



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

Minutes of the November 24, 2008, Meeting of the
Commission on Governmental Ethics and Election Practices
Held in Room 208, Burton M. Cross Office Building,
111 Sewall Street, Augusta, Maine

Present: Michael Friedman, Esq., Chair; Hon. Mavourneen Thompson; Walter F. McKee, Esq.; Hon. Francis C. Marsano (by phone); Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:01 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the October 17, 2008 Meeting

Mr. McKee moved to accept the October 17, 2008, meeting minutes as drafted. Ms. Thompson seconded. The motion passed unanimously (4-0).

Agenda Item #2. Complaint against Rep. Philip A. Curtis/Campaign Signs

Mr. Wayne explained that John Bertl filed a written complaint stating that the campaign signs of Rep. Philip A. Curtis did not contain the complete disclosure statement as required by law. The signs contained a statement that they were paid for and authorized by the candidate, but did not have the address of the candidate or the candidate's treasurer. Mr. Wayne said the staff agrees that there is a violation since there is no address printed on the signs; however, it is clear from the statement on the signs that they were paid for by the candidate's campaign. He stated that the staff recommendation is to not assess a penalty.

Mr. Bertl was not present at this meeting.

Rep. Philip Curtis explained that he is guilty of not having his address on the signs; however, the signs have been used in his previous campaigns and he was not aware of the law requiring this information. He said

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he believed the wording “paid for and authorized by the candidate” was acceptable and once he found out from the Commission staff that it was not, he took steps to correct most of the signs.

Ms. Thompson asked what percentage of his signs Rep. Curtis was able to correct. Rep. Curtis said he had ten home-made signs and six were corrected.

Mr. Friedman asked if this was Rep. Curtis first term. Rep. Curtis said this was his third term.

Mr. Friedman asked if these signs were used in the past and whether a complaint had been filed before. Rep. Curtis confirmed that they were used in the past but there had not been any complaint before.

Philip Roy, Treasurer of the Maine Republican Party and a recent candidate for county commissioner, said federal election law does not require the address but does require the name of the treasurer and/or the web address of the person who financed the signs. He noted that many large painted signs used during this election did not have the disclosure statement. He said the Commission should look at this law and consider making changes to clarify what disclosure is necessary taking into consideration the size of the sign and the practicality of requiring a printed disclosure statement that is not visible unless a person is very close to the sign.

Mr. Friedman asked what the maximum penalty amount for this violation. Mr. Wayne said \$200.

Mr. McKee made a motion to accept the staff recommendation to find in violation but with no assessment of a penalty. He said attempts were made to correct the signs and the signs were used in previous campaigns without any issue. Ms. Thompson seconded the motion. The motion passed unanimously (4-0).

Mr. McKee recused himself from participating in Agenda Item #3 because he made a contribution to the Dill Leadership PAC.

Agenda Item #3. Request for Waiver of Late-Filing Penalty/Dill Leadership PAC

Mr. Wayne explained that the Dill Leadership PAC was five days late filing its October Quarterly Report due October 10, 2008. Rep. Cynthia Dill requested a waiver of the \$51.25 late-filing penalty because of the sudden death of the PAC treasurer’s husband. The staff recommended the waiver of the penalty.

Cynthia Dill stated she respectfully requested a waiver due to the circumstances described by Mr. Wayne.

Ms. Thompson made a motion to accept the staff recommendation and provide a full waiver of the penalty.
Mr. Marsano seconded.

Mr. Friedman agreed this situation warranted a full waiver of this penalty.

The motion passed unanimously (3-0, Mr. McKee having recused himself from consideration of this matter).

Mr. McKee returned to the meeting.

