

Agenda

Item #11



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

MEMORANDUM

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: December 15, 2014
Subject: Possible Legislation: Disclosure of Governmental Advocacy in Ballot
Question Elections

In response to your discussion at the November 24, 2014 meeting, this memo proposes some possible courses of action if you wish to recommend that financial reporting to the Commission be required when departments of Maine state government or municipalities pay staff or otherwise spend money to influence public opinion on ballot questions.

Proponents of this reporting argue that if public entities are spending money to influence ballot question elections, it is important for Maine citizens (both as voters and as taxpayers) to be informed of how much money was spent. Others are more skeptical, arguing that financial reporting might discourage public officials from providing information to the public about ballot questions that fall within their areas of responsibility, and might discourage advocacy by officials which could be beneficial to the public. Also, accurate reporting of employee time generally requires record-keeping, which can be an administrative burden for the employee or employer.

These issues have arisen before the Commission in two cases:

- Employees of the Department of Inland Fisheries and Wildlife (DIFW) participated in advertising by the ballot question committee (BQC) opposed to the 2014 bear hunting initiative. In addition, the DIFW paid for the development of

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its own online videos which are still viewable on www.youtube.com. This degree of advocacy by a state department on a ballot question is exceptional and may not be repeated for some time.

- In 2009, the Commission considered whether the City of South Portland was required to register and file campaign finance reports as a ballot question committee. The South Portland City Council had passed two resolutions opposing the TABOR initiative and another initiative. The City prepared an insert that was mailed out with property tax bills explicitly stating the City's opposition to these initiatives. The Commission found that the City – as a municipal corporation – could qualify as a BQC, but in this instance did not because its spending to oppose the initiatives had not reached the \$5,000 threshold.

Current law

Ballot question committee reporting

Under current law, a “person” (definition discussed below) that has a major purpose other than influencing Maine elections is required to register and file financial reports with the Commission as a BQC if its spends more than \$5,000 to promote or oppose a ballot question. Payments by an organization to its staff to influence the ballot question count toward the \$5,000 threshold:

A person not defined as a political action committee who receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating or influencing a campaign as defined by section 1052, subsection 1, shall file reports with the commission in accordance with this section. For the purposes of this section, "campaign" does not include activities to influence the nomination or election of a candidate. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee. **For the purposes of this section, expenditures include paid staff time spent for the purpose of initiating or influencing a campaign.** The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals

who are the primary fund-raisers and decision makers for the committee.

...

(21-A M.R.S.A. § 1056-B) (emphasis added)

The term “person” is defined in campaign finance law to mean “an individual, committee, firm, partnership, corporation, association or organization.” (21-A M.R.S.A. § 1001(3)) The Commission’s Counsel has noted that the Maine courts generally have held that statutes do not apply to the State or state agencies unless expressly included in the language of the statute. *See, e.g., Department of Corrections v. Public Utilities Commission*, 968 A.2d 10147, 1050-51 (2009) (holding that the Department of Corrections was not a “person” for purposes of utilities regulation).

Based on this case law, the Commission staff has been inclined to believe that departments of Maine state government are *not required* to register as BQCs because they are not expressly included in the definition of “person” in § 1001(3). This is a matter of statutory interpretation for you to consider.

Because of the Commission’s 2009 decision concerning South Portland, the Commission staff has advised that if *municipal* governments spend more than \$5,000 on staff activities to promote or oppose a ballot question, the municipality *is* likely required to register and file campaign finance reports as a ballot question committee.

Paid staff time of government employees

In the subchapter of Election Law that covers campaign finance reporting by political action committees (PACs) and BQCs, the Maine Legislature defines “contribution” as set out below. Paragraph 3(D) relates to paid services that are provided to a PAC:

3. Contribution. "Contribution" includes:

A. A gift, subscription, loan, advance or deposit of money or anything of value made to a political action committee, except that a loan of money by a financial institution

made in accordance with applicable banking laws and regulations and in the ordinary course of business is not included;

B. A contract, promise or agreement, expressed or implied whether or not legally enforceable, to make a contribution to a political action committee;

C. Any funds received by a political action committee that are to be transferred to any candidate, committee, campaign or organization for the purpose of initiating or influencing a campaign; or

D. The payment, by any person or organization, of compensation for the personal services of other persons provided to a political action committee that is used by the political action committee to initiate or influence a campaign.

