



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

Minutes of the October 26, 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. (by phone); Margaret E. Matheson, Esq.,
Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne

Due to the late arrival of Chair McKee, Commissioner Matheson chaired the meeting in his absence.

At 12:40 p.m., Commissioner Matheson convened the meeting.

The Commission considered the following items:

Agenda Item #1. Request by Gayle Green concerning Elizabeth Mitchell

Gayle Green of Windsor had submitted a written request that the Commission consider whether 2010 gubernatorial candidate Elizabeth Mitchell violated the Code of Fair Campaign Practices because of the content of her campaign's first television advertisement. Ms. Green also questioned whether the advertisement was closed-captioned. Ms. Green was not present for the meeting.

Kate Knox, counsel for the Libby Mitchell campaign, said she agreed with Mr. Wayne's summary that actions concerning the Code are not within the Commission's jurisdiction. Nevertheless, she said that she is confident that there has been no violation of the Code. She said the ad is truthful and relevant to the campaign. Regarding the closed-captioned issue, she explained that there have been occasions when the broadcast stations have not properly encoded the ads. She said after working with the stations, they have corrected the problem. She said after their investigation of the ad, they discovered that it was being run with closed-captioned.

Mr. Healy asked whether the staff counsel agreed with Mr. Wayne's statement in the staff memo that the statute does not authorize the Commission to investigate allegations of violations of the Code and that the

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Commission does not have the authority to take any enforcement action against candidates who violate the Code.

Mr. Wayne said Ms. Gardiner does agree with this view. In 2006, the Commission, the staff and counsel had the occasion to review the legislative history of this provision after a complaint had been filed alleging violations of the Code of Fair Campaign Practices. The Commission at that time concluded that the Legislature intended that the role of the Commission was simply to distribute the forms, keep them on file but the Legislature did not intend for the Commission to take enforcement actions for violations of the Code. Mr. Wayne also confirmed, in response to a question from Mr. Healy, that the Legislature has not amended the statute since its original enactment.

Mr. Healy moved that this matter be dismissed for lack of jurisdiction by the Commission over the complaint.

Mr. Duchette stated that the closed-captioned matter does fall within the Commission's jurisdiction so suggested the motion include that piece as well.

Ms. Matheson suggested that the motion be amended as follows: that the Commission find that it has no jurisdiction and take no action on the request regarding the complaint alleging a violation of the Code of Fair Campaign Practices and that the Commission find no violation of the close-captioning requirement. Mr. Duchette seconded the motion as amended.

Motion passed unanimously (3-0).

Agenda Item #2. Request by Maine Republican Party concerning Robert Sezak

The Maine Republican Party filed a complaint stating that House candidate Robert Sezak had offered someone a discount for use at his bookstore to promote his election.

Daniel I. Billings, Esq., counsel for the Maine Republican Party, reviewed the scenario which resulted in the complaint being filed. Mr. Billings said the business card that Mr. Sezak left while going door to door campaigning included a 20% discount at his bookstore he owns. He said that there does not appear to be

any dispute about the facts and that the issue is a matter of legal interpretation and the application of the law to these. He said the Maine Clean Election Act (MCEA) requires MCEA candidates to limit their spending to the amount of MCEA funds received and prohibits these candidates from accepting any contributions, except in a very limited circumstance that does not apply here. He said the issue comes down to whether the discount card was a contribution to Mr. Sezak's campaign. He explained that this discount card did have value at the time it was presented, whether it was used or not. He said the only issue before the Commission is whether the purpose of the discount card was to influence Mr. Sezak's election. He cautioned the Commission not to rely on Mr. Sezak's after-the-fact argument and be objective in their decision. He said the objective evidence to consider includes how the card was distributed and the timing. He said the discount card was left with Mr. Sezak's campaign flyer at the door two weeks before the election. Mr. Billings said a reasonable person would conclude that the purpose of leaving the discount card was to influence their votes. Mr. Billings said Mr. Sezak claims he only left a card two times and he has no evidence to dispute that claim. However, Mr. Sezak's claim that his leaving the discount cards had nothing to do with his candidacy lacks credibility. He said the facts support a finding that a violation has occurred. However, if the Commission is inclined to view this as not a violation because it only happened on two occasions, Mr. Billings recommended opening an investigation to determine whether it did in fact only happen twice or whether there were more discount cards passed out. He said that he believes it to be a violation even if it happened just once. He said that the facts show that there is probable cause for the Commission to believe that a violation may have occurred.