Agenda Item #4. Request for Waiver of Late-Filing Penalty/Fed Up With Taxes PAC

Mr. Wayne explained that the Fed Up With Taxes political action committee was late in filing two 24-hour reports due October 24 and 25, 2008, for expenditures made over \$500. He said a single report containing the information for the relevant expenditures was filed on the evening of October 27. Mr. Wayne said based on the formula in the Election Law, the penalties for the two late reports are \$96.12 for the report that was due on October 24 and \$10,000 for the report that was due on October 25. The maximum penalty allowed by statute for a late-filed report is \$10,000. He said that William Dale on behalf of the PAC requests a waiver of the \$10,000 penalty because it is disproportionate to any harm suffered by the public from the late disclosure and for other reasons. Mr. Wayne also explained that a letter was received over the weekend from Benjamin Dudley.

Mr. Friedman read out loud Mr. Dudley's letter (attached) which advocated against a reduction in the \$10,000 penalty.

Ms. Thompson asked the staff for information regarding the Legislature's intent with regard to the requirement of 24-hour reporting.

Mr. Wayne stated that he had not researched the legislative history and background regarding the 24-hour reporting requirement. He said the last regular campaign report required to be filed before an election is

due eleven days prior to the election and it covers through the fourteenth day before the election. He said the 24-hour report covers large expenditures made by PACs in the final thirteen days before the election. He said that, under the current report filing schedule, if 24-hour reports were not required, these large expenditures would not be disclosed to the public until 42 days after the election when the final campaign finance report is due.

Mr. William Dale, Esq., of Jensen, Baird, Gardner & Henry, and counsel for Fed Up With Taxes PAC, said he did all the electronic filings for this PAC. He stated that it was his error not to report the two expenditures made after the 11-day pre-general reporting period. He said that he had filed a lengthy 11-Day Pre-General Report on October 24 and logged off the system without filing the reports for the expenditures made after the end of that reporting period. He said he had no excuse except that he forgot.

Ms. Thompson asked Mr. Dale what he believed the Legislature's intent was requiring these 24-hour reports.

Mr. Dale said he could not speak knowingly, except to surmise it would be for the purpose of disclosing large sums of money spent by PACs just prior to an election. He said this PAC was well-funded by national constituencies and those contributions as well as the PAC's expenditures were reported appropriately in the pre-election reporting periods, so it should have been no surprise that a great deal of money would be spent toward the end of the period.

Mr. McKee asked for clarification of the sequence of the filings. Mr. Dale said the 11-day pre-election reporting period covered the period from October 1 to October 21. The expenditures that were made on Thursday, October 23 and Friday, October 24 were made outside of the reporting period covered by the 11-day pre-general report.

Ms. Thompson made a motion to assess Fed Up With Taxes PAC the maximum penalty of \$10,000. Mr. Friedman seconded.

Mr. McKee said he was divided about what the Commission should do. On the one hand, Mr. Dale made extraordinary efforts to comply with the reporting requirements and was sincere in his acknowledgement that a mistake had been made. On the other hand, there were extremely large expenditures made for major

media buys prior to the election and this very important information was not disclosed to the public in a timely fashion.

Ms. Thompson stated this issue is one of the most important issues that has come before the Commission since she has been involved. She said the law requires that campaign finance activity be made transparent for the public. She acknowledged Mr. Dale's sincerity in admitting that a mistake had been made but did not think it was relevant to the Commission's consideration of this matter. She said the reality is that the public was not made aware of an expenditure of nearly three-quarters of a million dollars for a statewide people's veto election.

Mr. Marsano agreed with Ms. Thompson and stated that due to the large amount of the expenditures involved, he said the maximum penalty is appropriate.

Mr. Friedman said that there is no question as to Mr. Dale's integrity and acknowledged Mr. Dale's forthrightness in coming forward and admitting to the problem. Nonetheless, he said that he was not in favor of waiving or reducing the penalty because he did not believe the criteria warranting a waiver or reduction under 21-A M.R.S.A § 1062-A(2) were present in this case. Referring to the statute, he read the first condition for a waiver – "The Commission may waive a penalty if it is disproportionate to the level of experience of the person filing the report...." He said Mr. Dale is not inexperienced. Regarding the second condition for a waiver – "The commission may waive a penalty if it is disproportionate...to the harm suffered by the public from the late disclosure," he said the amount of this expenditure was very large, nearly \$750,000, and any delay in disclosing such an expenditure made so close to the election could be potentially very damaging to the public. Mr. Friedman also said that there were no mitigating circumstances as listed in the statute present in this case such that a waiver in whole or in part was warranted. The report was filed late due to error on the part of the filer, which is not a mitigating circumstance. While he recognized that \$10,000 was a large amount, he said that, under the statute, the Commission has no basis for reducing or waiving the \$10,000 penalty.

