



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

Minutes of the September 29, 2008, Meeting of the
Commission on Governmental Ethics and Election Practices
Held in Room 208, Burton M. Cross Office Building,
111 Sewall Street, Augusta, Maine

Present: Michael Friedman, Esq., Chair; Hon. Francis C. Marsano; Hon. Edward M. Youngblood; Hon. Mavourneen Thompson; Walter F. McKee, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the August 25 and September 2, 2008 Meetings

Mr. Youngblood made a motion, seconded by Mr. Marsano, to accept the August 25 and September 2, 2008, meeting minutes as drafted. The motion passed unanimously (5-0).

In consideration of the Commission's practice to address agenda items out of order to accommodate the attendance of participants regarding particular items, the following agenda items (Items# 3 and #4) were taken out of order:

Agenda Item #3. Request for Waiver of Late Filing Penalty/Candidate Geraldine Randall

Mr. Wayne explained that Geraldine Randall was required to file her 42 day post-primary campaign finance report on July 22, 2008. She had difficulty filing the report on the deadline because the internet browser she used was not compatible with the Commission's electronic filing system. She filed the report one day late on July 23. Mr. Wayne said the amount of the preliminary penalty is \$41.44, which she has paid. After further consideration by her treasurer, her campaign has requested a waiver of the penalty because of the browser problem and has also requested a refund of her penalty payment. Mr. Wayne said the Commission staff is actively working with its technology contractor to resolve the browser compatibility issue. He said the staff recommends waiving the penalty entirely and refunding her payment

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because she made a bona fide effort to file on the deadline but was prevented because of the browser compatibility problem.

Mr. McKee made a motion to waive the entire penalty amount and refund the amount due to the mitigating circumstances and the computer problems which are to be addressed. Mr. Marsano seconded the motion.

Ms. Thompson asked what the precedent has been with this type of browser issue.

Mr. Wayne said this issue has been coming about more often with filers. He explained that the website was developed in 2000 and it does not always work well with newer programs. He said there have been other requests for waivers in the past due to this same problem. He said he hoped the problem would be solved by the end of January.

The motion to return the penalty payment to Ms. Randall passed unanimously (5-0).

Agenda Item #4. Public Hearing on Proposed Change to Commission Rules

Mr. Wayne said that the Commission decided to accept public comment at the July 28, 2008, meeting on a proposed change to the Commission's rules that would increase the gubernatorial candidates' maximum amount of seed money contributions from \$50,000 to \$100,000. Mr. Wayne said the Commission has had only one other public comment from interested parties since July. Mr. Wayne said written comments may be submitted until October 14, 2008.

Ann Luther, Maine Citizens for Clean Elections, said the MCCE is in support of the increase to \$100,000. She said that this increase would not result in any harm to the program since the contributions will still be limited to \$100 from individuals. Candidates who intend to run as Maine Clean Election Act candidates only have seed money contributions to run their campaigns until they receive public funding. The current limit of \$50,000 may not be sufficient to run a campaign for a strong gubernatorial candidate who declares his or her candidacy in 2009. This change will make the program attractive to the strongest candidates.

Mr. Marsano questioned whether an increase to \$100,000 would be enough due to inflation since the law was passed.

Ms. Luther said the amount was a good starting place and the MCCE would not object if someone were to raise the amount more but the contribution would still be limited to \$100 per individual.

Ms. Thompson asked how the increase of \$100,000 was arrived at.

Ms. Luther stated, again, that the amount was totally arbitrary. She said it was decided to double the amount after listening to comments from people involved with the process.

Mr. Marsano asked Ms. Luther to confirm whether she thought that the contribution amounts of \$100 each should remain the same.

Ms. Luther said she did.

Mr. Joseph Greenier from Stockton Springs stated that he was a write-in candidate running traditionally since he lost the primary election. He stated his concern is that more money is given to candidates than needs to be. He said both the House and Senate candidates could run their campaigns on less money to save tax payer money. He also expressed concern regarding the money expended for campaign purchases made out of state. He said he would also like to see all meetings held broadcast over the internet.

Alison Smith, Maine Citizens for Clean Elections, passed out a written statement (attached). She also stated that the seed money cap is the only part of the statute that can be changed by rulemaking. She said that any unspent seed money is deducted from the initial distribution so all candidates start at the same point as far as funding is concerned.

Mr. Walter McKee commented regarding the potential of the increased seed money limit extending the length of the campaign period.

