



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

Minutes of the November 20, 2006 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 Andrew Ketterer; Hon. Michael P. Friedman; Hon. Jean Ginn Marvin; Hon. A. Mavourneen Thompson. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:07 A.M., Chair Andrew Ketterer convened the meeting. The Commission considered the following items:

Agenda Item #1 – Request for Waiver of Late Filing Penalty/Eagle Lake Democratic Committee

At the request of the Eagle Lake Democratic Committee, the Commission decided to postpone its discussion of this item until the December meeting.

Agenda Item #2 – Request for Waiver of Late Filing Penalty/South Portland Democratic Committee

Mr. Wayne said that the Commission staff sent a notice of the filing deadline to Alan Mills. Mr. Wayne said that any party committee that raises or spends at least \$1,500 in the first six months of a calendar year has to file a finance report in July. Mr. Wayne said that the local committee chair stated that the committee had a fundraiser in October 2005, but was not able to process the credit card payments and had to recollect the contributions. Mr. Wayne said that the committee expected to get the revenues in October 2005, but they did not actually come in until January and February of 2006.

Alan Mills, treasurer of the South Portland Democratic Committee, said that funds in the amount of \$1,050 were raised in 2005 and he thought the funds had been deposited at that time. Mr. Mills said that he thought the committee was well under the \$1,500 filing threshold by June 2006. Mr. Mills said that it was not until he filed the October report that he received notice from the Commission staff that he was required to have filed the January report.

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Mr. Friedman asked if someone assumed that the items from the auction in October 2005 had been paid for in 2005. Mr. Mills said that there was a glitch in the credit card payments. Mr. Friedman asked if it was only a problem with credit card payments. Mr. Mills said he understood that only credit card payments were affected. Mr. Mills said that due to the glitch, the committee chairperson at that time, John Jameson, had to recollect the money. Mr. Mills said that the recollection took place in 2006.

Mr. Friedman asked whether the glitch was with the committee, the bank, or some other entity. Mr. Mills said that it was probably due to miscommunication within the committee. Mr. Friedman asked if there was any question that the money was deposited into the account in 2006. Mr. Mills said that there was no question.

Ms. Ginn Marvin asked if the problem was due to not processing the receipts from the auction. Mr. Mills said that John Jameson was in charge of the auction and not himself. Ms. Ginn Marvin asked if the receipts from the auction were reported in 2005. Mr. Mills said that they were not reported because the committee did not exceed the \$1,500 filing threshold. Mr. Mills said that the \$1,050 did put the committee over the \$1,500 for the period of January through June of 2006.

Ms. Ginn Marvin asked when Mr. Mills first heard from Commission staff. Mr. Mills said that he filed the October report on October 25 and received a phone call from Martha Demeritt the same day asking for the January report. Mr. Mills said that he refiled the January report on October 27 after reviewing the committee's receipts.

Ms. Ginn Marvin said that she was not clear on why the credit card payments were not processed. Mr. Mills said that the credit card system did not process payments made at the auction, but he did not know why.

Ms. Thompson asked if Mr. Mills would have filed a report if the committee collected more than \$1,500 prior to January 2006. Mr. Mills said yes. Mr. Mills said that including the \$1,050 raised from the auction, the committee had \$1,975.15 in total receipts between January and June 2006. Mr. Mills said that without the auction receipts, the committee was well below the \$1,500 filing threshold.

Ms. Thompson asked when the \$1,050 was collected. Mr. Mills said that it was deposited in March 2006.

Ms. Ginn Marvin moved, and Ms. Thompson seconded, that the Commission follow the staff recommendation and assess the statutory penalty of \$500.

Ms. Ginn Marvin said that she did not hear any reasons why the Commission should be lenient. Ms. Ginn Marvin said that the committee had an obligation to file the report on time.

Mr. Friedman said that the committee was responsible for learning the filing requirements. Mr. Friedman said that it was clear that the filing should have occurred when the funds were actually received in 2006, whether or not there was a glitch in the processing of payments in 2005.

Mr. Ketterer said that the Commission had to consider whether the committee's explanation fit the statutory definition of mitigating circumstances. Mr. Ketterer said that \$500 was the maximum penalty for the type of violation being discussed.

The Commission voted unanimously (4-0) to follow the staff recommendation and assess the statutory penalty of \$500.

Mr. Mills said that the committee did not have funds available to pay the fine. Mr. Ketterer recommended that Mr. Mills discuss the payment of the penalty with Commission staff.