Mr. Marsano reemphasized that the \$10,000 amount is actually a reduction of the amount that the statute calls for in penalties that could have been 3% of the amount of the expenditure (\$750,000). He agreed with Mr. Friedman's interpretation of the statute.

The motion passed unanimously (4-0) to impose the \$10,000 penalty.

Agenda Item #5. Request for Waiver of Late-Filing Penalty/Teri McRae

Mr. Wayne explained that Teri McRae was a candidate for re-election to the office of Register of Probate for Cumberland County. She filed her 11-Day Pre-General Election Report one day late on October 25, 2008. This was a second late-filing violation for Ms. McRae. The preliminary penalty amount is \$132.10. Ms. McRae requests a waiver of the penalty.

Mr. McKee made a motion to accept the staff recommendation against granting a waiver and assess a penalty in the amount of \$132.10. He stated that Ms. McRae's circumstances as outlined in her letter do not justify a waiver. Ms. Thompson seconded.

Mr. Marsano said that he believes that Ms. McRae's letter provides a reason for waiving the penalty in that there was no significant harm suffered by the public due to the late filing.

Mr. Friedman said he was struck by McRae's interpretation of a previous violation for the late filing of an earlier campaign finance report. This penalty was waived because it was under \$10, which means the penalty is automatically waived. He said because she was found in violation previously, he would support the penalty amount for a second violation.

Mr. Marsano stated that the provisions that apply to a waiver in 21-A M.R.S.A. § 1020-A(2) involve the question of the harm suffered by the public from late disclosure. He said in his view there was no harm suffered in this case given the nature of the election. He said that even though the filing requirement may have been violated, the facts of this case support the grant of a waiver based on the lack of any harm suffered by the public.

Mr. McKee said after listening to Mr. Marsano's comments, he would agree and be inclined to vote against his motion. He said in her letter, Ms. McRae stated, "As Register of Probate, I deal with people filing things individually and through attorneys all of whom make errors in their filings and procedures, and I always try to respect their effort and not be too punitive for honest errors. I know most people try their best to get it right, I'm hopeful that you can take a similar position here." He said he supports that position in this case.

Mr. Friedman restated that his concern was the fact that this was Ms. McRae's second violation.

Mr. Marsano said that he can understand why Ms. McRae would think that the penalty should not be based on the 3% for a second violation. He said that the waiver of the penalty for the earlier violation could reasonably have been interpreted by Ms. McRae to mean that the violation had been waived also.

Ms. Thompson said she agreed with Mr. Friedman that this was a second violation and stated that she was struck by Ms. McRae's comment in her letter suggesting that the reporting deadlines do not matter. She said that the Commission cannot make assumptions about whether the public was or was not looking for the information contained in a late-filed report. She said that in her view the Commission has to uphold the law, which requires the report be filed by a certain time.

The motion failed (2-2), with Mr. Marsano and Mr. McKee opposing and Ms. Thompson and Mr. Friedman supporting the motion to assess a penalty.

Mr. Marsano made a motion to waive the penalty. Mr. McKee seconded.

The motion passed (3-1), with Ms. Thompson opposing.

Agenda Item 6. James Martin's Complaint against Tom Mooney

Mr. Wayne explained that House candidate James Martin filed a complaint against his opponent, Tom Mooney, alleging misleading endorsements in Mr. Mooney's palm card, missing disclosure on his campaign signs and palm card, and use of Maine Clean Election Act funds for purposes unrelated to his campaign. Mr. Mooney complains that he has suffered from harassment, false statements, and damage to campaign property by members of Mr. Martin's campaign committee. Mr. Wayne noted that the Commission staff received additional information from Mr. Mooney regarding the trip to Plantation 21 and the Bangor Daily News subscription and after review with the Commission's auditor, the staff has determined those expenditures are acceptable under the Clean Election Act. Regarding the cell phone issue, the staff would like the Commission to determine whether more information is necessary in order to make a determination as to whether the expenditure is acceptable after hearing Mr. Mooney's oral presentation.

