

Agenda

Item #13



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

To: Commissioners
From: Benjamin Dyer, Political Committee and Lobbyist Registrar
Date: January 15, 2015
Re: Request for Waiver of Late-Filing Penalty by Anne PAC

In the thirteen days before an election, all political action committees, ballot question committees and political parties must file a report within 24 hours of receiving any single contribution of \$5,000 or more or making any expenditure of \$1,000 or more.¹ On October 23, 2014, the Anne PAC (the PAC) made a \$3,500 expenditure in the form of a contribution to the Senate Democratic Campaign Committee PAC. It was required to disclose this contribution in a 24-Hour Report by October 24, 2014, but did not do so until December 15, 2014.

LEGAL REQUIREMENTS

PACs are required to report any single contribution of \$5,000 or more received or single expenditure of \$1,000 or more made during the 13 days before an election within 24 hours of that transaction. (21-A M.R.S.A. § 1059(2)(E)) If the PAC is late in filing the 24-hour report, the amount of the penalty is set by a formula which takes into consideration the amount of the transaction, the number of prior violations within a two-year period, and the number of days the report is late. (21-A M.R.S.A. § 1062-A(3))

¹ Candidates have a similar 24-hour reporting requirement, except with a lower reporting threshold (\$1,000) for contributions.

DISCUSSION

On October 23, 2014, the PAC made a \$3,500 expenditure in the form of a contribution to the Senate Democratic Campaign Committee PAC. The PAC filed the required 24-hour report on December 15, 2014.

Based on the statutory formula for calculating late-filed report penalties, the preliminary penalty amount totals \$1,820, calculated as follows:

Transactions	Date	Financial Activity	Penalty Rate	Days Late	Preliminary Penalty
Expenditure in the form of a Contribution to the Senate Democratic Campaign Committee PAC	10/23/2014	\$3,500	1%	52	\$1,820

The PAC asks that the Commission waive the penalty, in whole or in part, for two of the reasons in 21-A M.R.S.A. § 1062-A(2): because the penalty is disproportionate to the experience of the treasurer and because the penalty is disproportionate to the harm suffered by the public from the late disclosure. The PAC writes that it accepts full responsibility for the filing error. It offers that in August of 2014 it lost its founding, experienced, treasurer Joy O'Brien, to a terminal health condition. Its new treasurer did not have previous experience working with campaign finance reports, had only been in the position for 2 months at the time of this expenditure, and was not aware of the 24-Hour Report requirements. It explains that she thought the only accelerated reports required were for Independent Expenditures, which she knew the PAC would not be

making. The PAC also argues that the preliminary penalty, at over half of the value of the expenditure, is disproportionate the harm to the public from the late filing, as this was not an Independent Expenditure, but simply a transfer of funds from one PAC to another. The receiving PAC timely reported on a 24-hour report its receipt of the expenditure.

STAFF RECOMMENDATION

Violations of the 24-hour reporting requirements can be serious matters. 24-hour reports play an important role in informing the electorate about how money is changing hands in the critical days just before an election. In this situation, the PAC made a contribution to another PAC for \$3,500 twelve days before the election and did not disclose this transaction for over fifty days, depriving the public of important information in the critical days leading up to the general election. That said, in this fact pattern, a new, inexperienced treasurer seems an especially powerful mitigating factor warranting a significant reduction in the penalty ultimately assessed. While it must be incumbent on PACs which choose to be involved in the political game to select skilled agents who will allow them to comply fully with campaign finance laws, the Commission staff also recognizes that for many smaller PACs, even "leadership" PAC like this one, volunteers with that kind of specialized knowledge are an especially rare commodity, and hiring help would be infeasible due to costs. In addition, while sufficient to meet the reporting threshold, the transaction at issue was relatively small compared to some PAC expenditures. The staff recommends the Commission find that the PAC failed to file the 24-Hour report on-time and impose a \$250 penalty.

Thank you for your consideration of this memo.

