

Minutes of the October 20, 2004 meeting of the
Commission on Governmental Ethics and Election Practices
Held in the Commission's Meeting Room,
PUC Building, 242 State Street, Augusta, Maine

Present: Chair James Donnelly; Hon. Andrew Ketterer Hon. Jean Ginn Marvin; Hon. A. Mavoureen Thompson. Staff: Executive Director Jonathan Wayne; Counsel Phyllis Gardiner.

At 9:00 a.m., Chair Donnelly convened the meeting. The Commission considered the following items:

Agenda Item #1 – Request for Reconsideration by Senate Democratic Campaign Committee

The Senate Democratic Caucus requested that the Ethics Commission reconsider its September 29 decision in favor of awarding Senators Paul Davis and Chandler Woodcock matching funds on the basis of radio ads criticizing "Republican Leaders" for not putting bonds on the election ballot. As part of the request, the caucus alleged that the Chair of the Commission had a conflict of interest because of his political activities.

The Commission Director explained that the issue at the September 29 meeting was whether a reference to Republican leaders in the ad, which was generally critical of Republican leaders for not putting bond issues on the November 2nd ballot, clearly identified Senators Davis and Woodcock. The Commission at that meeting decided that those two Senators were clearly identified by a vote of 2-1, and now the Senate Democratic Campaign Committee was looking to revisit the issue.

Mr. Donnelly asked what rules the Commission should follow. Ms. Gardner replied that the Commission has never taken a formal vote on following Robert's Rules, and that it is a custom practice. Ms. Ginn Marvin stated that the Commission needed to know if Robert's Rules were to be followed. She then said that she was concerned that this issue would allow for reconsideration to become a common practice and that it had the potential to get out of hand very quickly. Mr. MacTaggart said he felt the Commission should go ahead with its regular process and consider the issue. Ms. Thompson agreed with Mr. MacTaggart. Ms. Gardner responded that she recalled that in the last four or five years the Commission did vote to reconsider an issue once. However reconsideration is discretionary as it is not in the rules. Mr. Donnelly suggested allowing Mr. Tucker to present his case, and then a motion of reconsideration needed to be made by a member of the prevailing majority of the previous vote. Mr. Ketterer stated that he read the materials concerning this issue and he felt that reconsideration should be allowed if it seemed reasonable. Mr. Ketterer said that he would not reconsider an issue based on an apparent conflict of interest by a sitting Commission member. He stated that had he been present at the previous meeting he would have voted with the minority. He reiterated that if the only

reason behind the reconsideration was concern over Mr. Donnelly's impartiality then he would be against reconsideration in the strongest possible terms. However, he would support reconsideration if that motion took into account the fact that two Commission members were absent.

Ralph Tucker, representing the Senate Democrats, took the floor. He explained that there is a requirement for people serving on the Commission, namely Subsection 2 of 1 M.R.S.A. Section 1002. This section states that no one, "who is an officer of a political committee, party committee or political action committee" may serve on the Commission. Mr. Tucker pointed out that Mr. Donnelly served as a State Regional Chair for the Bush Cheney organization, which Mr. Tucker believed fell under the categories listed in M.R.S.A. Section 1002. Therefore, Mr. Tucker argued that Mr. Donnelly should be disqualified from the Commission. He also said that Mr. Donnelly's resignation from Bush Cheney Inc. did not allow him to escape disqualification. Mr. Tucker then addressed Dan Billing's response letter. He argued that the date of appointment shouldn't be considered. He also said that Mr. Billing's interpretation of election law was narrow with respect to the candidate status of Mr. Bush and Mr. Chaney. Mr. Tucker went on to rebut the assertion that the Commission has no jurisdiction over federal political committees, saying that almost all campaigns are merged to some extent based on the two party system, and that it would be difficult to separate the various levels of elections. Mr. Tucker also expressed his belief that Commission members should not be partisan in nature and that they should be objective, which is what the law states. Mr. Tucker went on to say that this was not a matter of attacking personal integrity, rather a matter of statutory responsibility. Mr. Tucker then moved on from his procedural argument and reiterated the arguments expressed in the previous meeting with regards to Senators Davis and Woodcock being clearly identified in the ad in question. He noted that the ad didn't name either Senator by name, that the ad does not clearly identify either candidate as set out in state law, and that matching funds should not be issued. Finally Mr. Tucker felt that, according to Robert's Rules, anyone on the Commission can bring forth a motion for reconsideration.

