's coordination. She said the independent expenditure statute should not apply to this matter.

Ms. Smith said the ad was campaign related and the purpose was to promote the Libby Mitchell campaign. She said the answer to the question of whether the campaign spent MCEA funds to promote or assist another candidate is that it did not. Ms. Smith also noted that the Libby Mitchell campaign took the additional step of checking with the Commission before going ahead with the ad. She said the only lingering question is whether this ad assisted the other candidates even though that was not the ad's purpose. She suggested that if the Commission decides that Emily and Will Mitchell received some benefit from the ad, perhaps Emily and Will Mitchell should reimburse the Mitchell for Governor campaign for the prorated cost of the ad that could be attributed to them by calculating the time they appeared in the ad and the possible number of viewers in their districts. She said common sense should prohibit that scenario because the purpose was never to promote Emily or Will Mitchell's campaigns.

Mr. McKee said the question remains whether the expenditure made by the Libby Mitchell campaign constitute a contribution to Emily Mitchell's campaign.

Mr. Wayne said another issue raised by Mr. Billings is whether the Commission's guidelines for permissible uses of MCEA funds were violated as a result of MCEA funds being used to benefit Emily and Will Mitchell's campaigns. To find that the expenditure was a contribution, the Commission would have to determine that the Mitchell for Governor campaign's purpose in making the expenditure was to promote the other candidates.

Mr. Healy asked what the posture of this issue would be if the Commission were to factually conclude that the purpose of the expenditure was not to promote the campaign of Emily Mitchell, but that there was a benefit to her campaign.

Ms. Gardiner said the fact that the candidate is clearly identified is only relevant in the context of an independent expenditure but that is not the case here. Instead, the question becomes whether there was a violation of the Commission's guidelines on how MCEA funds can be spent. She said the clear purpose of the ad was to promote Libby Mitchell's campaign and not Emily's. However, the Commission could

decide whether its guideline that MCEA funds may not be used to assist another candidate means that an MCEA candidate cannot make an expenditure that confers an ancillary or collateral benefit to another candidate in the process of carrying out the primary purpose of the expenditure, which is to promote the MCEA candidate's campaign. Similarly, it is necessary to analyze the purpose of the expenditure to determine whether the expenditure should be considered an in-kind contribution to Emily and Will Mitchell.

Mr. McKee distinguished this ad from the 2008 ad in which Rep. Cornell du Houx appeared. That ad was a national ad and any collateral benefit was insignificant. In this case, it is clear that the independent expenditure statute does not apply. All factors surrounding the ad suggest that it is not a contribution. Mr. McKee also said that he did not see that the expenditure was made to assist the campaigns of the other two candidates.

Mr. Healy said he agreed that the primary purpose of the ad was to promote Libby Mitchell's campaign and not Emily Mitchell's campaign; however, he said there was an unquantifiable benefit to Emily Mitchell's campaign.

Mr. McKee stated that even though there may have been some small benefit to Emily Mitchell, the fact remains that it was not intended as a contribution or expenditure.

Mr. McKee moved that the Commission find there was no independent expenditure. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Mr. McKee moved that the Commission find there was no contribution or expenditure made as those terms are defined in § 1012. Ms. Matheson seconded.

Mr. Youngblood noted that the time that Emily was allotted was the same amount as the other children and therefore was not made to assist her campaign.

Motion passed unanimously (5-0).

Mr. Wayne said the only issue left for discussion was to consider whether this was a violation of the MCEA expenditure guidelines.

Mr. Healy asked whether the guidelines were adopted pursuant to the Maine Administrative Procedures Act and have the force of law.

Mr. Wayne explained that the Maine Clean Election Act requires the Commission to publish guidelines outlining permissible MCEA expenditures. There was an opportunity for public comment before the Commission adopted the guidelines but they were not adopted under the APA and do not have the force of law. He explained that the statute says the Maine Clean Election Act funds can only be spent on campaign-related purposes and directs the Commission to determine what the purposes are.

Mr. McKee said the Commission needs to determine whether the Libby Mitchell ad was a campaign-related purpose. He explained helping out another candidate may not be considered a campaign-related purpose.

Mr. Healy asked what authority does the Commission have to take an action if it finds that there has been a violation of the guidelines.

Mr. Wayne explained that some candidates would feel a finding of a violation by the Commission to be significant in itself.

Ms. Gardiner said the guideline itself does not have the force of law. However, the statute states that the funds can only be spent for campaign-related purposes. She said if the expenditure for the ad was not for a campaign-related purpose, then it is a violation of the statute and could be a civil violation.

Mr. Wayne explained the Commission's authority to assess penalties only relates to violations of the MCEA or rules, not the guidelines.

Mr. Healy said it appears the guidelines were probably violated, but the Commission has no authority to do anything formally. He said the Commission should limit its authority to determining violations of the statute and the Rules.

Mr. Wayne said some Commissioner's may feel that this ad did not assist Emily Mitchell in any way and therefore the guidelines were not violated. He said when candidates act in good faith, they deserve credit for that.

Mr. McKee said the "assist in any way" language is a very low standard. However, he said the Commission has to follow the standard as set forth in the guidelines.

Mr. Duchette said that the Commission must conclude that there was some assistance simply due to the fact that Emily appeared in the ad.

Mr. McKee said that he finds it very difficult to find a violation but that he is appreciative of the Commission's obligation to make its finding on the facts and follow its own guidelines.

Mr. Healy said he did not feel the Commission should engage in finding violations of the guidelines since there are no procedures for assessing penalties.

Ms. Matheson said she believes that the statutory language, "campaign related purpose," leaves room for some subjectivity. She said the ad was clearly made for the purpose of benefitting Libby Mitchell's campaign.

No motion was made.

Other Business

Request for investigation by Wade McLaughlin of his opponent, Rep. Bernard Ayotte

Wade McLaughlin, the Democratic candidate for House District 3, requested an investigation of his opponent, Rep. Bernard Ayotte, regarding a flyer about the circuit breaker property tax refund program that has been distributed in the district. Rep. Ayotte is not aware that this is on the agenda.

Mr. McKee moved that the Commission take no action on this matter. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Ms. Matheson moved and Mr. Duchette seconded to adjourn. Meeting adjourned at 12:00 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director