21-A M.R.S.A. § 1052(3)(D) (emphasis added) The BQC law states that this definition applies to BQCs, as well. (21-A M.R.S.A. § 1056-B(2)) (“The definitions of "contribution" and "expenditure" in section 1052, subsections 3 and 4, respectively, apply to persons required to file ballot question reports.”) This was the provision at issue in the DIFW matter that you considered last month when the Commission voted (3-1) not to investigate whether the BQC opposing Question #1 should have reported the value of in-kind services of DIFW agency personnel as a contribution.

Possible Courses of Action for the Commission

1. Change the definition of “contribution” so that PACs and BQCs must report the value of any paid staff time provided by government employees.

The Commission could propose modifying the definition of “contribution,” so that if a governmental department is compensating its staff to provide personal services to a PAC or BQC, the committee must report the value of the paid services. This policy change could be accomplished through the following statutory change:

D. The payment, by any person, ~~or~~ organization or governmental agency or authority, of compensation for the personal services of other persons provided to a political action committee that is used by the political action committee to initiate or influence a campaign.

2. Expand the categories of entities that must register and file reports as ballot question committees under § 1056-B to explicitly include public entities.

This did not seem to be your preference at the Nov. 24 meeting, but you could consider whether governmental agencies, *themselves*, should be required to register and file reports as a BQC if they spend more than \$5,000 to promote or oppose a ballot question. This could be accomplished by adding the following sentence to section 1056-B:

A person not defined as a political action committee who receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating or influencing a ballot question campaign ~~as defined by section 1052, subsection 1,~~ shall register and file reports with the commission in accordance with this section. ~~For the purposes of this section, "campaign" does not include activities to influence the nomination or election of a candidate.~~ For purposes of this section, "person" includes a governmental entity, such as a municipality, school administrative unit, county, state agency or authority. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee. For the purposes of this section, expenditures include paid staff time spent for the purpose of initiating or influencing a campaign. The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals who are the primary fund-raisers and decision makers for the committee.

Thank you for your consideration of this issue.

BANGOR DAILY NEWS

Maine wildlife agency spent \$31,000 to defeat bear hunting referendum



Courtesy of Sharon Fiedler

A black bear stands at the edge of the forest in Hancock in June 2014.

By Aislinn Sarnacki, BDN Staff

Posted Dec. 12, 2014, at 2:52 p.m.

The Maine Department of Inland Fisheries and Wildlife spent at least \$31,000 on campaign materials, television ads, debate coaching and staff time to fight Question 1, the citizen initiative to ban bear baiting, trapping and hounding in Maine.

The spending was detailed in internal agency documents and invoices released to the Bangor Daily News under the Maine Freedom of Access Act. Question 1 was defeated by Maine voters by about 44,000 votes on Nov. 4.

In the campaign against Question 1, DIF&W took an unprecedented advocacy role on the referendum question. Wardens, biologists and other agency staff spoke at dozens of voter

forums around the state and in several TV spots to defeat the initiative.

Although this activity was declared legal by a judge when challenged in October, the legality of state departments spending money and resources to influence a vote is still being questioned by referendum proponents Mainers for Fair Bear Hunting, who filed a lawsuit against DIF&W in September.

That suit remains pending in Cumberland County Superior Court.

“It’s absolutely inappropriate for our government to be telling us how to vote,” said Katie Hansberry, director of Mainers for Fair Bear Hunting. “Regardless of how people feel about bear baiting, trapping and hounding, all Mainers should really be concerned about this overreach by the government and misuse of government resources and power to influence the outcome of an election.”

The pending lawsuit seeks to stop DIF&W from further use of taxpayer resources and staff time to run a coordinated political campaign, and seeks to force DIF&W staff to immediately respond to FOIA requests for records concerning its campaign activities and bear management practices, according to the complaint.

In addition, Mainers for Fair Bear Hunting filed a second suit on Dec. 2 against the Maine Commission for Environmental Ethics and Election Practices, asking the the court to review the commission’s decision to deny its Oct. 30 “request for an investigation of the Maine Wildlife Coalition Council for repeated campaign finance violations,” including failing to report DIF&W contributions to the campaign.