Agenda Item #3 – Finding of Violation for Commingling Maine Clean Election Act Funds/Hon. Joan Bryant-Deschenes

Mr. Wayne said that the instance of commingling was a result of the Commission staff's random audits of campaign finance reports. Mr. Wayne said that Rep. Bryant-Deschenes deposited her Maine Clean Election Act funds into a personal bank account. Mr. Wayne said that some candidates commingle funds without being aware that it is illegal. Mr. Wayne said that he recommended that the Commission find the candidate in violation for commingling Maine Clean Election Act funds with personal funds. Mr. Wayne said that it was a legal requirement not to commingle funds, and this requirement encourages good record keeping and good reporting. Mr. Wayne said that there were likely other candidates who commingled funds and were not audited by the Commission staff, so the Commission could decide not to take any action in order to avoid singling out Rep. Bryant-Deschenes.

Ms. Thompson asked how many times Rep. Bryant-Deschenes had run as a Maine Clean Election Act candidate. Mr. Wayne said that the 2006 election was at least her second time running with public funding. Mr. Wayne said that the commingling requirement was included in the candidate guidebook but was not considered a major issue, so it was possible that Rep. Bryant-Deschenes was not aware of it.

Ms. Thompson asked about the purpose of auditing candidates. Mr. Wayne said that auditing provides greater assurance to the legislature and to taxpayers that candidates are held accountable for their use of public funds. Mr. Wayne said that auditing ensures that candidates use public funds for campaign-related purposes. Mr. Wayne said that Rep. Bryant-Deschenes used all of her funds appropriately and filed her reports correctly.

Ms. Thompson asked if Mr. Wayne was aware of other instances of commingling. Mr. Wayne said that the audits revealed two candidates who appear to have commingled funds. Mr. Wayne said that the auditing was random.

Mr. Friedman asked what the range of possible penalties would be.

Mr. Ketterer said there were instances in the past where candidates deposited Clean Election funds in their personal checking accounts and then used the funds for personal expenses. Mr. Ketterer said that it was easier to track expenditures when the funds remained in a separate campaign account. Mr. Ketterer said that the legislature added the commingling requirement to the statute as a result of these and similar problems. Mr. Ketterer said that the commingling requirement appeared in the candidate guidebook.

Mr. Wayne said that commingling was now a violation of the Maine Clean Election Act, and any violation of that act could be subject to a penalty of up to \$10,000. Mr. Wayne said that he sent Rep. Bryant-Deschenes a notice that her commingling of funds would be on the meeting agenda, but none of the materials suggested that there could be a penalty. Mr. Wayne said that it might be appropriate to delay assessing a penalty until the next meeting.

Mr. Ketterer said that he thought there was a criminal law requirement against commingling funds.

Mr. Friedman said that it was a serious violation. Mr. Friedman said that commingling funds makes it much easier to spend Clean Election funds inappropriately. Mr. Friedman said that the Commission should assess a penalty in order to demonstrate that commingling funds is a violation. Mr. Friedman said that the requirement was included in both the statute and the candidate guidebook.

Ms. Thompson said that she could not think of a reason why anyone would not think it appropriate to deposit public funds into a separate bank account. Ms. Thompson said that there should be both a finding of wrongdoing and a penalty. Ms. Thompson said that a penalty should not be assessed before there is a staff recommendation and an opportunity for Rep. Bryant-Deschenes to comment.

Mr. Ketterer said that he thought it was appropriate to find a violation and then make a penalty determination at a future meeting.

Ms. Thompson moved, and Mr. Friedman seconded, that the Commission find Rep. Bryant-Deschenes in violation of the Maine Clean Election Act with consideration of a penalty assessment to be made at the next meeting.

Ms. Ginn Marvin said that the fact that the commingling was discovered as the result of a random audit, with other potential instances of commingling not known, was not a sufficient reason to avoid making a finding of violation.

The Commission voted unanimously (4-0) to find Rep. Bryant-Deschenes in violation of the Maine Clean Election Act with consideration of a penalty assessment to be made at the next meeting.

Agenda Item #4 – Report of Audit Findings

Vincent Dinan said that there were eight audit reports included in the meeting materials. Mr. Dinan said that seven were without exceptions and one was the commingling issue considered in agenda item #3. Mr. Dinan said that the staff had completed 18 audits and had 9 in progress. Mr. Dinan said that most audits resulted in a finding of no exceptions.

