



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Tabled 9/19/11
For more
members to be
present.
Approved
10/28/11

Minutes of the August 18, 2011, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
Augusta, Maine

Present: Margaret E. Matheson, Esq., Acting Chair; André G. Duchette, Esq.; Hon. Edward M. Youngblood; Michael T. Healy, Esq. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:00 a.m., Chair Margaret Matheson convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the July 28, 2011 Meeting

Mr. Duchette moved to accept the minutes as drafted. Mr. Youngblood seconded.

Motion passed unanimously (4-0).

Agenda Item #2. Commission's Report on Maine Clean Election Act Program

The Commission is required by Resolve Chapter 103 to study the Maine Clean Election Act program in light of a recent U.S. Supreme Court decision eliminating matching funds from the program. Mr. Wayne explained that several meetings have taken place with advocates for the program and legislative caucuses to obtain some ideas and thoughts on changes to the program. As a result of those meetings, the Commission staff presented two options for consideration by the Commissioners to forward to the Legislature.

Mr. Wayne explained that Proposal #1 would give candidates a fixed amount for the primary election and a fixed amount for the general election. No more contributions would be accepted and candidates would know up front the amount the state will give them for their entire campaign. He pointed out three variations to this plan on the chart in the materials.

Mr. Wayne said Proposal #2 would allow candidates to re-qualify for additional funds. He said candidates would have funds for the primary and the general but if candidates anticipate that they will need additional funds due to independent expenditures or having a traditionally funded opponent, those candidates would be able to qualify for additional supplemental payments for the general election. He said each campaign is different and some need additional funding for various reasons and this would allow the program to accommodate those candidates to work towards receiving more funds by re-qualifying and collecting additional contributions.

The public hearing began.

Alison Smith, President of Maine Citizen's for Clean Elections (MCCE), provided the following comments:

Regarding Legislative Proposal #1:

- The strength of Legislative Option #1 is its simplicity – a single distribution of a fixed amount. However, in this case, simplicity does not create good policy.
- The distribution amount has to be sufficient so that MCEA candidates will have enough to run a reasonable campaign and have enough in reserve for the last weeks before the election.
- Unless the distribution amount is much higher than even what the staff proposed, MCCE is concerned that the program will not be attractive to a wide array of candidates or suitable for the variety of races in an election cycle.
- Whatever option is finally adopted, the system should be designed so that a qualified challenger can compete with an incumbent.
- If the distribution amount is set too low, the public funding program could become an incumbent protection program. That is counter to the spirit of the law which is to provide an opportunity for an array of candidates to run for office.
- It is important to avoid letting the program become one that is only viable for incumbents, candidates in “safe” districts, and candidates who will ultimately lose. That does not provide real value to Maine citizens.
- Setting the amount too high would provide most candidates with too much money, which would not be a good use of public money.

- This proposal creates a “sitting duck” problem. If it is known that MCEA candidates have only a fixed amount to spend, it is very clear how much is necessary to outspend them. MCEA candidates will not have access to any additional public or private funds to spend on their campaign if the race heats up in the final weeks of the campaign.
- If Legislative Option #1 is adopted, the MCCE approves of the suggestion that the distribution for the general election be made in two increments, one after the primary election and one later in the campaign upon request of the candidate. The initial amount may be enough for some candidates and they may never request the second payment. However, they will know that they have some funds available to them if their race heats up.

Regarding Legislative Proposal #2:

- This proposal comes the closest to filling the gap left in the program after the U.S. Supreme Court decision.
- It achieves the goal of getting resources to the competitive races that need additional funds above the initial distribution in an effective and efficient manner.
- It avoids the constitutional issues because whether a candidate gets supplemental funds does not depend on an opponent’s or independent group’s spending.
- A potential downside is that in order for it to work within the program’s resources, most candidates would have to opt out of receiving one or both of the supplemental payments.
- By setting a higher initial distribution, perhaps \$6,000 for a House race and \$27,000 for a Senate race, many candidates may forgo seeking supplemental funds.
- One objection MCCE has to the staff proposal is the cutoff date of June 30. Most candidates will see the wisdom of qualifying early. But the MCCE does not see the wisdom of preventing a candidate from qualifying for supplemental payments later.
- Some candidates may not know how competitive their race will be by June 30. They might not even know who they are running against if the candidate from the opposing party in the primary is replaced.
- A significant upside of a later deadline is that fewer candidates will feel that they have to qualify for supplemental payments at the outset and may not seek supplemental payments at all.

