



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

To: Commissioners
From: Jonathan Wayne, Executive Director
Assistant Attorney General Phyllis Gardiner, Commission Counsel
Date: August 15, 2018
Re: Analysis of MCEF funding situation for FY 2018-19

This memo offers some preliminary thoughts on behalf of the Commission staff and Counsel in response to the correspondence received this morning from the Maine Citizens for Clean Elections.

Statement of the problem:

The budget law for the current biennium, P.L. 2017, c. 284, appears to create a “negative allocation” for the Maine Clean Election Fund (MCEF) in FY’19 because the de-allocation of \$3 million in FY’19, shown in parentheses in section ZZZZZZ-19 of the budget law, offsets a positive allocation of only \$1,952,360, which is part of “All Other” Special Revenue Funds in section A-26 of the same budget law. This results in a net negative number (i.e., a net negative allocation) of -\$1,034,176.

A negative All Other allocation is an obstacle to spending any MCEF funds in this fiscal year – either for administrative costs or for distributions to MCEA candidates. This could affect replacement candidates who seek to become certified on or before August 22, 2018, as well as already certified candidates who submit enough qualifying contributions to receive supplemental payments pursuant to 21-A M.R.S.A. § 1125.

As explained below, the staff agrees with the Maine Citizens for Clean Elections that this apparent negative allocation occurred as the result of a drafting error and does not reflect the legislative intent of the budget law. Ever since the error was discovered, we have assumed that the Legislature would fix it through legislation. Thus far, legislative action has not occurred, however, and it appears unlikely in the near future. Based on further analysis of the budget laws, the Superior Court's decision in *Maine Citizens for Clean Elections v. LePage*, AUGSC-CV-18-112 (Me. Super. Ct., Ken. Cty., Aug. 2, 2018), and the MCCE's memorandum, the staff has concluded that no legislative action is required in order for the Commission to make payments to qualifying MCEA candidates in this fiscal year. Our reasoning is similar but not identical to that of the MCCE.

The apparent negative allocation is contrary to legislative intent.

The language and the history of the budget law suggest that the Legislature did not intend to de-allocate \$3 million in MCEF funds in FY'19 and certainly did not intend to create a negative allocation for the MCEF, leaving the Commission without MCEF spending authority in FY'19.

First, the plain language of P.L. 2017, c. 284, § NNNNNN-1 unambiguously communicates the Legislature's intent to simply shift the timing of the transfer of General Fund monies to the MCEF from January 1, 2019 (as provided by statute, 21-A M.R.S.A. § 1124(2)(B)) to on or before June 1, 2018 – i.e., in FY'18. This is a revenue-neutral change, involving no additional General Fund money going into the MCEF. As a result of the accelerated transfer, no additional General Fund monies would be transferred to the

MCEF on January 1, 2019 – instead, those funds would be transferred 7 months earlier, in FY’ 18, and there would be \$ 3 million less coming into the MCEF in FY’ 19.

The stated purpose of Section ZZZZZZ-19 is to “adjust[] allocations for the Maine Clean Election Fund to reflect amounts transferred to the fund” – i.e., to reflect that the funds would be transferred in FY’ 18 instead of FY’ 19. This language in no way suggests that its purpose was to remove the Commission’s authority to make payments to candidates or pay administrative costs in FY’ 19. Section ZZZZZZ-19 allocated \$3 million in FY’ 18 so that the Commission would have authority to spend it in FY’ 18.

Statutes are supposed to be interpreted to effectuate legislative intent and to avoid absurd results. It would be absurd to read the budget law as simultaneously authorizing a transfer of \$3 million to the MCEF in FY’ 18 and then withdrawing the Commission’s authority to spend that money in FY’ 19, barely a month after the transfer occurred.

Moreover, the Legislature on many prior occasions has enacted budget laws that effected transfers of MCEF funds to the General Fund. *See* chart of “De-appropriations from the Maine Clean Election Fund,” with attached copies of the referenced public laws.¹ Each time, the Legislature adopted very explicit language describing the transfer from the MCEF to the General Fund. *Id.* The absence of similar language in P.L. 2017, c. 284 further supports the conclusion that the 128th Legislature did not intend to de-allocate funds or to remove the Commission’s authority to spend the extra \$3 million in funds that were transferred to the MCEF in the middle of this election year.

¹ On several other occasions, the Legislature has transferred funds back to the MCEF – *see* “Returns to the Maine Clean Election Fund,” shown on the same chart.

The apparent de-allocation of funds in FY'19 and the resulting negative allocation in "All Other" Special Revenue funds occurred as the result of a drafting error.