BERNSTEIN SHUR
COUNSELORS AT LAW

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146 Capitol Street
PO Box 5057
Augusta, ME 04332-5057

Katherine R. Knox
207 228-7229 direct
kknox@bernsteinshur.com

January 9, 2015

Ben Dyer
Political Committee and Lobbyist Registrar
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, Maine 04333-0135

RE: Anne PAC Waiver Request for the Late Filing of 24-Hour Report

Dear Mr. Dyer:

On behalf of my client, Anne PAC (APAC or PAC), and pursuant to 21-A M.R.S.A. § 1062-A(5), I write to request a waiver of the preliminary penalties issued by the Commission staff for late filing of a 24-Hour report required for a \$3,500 expenditure in the form of a contribution to the Maine Senate Democratic Campaign Committee (SDCC). While Anne PAC takes full responsibility for the filing errors, the mistake above was inadvertent and due entirely to the inexperience of a new Treasurer. The ultimate harm to the public was minimal and the expenditure was properly reported by the recipient PAC in a timely fashion.

FACTUAL SUMMARY

Anne PAC was registered with the Commission on Governmental Ethics and Election Practices on November 6, 2013. Upon founding the PAC, Senator Anne Haskell was listed as a principal officer and Joy O'Brien was Treasurer. Ms. O'Brien was chosen as Treasurer because of her intimate knowledge with campaign cycles and the reporting requirements for PACs.

Unfortunately, Ms. O'Brien was diagnosed with breast cancer and throughout early 2014 found her health declining. Recognizing her serious health condition, on August 15, 2014, Ms. O'Brien resigned her position as Treasurer and Susan Whipkey agreed to take over the PAC Treasurer responsibilities.

Two months later, on October 23, 2014, the PAC wrote a check for \$3,500 to the Senate Democratic Campaign Committee. Ms. Whipkey recorded the check in her internal

system assuming it was to be reported on the next regular report due on 42-Day Post General Election. The \$3,500 check was received and properly reported by the Senate Democratic Campaign Committee.

When filing the 42-Day Post General Election report, the filing system alerted Ms. Whipkey that an error occurred and she promptly corrected the report and filed the additional paperwork. Unfortunately, the delay of almost two months results in a proposed fine of \$1,850 which Anne PAC contends is vastly disproportionate to the severity of the error. As such, the PAC now requests a waiver of the penalty.

1. Ms. Whipkey's Level of Experience as a Treasurer is Vastly Disproportionate to the Proposed Fine.

When it became increasingly clear that Ms. O'Brien's health was continuing to seriously decline (in fact, Ms. O'Brien passed away in October 2014), Senator Haskell approached her daughter, Susan Whipkey, about taking over the Treasurer's duties for the PAC. Ms. Whipkey had never before acted as PAC Treasurer or had any other involvement in the running of a PAC. In preparation for the PAC filings, she familiarized herself with the basic PAC rules and reporting deadlines. She did not, at that time, understand that a PAC to PAC contribution was the type of activity to trigger a 24-hour report.¹

As stated above, Ms. Whipkey had no previous experience as a PAC Treasurer or principal officer -- and does not deal with financial matters in her day to day work. Currently an associate project manager at Envirologix, she is a competent professional working in the field of immunoassay test kits for the worldwide food production chain. While new to her role as PAC Treasurer, Ms. Whipkey is capable, skilled and took her new role very seriously. Even so, she did not understand that the check written to the SDCC would be considered an "expenditure" which triggered the 24-hour filing rule. For those not intimately familiar with Ethics law and rules, the 24-hour rule appears to be designed to capture last minute expenditures meant to directly influence the election -- such as Independent Expenditures. In Ms. Whipkey's case, she knew that the PAC was not involved in any independent spending activities and as such, assumed that the PAC to PAC transfer could be reported on the next regular PAC report.

In this case, the illness and death of a long-time Treasurer created the need to replace an experienced Treasurer with someone who, while very competent, understandably misunderstood the applicability of the 24-hour rule. It is an understandable mistake for someone who had been acting as Treasurer for only two-months. The penalty matrix in this case unfairly calculates a penalty which is equivalent to over 50% of the

¹ Her understanding was that 24-hour reports were applicable to direct expenditures made by the PAC to influence the election (i.e. independent expenditures).

expenditure itself. The PAC argues that the circumstances of Ms. O'Brien's illness and ensuing appointment of a new and inexperienced Treasurer make this fine vastly disproportionate to the mistake made.