Mr. Friedman questioned the harassment and other issues that Mr. Mooney has brought forward and understood this area to be out of the Commission's jurisdiction. Mr. Wayne agreed and said that the staff views the claims that Mr. Mooney has made against Mr. Martin as police matters, not issues to be considered by a campaign finance agency.

Mr. Jeffrey Martin said the letter he submitted on October 20, 2008, outlined his concerns regarding Mr. Mooney's campaign. He said this is the third time Mr. Mooney has run for office and he should be fully aware of the requirements for disclosure. He said other people brought some concerns to him regarding Mr. Mooney's previous campaigns so he took it upon himself to keep a close look at Mr. Mooney's campaign finance reports. He said the travel reimbursement to Plantation 21, the cell phone expenditure for over \$300, and the subscription to the Bangor Daily News raised concerns for him.

Mr. Thomas Mooney said his signs were made during his first run for office and because he was living in an apartment and moving soon, he did not put an address on those signs since it would not be accurate. He also said the company that produced the signs which has experience in this area told him the disclosure would be sufficient without an address. He said Mr. Michael Dunn, who was on his committee during his first campaign and currently is Mr. Martin's treasurer, told him the signs were acceptable. He said he understood the intent of the rule is to identify the sponsor of the advertisement and his signs clearly identify the candidate as being the sponsor. He said cell phone use is an allowable campaign expense and the cell phone was used for campaign business only. He said his phone receipts provided to the Commission indicate what the charges were for but he was not comfortable providing the phone numbers of people he called due to privacy issues. He said he has never received any penalties or complaints during his previous campaigns.

Mr. McKee asked Mr. Mooney to clarify whether he was asking the Commission to rely on his word to the Commission that the cell phone usage was only campaign-related since he would not be providing any detail of the calls.

Mr. Mooney said he did not feel comfortable releasing a phone log of numbers called due to respect of the privacy of those listed in the detail.

Mr. Friedman asked whether Mr. Mooney had a land line through his campaign period and whether this cell phone was purchased for the campaign.

Mr. Mooney stated that he began the cell phone service in June 2008 with a new phone number. He said it was used from June until the end of October. He confirmed that he has always had a land line.

Ms. Thompson asked staff to justify the recommendation regarding these four expenditure items.

Mr. Wayne explained that the staff requested the cell phone details from Mr. Mooney and was told by Mr. Mooney that he did not wish to provide a detailed list of phone numbers. He said it is not unreasonable to ask for more detail from Mr. Mooney regarding his cell phone but it is up to the Commission to determine whether that is necessary.

Ms. Thompson asked what other candidates have provided when requested to provide documentation for cell phone usage.

Mr. Wayne said when it has been necessary to ask for records, which he only recalled happening one time, the information was provided by the candidate. He also said that he believed Mr. Mooney did not have a land line, which is not the case.

Mr. Mooney stated for clarity that he has never been without a land line and he uses it for personal calls. He said the primary reason the phone number changed was due to harassment by a member of Mr. Martin's staff.

Mr. Friedman summarized the staff recommendations as follows:

1. Omission of an address on campaign signs – staff recommends finding a violation, no penalty;
2. Palm card endorsements – Supreme Judicial Court invalidated this statute, staff recommends taking no action;
3. Payment of \$65.28 to Bangor Daily News for subscription – staff concluded this was campaign-related;
4. Payment of \$80.22 for June 11 trip to Plantation 21 – staff concluded this was campaign-related;
5. Cell phone usage – staff requests Commission's input.

Mr. McKee questioned the Bangor Daily News subscription as being a valid MCEA expenditure since it falls under personal, ordinary expense.