Mr. Healy asked whether the fact that Mr. Sezak left his business card only on two occasions, as appears may have been the case, should be taken into consideration in determining what the intent was.

Mr. Billings said it should not make a difference. He said if Mr. Sezak did it once, that would be a violation. He said the number of occurrences could be a consideration in the penalty phase. In response to a question from Mr. Healy, Mr. Billings said that he could see that the intent in giving a discount card to the existing customer could have been business related rather than election related.

Mr. Healy said that at this point there was no evidence that there were more than two discount cards given out and in one instance a card was given to a regular customer of Mr. Sezak. He acknowledged that no investigation had taken place to determine if there were more than two instances. He asked Mr. Billings

whether he would agree that if there were only one instance where a discount card was given with the intent to influence a person's vote, it would be a de minimis violation.

Mr. Billings agreed that it would be a de minimis violation but said the Commission needs to send a message that it is not appropriate for candidates to use discounts for their business as part of their campaigns.

Robert Sezak explained that this was a first, one-time instance which was an error on his part. He said he does not mix his business with campaigning unless someone asks him what he does while campaigning. He apologized for the error.

Mr. Healy asked if Mr. Sezak gave out more than two discount cards.

Mr. Sezak said no.

Mr. Healy asked, if someone purchased \$1,000 worth of books would Mr. Sezak give them a 20% discount on that purchase and could it be transferred to another person.

Mr. Sezak said he would honor the card with his handwriting no matter who had it.

Ms. Matheson asked if Mr. Sezak routinely wrote the discount on the back of his business cards.

Mr. Sezak said he did not.

Ann Luther, co-chair of Maine Citizens for Clean Elections, stated their view was the discount card did have value although de minimis, whether it was used or not.

Mr. Wayne said it was difficult to quantify the value of the discount because it is conditioned on a future purchase of an unknown amount. It is difficult to determine the purpose as well. He questioned whether Mr. Sezak's intent with the discount card was to influence this voter or whether Mr. Sezak was making a

connection with someone who appreciated books as he does. Mr. Wayne said he did not support the suggestion that Mr. Sezak's participation in the MCEA program be revoked.

Mr. Duchette said that he would be in favor of finding of violation without a penalty. He said the MCEA candidates are held to a high standard. Looking at the circumstances under which the discount card was passed out, it is hard not to view it as a contribution to influence a vote. However, he did agree that it was de minimis.

Mr. Healy said he believed this was a violation and the discount card did have value which could be a substantial amount. However, as it happened only one time, a minimal penalty should be assessed in order to make it clear to candidates that they cannot leave something of value with their campaign materials. He said, as viewed by a voter, it could be seen as an enticement to vote for the candidate.

Mr. Duchette moved that the Commission find a violation of the Maine Clean Election Act because Mr. Sezak accepted an improper contribution and assess a penalty of \$25. Mr. Healy seconded.

Motion passed unanimously (3-0).

Agenda Item #3. Request by Shelley Sylvester concerning Patricia Brown

Patricia Brown, the Register of Deeds for Aroostook County, filed a sworn statement with her registration form that she would not make expenditures for her campaign. The statement exempts the candidate from the duties of filing campaign finance reports and appointing a treasurer. Ms. Brown subsequently made two campaign expenditures before revoking the statement on October 21, 2010. Mr. Wayne explained that Shelley Sylvester saw an ad placed by Ms. Brown in the newspaper and questioned the expenditure since Ms. Brown had registered as an exempt candidate. Mr. Wayne said a candidate is allowed to amend the registration, but Ms. Brown did not.

Patricia Brown (by phone) explained that when she ran in the previous election she did not have an opponent so she did not spend any money during her campaign. She said in this election she does have an opponent. She said she did not really read the exemption criteria and thought the exemption simply meant she could spend her own money but could not receive any contributions. She said she did not mean to

make the error. It was a misunderstanding on her part. She is willing to pay whatever penalty is assessed to her for this error.

Mr. Healy moved to accept the staff recommendation and assess a penalty of \$59.40. Mr. Duchette seconded.

Motion passed unanimously (3-0).