Dan Billings took the floor, and expressed his belief that his reading of the statute was correct with regards to continuing requirements for a serving Commission member. He also said that the Commission had no jurisdiction over federal political committees. Mr. Billing's pointed out that as far as campaign finance is concerned there needs to be clear separation between local, state and federal campaigns. Mr. Billing's also mentioned that the timing of the request for reconsideration should be considered, as there appeared to have been plenty of time for the Senate Democrats to bring this matter up before this date. He also expressed concern over the Commission allowing reconsideration over what was really a reargument of the merits, which has already been heard and decided upon. Mr. Billing's said that it was his opinion that the ad clearly identified Senators Davis and Woodcock by using the words, "these Republican Leaders", that it was an unambiguous reference, and that matching funds should be issued.

Arn Pearson, Director of the Maine's Leadership Fund, took the floor and said that while he would support the motion for reconsideration based on the merits he would not

support such a motion based on procedural grounds. He said that it was unfortunate that this motion for reconsideration was brought up in this context, and that during his time on the Commission there had been no suggestion of partisan voting on the part of Mr. Donnelly. He also said that he felt the Senate Democrats had the better argument but that at the last meeting the Republicans did a better job at presenting their arguments. Mr. Pearson cautioned the Commission that the decision they made in that last meeting was probably broader than they wanted to go.

Mr. Donnelly asked for staff's opinion with regards to the possible conflict with Mr. Donnelly's vote in the previous meeting. Ms. Gardner replied that this wasn't something the Commission would decide on as a body; rather it would be up to Mr. Donnelly as the best course of action. Mr. Donnelly then stated that he believed he didn't violate the statute in any way. He said he was not a member of any political committee. Mr. Donnelly noted that he had asked staff to perform a review of all the votes taken while Mr. Donnelly served on the Commission, and that review strongly suggested a non partisan nature of the entire Commission. Mr. Donnelly moved and Ms. Thompson seconded to reconsider the matching funds issue. Mr. MacTaggart expressed his opinion that Mr. Donnelly was an even handed and fair minded person. He also stated that he was against the motion for reconsideration. Mr. MacTaggart said that unless new evidence was presented, the Commission should not support motions to reconsider. Ms. Ginn Marvin shared Mr. MacTaggart's opinion, and was also opposed to the motion for reconsideration. She then asked for clarification as to whether or not Senators Davis and Woodcock could actually receive these matching funds. The Commission Director replied that because of the amount of money both Senators had after the primary, neither of them was eligible for the matching funds in question. Mr. Ketterer said that he would support the motion. Ms. Thompson echoed Mr. MacTaggart's comments about Mr. Donnelly's integrity. She said that because an entity of the public came forward and expressed the belief that the decision was not made as unbiased as it should have been, she would support the motion. The Commission Director called the vote, and the motion was defeated 2-3.

Agenda Item #2 – Request for Matching Funds

The Senate Republicans inquired whether Julie O'Brien was entitled to matching funds based on campaign literature in support of Libby Mitchell that voters received on or after October 13. This item was tabled to allow interested parties the opportunity to participate.

Agenda Item #3 – Tom Saviello

Business Minded Democrats sent out an ad concerning Thomas Saviello that fell in the 21 day period due to an error by the Bangor Letter Shop. This ad, coupled with the PAC reporting this expenditure within the 21 day period, caused matching funds to be triggered for Mr. Saviello's opponent. The ad was very similar to an ad discussed in the previous Commission meeting concerning Senators Davis and Woodcock. The PAC indicated in a letter sent to the Commission that the PAC had decided to change the mailing to clearly advocate for the election of Mr. Saviello. Mr. Saviello had stated his opinion that the ad wasn't supporting him and that it would not influence voters in the

election. The Commission Director stated that, based on the Commission's previous votes, he felt the ad was intended to influence the election.

Ms. Thompson asked if the ad had been changed as indicated in the letter. The Commission Director replied that he thought that this was the changed ad, and that the letter referred to this specific ad. Ms. Thompson expressed her desire to find out if this ad was what was referred to in the letter sent by the PAC.

Mr. Saviello took the floor and stated that he received the ad the week of the 4th in October. The Commission Director replied that if the ad was filed before October 13th then it would not fall under the 21 day exception. The Director explained that when the PAC files a report they are not required to file a report with the Commission staff, and it appeared that the staff needed to see the ad before making a further determination. The Director expressed concern that Mr. Saviello didn't know what the ad was in question. Mr. Donnelly asked if it was necessary for a candidate to know about an ad portraying them in one way or another. The Director replied that most candidates know about ads like this at some point, often after the ad has been sent out. Ms. Ginn Marvin moved and Mr. MacTaggart seconded to table the motion. Mr. Saviello wanted to freeze the payments made to his opponents until after clarification was made as to whether the ad really was designed to influence the election. After a brief conversation, both Commission members withdrew their motion to allow further discussion to take place.