- A later cutoff date for qualifying for supplemental funds would eliminate the “sitting duck” problems because opponents could not be certain how much the MCEA candidate would have to spend.

Regarding other changes proposed by Commission staff:

- MCCE sees no harm in doubling the amount of seed money contributions candidates can raise. In fact there may be a benefit in doing so, if the amount to primary candidates is reduced and there are no supplemental funds available to primary candidates.
- MCCE does not agree with the staff proposal that would allow candidates to roll unspent seed money forward after a candidate is certified.
- MCCE agrees with some of the suggestions of the Commission staff regarding changes to the reporting requirements. However, the requirements should fit comfortably with the new distribution scheme and they should not reduce the amount of campaign finance information disclosed to the public.

Mr. Duchette expressed concern that Proposal #2 looks very similar to the matching fund process since money is being distributed over time, closer to the election. He questioned whether this could be in conflict with the Supreme Court decision.

Ms. Smith said she did not see any connection because the decision for spending would not be by the Commission, but by the candidate. She said the distribution would not be based on another candidate's spending.

Mr. Healy asked what a suitable amount should be and Ms. Smith said the minimum should be just over \$6,200 for the House and \$28,000 for the Senate in her view. She said based upon a highly contested race, the maximum amount for the House was \$12,000 and \$60,000 for a Senate race which would not be possible for the Fund to support. She said according to the graph provided by Commission staff the average spending for MCEA Senate candidates in 2010 was \$20,000 - \$30,000. She said in order for the program to be attractive, the amounts need to be higher than \$28,000.

Mr. Healy stated that a reasonable amount in his view for the House would be \$6,200 however for a Senate campaign \$28,000 was too low and \$60,000 too high. He asked Ms. Smith if all candidates took the maximum amount of funds under Proposal #2, what it would cost the state of Maine.

Ms. Smith said the cost would be too much and explained that the law states the Commission cannot pay out any more than the balance in the Fund and further if the Commission is unable to pay distributions, the candidates are entitled to engage in private fundraising up to the cap amount. She said the budget for 2012 is based upon what the previous election cost under the old system with matching funds.

Mr. Healy asked why a candidate would not want to qualify for the maximum amount.

Mr. Wayne explained candidates do not spend all their funding under the current system, most return the funds to the Program. Many candidates feel they do not need more than \$5,000 to run a viable campaign for a House race. Also, most candidates do not enjoy the extra work of having to collect qualifying contributions because it is time consuming.

In response to Mr. Healy's question regarding raising the qualifying contribution amount, Ms. Smith said this question has been discussed since the inception of the MCEA. She explained that a \$10 contribution has a different impact on the budgets of individual contributors in different parts of the state. In order for the system to remain inclusive and affordable for all people in the state, the amount has remained at \$5. Ms. Smith said currently the amount is at least \$5 but individuals may donate more if they choose.

Ms. Smith said that it may seem likely that all or most candidates will seek to qualify for the maximum amount of supplemental funds under Proposal #2. However, if it was harder to qualify for supplemental funds and if candidates had to collect more qualifying contributions, then only the candidates who really need the additional funds will find it worthwhile to do the extra work to get the supplemental funds. Ms. Smith said that another aspect that deserves consideration is making the initial distribution in increments. That way a candidate can leave money on the table, knowing that it will still be available, and request it later if it is needed.

Mr. Duchette said his concern with leaving the money on the table was that a candidate could come back later in the cycle to request it only to discover there were no funds left because it had been given to other candidates.

Mr. Duchette asked why the option of more private fund raising was not being focused on.

Ms. Smith said that a hybrid system that is less than a full public funding system was not supported by the MCEA stakeholders in Maine. She said there is no interest in going that route and for that reason the MCCE has not spent a lot of time pursuing that option.

Mr. Healy asked whether there would be enough funds in the budget if there were a single distribution where every contested House race received \$6,200 and contested Senate race received \$40,000.