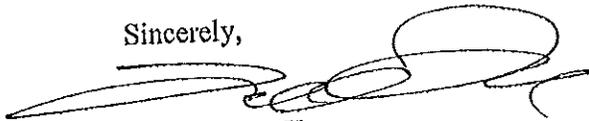
2. *The Proposed Fine is Vastly Disproportionate to the Level of Harm to the Public.*

While the PAC takes full responsibility for the error, it also believes that a fine of \$1,850 is unfairly high given the limited harm to the public. In this case, the expenditure at issue did not involve direct spending on a campaign or voter contact.² The expenditure was not an Independent Expenditure intended to influence voters on behalf of Anne PAC. Maine's disclosure laws are designed to give the public maximum information about who is raising and spending money to influence the opinions of voters. As such, Anne PAC contends that the failure to timely disclose a PAC to PAC contribution is a very different kind of transaction than one which is meant to report direct spending on an election. This is not a case where money was raised to directly influence the election – and then not disclosed to the public. Anne PAC simply made a contribution to other PAC – who then properly disclosed what the money was used for. While the PAC agrees that the 24-Hour report should have been filed, it does not believe that the fine proposed is at all reasonable given the circumstances. While the public may not have known that Anne PAC gave \$3,500 to the SDCC, it had full knowledge of who had given money to Anne PAC and there were no direct efforts to influence campaigns or voters. As a result, the PAC believes the harm to the public was minimal.

Both the inexperience of the Treasurer and the de minimis harm to the public, support Anne PAC's request for a waiver of the fine. While the PAC acknowledges a mistake was made, it also contends that a fine of over 50% of the excluded expenditure is not commensurate to the severity of the mistake.

Accordingly, Anne PAC requests that this Commission significantly reduce the preliminary penalty amount to reflect the relative seriousness of the violations.

Sincerely,



Katherine R. Knox

² Any direct spending on campaigns or voter contact was done by the Senate Democratic Campaign Committee who properly reported all such spending to this Commission.



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

December 19, 2014

Susan Whipkey, Treasurer
Anne PAC
2 Aspen Ridge
Raymond, ME 04071

Re: Late Filing of 24-Hour Report

Dear Ms. Whipkey,

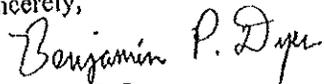
The Commission staff has made a preliminary determination that the Anne PAC (the PAC) was late in filing the 24-Hour Report required for the \$3,500.00 expenditure in the form of a contribution to the Maine Senate Democratic Campaign Committee PAC that the PAC reported making on October 23, 2014. The report was due by 11:59 p.m. on October 24, 2014, but was not filed until December 15, 2014. Under the Commission's statutes, the late filing of a report triggers an enforcement process. (21-A M.R.S.A. § 1062-A(3)). Based on the amount of financial activity in the report, the number of calendar days the report was late, and the PAC's history of violations, the commission staff has determined that a penalty of \$1,820.00 is owed. (Please see attached penalty matrix for the calculation).

The PAC may make a written request that the Commission waive the violation or penalty in whole or in part. Any request for a waiver must be made within 14 calendar days of your receipt of this notice. The request must be in writing and contain a full explanation of the reasons the PAC filed late. Upon receiving your request, the Commission staff will schedule your appeal for an upcoming Commission meeting.

The Commission may waive the penalty if it determines that the report was late due to mitigating circumstances, which are defined as (1) a valid emergency; (2) an error made by the Commission staff; or (3) relevant evidence that the PAC made a bona fide effort to file the report on time. Also, the Commission may waive the penalty if it is disproportionate to the level of experience of the person filing the report or the harm suffered by the public from the late disclosure.