Ms. Smith said this change would not alter the start time for raising campaign contributions. Candidates for governor in 2010 could be raising seed money or regular contributions now. She also said that most candidates would probably not be able to raise as much as \$100,000 due to the contribution limit being at \$100 each. The idea behind the increase is to allow candidates to do more to build a campaign and collect qualifying contributions.

Mr. Friedman stated that the comment period is open until October 14, 2008, and the Commission would consider taking final action on the rule at its next meeting on October 27.

Agenda Item #2. Request for Waiver of Late-Filing Penalty/Charles R. Bearce

Mr. Wayne said Charles Bearce was required to file a 42 day post-primary report on July 22, 2008, but filed it six days later on July 28. He said based on the formula in the statute, the amount of the preliminary penalty is \$248.64. Mr. Bearce has requested a waiver of the penalty based on a medical condition of a family member. Mr. Wayne said the staff recommends a partial waiver of the penalty because he is a first-time candidate and because the amount of \$248.64 is disproportionate to the harm suffered by the public from the lack of disclosure.

Rep. Tardy said that due to mitigating circumstances in Mr. Bearce's family during the reporting deadline, he was distracted from the due date. He also said he and Mr. Bearce would support the staff's recommendation to reduce the penalty to \$100.

Mr. Bearce had no further comment beyond his written statement submitted to the Commission.

Mr. Friedman asked Rep. Tardy whether the parties made any attempt to instruct their candidates on filing deadlines and requirements of the Maine Clean Elections Act.

Rep. Tardy stated that both sides – the parties and the Ethics Commission staff – make attempts through packets, memos and electronic transmissions. He said he did not know if his caucus had contacted this candidate or not.

Mr. Bearce said he did receive an e-mail and a written reminder from the Ethics Commission.

Mr. Bearce said his attention was directed towards his family situation at the time of the filing deadline.

Mr. Marsano made a motion to adopt the Commission's recommendation to reduce the penalty to \$100 due to the mitigating circumstance of Mr. Bearce's mother's health issue. Mr. McKee seconded the motion.

The motion passed unanimously.

Agenda Item #5. Payments of Maine Clean Election Act Funds to Family Member/Robert Zabierek

Mr. Wayne explained that House candidate Robert Zabierek wishes to use Maine Clean Election Act funds to hire a band to perform at a campaign event on Columbus Day weekend entitled, "*Rock and Register with House District 9 candidate Robert Zabierek.*" His son is a member of the band and would receive \$100 in income from the engagement. He has provided information to the Commission to demonstrate that the proposed expenditure satisfies the criteria enacted in 2008 for payments of public campaign funds to family members. Mr. Zabierek was unable to attend the meeting in person, so he was telephoning into the meeting.

Mr. McKee asked whether Mr. Zabierek's son lived at home in the summer and if he claimed his son as a dependent.

Mr. Zabierek stated his son did not live at home with him, but his son lives in a house in Old Town owned by Mr. Zabierek and his wife. He was not sure if his son was claimed as a dependent since his wife does the income taxes. He said his son is a full time college student, working approximately 25 hours a week at Microdyne during the school year and 40 hours during the summer. Mr. Zabierek only provides a room for his son in the house in Old Town. His son pays for all his other expenses. His son does not live with him during the summer.

Mr. Zabierek also stated that in trying to be creative with his campaign, he is trying to attract the younger voters in his district with the idea of using a band and this campaign event.

Alison Smith, co-chair of Maine Citizens for Clean Elections, stated that she felt this particular case could be covered under the exemption in the statute, but she questioned whether it was necessary. She said the purpose of the new law is to stop candidates from using public money to pay family members. She said the Legislature wants to stop this activity and prevent a personal enrichment scheme. Ms. Smith said it appears that Mr. Zabierek's son is within the same economic unit as the candidate, which could look like personal enrichment. She said the Legislature wanted to ban paying public funds to family members, but settled for narrow exceptions to the rule. She referred to the "Ann Rand Exemption" which came about because Ann Rand uses Dale Rand Printing, a family business, for her literature and print services, which allows for

services that are provided as a regular business to the public also be allowed to be provided to the candidate.

Ms. Luther said this expenditure would qualify under the exception; however, thought should be given to whether it is a legitimate expense and whether this is his son's regular business. She questioned whether the band ever does work for charity purposes and could this event be a donation to the campaign. She said this is the first case under this new law and she said a high standard should be set this first time around. She said the intent of the rule was to stop people from paying family members, not set rules by which candidates could pay family members.