Mr. Friedman asked if 2 out of 18 completed audits contained a finding of commingled funds. Mr. Dinan said yes, and that there were no indications that any audits in progress contained evidence of commingled funds. Mr. Friedman said that if the numbers were extrapolated, it could indicate a serious problem.

Mr. Dinan said that the commingling requirement existed in the statute for some time, but the change that went into effect in April 2006 required candidates to both maintain a separate bank account and to avoid commingling funds.

Ms. Thompson asked if the audits were used to alert staff to serious issues and possible changes. Mr. Dinan said that he communicated with staff if the audits uncovered evidence of widespread problems. Mr. Dinan provided the example of travel reimbursements that did not comply with the Commission's rules. Mr. Dinan said that the staff then sent out advisory notices to the candidates.

Ms. Thompson asked how an audit identified issues that the normal staff review would not uncover. Mr. Dinan said that the audits check to see whether the source documentation, such as vendor invoices, bank statements, and canceled checks, supports the candidate's reported expenditures. Mr. Dinan said that for the most part, candidates have been very cooperative in providing the source documentation requested by the Commission staff.

Ms. Ginn Marvin asked if the gubernatorial campaigns were also being audited. Mr. Dinan said that there would eventually be on-site audits of all gubernatorial campaigns.

Ms. Ginn Marvin said that it might be useful if the Commission staff released the results of the gubernatorial audits to the public. Ms. Ginn Marvin said that many members of the public were suspicious about how the gubernatorial campaigns were using Clean Election funds.

Mr. Ketterer said that it was difficult to determine how frequently the commingling of funds occurred based on the information available. Mr. Ketterer said that the auditing process increased accountability.

Agenda Item #5 – Proposed Statutory Changes

Mr. Ketterer mentioned an article on Clean Election loopholes in the fall 2006 *Maine Bar Journal*. Mr. Friedman said that the article included information on Clean Election candidates setting up private political action committees.

Mr. Wayne said that the staff would like to present some of the more complex recommendations at the Commission's December 12 meeting. Mr. Wayne said that one of those recommendations will relate to the Clean Election qualification of gubernatorial candidates.

Mr. Wayne said that candidates were allowed to form leadership PACs and participate in their legislative caucus PACs. Mr. Wayne said that none of the proposed changes made in 2005 were adopted, although there may be more proposals in 2006. Mr. Wayne said that the Commission may want to allow the legislature to resolve the issue without having any specific recommendations from the Commission.

Ms. Thompson asked what problems were associated with leadership PACs. Mr. Wayne said that some see a conflict between the agreement as a Maine Clean Election Act candidate not to accept private campaign contributions and the raising of private contributions by Clean Election candidates through PACs.

Mr. Wayne said that there were costs associated with running for a leadership position.

Ms. Gardiner said that the leadership PACs may also contribute the money they raise to privately financed candidates.

Mr. Wayne said that placing restrictions on Clean Election candidates that wish to form leadership PACs may create a disadvantage for Clean Election candidates who then run for leadership positions in the legislature.

Mr. Friedman asked if there was a difference between private PACs and leadership PACs. Mr. Wayne said that most candidates who form PACs call them leadership PACs, but in either case the money raised by the PAC can be used the same way.

Mr. Wayne said that Clean Election candidates could not use money raised by leadership PACs toward their own campaigns for the legislature.

Mr. Ketterer said that the Commission could express its concern about a particular issue without making specific recommendations. Mr. Ketterer said that the Commission should not just ignore an issue and hope the legislature does something about it.

Ms. Thompson said that the Commission should make recommendations for legislation whether or not the legislature is likely to adopt it.

Mr. Friedman said that it may be difficult to draft proposed legislation with a chance of being passed due to the fact that legislators have such a stake in the outcome.

Ms. Ginn Marvin said that the Commission should show leadership on the issue and be aware that it may face criticism from the public if it takes no action.

Alison Smith, member of Maine Citizens for Clean Elections, said that contribution limits should also be considered when discussing leadership PACs. Ms. Smith said that privately or publicly financed candidates could set up PACs to go around the contribution limits. Ms. Smith said that some candidates use their leadership PACs to raise money for the party caucuses. Ms. Smith said that contribution limits on candidate PACs may be a solution.

Ms. Thompson asked if there could be a public workshop on leadership PACs. Mr. Ketterer said that the Commission was required to have a workshop on proposed rule changes but not statutory changes.

Mr. Wayne said that the Commission staff had reached out to interested parties. Ms. Thompson said that those communications did not include members of the general public who may be interested in commenting.

