



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Minutes of the November 3, 2014, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: Walter McKee, Esq. Chair; Michael T. Healy, Esq.; Margaret E. Matheson, Esq.; Hon. Richard A. Nass

Absent: André G. Duchette, Esq.

Staff: Jonathan Wayne, Executive Director; Phyllis Gardiner, Counsel

Commissioner McKee convened the meeting at 2:00 p.m.

The Commission considered the following items:

1. Request to Investigate the Maine Wildlife Conservation Council

Mr. Wayne explained that Mainers for Fair Bear Hunting, a ballot question committee supporting Question 1, has filed a request to investigate the completeness of campaign finance reporting by the Maine Wildlife Conservation Council (MWCC), the principal campaign committee opposing Question 1. Mainers for Fair Bear Hunting contends that the MWCC was required to include in its campaign finance reports the donation of paid staff time and other things of value from the Maine Department of Inland Fisheries and Wildlife (IFW). Mr. Wayne said that Mainers for Fair Bear Hunting also brought up an issue regarding possible unreported contributions from the Maine Bowhunters Association to MWCC.

Mr. Healy said that he would like the parties and Mr. Wayne to address whether the Commission has jurisdiction to investigate this matter under section 1003 at some point during the meeting.

Rachel Wertheimer, Esq., representing Mainers for Fair Bear Hunting, stated they were satisfied with the explanation that the \$10,000 donation was actually a series of small donations from the Maine Bowhunters Association to MWCC. She said the real concern is whether staff time contributed by IFW employees constitutes an in-kind contribution that should have been reported by MWCC. She said the requirement is for BQC's to report all contributions including in-kind

contributions in the form of staff time and these in-kind contributions were not reported. She said to be clear, the matter is not about what IFW is allowed to do under the law with regard to educating the public on Department issues. She said the sole issue is whether MWCC should have reported in-kind contributions from IFW for staff time for particular events, such as when IFW staff were featured in certain ads that were paid for, produced and aired by MWCC and when the services of IFW staff were relied upon in the creation of such ads and for other events. She explained that section 1056(B) requires ballot question committees to report all contributions made for the purpose of influencing a campaign. She reviewed other related statutes and rules as well as the Commission's guidebook which explains that if an employer pays its employees to provide services to the BQC, that is an in-kind contribution that is supposed to be reported. Mainers for Fair Bear Hunting has requested an investigation but it does not profess to be aware of all the incidences where IFW staff time was provided to MWCC nor does Mainers for Fair Bear Hunting know the actual value of the services provided. Ms. Wertheimer stated that in review of the Commission's statutes, there appears to be no distinction between employees of public entities and private entities. She said the purpose of the campaign finance law is to increase transparency and public disclosure and it should not make any difference whether the source of contributions is from the private or public sector. She stated that the need for transparency was even greater when public resources are being used for a campaign. The voting public has a right to know. In addressing some arguments raised by counsel for MWCC, Ms. Wertheimer explained that their complaint was not late. The complaint was brought at this time because it is based, in part, on ads that aired in late September and mid-October and which were reported in MWCC's campaign finance reports in mid and late October. The complaint followed in a timely manner from those reporting dates. She said their complaint was focused on what was disclosed in MWCC's reports, not on what was allowed or authorized by law.

Mr. Healy referred to section 1003 and asked whether a State agency is a person under the statute.

Ms. Wertheimer explained that they are not asking the Commission to investigate the IFW. She said MWCC should have records for the value of the work IFW did for MWCC.

Mr. Healy said that the only way to determine the value of the contribution was to know the amount of staff time and the value of the staff time provided by IFW.

Mr. McKee said that Mainers for Fair Bear Hunting was not asking for IFW to disclose the information in campaign finance report but that MWCC should report it.

In response to a question from Mr. Healy, Ms. Wertheimer said that if IFW provided staff to MWCC for campaign purposes and paid the staff for the time they spent providing services to MWCC, that would constitute a contribution even if it was governmental speech.

Ms. Wertheimer said this case is not simply about a public event where IFW employees attended, spoke on an issue and were filmed, and that film was later used for campaign purposes. In this case, IFW provided paid staff to MWCC for the purpose of filming the ads. It was not simply a matter of government speech and the complaint was not whether the provision of paid IFW staff to MWCC was authorized. She said that staff time was a contribution and the question was what was the value of the staff time and other services or items contributed to MWCC.

Ms. Gardiner asked Ms. Wertheimer if she was familiar with the general doctrine often cited by the Law Court that the State or State agency does not fall within the purview of a statute unless the statute expressly names or refers to the State and State agency. She asked Ms. Wertheimer if she thought the reference to “person or organization” in the definition of contribution in section 1052(3)(D) included the State or a State agency, such as IFW, even though the statute does not expressly name the State or State agencies.

Ms. Wertheimer said she had not considered that issue directly since her focus was on the purpose of the statute to provide full disclosure and transparency. In other instances where the Legislature wanted to treat State agencies and employees differently with respect to a statute, the Legislature would draft the law specifically to address that. She said that she did not see anything in the statute on which to base the conclusion that contributions from State agencies should not be disclosed.

Ms. Matheson commented that it seemed that Ms. Wertheimer was proposing a different interpretation of how donated staff time should be treated under section 1056-B. She said that donated staff time would count as a contribution if an organization essentially loaned its staff to act as campaign staff for the ballot question committee.