Mr. Mooney said he has had a subscription in the past, but did not in the year prior to his campaign. He stated that this expenditure was necessary to stay abreast of the local news and politics in order to run an effective campaign. He said online sources do not provide the depth of information necessary to operate his campaign. He said he was able to get the lowest rate for the campaign period.

Mr. Friedman said he would like Mr. Mooney to be more forthcoming with documentation for his cell phone records; however, he was satisfied with Mr. Mooney's explanation.

Mr. Friedman made a motion to adopt the staff recommendation regarding:

Item #1, the lack of address on campaign signs, to find a violation but assess no penalty;

Item #2, the palm card endorsements, to take no action given the Law Court decision;

Item #3, the expenditure for the Bangor Daily News subscription, to allow as campaign-related;

Item #4, the expenditure for the trip to Plt.21, to allow as campaign-related; and

Item #5, the expenditure for cell phone use, to allow as campaign-related.

Mr. Marsano seconded.

Mr. McKee agreed with all those findings except the Bangor Daily News subscription, stating that this item seemed too much like a personal expense. He said Maine newspapers are available online and he has difficulty supporting the use of taxpayer money for a newspaper subscription. He said this expenditure may meet the statutory criteria; however, he finds it difficult to accept that this is a legitimate campaign expense rather than an ordinary personal expense.

Ms. Thompson agreed with Mr. McKee and suggested changing the motion to three separate items instead of combining them.

Discussion took place regarding how to separate the items within the motion.

Mr. Friedman said the staff has reviewed the evidence and determined this recommendation and he cautioned against micro-managing a candidate's campaign.

Mr. McKee agreed with Mr. Friedman regarding micro-managing campaigns but also expressed his concern with the personal nature of the newspaper subscription. He said that he would support separate motions for each item.

Mr. Friedman withdrew his motion and Mr. Marsano withdrew his second.

Mr. Friedman made a motion to adopt the staff's recommendation to find a violation but assess no penalty with respect to the missing address on the disclosure statement and to take no action with respect to the palm card endorsements in light of the Law Court's decision Mr. Marsano seconded.

The motion passed unanimously (4-0).

Mr. Friedman made a motion that the Commission adopt the staff recommendation to allow the expenditure of \$65.78 for a 22-week subscription to the Bangor Daily News as a campaign-related. Mr. Marsano seconded.

Mr. Marsano said a newspaper purchased by a candidate who does not usually purchase a subscription on a regular basis should be viewed as a campaign-related expense. He said being familiar with articles in the newspaper regarding current events is important for a candidate's campaign.

The motion failed 2-2, with Mr. Marsano and Mr. Friedman in favor; Mr. McKee and Ms. Thompson opposed.

Ms. Thompson made a motion to find the Bangor Daily News subscription is not campaign-related and require Mr. Mooney to reimburse the Clean Election fund for that amount. Mr. McKee seconded.

The motion failed 2-2, with Ms. Thompson and Mr. McKee in favor; Mr. Marsano and Mr. Friedman opposed.

Mr. Friedman made a motion to adopt the staff recommendation that the expenditure for Mr. Mooney's trip to Plantation 21 was campaign-related. Mr. Marsano seconded. The motion passed unanimously (4-0).

Mr. Friedman made a motion to find the cell phone usage campaign-related. Mr. Marsano seconded. The motion passed unanimously (4-0).

Mr. Friedman asked staff whether there was any other investigative information that could be provided regarding the newspaper subscription that would help the Commission reach consensus.

Mr. Wayne said in the past there have been candidates who have opted to spend their MCEA funds towards newspaper subscriptions; however, he said staff would be willing to look to the Commission for guidance as to whether this is an acceptable use of funding. He said an argument may be made for the benefit of having the newspaper to learn about the community and current events which would be helpful to a candidate. He said the guidelines have allowed this expenditure in the past but the Commission could change the policy and revisit the guidelines if they wish to do so.

Ms. Thompson asked how to recall her vote on the previous motion. Discussion took place regarding parliamentary rules.