At 1:20 p.m. Mr. Healy moved for recess until 1:45 p.m. Ms. Matheson seconded.

Motion passed unanimously (3-0).

Mr. McKee joined the meeting at 1:55 p.m. at which time the meeting resumed.

Agenda Item #4. Request by Maine Democratic Party concerning Republican State Leadership Committee

The Maine Democratic Party has filed a request that the Commission consider whether the Republican State Leadership Committee has filed an independent expenditure report late. Mr. Wayne said the primary issue is whether the report filed on Saturday, October 23, was filed on time and whether all costs have been included in that report. Mr. Wayne said it is a very large sum of money being spent on five Senate districts in Maine. He said the Democratic Party contends that television stations received the fully produced ad on Friday, October 22, and the mailings went out on Friday or before. It contends that it would not have been possible for the expenditures to have been on the same day. He said the Democratic Party believes the expenditure dates were earlier than reported and the report should have been filed earlier and the candidates involved should have received matching funds earlier as a result. Mr. Wayne said the Democratic Party wishes the Commission take action on this promptly in order to deter other entities in the future from delaying filing.

Mr. McKee asked for clarification as to whether an investigation would go forward at this point or if the Commission would be required to make a decision on the complaint immediately.

Mr. Wayne said the request is that the Commission come to a decision as soon as possible, perhaps today.

Mr. Healy said the complaint asks for the Commission to investigate the matter. He questioned the ability to adjudicate the matter without more fact finding.

Mr. Wayne said Scott Ward, general counsel for the Republican State Leadership Committee (RSLC), told him that his organization does want to respond to this complaint; however, they will need to contact all the vendors and cannot submit a response in less than two weeks.

Mr. McKee said the Commission is required to deal with issues that come up in this time period in short notice. He said entities that participate in Maine elections need to know the rules. He did not support waiting two weeks for a response from the RSLC. He asked what exactly was the action required of the Commission under the statute.

Mr. Wayne said the statute, 21-A M.R.S.A. § 1002, seems to have two different requirements. One, he said, states, "*the 28 days preceding an election the Commission shall meet in Augusta within one calendar day of the filing of any complaint or question with the Commission.*" The next sentence reads: "*Agenda items in the 28 days preceding an election must be decided within 24 hours of the filing unless all parties involved agree otherwise.*"

Mr. McKee said there is no permissive language that allows the Commission to wait on this issue.

Mr. Wayne said in an e-mail from staff counsel, Phyllis Gardiner regarding this issue, the RSLC would have good grounds for objecting to any determination and/or penalty arrived at today by the Commission because they have not had an opportunity to respond to this complaint.

Mr. McKee said the issue would definitely be investigated but the statute seems to be clear that the matter has to be decided today unless all parties agree.

Mr. Healy said penalties should not be imposed on people without some notice and opportunity to be heard.

Mr. McKee said the statute requires the Commission to decide within one calendar day. He said the issue is less alarming since matching funds have already been administered. He said the first issue would seem to be whether there has been a violation and address the penalty issue later.

Mr. Wayne said another middle ground option was to give RSLC until Thursday, October 28, the next Commission meeting date, to respond which addresses the concern to allow sufficient time to respond.

Mr. Healy suggested ordering an investigation with the requirement that the response must be within seven days from today.

Mr. Duchette said he is struggling with what the statutory requirement actually dictates. He also said he did not think a determination as to whether a violation occurred needed to happen immediately.

Daniel Walker, Esq., counsel for Maine Democratic Party (MDP), said the party has done considerable research into this matter and the Commission could decide today after hearing from them. He said RSLC counsel is available to call in and address these issues. He suggested allowing the Democratic Party to present their findings and then let RSLC respond over the phone. He said allowing a couple days would be acceptable; however, seven days would put it on Election Day which defeats the purpose of the investigation. He said the public has a right to know who dropped \$400,000 in the state of Maine to influence the election late in the process which caused delayed matching funds in four Senate districts. Mr. Walker said also this organization filed no activity reports straight through and including the October 22 filing. Yet they spent over \$400,000 within a few days after the end of that reporting period. He said mailers and television productions require advance planning and budgeting. He said the filing took place on a Saturday and was planned out very well to be reported at the last minute.