As explained to us by staff of the Legislature's Office of Fiscal and Program Review (OFPR), the above-described error occurred partly as a result of a last minute effort to fold a separate bill proposed by the Commission into the budget bill. L.D. 1210 was a stand-alone bill written to accomplish two things: a) to transfer an extra \$3 million of General Fund money into the MCEF by June 2018, and b) to transfer \$1.7 million of General Fund money into the MCEF in January 2019 – or \$1.3 million less than the \$3 million that would transfer automatically pursuant to 21-A M.R.S.A. § 1124(2)(B).

L.D. 1210 shows an allocation of \$3 million in FY '18 and a de-allocation of \$1.3 million in FY'19. The parentheses around the \$1.3 million in FY'19 makes sense in this context because the Legislature sought to decrease to \$1.7 million the statutory transfer of \$3 million that would occur in January 2019 by operation of 21-A M.R.S.A. § 1124(2)(B). This intent is clearly expressed in L.D. 1210, §§ 1 and 2.

At the very end of the budget process in July of 2017, OFPR was instructed to fold L.D. 1210 into the budget bill but to strip out the \$1.7 million provision and simply move up the timing of the \$3 million transfer. When this was attempted, the parentheses around the FY'19 number in L.D. 1210 remained, while the number was changed from \$1.7 million to \$3 million – thus inadvertently reflecting a de-allocation of \$3 million even though the statutory transfer of \$3 million would no longer occur in FY'19 because of the provisions of section NNNNNN-1. Because of the rushed time frame to resolve a budget (already three days into the new fiscal year, on July 3, 2017), fiscal staff did not notice that the positive allocation in Part A of the budget law was less than \$3 million and

thus did not catch the net negative effect of section ZZZZZZ-19. Had that occurred, it is likely that the error would have been fixed before the budget law was enacted.

The effect of a negative allocation can be remedied administratively.

The MCCE urges the Commission to read the de-allocation of \$3 million out of the budget law and conclude that there is no net negative allocation of MCEF funds in this fiscal year. Assuming arguendo that the Commission has authority to reach that conclusion, the staff believes that it is unnecessary to do so. Even with a negative allocation, the Commission has the ability to request an increase in its allotments for this fiscal year to authorize spending the “unused balance of allocations” from the prior fiscal year, pursuant to 5 M.R.S.A. § 1667-B. Most of the \$3 million that was transferred to the MCEF on or before June 1, 2018, pursuant to P.L. 2017, c. 284, § NNNNNN-1, and allocated in FY’18, remains unspent. (The current balance in the MCEF is \$3,692,378.75). A negative allocation does not appear to preclude use of this statutory mechanism. Indeed, both the Budget Officer and the Office of Fiscal and Program Review have indicated that requesting an increase in allotment pursuant to section 1667-B is an available mechanism to remedy a negative allocation.

The Superior Court’s order in *MCCE v. LePage* did not specifically address the situation described here or the language of the 2017 budget law. However, the Court’s reasoning applies here to the extent that a financial order should not be necessary in order to increase the Commission’s authority to distribute allocated but unspent revenues in the Fund to candidates who qualify by statute to receive those funds. The Court’s reasoning does not extend to paying for administrative costs, however. Accordingly, a financial order would appear to be necessary to give the Commission authority to pay those costs,

which include payments to the state's Office of Information Technology for IT and communications services, reimbursement for office rent to the Department of Administrative and Financial Services (DAFS), payments to a contractor to support the electronic filing system, paying STA-CAP to reimburse the state for general overhead expenses, and contracting with an accounting firm to conduct an independent audit of MCEA candidates.

If the Commission agrees, then staff will submit requests to DAFS for initial general election distributions to any replacement candidates who request certification on or before August 22nd and qualify under the MCEA, as well as for supplemental payments to any participating MCEA candidates who submit the requisite number of qualifying contributions -- just as we did with DAFS' cooperation on August 7th to comply with the Superior Court's order in *MCCE v. LePage*.² We are considering whether to submit a financial order requesting an allotment increase in order to give the Commission authority to make necessary expenditures of MCEF funds to cover our administrative costs this fiscal year.

Thank you for your consideration of this memo.

² Although DAFS Commissioner Alexander E. Porteous suggested in a letter, dated August 6, 2018, that the Commission would henceforth have to process all payments on its own, this would conflict with existing law which provides that DAFS "shall serve as the fiscal agent for" the Commission. P.L. 2005, c. 12, §§ G-1 & G-2.