Ms. Smith said it would depend upon the number of candidates participating but the higher the distribution, the higher the participation rate.

Mr. Healy expressed concern over the cost to the state of Maine under Proposal #2 which he thought was too open-ended.

Mr. Youngblood said he liked the idea of making payments in increment which allows for budgeting money later in response to opponents. He asked whether a candidate could collect additional contributions from previous contributors or would a candidate have to get contributions from new contributors.

Ms. Smith said these contributors should be new people because this shows additional grassroots support in the district. If a candidate is making the argument that he or she needs more money for the campaign, they should be able to show that they have a growing base of support and that they have been doing the outreach and work to get the additional funds. That way the program can be sure that the money is going to viable candidates. It is similar to the traditionally financed candidate who finds new donors to get additional financial support for their campaign.

Mr. Youngblood said the local political action committees and leadership PACs should not be overlooked because they too are raising money to support their candidates without fear of matching funds now being triggered for the opponent.

Ms. Smith agreed and said that was a reason for making sure that the amount of the initial distribution is adequate for a candidate to run a viable and competitive race. Addressing the issue of the influence of PAC spending is perhaps better dealt with separately but the Commission needs to make sure that the public financing system is viable for candidates on its own. If the amount of the distribution is reduced too much, the program will only be viable for safe incumbents, candidates in safe districts and marginal candidates.

Ms. Matheson asked if candidates could gather all their qualifying contributions, including qualifying contributions for supplemental funds, all at the same time so that all the administrative work is done early in the campaign to allow the candidates to focus on the issues from that point forward.

Ms. Smith said that seemed to be the preferred method for most stakeholders, to get the qualifying process done early so that candidates know how much they have and can budget accordingly. She said that the majority of the candidates would be completed early. The MCCE, however, believes that provisions should be made so that candidates who have an "October surprise" can get more funding to respond to ads late in the campaign. She acknowledged that it would be work on the candidate's part but also allow candidates to get into the field to be in touch with voters which could strengthen campaigns.

Representative Michael E. Carey (House District 72) provided the following testimony:

- The original policy of the Maine Clean Election Act was to have a balance between providing candidates with sufficient funding and safeguarding the public's money by having an efficient means to distribute the funds.
- Legislative Proposal #1 would either provide too much or too little money to run a campaign.
- Since public funds cannot go to the most competitive races based on an opponent's spending or independent expenditure, candidates will have to take the responsibility of determining how much funding they need for their particular race.
- Legislative Proposal #1 should have more tiers with small amounts for each tier. Candidates will have more options for the amount of funding they need to qualify for. Otherwise, some candidates will be forced to take more funds than they actually need.

- There should be increasing levels of difficulty for each tier of funding.

In response to a question from Ms. Matheson, Rep. Carey said deadlines are very effective for getting people to do work. He said having the deadline early gets the paperwork over with and frees up the candidate for outreach. He said more important than a deadline in his view was keeping the system as straight forward as possible with as little bureaucratic procedure as possible. The qualification period should be determined only by the state's ability to turn the money around quickly and the Commission's ability to qualify the checks.

Public comment ended.

Mr. Wayne said at this point the Commission could recommend one or both proposals for the Legislature. He said the Veterans and Legal Affairs (VLA) Committee will be meeting on Monday, September 26 and if the Commission's report was completed by then they would consider the report at that time.

Ms. Matheson suggested that the payment amounts for uncontested primary candidates be looked at to see whether there is any savings there. She suggested continuing the discussion on this item later in the meeting.

Mr. Healy moved that the Commission table this agenda item until later in the meeting and take up the remainder of the agenda in order to move the meeting along. Mr. Duchette seconded.

Motion passed unanimously (4-0).

In consideration of the Commission's practice to address agenda items out of order to accommodate the attendance of public participants regarding particular items, the following agenda item was taken out of order:

Agenda Item #3. Audit of 2010 Campaign of Howard McFadden

State Representative Howard McFadden was a Maine Clean Election Act (MCEA) candidate for the Maine House of Representatives in 2010 was selected for an audit. The audit disclosed no problems with the campaign's financial reporting and record-keeping, but the campaign bank account contained some

personal funds for most of the campaign year. Although no personal funds were used for campaign purposes, commingling of MCEA funds and personal funds is prohibited. Mr. Wayne said this penalty assessment is in line with previous similar instances. Mr. McFadden did not attend the meeting.