The Maine Wildlife Coalition Council was the central proponent of the No on 1 campaign, against Mainers for Fair Bear Hunting, a coalition almost entirely funded by the Humane Society of United States, the chief advocate of changing Maine’s bear hunting laws.

“In elections, transparency is very important,” Hansberry said. “We’re continuing to pursue this litigation.”

DIF&W spending

Leading up to Election Day, DIF&W stated its opposition to the referendum on the state website and aired a number of online and television campaign ads featuring department biologists and game wardens speaking against the referendum.

According to the documents released by the agency to the BDN, in campaigning against the referendum, DIF&W paid:

- \$10,600 to Erica Johnson Design of Westbrook for design services, including the creation of a website, YouTube channel, brochures, PowerPoint presentations, graphics for videos and handouts.
- \$5,415 to Patra Co. LLC of Brunswick to produce video ads.

- \$3,887 to Salient Point LLC of Boston for public communications and debate coaching for representatives of the coalition against the referendum.
- \$170 for Maine Proofreading Services.
- \$3,256 for the use of state vehicles.
- \$7,849 for 165.5 hours of paid staff time.

The numbers don't tell the whole story, however.

DIF&W staff spent more than 165.5 hours on campaign-related activities. However, these additional hours were unpaid and therefore were not listed in the FOAA request documents, according to Christl Theriault, assistant to the commissioner of Inland Fisheries and Wildlife, who was in charge of collecting documents for the FOAA request sent by the BDN.

"Many of the hours spent occurred after an employee had already worked their eight hours in the day or 40 hours in the week, and often these were salaried employees, so this time was spent at no additional cost," Theriault wrote in an email to the BDN.

According to state records, the department sent state employees to speak at more than 50 public events, including formal debates, in opposition to the referendum.

"Nobody was asked to do anything that they were uncomfortable with," said DIF&W wildlife division director Judy Camuso, a leading spokesperson for the agency on Question 1. "In fact, a lot of regional staff were actually frustrated because they wanted to be more involved."

Camuso spoke at 33 public events in opposition to the referendum, relaying the message that the use of bait, hounds and traps are necessary to control Maine's growing black bear population.

"Clearly I'm personally invested in the department's position," said Camuso. "I adamantly believe that our management tools are the most effective and most humane things for black bears in the state of Maine."

Work continues

DIF&W was established "to preserve, protect and enhance the inland fisheries and wildlife resources of the State; to encourage the wise use of these resources; to ensure coordinated planning for the future use and preservation of these resources; and to provide for effective management of these resources," according to Title 12 of Maine Revised Statutes.

This mandate was referenced by Superior Court Justice Joyce Wheeler in October, when she denied an injunction request by Mainers for Fair Bear Hunting that asked the judge to order DIF&W to remove all political content from its website, repay funds to the state that were used in campaign activities and remove television ads featuring DIF&W staff from the air.

In her decision, Wheeler said that DIF&W is "mandated to 'encourage the wise use of [wildlife] resources.' Thus, DIF&W is statutorily required 'to attempt to persuade' the public to make

wise use of these resources, or to make wise use 'more appealing or more likely to happen.'"

The funds and staff time DIF&W spent in fighting the bear baiting ban is only the beginning of what the department ultimately will spend in this battle against the Humane Society of United States and Mainers for Fair Bear Hunting.

In addition to resources spent on the lawsuit, DIF&W also is working to satisfy multiple FOAA requests made by the Humane Society.

This year, DIF&W personnel spent an estimated 571 hours working on FOAA requests filed by the Humane Society of the United States, said Theriault. By law, a FOAA requester can only be billed at an hourly rate of \$15 per hour of work in response to the request.

"As you can imagine, many of the employees that worked on this request have a fully burdened rate of more than \$15 an hour," wrote Theriault in an email to the BDN. "So the cost to the licensed sportsmen and women of the state of Maine has been tens of thousands of dollars more than the \$8,568.25 the IFW will be reimbursed for."

"I don't think people understand how much time we've spent reviewing documents, and we're only like halfway done," Camuso said. "Outright, I think we probably spent more money in response to FOAA requests than we did on the referendum."

<http://bangordailynews.com/2014/12/12/politics/elections/maine-wildlife-agency-spent-31000-to-defeat-bear-hunting-referendum/> printed on December 12, 2014