The Commission Director said that the necessary information could be obtained to resolve the situation. In the meantime a call could be made to Mr. Saviello's opponent asking him to hold off on spending the matching funds. However, since the letter indicated that a mailing, regardless of the mailing before the Commission, would be sent out and therefore would trigger matching funds. Ms. Ginn Marvin remotioned, Mr. Donnelly seconded, and the Commission voted unanimously to table the item.

Agenda Item #2 (continued)

The Commission Director explained that the Maine Democratic Party hired a vendor out in Louisiana to design and mail literature in support of Libby Mitchell. The Senate Republicans, on behalf of Julie O'Brien, informed the staff that the mailing was received by some voters as late as October 15th or 16th, which they believed would trigger matching funds because it fell in the 21 day period. The vendor sent a letter to the Commission with a receipt from the post office, which confirms that the vendor sent the mailings out on October 6th, and that it would be received by October 12th, in which case no matching funds would be triggered. However, it appeared that some mailings hadn't been received until the 15th or 16th. Numerous reports indicated that voters in Augusta received this mailing on the 15th or 16th of October. The staff recommendation was to not grant matching funds, based on the fact that the bulk of the mailings were received before the 21 day period, and while the Senate Democrats did cut the timing a little close there was no real evidence to prove that the bulk of the mailings was received during the 21 day period.

Ms. Thompson asked how the law handled the various dates associated with receiving, delivering and sending mail. The Director responded that the law just says disseminated. Ms Gardner said that she thought dissemination meant when the party sent the information. Ms. Thompson said that dissemination needs to be clearly defined in rule making or through statutory changes.

Mr. Billings took the floor and stated that he felt that the Senate Democrats created this situation by leaving things to the last minute. Also, from the information Mr. Billings had, there was no indication that anyone had received the mailing before October 13th. Mr. Billings said that dissemination meant when the information got into the hand of the voters. Mr. Ketterer stated that dissemination is something a sender does as opposed to a recipient. Mr. Billings agreed but commented that dissemination requires someone receiving the information. The Director asked about the extent of the investigation as to when the mailing was received. Mr. Billings replied that he had heard of no instance where a voter received the mailing before the 21 day period. Mr. Ketterer moved and Mr. MacTaggart seconded to adopt the staff recommendation. Ms. Ginn Marvin expressed concern over granting an exception and thereby adding to the "patchwork quilt". She said that if it occurs in the 21 day period then matching funds should be entitled, and that there shouldn't be any other way of deciding the issue. Mr. Ketterer replied that if the Commission attaches dissemination to the last date a voter received the mailing then the Commission would be paying too much money in matching funds. Ms. Ginn Marvin replied she wanted to hear the other side of the story before she could feel comfortable voting.

Ben Grant took the floor, and explained that the Senate Democrats had no intention to subvert the 21 day period, and that it was a good faith effort to get the mailing out. Mr. Grant also commented that from the information presented during the meeting only 6 people had received the mailing during the 21 day period and that there was no information to suggest that the bulk of the voters had received the mailing during the 21 day period.

Mr. Mahoney took the floor, and stated that giving a week for a mailing to go out was a reasonable attempt to get the mailing on people's doorsteps before the 21 day period. Mr. Mahoney also agreed with Mr. Ketterer as to the intent of the word dissemination with regards to the law. He also said that the only bright line test that could be used was the postmark date or the date when the mailing was sent out. Ms. Ginn Marvin replied that in this case there didn't seem to be a postmark, so how would he suggest using the bright line test. Mr. Mahoney replied that the Commission should use the information concerning when the mailing went into circulation. Ms. Ginn Marvin replied that she didn't think that sending out the mailing so close to the deadline was a smart decision. Mr. Grant stated that the post office informed the Senate Democrats that the 6th of October would be a good date to send out the mailings. Ms. Thompson expressed concern that there was not enough evidence, in her opinion, to make a clear decision based on the actual facts.

Arn Pearson took the floor and said that basing standards on when mailings are received can be problematic. However, there are also problems with going by the date that a mail was sent out by the post office. Mr. Pearson suggested thinking about a reasonable expectation, meaning whether it was reasonable to expect that based on the dates whether or not the mailing would arrive within the 21 day period. Mr. Donnelly asked if it should be left to a case-by-case determination by the Commission. Mr. Pearson agreed, saying that the Commission could use the reasonable expectation principle to help guide their decision. Ms. Ginn Marvin asked what would be a reasonable expectation in this case. Mr. Pearson replied that there wasn't any easy answer.

Mr. Donnelly indicated that based on what he had heard he was inclined to support the motion. The motion was considered withdrawn due to the fact that both Commissioners who made the motion were not available at the time of the vote. Ms. Thompson removed and Mr. Donnelly seconded to adopt the staff recommendation not to grant matching funds. The Commission voted 2-1 to adopt the staff recommendation (Ms. Ginn Marvin dissenting).

There being no further business the Commission adjourned.