Please call me at (207) 287-6221 or send me an email at benjamin.p.dyer@maine.gov if you have questions.

Sincerely,


Benjamin P. Dyer
Political Committee and Lobbyist Registrar

Enclosure: payment receipt & penalty matrix

Payment Receipt

Mail payment to:

The Maine Ethics Commission
135 State House Station
Augusta, ME 04333

Make checks payable to: "Treasurer, State of Maine."

Taryn Hallweaver, Treasurer
Environment Maine PAC
142 High Street, Suite 624
Portland, ME 04101

Violation:	Late 24-hour Report
Amount Due:	\$1,820.00

Committee Name: Anne PAC

Report Title: 24-Hour Report
Due Date: October 24, 2014

Previous Violation(s): N/A

Filed Date: December 15, 2014

The penalty for late filing of a required report is a percentage of the total contributions or expenditures for the filing period, whichever is greater, multiplied by the number of calendar days the report is filed late, as follows:

For the first violation, 1%
For the second violation, 3%
For the third and each subsequent violation, 5%

A penalty begins to accrue at 11:59 p.m. on the day the report is due.

Penalty Example:		Your Penalty is calculated as follows:	
The treasurer files the PAC's report two (2) days late. The PAC has not had any previous late violations this biennium. The PAC reports a total of \$2,500 in contributions and \$1,500 in expenditures for the filing period. The penalty is		Contributions / Expenditures:	\$3,500.00
\$2,500	Greater amount of the total contributions received or expenditures made during the filing period	X	
X .01	Percent prescribed for first violation	Percent Prescribed:	1%
\$25.00	One percent of total contributions		\$35.00
X 2	Number of calendar days late	Number of days late:	52
\$50.00	Total Penalty	Total penalty accrued:	\$1,820.00

Any penalty of less than \$10 is waived.

Violations accumulate on reports with filing deadlines in a 2-year period that begins on January 1st of each even-numbered year. Waiver of a penalty does not nullify the finding of a violation.

A required report that is sent by certified or registered United States mail and postmarked at least 2 days before the deadline is not subject to penalty.

MAXIMUM PENALTIES

21-A M.R.S.A. Section 1062-A(3)

\$10,000 for Pre- and Post-Election Reports, Quarterly Reports and 24-Hour Reports, except that if the financial activity reported late exceeds \$50,000, the maximum penalty is one-fifth of the amount reported late.

21-A M.R.S.A. § 1059. REPORT; FILING REQUIREMENTS

Committees required to register under section 1052-A, 1053-B or 1056-B shall file an initial campaign finance report at the time of registration and thereafter shall file reports in compliance with this section. All reports must be filed by 11:59 p.m. on the day of the filing deadline, except that reports submitted to a municipal clerk must be filed by the close of business on the day of the filing deadline. [2013, c. 334, §27 (AMD).]

1. Contents; quarterly reports and election year reports.

[2007, c. 443, Pt. A, §35 (RP) .]

2. Reporting schedule. Committees shall file reports according to the following schedule.

A. All committees shall file quarterly reports:

- (1) On January 15th, and the report must be complete as of December 31st;
- (2) On April 10th, and the report must be complete as of March 31st;
- (3) On July 15th, and the report must be complete as of June 30th; and
- (4) On October 5th, and the report must be complete as of September 30th. [2011, c. 691, Pt. A, §19 (RPR) .]

B. General and primary election reports must be filed:

- (1) On the 11th day before the date on which the election is held and must be complete as of the 14th day before that date; and
- (2) On the 42nd day after the date on which the election is held and must be complete as of the 35th day after that date. [2007, c. 443, Pt. A, §35 (AMD) .]

C. Preelection and post-election reports for special elections or ballot measure campaigns must be filed:

- (1) On the 11th day before the date on which the election is held and must be complete as of the 14th day before that date; and
- (2) On the 42nd day after the date on which the election is held and must be complete as of the 35th day after that date. [2011, c. 389, §45 (AMD) .]

D. A committee that files an election report under paragraph B or C is not required to file a quarterly report when the deadline for that quarterly report falls within 10 days of the filing deadline established in paragraph B or C. [1991, c. 839, §29 (RPR) .]