Mr. Ketterer asked what the deadline was to submit proposed statute changes. Mr. Wayne said that the Commission could submit a bill up until 90 days after the election.

Mr. Friedman said that the Commission staff should reach out to not only leaders from the major parties, but also groups like Maine Citizens for Clean Elections.

Mr. Ketterer said that the Commission could post a public notice and invite members of the public to communicate with the Commission by e-mail or other means.

Ms. Thompson said that the Commission members should participate in any discussion of rule or statute changes.

Ms. Ginn Marvin said that she was not aware of anyone complaining that the Commission was not open to input from the public.

Ms. Thompson recommended that part of the next Commission meeting be devoted to a public workshop on leadership PACs.

Mr. Friedman said that the Commission should rely on staff to know who would have an interest in commenting on a particular issue and notify those parties about the opportunity to comment at a Commission meeting.

Ms. Thompson asked Mr. Friedman if he agreed with her proposal for a public workshop. Mr. Friedman said that he would support a workshop if input from interested parties was not sufficient.

Ms. Thompson said that statutory recommendations on leadership PACs could result in substantial changes. Ms. Thompson said that the Commission was responsible for representing the public with any proposed changes.

Ms. Gardiner said that people were more likely to send a written communication than come to Augusta for a Commission meeting.

Ms. Thompson said that holding a hearing demonstrates the Commission's transparency and openness to comments.

Mr. Wayne suggested that a public workshop on leadership PACs be held at the December 12 meeting. Mr. Wayne said that the staff would send out an e-mail to all candidates, PACs, lobbyists, and party committees informing them of the workshop and the option of sending written comments.

Mr. Wayne said that many people were concerned about the costs of publicly financing gubernatorial campaigns. Mr. Wayne asked if the Commission would prefer to hold a public workshop on that issue or hear recommendations from staff.

Ms. Thompson said that she agreed with Jonathan's suggestions about holding public workshops on leadership PACs and gubernatorial Clean Elections qualification.

The Commission members and staff agreed to discuss both items as part of a single workshop during the December 12 meeting.

Mr. Friedman asked Mr. Wayne if his notice to interested groups was extensive enough. Mr. Wayne said that he would also send a written notice to party leadership. Mr. Ketterer suggested putting out a press release.

Mr. Wayne said that a proposed statutory change would allow radio advertisements financed by a candidate to omit the candidate's address.

Mr. Wayne said that a proposed change would expand the 21-day presumption period for independent expenditures to 60 days. Mr. Wayne said that a paid-for disclosure would not be required if the communication was not made for the purpose of influencing the candidate's election.

Mr. Wayne said that a proposed change would only require live phone calls to mention who paid for the call, with surveys and research polls being excluded from the disclosure requirement.

Ms. Ginn Marvin asked what the disclosure requirement would be if the caller was a volunteer. Mr. Wayne said that there may not be a need for a disclosure statement if no expenditure was made. Ms. Gardiner said that the requirement to disclose who paid for a phone call was consistent with the disclosure requirement for written materials.

Mr. Wayne said that under current law, a volunteer would not have to state who was making the call.

Mr. Wayne said that a proposed change would apply contribution limits to sole proprietorships in the same way it is applied to multiple businesses with the same owner.

Mr. Wayne said that a proposed change would eliminate the requirement for replacement candidates to file a replacement candidate report 15 days after they are appointed. Mr. Wayne said that the requirement is no longer necessary since most replacement candidates submit seed money reports. Mr. Wayne said that privately financed replacement candidates would not have to file a report until 6 days before the election.

Ms. Thompson asked about the removal of the disclosure requirement for communications that were not made for the purpose of influencing an election. Ms. Thompson asked how the change was connected with the Commission's discussion of how to define express advocacy. Ms. Gardiner said that the proposed change would require a disclosure statement on any communication that depicts a clearly identified candidate, so there is an exception for communications depicting a candidate that are not election-related.

Alison Smith said that a 60-day presumption period before the general election would be reasonable, but that 60 days before a primary election would be too long. Ms. Smith asked if voter guides and similar mailings were required to contain disclosure statements. Mr. Wayne said that the disclosure was not required in these cases, although some groups include disclosure statements voluntarily.

Ms. Smith said that the rebuttable presumption could be used if a communication was not campaign-related. Mr. Friedman said that the group paying for an ad may not be familiar with the rebuttable presumption requirements.

Mr. Wayne recommended that the staff consider the issue further and then present its views at the December 12 meeting.