Ms. Smith said Maine campaigns are well known for volunteer efforts and the Legislature does not want the public funding system to change that grass-roots type of campaigning.

Mr. Marsano said the phrase "*legitimate campaign purpose*" concerns him. He said Mr. Zabierek's type of expenditure does not seem to fall into that category and he cautioned against the Commission do anything that suggests approval of this type of expenditure or defines what is legitimate.

Ms. Luther said the definition of legitimate campaign purpose should be left up to the candidate. She said the candidate should decide what legitimate or good campaign strategies are.

Mr. Marsano said if the Commission approves to allow this expenditure, he is concerned that it would appear to the public that the Commission approves this as a legitimate campaign expense. He said the definition of "*legitimate campaign purpose*" should be addressed in order to approve or disapprove this request.

Ms. Smith said the Expenditure Guidelines provided by the Commission do not mention entertainment. She said this type of pre-approval process forces the Commission to make decisions that may set precedence. She said it would be better for the candidates to make the decision and take the risk of making the expenditure. She cautioned the Commission not to get involved and bogged down with defining what is a legitimate expense.

Mr. Greenier stated that if the candidate's son were not in the band, would this expenditure be allowed. He said the amount is not significant. He said that based on what he has heard, he thinks that it is a legitimate expense.

Mr. Zabierek stated that originally the band was willing to play at no cost; however, Mr. Zabierek was under the impression that this was not allowed because it would then become an in-kind contribution.

Mr. Wayne said he was under the impression that Mr. Zabierek wanted the band to be paid. He said anyone can volunteer their services with it being considered an in-kind contribution. He said if that is a possibility then this issue would not need to be decided today.

Mr. Zabierek stated, again, that he did not think this was an option under the law.

Mr. Wayne read the statute exceptions aloud.

Mr. Friedman asked Mr. Zabierek if he would like to offer that option to the band.

Mr. Zabierek said he would be happy to do so; however, he felt that under the circumstances since this was the first case being heard by the Commission under the new rule, he felt this was a good test case for the Commission to decide today.

Ms. Thompson stated she would like the Commission to define the term, "legitimate campaign purpose," and also how the staff relates Legislative intent with regard to developing examples of legitimate expenses.

Mr. Wayne explained that the voters enacted the phrase originally when the Act was adopted in 1996. He said there has not been any guidance from the Legislature with regard to what is a legitimate campaign related expenditure. He said the statute does require the Commission to develop guidelines, which the Commission has done. He said the guidelines are updated every two years.

Mr. Youngblood requested more clarification. He said if the Commission decides today on this issue, does it mean the Commission supports allowing bands as a legitimate expenditure, or does it mean the Commission only approves Mr. Zabierek pay his son \$100.

Mr. Wayne stated that the decision the Commission makes today is broader than this individual item, since it is the first case brought before the Commission with regard to the new rule banning the use of public funds to pay family members. He said there are three criteria in the rule that need to be met in order for an exception to be made. The three criteria used in order for payment to a family member are:

- For a legitimate campaign-related purpose;
- To an individual or business that provides the goods or services being purchased in the normal course of their occupation or business; and
- In an amount that is reasonable, taking into consideration current market value and other factors the commission may chose to consider.

Mr. Wayne said it could be interpreted that the Commission approves the expenditure of the band, if the vote is in favor of Mr. Zabierek's request today.

Mr. Marsano said when the rule was proposed he disagreed with it. He said the preliminary question is whether it is a legitimate campaign expense. He said he was pleased Mr. Zabierek was willing to bring the issue forward for the Commission's discussion and decision. He said this way, the public will know what the discussion was and how the Commission established the decision today.

Mr. McKee said that he was reticent about weighing in on the propriety of expenditure such as this particular instance especially since the Commission has established guidelines that state that a campaign event is specifically campaign-related. He said that the Commission should be very careful about making those decisions for the candidate. He said that when he sees thousands of campaign signs on the roads every election, he questions whether that is such a good idea. But he knows that it is not his decision, as a Commission member, to make. If he were a candidate, he might do it differently. Candidates must have a fairly broad zone in which to act. He said that looking at the facts as presented and the standard that must be applied, he does not see any other conclusion than that this expenditure should be allowed.