E. A committee shall report any single contribution of \$5,000 or more received or single expenditure of \$1,000 or more made after the 14th day before the election and more than 24 hours before 5:00 p.m. on the day of the election within 24 hours of that contribution or expenditure. The treasurer is not required to include in this report expenditures for overhead expenses or compensation paid to an employee or other member of the campaign staff who has received payments at regular intervals that have been disclosed in previously filed campaign finance reports. As used in this paragraph, "overhead expenses" includes, but is not limited to, rent, utility payments, taxes, insurance premiums or similar administrative expenses. [2013, c. 334, §28 (AMD) .]

[2013, c. 334, §28 (AMD) .]

3. Report of expenditures made after the 11th day and more than 48 hours before any election.

[1989, c. 504, §§28, 31 (RP) .]

4. Special election reports.

[1989, c. 504, §§28, 31 (RP) .]

5. Electronic filing. Committees shall file each report required by this section through an electronic filing system developed by the commission. The commission may make an exception to this electronic filing requirement if a committee submits a written request that states that the committee lacks access to the technology or the technological ability to file reports electronically. The request for an exception must be submitted within 30 days of the registration of the committee. The commission shall grant all reasonable requests for exceptions.

[2007, c. 443, Pt. A, §35 (AMD) .]

SECTION HISTORY

1985, c. 161, §6 (NEW). 1989, c. 7, §06 (AMD). 1989, c. 504, §§28, 31 (RPR). 1989, c. 833, §§16-20 (AMD). 1991, c. 839, §29 (AMD). 2003, c. 628, §B5 (AMD). 2005, c. 301, §§25, 26 (AMD). 2007, c. 443, Pt. A, §35 (AMD). 2007, c. 571, §9 (AMD). 2009, c. 190, Pt. A, §§23, 24 (AMD). 2009, c. 366, §9 (AMD). 2009, c. 366, §12 (AFF). 2009, c. 652, Pt. A, §22 (AMD). 2011, c. 367, §2 (AMD). 2011, c. 389, §§43-45 (AMD). 2011, c. 389, §62 (AFF). 2011, c. 691, Pt. A, §19 (AMD). 2013, c. 334, §§27, 28 (AMD).

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21-A M.R.S.A. § 1062-A. FAILURE TO FILE ON TIME

1. Registration. A political action committee required to register under section 1052-A or 1053-B or a ballot question committee required to register under section 1056-B that fails to do so or that fails to provide the information required by the commission for registration may be assessed a fine of no more than \$2,500. In assessing a fine, the commission shall consider, among other things, whether the violation was intentional, the amount of campaign and financial activity that occurred before the committee registered, whether the committee intended to conceal its campaign or financial activity and the level of experience of the committee's volunteers and staff.

[2013, c. 334, §30 (AMD) .]

2. Campaign finance reports. A campaign finance report is not timely filed unless a properly signed or electronically submitted copy of the report, substantially conforming to the disclosure requirements of this subchapter, is received by the commission by 11:59 p.m. on the date it is due. Except as provided in subsection 6, the commission shall determine whether a required report satisfies the requirements for timely filing. The commission may waive a penalty in whole or in part if it is disproportionate to the level of experience of the person filing the report or to the harm suffered by the public from the late disclosure. The commission may waive the penalty in whole or in part if the commission determines the failure to file a timely report was due to mitigating circumstances. For purposes of this section, "mitigating circumstances" means:

A. A valid emergency of the committee treasurer determined by the commission, in the interest of the sound administration of justice, to warrant the waiver of the penalty in whole or in part; [1999, c. 729, §9 (AMD).]

B. An error by the commission staff; or [1999, c. 729, §9 (AMD).]

C. Other circumstances determined by the commission that warrant mitigation of the penalty, based upon relevant evidence presented that a bona fide effort was made to file the report in accordance with the statutory requirements, including, but not limited to, unexplained delays in postal service or interruptions in Internet service. [2007, c. 443, Pt. A, §38 (AMD).]