Mr. Dinan said the McFadden campaign was well documented in other areas of his campaign. He said Mr. McFadden did not contest the audit findings outlined.

Mr. Duchette moved the Commission adopt the staff recommendation to find the McFadden campaign in violation of 21-A MRSA § 1125(7) for commingling MCEA funds with personal funds and assess a penalty of \$100. Mr. Healy seconded.

Motion passed unanimously.

Agenda Item #4. Audit of 2010 Campaign of Patrick McGowan

Patrick McGowan was a Maine Clean Election Act candidate for the Democratic nomination for Governor in 2010. During the audit, the campaign disclosed that it accidentally overstated the seed money contributions itemized in the campaign's April 1, 2010 seed money report, which resulted in the campaign spending MCEA funds for some staff services received prior to certification and the campaign omitted nine expenditures of MCEA funds from its October 2011 report. Mr. Wayne stated that these findings were self-reported by the campaign as it was reviewing the records and they were very minor.

Vincent Dinan, auditor for the Commission, explained the reason this audit took more time was due to the death of the campaign's treasurer and getting documentation back from vendors.

Mr. Dinan said Finding #1 was an error in reporting seed money contributions. The final report submitted to the Commission reported \$78,415 which was \$2,048 more than actual receipts and resulted in expenditures in excess of permitted amounts during the qualifying period. He said Finding #2 was with nine, small unreported expenditures totaling \$285.83 and said these were unintentional errors.

Mr. Dinan expressed concern with the process for media purchases through media buyers. Campaigns pay out large sums to a media buyer who places the ad with the station and also pays the station. He said this process is very troublesome from an accounting standpoint since the stations do not provide an invoice at

the time payment is made. He said usually the invoice is provided after the election is over and sometimes months after the expenditure is made when there is no one with the campaign involved to check accuracy, documentation or whether refunds have been paid. He said in this case there was over \$7,000 in refunds due back to the campaign from the media buyer which the treasurer, eventually, was able to recover and after adjustments returned \$5,000 to the Clean Election fund. Mr. Dinan said this practice is very wide spread among campaigns and needs to be looked at and controls should be strengthened because unless the campaigns ask and continue to follow up with the media buyers, the money does not come back to the campaigns. He said if the candidate pays the station directly, the accounting issues are handled properly but most candidates use media buyers.

Mark Barrett, treasurer for the McGowan for Governor campaign, said the two small accounting errors which affected approximately less than one-half of one percent of the campaign's total budget were self reported after the election. He also said the campaign raised approximately \$76,000 in seed money while only \$40,000 was required and over \$5,000 was returned to the Clean Election fund.

In response to Mr. Healy and Mr. Duchette, Mr. Barrett said there were no disputes with the audit report or the amount of the penalty assessed.

Mr. Barrett explained with regard to the media purchase that after the election in the fall, the campaign had some concerns over invoices from the media buyer and getting the documentation requested from one of the vendors took through the winter months and into the spring.

Mr. Healy asked Mr. McGowan if the funding for the gubernatorial race was a viable amount to run a campaign.

Mr. McGowan said he had not seen the disbursement amounts for the general election; however, he felt the amounts for the primary were sufficient. He said he was able to stay toe-to-toe with his competition with regard to media buys and other expenditures. He said this system allows candidates to compete fairly.

Mr. Duchette moved to adopt the staff recommendation and find the McGowan campaign in violation of the following:

- Finding #1, 21-A M.R.S.A. § 1125(12) by failing to accurately report contributions received during the qualifying period and 21-A M.R.S.A. § 1125(2-A)(A) by using MCEA funds to pay for services received prior to the candidate's certification as an MCEA candidate and assess a penalty of \$200; and
- Finding #2, 21-A M.R.S.A. § 1125(12) by not reporting nine expenditures totaling \$248 in the 11Day Pre Primary campaign finance report and assess a penalty of \$100 for this violation.

Mr. Youngblood seconded.

Motion passed unanimously (4-0).