Daniel I. Billings, counsel to the Maine Republican Party but not representing any party to this matter, said this situation has come up before in previous election years. He said in the past the Commission has wanted to move quickly in cases where matching funds were being affected. He said in this case the matching funds have already been distributed and there is no other party or candidate who would be harmed by a delay in the Commission's decision. He said the statute says an agenda item needs to be decided within 24 hours. He said the word "decided" does not necessarily mean that the Commission has

to decide one way or the other on the complaint. It could mean the Commission decides to table the complaint or to take some other kind of action. He said it would be an unreasonable reading of the statute to require the Commission to decide an issue within 24 hours from when a complaint is filed. The Commission should engage in the fact-finding as spelled out in the Commission's rules and as intended under the statute. He said the original request was whether or not to open an investigation.

Mr. McKee said he did not want to let this matter linger. He would support having it on the Thursday meeting agenda.

Scott Ward, Esq., counsel for RSLC, called into the meeting. He stated that he had just become aware of the complaint less than 24 hours ago. He said he was attempting to obtain local counsel and would need two weeks to respond due to involvement with the upcoming election. He said he would need to contact vendors about the details of the complaint which will be time consuming and difficult with the election coming up.

Mr. McKee explained to Mr. Ward that in Maine there is a requirement to deal with complaints within one calendar day. He said he understood that all sides are very busy right now but this amount of money reported is significant and this matter should not be allowed to linger. He expressed confidence that Mr. Ward could find local counsel and recommended that he continue to do so.

Mr. Ward said in order to provide a full and accurate response to the complaint he would need time. He also said that if during his investigation it is discovered the report was late, his organization will report that to the Commission and pay whatever penalty is appropriate. He said they are not trying to hide anything.

Ms. Matheson asked whether staff had sent a copy of the Commission rules concerning expenditures and report filing deadlines to the RSLC.

Mr. Wayne said he had discussed these rules with Mr. Ward.

Mr. Healy said the Democratic Party has shown probable cause to begin an investigation. However, he said there was no significant emergency. If the results of an investigation show that the filing should have

been made earlier, the Commission's next steps are to find a violation and impose a penalty. He said that he did not think the determination of the amount of a penalty was an emergency matter that required an organization to respond in such an expedited manner. They should be given a reasonable time to provide a defense to the allegations against them. It would be a different matter if candidates were waiting for matching funds to be distributed.

Ms. Matheson said she appreciates the effort to fashion a solution that addresses both parties concerned. She would support addressing the issue at the Thursday meeting.

Mr. Duchette said he would support proceeding with an investigation and was concerned that there may not be any more information available for the meeting on Thursday.

Daniel Walker said he was concerned that if the Commission does not go forward and deal with this matter before the election, the delay may be an incentive to other groups to report expenditures in the same late fashion without worry of being held accountable. He said the clean election process in Maine deserves quick responses to complaints and he believes that is the reason for the 24-hour rule. The Commission needs to create a disincentive to discourage groups from filing late reports.

Mr. Wayne said the Democratic Party is asking for an investigation. He does think the statute's 24 hour requirement to make a final decision on a complaint is not practical. He said he agreed with Mr. Healy that the Commission could meet the statute requirement by initiating an investigation. He agreed with Mr. Healy's suggestion that the urgency to have a decision before the election may not be necessary.

Ann Luther, co-chair Maine Citizen's for Clean Elections, said looking at this issue from the view of a candidate who has been opposed by these ads, there is no remedy in terms of the penalty because the ads will run anyway at this point. The only remedy at this point for the candidates affected by the ads would be something on the record from the Commission that found RSLC in violation.

Mr. Healy moved to have the Commission open an investigation into this matter and authorize the staff to investigate it and place it on the Commission's agenda as soon as it is appropriate to do so. Mr. Duchette seconded.

Motion passed (3-1), with Ms. Matheson opposing.

Daniel Walker asked whether the Commission made this decision because the MDP requested an investigation instead of filing a complaint.

Mr. McKee said he did not make that distinction. He said he assumed that what the MDP filed was a complaint. He said he viewed the request for an investigation the same as a complaint and if the MDP were to file a complaint, it would not change his view on the matter.

Due to a conflict for Mr. McKee the next meeting will be held at 12:30 p.m. on Thursday, October 28.

Mr. Healy moved to adjourn. Mr. McKee seconded. The motion passed unanimously.

Meeting adjourned at 2:35 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director