Ms. Wertheimer responded that the purpose of the disclosure is to reflect where a campaign is getting its support. She said if someone else was paying a State employee to do an activity during work hours for a campaign, it should be reported.

Mr. McKee agreed. He said there is a difference between someone volunteering their own time and an organization paying employees for the time they worked on a campaign for a committee. He asked Ms. Wertheimer whether she had any way of knowing what the value of the donated staff time and other items would be. She said that information was not available to them and a reason why the investigation is necessary.

Mr. Healy stated that he did not believe that the State falls under the statutory definition of person and therefore, the Commission does not have jurisdiction to investigate pursuant to section 1003. The State is not included under section 1003 or section 1052. He said the law does not apply to the State unless the law clearly and specifically says that it does.

In response to a question from Mr. McKee, Ms. Gardiner provided the Commissioners with a brief survey of the Law Court cases in which the Court applied the principle that a statute does not apply to the State unless the State is expressly named in the statute.

Daniel Riley, Jr., Esq., representing the MWCC, said the threshold question is whether a State agency such as IFW is subject to the campaign finance laws. Mr. Riley said the Commission does not have jurisdiction in this case. He said even if it was found to have jurisdiction, it would be an absurd result that his client would have any way to know that they had a legal obligation to report these activities by the IFW employees as in-kind contributions since there was nothing in Maine law that directs them to do so.

Mr. Riley referred to a Commission matter in 2009 with regard to the TABOR Now's request to investigate whether the city of South Portland should have registered as a BQC based on a mailing it sent to taxpayers in South Portland. By a 3-1 vote, the Commission at that time found that the city was a corporation under law and therefore, the city was a person under Title 21-A and would be required to file campaign finance reports if its expenditures exceeded a certain amount. He said the legislative history of Title 21-A provides a solid basis for the view that the Legislature did not intend the State or State agencies to be subject to campaign finance laws. In 1985, the Legislature consolidated three chapters of campaign finance laws into a new Title 21-A. Prior to that, the definition of "person" in one of the chapters included governmental agencies. However, in the re-codified Title 21-A, the definition of "person" omitted governmental agencies. Mr. Riley also noted that in the lobbyist disclosure law in Title 3, the Legislature included specific provisions that applied to employees of State agencies who lobby for those agencies at the Legislature.

Mr. Riley asked the Commission to consider the timing of the filing of the complaint – the day before the election – as an indication that the complainant's motive was to harm MWCC in the public's view. He discussed some of the history of state agency involvement in ballot question elections. He said there is no precedent that would indicate that State agencies have campaign finance reporting requirements. Furthermore, it is unreasonable to assume MWCC would know it was required to report these specific activities as in-kind contributions.

Mr. McKee said that he saw a difference between State agencies going to a public hearing at the Legislature or holding a press conference and State agency staff appearing in a privately-produced advertisement and being paid by the State agency for that campaign activity.

Mr. Riley disagreed. He said the IFW was authorized to do this type of activity. Mr. McKee agreed the IFW has a statutory obligation to educate the public; however, the issue is what the PAC is required to do when it receives in-kind contributions.

Mr. Riley referred to a case that came before the Commission a number of years ago in which the Commission found that a corporation had made an in-kind contribution to a candidate's

campaign by paying its employees to put up campaign signs for that candidate. The key difference to consider is that the corporation's employees' normal work activities did not include putting up campaign signs. One of the normal work activities of IFW employees is to educate the public according to the Department's authorizing statute and the recent Superior Court decision by Justice Wheeler. The IFW employees' activities which are the subject of the complaint are no different than their normal work routine and the Department did not expend any additional funds with respect to those activities. Mr. Riley said that is the distinction in this case.

Mr. Nass asked Mr. Riley whether he thought the amount of the alleged in-kind contributions was de minimis in light of the \$2.2 million spent by MWCC on the campaign so far. Mr. Riley said that it was a small amount. While there is no threshold for reporting in-kind contributions, the real issue is whether MWCC was required to report any of the IFW activities at all.

In response to a comment by Mr. Riley regarding the timing of the complaint, Mr. Healy said that the timing of the complaint and the amount of the in-kind contribution were irrelevant. The statute provides a mechanism for complaints to be filed and for the Commission to hear complaints within 2 days close to an election. The real question for him is whether a contribution by a State agency can be the subject of an investigation if the State agency does not fall within the definition of person and section 1003.

Mr. McKee stated his concern was State employees and State funds were used for promoting a ballot initiative and no disclosure was made. He said the purpose of the disclosure laws is so that the public know who is trying to influence a ballot question and how much is being spent to do so. He said his opinion was the State does fall under the definition of an organization; therefore, MWCC is required to report an in-kind contribution from IFW.

Mr. Healy disagreed and said he does not believe the Commission has jurisdiction because a State agency was not a person for the purpose of campaign finance laws.

Mr. Nass moved not to initiate an investigation. Mr. Healy seconded.

Mr. McKee said that a State agency is an organization and a person for the purpose of campaign finance law. Therefore, if a State agency makes a contribution to a BQC, the BQC must report it.

Mr. Nass said this is clearly a legislative policy issue regarding whether a State agency is subject to campaign finance law because it is included in the definition of “person.” However, he said that the Commission does not have the authority to make that determination at this point.

Ms. Matheson said she believes this activity falls under governmental speech which would be difficult to put a value on.

Motion passed 3-1 with Mr. McKee opposing.

By motion of Mr. Nass, the meeting adjourned at 3:22 p.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director