Mr. Friedman restated a new motion that the Commission accept the staff recommendation that the Bangor Daily News subscription expenditure is campaign-related. Mr. Marsano seconded.

The motion passed (3-1), with Ms. Thompson, Mr. Friedman and Mr. Marsano in favor; Mr. McKee opposed.

Mr. Friedman stated that he believed that the substance of Mr. Mooney's complaint against James Martin regarding misleading statements by Mr. Martin and harassment by members of Mr. Martin's campaign committee, including video surveillance of Mr. Mooney, was outside of the Commission's jurisdiction.

Mr. McKee made a motion to dismiss the complaint due to lack of jurisdiction. Mr. Marsano seconded.

The motion passed unanimously (4-0).

Mr. Friedman recused himself from the following agenda item because an attorney from his office is a treasurer for the Bangor City Republican Committee. Ms. Thompson was nominated to chair the Commission for this item by Mr. Marsano. Mr. McKee seconded. The nomination was approved.

Agenda Item #7. Missing Disclosure Statement on Letter by Bangor City Republican Committee

Mr. Wayne explained that on October 27, 2008, Democratic House candidate Steven Butterfield requested that the Commission investigate a mailing in support of the Republican nominee in his race to determine the identity of the person who paid for the mailing. He explained that the mailing was a letter signed by Fred and Lucille Hallsworth that expressly advocated for the election of the Republican candidate, Doug Damon, but the letter did not have a disclosure statement stating who had paid for the mailing and whether it had been authorized by the candidate. That same day, the Commission received an independent expenditure report filed by the Bangor City Republican Committee in the amount of \$1,198 for a mailing. The mailing of the Hallsworths' letter in support of Mr. Damon was financed by the Bangor City Republican Committee. The independent expenditure report was filed three days late. Mr. Wayne said the Committee admitted the error and paid the late-filing penalty of \$34.44. He said that the issue before the Commission was the lack of a disclosure statement on the letter. The staff recommendation is to assess a \$200 penalty, which is the maximum amount, allowed under the law because there was no disclosure statement.

Mr. Butterfield stated that the letter was brought to his attention by some members of his district. He originally thought the letter was sponsored and paid for by the Hallsworths who are neighbors of Doug Damon; however, the Bangor Republican City Committee paid for the mailing, not the Hallsworths, as the Commission staff discovered.

Mr. Daniel Billings, Esq., spoke on behalf of the Bangor Republican City Committee since Mr. Weston could not attend. He agreed the letter is in violation of the law and a penalty of some amount is appropriate. He explained that the Committee is completely voluntary and had new participants and leadership during this election cycle. The members responsible for filing reports were unfamiliar with the required procedures because it was their first time in this role. He said this was simply an oversight on the part of the Committee. He said looking back at previous cases similar to this, he found there has only been one case where the maximum penalty was imposed because of intentional false reporting. He said in most

cases, the penalties have not been assessed. He said under these circumstances, he urged the Commission to assess something less than the maximum amount of \$200.

Mr. Wayne said this situation is different from the candidate-sponsored communications to which Mr. Billings referred, which do not have the disclosure statement. This communication was created and paid for by a third party and disseminated over a large area. He said the people receiving it did not know who paid for it, which could have an affect on the election. He stated that if the recipients had known who paid for the communication, it could have influenced how the communication was perceived. He said staff feels this is more serious than a candidate's missing disclosure statement.

Mr. McKee agreed in part with Mr. Wayne's assessment of the issue. He said a letter from a neighbor is quite different than a letter from a political party committee. He said a penalty of \$100 would be appropriate taking into account the inexperience of the committee's new members as a mitigating circumstance.

Mr. Marsano shared this view.

Mr. McKee made a motion that a violation be found and a penalty of \$100 be assessed to the Bangor City Republican Committee. Mr. Marsano seconded.

The motion passed unanimously (3-0).

Mr. Friedman resumed as Chair.