Agenda Item #5. Audits of Maine Clean Election Act Campaigns

In addition to agenda items #3 and #4, the Commission's auditor has completed seven audits of 2010 Maine Clean Election Act candidates. No exceptions (violations) were found.

The Commission resumed the scheduled order of agenda items at this point.

Item 2. Commission's Report on Maine Clean Election Act Program (con't.)

Ms. Matheson suggested that the Commission may want to consider submitting the two proposals to the VLA Committee, even if the Commission is recommending one proposal over the other. She said that there was merit to both proposals and it may be helpful for the VLA Committee to have both options to compare.

Mr. Youngblood said he preferred Proposal #2. He said that he liked giving the candidates the option of qualifying for additional funds. He also said the June 30 deadline for submissions would give candidates ample time to collect the contributions. He also supported the \$25,000 - \$27,000 payment amount for the Senate which could be broken into two separate increments in order to provide additional funds closer to the election if necessary which is a critical time to have funds available.

Mr. Duchette expressed concern when the Commission's role becomes law makers instead of simply overseers since this is the Legislators' role. He agreed with Commissioner Matheson to provide both options to the Committee and let them make the final decision after public comment.

Mr. Healy said he preferred Proposal #1. He is not opposed to Proposal #2 but he is concerned that Proposal #2 creates an open-ended liability for the state. He said Proposal #1 is simple. He said even though it is not the intention, Proposal #2 appears to be a matching fund program in disguise. He believes most candidates will opt to get the maximum amount even though they may not use it all. He said basically this is a reallocation of the amount that would have been spent on matching funds. He said that the payment amounts must be high enough for a candidate to run a viable campaign. He suggested for a House campaign approximately \$6,200 - \$7,200 and for a Senate campaign approximately \$35,000 - \$40,000. Candidates must know up front how much they will receive and the process should be kept as simple as possible.

Ms. Matheson said she liked the simplicity of Proposal #1 but, based on the comments received, she understood the appeal of Proposal #2. However, she had concerns as to whether the cost of Proposal #2 would be affordable and whether funds would be available if a candidate needed them closer to the election. She also asked for clarification regarding independent expenditure reporting requirement changes and where the public would be able to get that information if the changes were made to the reporting.

Mr. Wayne explained that comments from the Governor's counsel suggesting that if matching funds were not being paid out, perhaps the two-day reporting period of independent expenditures during the 60 days before the election could be changed.

Ms. Matheson said she welcomes the opportunity to discuss these issues but would rather the Legislature make the final decisions on the details.

Mr. Healy said the VLA Committee will see the proposals and make the final decision no matter what the Commission decides to do.

Mr. Wayne suggested that the report to the VLA Committee contain the two proposals, including the comments received from the public. He could present a draft report to the Commission at a meeting in September.

Ms. Matheson said she supports withholding a percentage of the initial distribution in reserve in the Clean Election fund because it provides a safety net for candidates at the last minute of their campaigns.

Ann Luther stated that the affordability of each proposal is dependent on the number of participants so it applies to both proposals.

Mr. Youngblood expressed concern that Legislators who want to do away with the Clean Election program could set the amount too low under Proposal #1 and discourage candidates from using the program.

Ms. Matheson said she appreciated Rep. Carey's comments regarding requiring candidate's to work harder to get additional funds for their campaigns later in the cycle.

Ms. Matheson asked the Commission's counsel whether there were any issues that may raise concern.

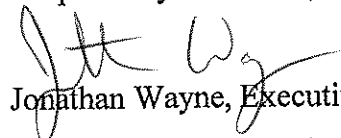
In response to a question from Ms. Matheson, Ms. Gardiner said she did not see constitutional problems with Proposal #2 because the process does not involve a trigger based on an opponent's fundraising or spending or independent expenditures. Both proposals could pass muster under the Court's analysis. She encouraged the Commission to flag the issue of adjusting the reporting requirements for independent expenditures.

The Commission directed the staff to prepare a draft report outlining two options for modifying the Maine Clean Election Act for consideration by the Veterans and Legal Affairs Committee. The draft report will be presented at the Commission's September meeting.

Mr. Healy moved to adjourn and Mr. Duchette seconded the motion, which passed unanimously.

Meeting adjourned at 11:15 a.m.

Respectfully submitted,


Jonathan Wayne, Executive Director