Mr. Friedman agreed with Mr. McKee. He said he believes the band is a legitimate expense and he cautioned against the Commission getting into the minds of the candidates and making decisions on how or what is legitimate campaign expenditures. He said bands do play at campaign events and in this case it is very appropriate in order to appeal to the younger voters.

Ms. Thompson made a motion that the proposed concert appears to be campaign related within the normal scope of the band's activities and a payment to James Zabierek appears a reasonable amount and should be allowed. Mr. McKee seconded the motion.

The motion passed (4-1 with Mr. Marsano opposing).

6. Update on 2008 Audits

The Commission's auditor, Sumner Field, updated the Commission on audits of three Maine Clean Election Act candidates who were defeated in the 2008 primary election. These audits were conducted for Edward Kelleher, Henry Simmons and Rick Briggs. No exceptions were noted.

Other Business

VoteVets.org Ad: A meeting date was set for October 17 at 1 p.m. for discussion of a request from the Maine Republican Party for the Commission to consider whether action should be taken regarding a television advertisement by VoteVets.org in which a Maine Clean Election Act candidate, Alexander Cornell du Houx, is the spokesperson opposing U.S. Senator Susan Collins' re-election.

Lundeen Signs: Rep. Jacqueline Lundeen is currently running for the Senate. Mr. Wayne explained that he received a phone call regarding her campaign signs which include the words, "Your Senator." She is not an incumbent and has never served in the Senate. Mr. Wayne said the sign is misleading; however, the Commission Counsel has cautioned against interfering with First Amendment rights.

Mr. Friedman said at this point, unless a complaint is made, nothing can or should be done.

Mr. Marsano said he did not believe the Commission could do anything about this issue. He said the Commission has no authority on these matters, only to allow discussion to be available for the parties.

Independent Expenditure by the Maine Democratic Party: The expenditure was made on September 18 and the report should have been filed on September 19; however the report was not filed until September 26, a week later. The amount was \$4,690 in support of Peter Bowman. The executive director of the Democratic Party said there was a newer member on staff who was unclear about the "express

advocacy” guidelines. Mr. Wayne said apparently the staff person thought the ad constituted issue advocacy and not express advocacy, which is why the IE was filed a week later. Mr. Bowman’s opponent was entitled to matching funds and the State has made that payment. Mr. Wayne explained that the issue is how to handle the enforcement matter. He said the preliminary penalty amount is just over \$300 which is an automatic penalty because the report was late. Mr. Wayne said there is a discretionary penalty when a late filed independent expenditure report results in a delay in payment of matching funds. The Commission can assess an additional penalty of up to \$10,000. He said the staff is not inclined to recommend an additional penalty, since the opponent, Mary Andrews, received her matching funds before the mailer for Peter Bowman was mailed out. Mr. Wayne said the Democratic Party feels the difference between the two types of advocacy is difficult to determine. Mr. Wayne said the state parties need to be made aware that they need to be pro-active in knowing what the requirements for filing are and realize, also, that matching funds are involved so timing is very critical. Mr. Wayne explained that he felt the decision to assess any additional penalty should be decided at the Commission level, not the staff level.

Ms. Thompson asked whether this should be on an agenda with those affected parties present before an action should be taken.

Mr. Wayne said the rules require him to bring this type of issue before the Commission. He said he also wanted the Commission to have the option to initiate an enforcement process, but the interested parties would have to have notice and an opportunity to be heard.

Ms. Thompson said for clarification, initiating enforcement action would be for assessing a greater penalty because matching funds were paid late.

Mr. Wayne confirmed that option. He said the Commission could also wait for a complaint to be filed.

Mr. McKee said more information would be beneficial before an additional penalty is assessed.

Mr. Friedman said one of the Commission’s functions is to educate, not just penalize. He said the publicity about this would educate and therefore it should be placed on the agenda for next month. He said he is not comfortable with proceeding with enforcement until more information is provided.

Mr. Marsano agreed with Mr. Friedman. He said the matter should be brought forth for the Commission to consider.

2009 Meetings: Mr. Friedman expressed a desire to meet the first week of every other month. He would like the matter on the next agenda.

Meetings accessible by internet: Ms. Thompson asked if the meetings could be broadcast over the internet. She said opening the meetings up to the public is very important. Mr. Wayne will look into the broadcast capabilities of the Public Utilities Hearing room.

Meeting adjourned at 10:35 on the motion by Mr. Marsano; seconded by Mr. McKee and voted on unanimously.

Respectfully submitted,

Jonathan Wayne, Executive Director

Attachment-MCCE