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 #10. Policy Issue: Candidates' Appearance in Third-Party Advertising

Mr. Friedman explained that in September 2008, the Maine Republican Party requested that the Commission consider advertising in which Maine House candidate Alexander Cornell du Houx appeared and which was sponsored by VoteVets.org regarding U.S. Senator Susan Collins' record on funding the

war in Iraq. At its meeting on October 17, the Commission took no action with respect to the advertisement and postponed consideration of any policy change to address the broader issue of a candidate receiving free exposure to voters by appearing in third-party advertising.

Mr. Philip Roy, Treasurer of the Maine Republican Party, expressed concern that PACs, party committees or other organizations can assist the campaign of a MCEA candidate or a privately financed candidate by having that candidate appear in an ad or a communication as a spokesperson for a national issue and the communication will not be treated as an independent expenditure because the communication ostensibly was not made to influence that candidate's election and matching funds for the candidate's opponent will not be triggered. However, the candidate does derive a benefit from the ad because of the voter identification that results from the communication. This could also create a situation in which the candidate receives an impermissible in-kind contribution. He said that he did not have a specific recommendation to address this issue but hopes that the Commission can tighten up the statute and rules to cover these kinds of situations.

Mr. McKee asked Mr. Roy for his view of whether there should be different rules for this kind of communication as opposed to business advertising by candidates running for office. He said that this situation seemed unique and did not know whether it required a new set of rules.

Mr. Roy said a business owner regularly advertises his business and does so as normal business practice. He said a political action committee is strictly political in nature and does not run ads for business. He also recognized the First Amendment issue with regard to political speech.

Mr. Roy said a political entity, a private entity and business entity are all completely different and should be treated differently. He said using a national organization's money to promote a state candidate's campaign is not acceptable. He said that it was obvious that Mr. Cornell du Houx was using the ad to benefit his campaign or else he would not have put the ad up on his website.

Mr. Dan Billings said that this situation with the VoteVets.org ad does raise a lot of questions and potentially opens a loophole in the law. However, he said that he was confident that the Commission and its staff are capable of pursuing a line of questioning to develop the facts in a particular case and make a determination on a case by case basis as to whether an expenditure should be considered a contribution or

not. He said the way the Commission handled the recent complaints regarding business advertising by MCEA candidates proves this. He said his concern is that issue advocacy could be considered a contribution to a candidate. He said that the Commission could provide guidance in the candidate guidebook that alerts candidates that their appearance in an issue ad could be a contribution depending on the facts regarding that ad. He said that he would be concerned that candidates could use a referendum campaign to promote their candidacy. Though he did not think it would be unconstitutional to limit MCEA candidates' involvement in ads for referenda campaigns, he questioned whether that would be a good policy decision. He said the Commission could instead consider expanding the rebuttable presumption period to 45 or 60 days before the election. It could limit these kinds of communications from happening without imposing any restrictions on what MCEA candidates could do.

Ms. Alison Smith, co-chair of Maine Citizens for Clean Elections, said she agreed with Mr. Billings. She also added that the extension of the rebuttable presumption period is an area they have supported for a while. She said that an important criterion of independent expenditures to keep in mind is that they cannot be coordinated with the candidate. She gave an example of an organization that supported a referendum question using video of a candidate that the organization had obtained independently of the candidate. In that case, the communication could likely be an independent expenditure and if aired during the rebuttable presumption period, the organization and the candidate could likely successfully rebut the presumption. If the candidate volunteered to be taped for the ad, it would not be an independent expenditure. She said that she thought the Commission ably considered the constitutional issues and election law issues in the matter concerning the Cornell du Houx ad and thought the Commission was well equipped to tease out the issues that may come up in the future. She suggested establishing a work group for discussion and exploration of this issue.

Ms. Thompson agreed with Ms. Smith's idea of a work group that could develop statutory changes to go before the Legislature. She said that her concerns about making any changes involved any negative impacts on the free speech rights of political candidates, whether they be appearing in a referendum ad or a business ad and putting the Commission in the position of trying to determine the intent or motivation of candidates.