[2009, c. 190, Pt. A, §29 (AMD) .]

3. Basis for penalties. The penalty for late filing of a report required under this subchapter is a percentage of the total contributions or expenditures for the filing period, whichever is greater, multiplied by the number of calendar days late, as follows:

A. For the first violation, 1%; [1995, c. 483, §21 (NEW).]

B. For the 2nd violation, 3%; and [1995, c. 483, §21 (NEW).]

C. For the 3rd and subsequent violations, 5%. [1995, c. 483, §21 (NEW).]

Any penalty of less than \$10 is waived.

Violations accumulate on reports with filing deadlines in a 2-year period that begins on January 1st of each even-numbered calendar year. Waiver of a penalty does not nullify the finding of a violation.

A report required to be filed under this subchapter that is sent by certified or registered United States mail and postmarked at least 2 days before the deadline is not subject to penalty.

A required report may be provisionally filed by transmission of a facsimile copy of the duly executed report to the commission, as long as an original of the same report is received by the commission within 5 calendar days thereafter.

[2007, c. 443, Pt. A, §39 (AMD) .]

4. Maximum penalties. The maximum penalty under this subchapter is \$10,000 for reports required under section 1056-B or section 1059, except that if the financial activity reported late exceeds \$50,000, the maximum penalty is 1/5 of the amount reported late.

[2011, c. 389, §49 (AMD) .]

5. Request for a commission determination. If the commission staff finds that a political action committee has failed to file a report required under this subchapter, the commission staff shall mail a notice to the treasurer of the political action committee within 3 business days following the filing deadline informing the treasurer that a report was not received. If a political action committee files a report required under this subchapter late, a notice of preliminary penalty must be forwarded to the treasurer of the political action committee whose report is not received by 11:59 p.m. on the deadline date, informing the treasurer of the commission staff finding of violation and preliminary penalty calculated under subsection 3 and providing the treasurer with an opportunity to request a determination by the commission. A request for determination must be made within 14 calendar days of receipt of the commission's notice. A principal officer or treasurer requesting a determination may either appear in person or designate a representative to appear on the principal officer's or treasurer's behalf or submit a sworn statement explaining the mitigating circumstances for consideration by the commission. A final determination by the commission may be appealed to the Superior Court in accordance with Title 5, chapter 375, subchapter 7 and the Maine Rules of Civil Procedure, Rule 80C.

[2013, c. 334, §31 (AMD) .]

6. Final notice of penalty. After a commission meeting, notice of the final determination of the commission and the penalty, if any, imposed pursuant to this subchapter must be sent to the principal officer and the treasurer of the political action committee.

If a determination is not requested, the preliminary penalty calculated by the commission staff is final. The commission staff shall mail final notice of the penalty to the principal officer and to the treasurer of the political action committee. A detailed summary of all notices must be provided to the commission.

[2009, c. 302, §9 (AMD) .]

7. List of late-filing committees. The commission shall prepare a list of the names of political action committees that are late in filing a report required under section 1059, subsection 2, paragraph B, subparagraph (1) or section 1059, subsection 2, paragraph C or D within 30 days of the date of the election and shall make that list available for public inspection.

[2007, c. 443, Pt. A, §41 (AMD) .]

8. Failure to file. A person who fails to file a report as required by this subchapter within 30 days of the filing deadline is guilty of a Class E crime, except that, if a penalty pursuant to subsection 8-A is assessed and collected by the commission, the State may not prosecute a violation under this subsection.

[2003, c. 628, Pt. A, §8 (AMD) .]

8-A. Penalties for failure to file report. The commission may assess a civil penalty for failure to file a report required by this subchapter. The maximum penalty for failure to file a report required under section 1056-B or section 1059 is \$10,000.

[2009, c. 190, Pt. A, §31 (AMD) .]

9. Enforcement. A penalty assessed pursuant to this section that has not been paid in full within 30 days after issuance of a notice of the final determination may be enforced in accordance with section 1004-B.

[2009, c. 302, §10 (RPR) .]