Mr. Wayne said that a proposed change would increase the 21-day presumption period before a general election to a 60-day period. Mr. Wayne said that it would be presumed that a communication made within the presumption period that named or depicted a clearly identified candidate in a race involving a Maine Clean Election Act candidate was intended to influence the election unless the party making the expenditure filed a statement of rebuttable presumption.

Mr. Wayne said that a 60-day presumption period before the primary election could be problematic due to its closeness to the end of the legislative session. Mr. Wayne said that legislators may wish to send constituent communications during this time. Mr. Wayne recommended a 30-day presumption period before the primary election. Mr. Wayne said that the change could increase the amount of matching funds distributed and result in independent expenditures being made earlier.

Mr. Ketterer said that he supported increasing the presumption period to 60 days before the general election.

Mr. Friedman asked how the staff arrived at the 60-day proposal. Mr. Wayne said that the end of September and the beginning of October tend to be when outside groups begin to try to influence the election. Mr. Wayne said that the 60-day period mirrors a federal law applying to Congressional candidates.

Mr. Wayne said that a proposed change would reduce from 5 to 3 the number of notices that must be sent to a candidate who has not filed a campaign finance report before the Commission could refer that candidate to the attorney general. Mr. Wayne said that the 5-notice requirement was the result of a compromise in a previous bill before the legislature.

Newell Augur, appearing on behalf of the Senate Democratic Campaign Committee, said that people generally realize that communications sent out close to the election could be construed as

campaign-related. Mr. Augur said that there was still a question of what constitutes express advocacy, which is not addressed by extending the presumption period to 60 days before the election.

Mr. Wayne said that a proposed change would make the statute consistent in setting a \$1,500 threshold of contributions or expenditures requiring an organization to register as a PAC.

Mr. Wayne said that a proposed change would require PACs to keep invoices but not cancelled checks. Mr. Wayne said that Dan Billings commented that the requirement to keep an invoice or receipt should only apply to expenditures made with the intent of influencing an election. Mr. Wayne said that he had not yet discussed the proposal with the staff auditor. Mr. Ketterer recommended discussing the matter again at the December 12 meeting.

Mr. Wayne said that a proposed change would give the Commission the ability to deny or revoke the certification of candidates to receive Maine Clean Election Act funds. Mr. Wayne said that the proposal would prevent certification in the event that a candidate made a material false statement in a report or other document submitted to the Commission. Mr. Wayne said that if a candidate had a prior request for certification revoked for reasons of fraud or a substantial violation, the Commission could deny a subsequent request for certification. Mr. Wayne said that the proposal would give candidates with outstanding penalties who applied for Maine Clean Election Act certification 10 business days to pay the penalty. Mr. Wayne said that the proposal would give the Commission staff additional time to investigate those provisions if the candidate is notified. Mr. Wayne said that the proposal also allows for certification to be revoked after the fact.

Ms. Thompson asked about the definition of a material false statement. Ms. Gardiner said that a material false statement would have to be relevant to the criteria needed to qualify for public funding.

Mr. Wayne said that the prevention of certification due to past instances of fraud could be seen as controversial. Mr. Ketterer said that only major violations would prevent a candidate from being certified in a future election.

Mr. Friedman asked if an automatic disqualification would result. Mr. Ketterer said that the Commission would have discretion over each case.

Ms. Gardiner said that the Commission may want to limit the time a candidate requesting certification is given to pay an outstanding penalty to 3 business days rather than 10 as originally proposed.

Mr. Wayne said that a proposed change would allow for revoking the certification of candidates who misrepresented to contributors the purpose of collecting \$5 qualifying contributions. Mr.

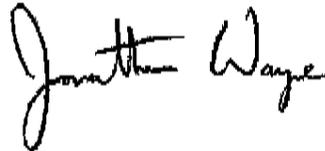
Wayne said that other reasons for revocation would include failing to comply with seed money restrictions, spending or raising private funds for the campaign, making false statements or material misrepresentations, or otherwise substantially violating the Commission's laws and rules.

Mr. Wayne said that a proposed change would allow the Commission staff to investigate lobbyists.

Mr. Ketterer said that the proposal was a good idea. Mr. Ketterer said that the legislature was sometimes reluctant to give subpoena power.

The Commission decided on the 19th as the tentative date of its January meeting.

Respectfully submitted,

A handwritten signature in black ink that reads "Jonathan Wayne". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Jonathan Wayne
Executive Director