Ms. Ann Luther, co-chair of Maine Citizens for Clean Elections, raised the issue of a candidate appearing in an ad by chance as opposed to actively participating in the creation of the advertisement. She said if the

candidate cooperates in the making of the ad, it is not an independent expenditure so rebuttable presumption would not apply. She said the convening of a work group to explore this issue and to propose new legislation, if necessary, was the way to proceed.

Ms. Smith said business ads are different from political ads and believes that the two should not be considered together. She said the issue here is whether a candidate running in a statewide office can coordinate with referenda campaigns and appear in advertising and not be in violation of a statute or rule. She stated that political speech is highly protected and it is not the Commission's place to regulate it.

Mr. Friedman stated that the issues raised in agenda items 9, 10 and 11 are likely to rise again and affect the 2010 election. These important issues need to be discussed and researched to look for improvements or loopholes that may exist. He recommended that a work group be established with individuals and groups who have the expertise to resolve these issues. He said staff discussions and public discussions need to take place in order to get all sides involved and have resolution in time for the next election.

Ms. Smith agreed with this suggestion but cautioned that to get changes through the Legislature in time for the next election in 2010, it has to happen in this session because the gubernatorial campaigns will be well under way later in 2009.

Mr. Wayne suggested that meetings be scheduled within the next four weeks in order to provide some proposals at the Commission meeting in December or January. He said this would allow time for a proposal to be submitted to the Legislature by the February deadline for the Commission to submit its bill.

Ms. Thompson expressed a concern that everyone who wanted to have some input into the bill has a chance to do so but given the short time frame that may not be possible. She asked whether it was possible to put in a concept bill and then add to it after the deadline.

Mr. Wayne said the Commission has a special exception in its laws that exempt it from normal agency deadline for submitting legislation. He said suggestions for improving campaign finance reporting may be submitted within 90 days of the general election, but he said he believed that it has to be a fully drafted bill.

Ms. Thompson asked that the staff make every effort to solicit input and comments not only from the usual groups that come before the Commission but from as wide a group as possible.

The Commission resumed the remainder of agenda items at this point.

Agenda Item #8. Rule-Making on Seed Money Collected by Gubernatorial Candidates

Mr. Wayne explained that after receiving public comment on increasing the maximum amount of seed money which a gubernatorial candidate seeking Maine Clean Election Act funding can collect from \$50,000 to \$100,000, the Commission agreed at its October 27 meeting to accept public comment on a proposed increase to \$150,000. He said the Commission has not received comments on the \$150,000 proposal.

Mr. Friedman stated that this issue had been discussed in detail at previous meetings but the Commission would be willing to hear new points and issues concerning this increase.

Ms. Alison Smith stated that the MCCE does not object to the proposed higher limit and said this will attract the strongest candidates to the program. She made four points with regard to tripling the seed money cap:

- Out of state contributions should be limited.
- Seed money contributions should not be allowed to rollover and commingle with MCEA funds after the candidate has been certified.
- Looking at the fundraising efforts of privately financed candidates should not be used a reference point. First, it is more helpful to look at how much a privately financed candidate spends in the time period before the certification deadline. Second, privately financed candidates have to establish an on-going fundraising effort early in the campaign and much of the money raised early goes towards that effort. Clean election candidates do not have similar needs.
- Fair Elections Now Act (the federal publicly financed campaign act now pending before the U.S. Senate) contains lower seed money limits - \$75,000 plus an additional \$7,500 per congressional district within the state.

Joseph Greenier, Stockton Springs, stated that he is opposed to increasing the cap to \$150,000. He raised concerns over keeping costs of the program down. He said the more money given to candidates, the more matching funds will rise. He also said this public campaign money should stay within the State of Maine.

Mr. Friedman asked for a timeframe for this issue. Mr. Wayne stated the rulemaking should be concluded at the December meeting in order for submission to the Legislature as a major substantive rule in January.

Ms. Gardiner said the appropriate procedure would be to allow public comments to be received until the deadline. That deadline was an extension of the original deadline since the Commission made a substantial change to the original proposed rule by increasing the proposed seed money maximum from \$100,000 to \$150,000. At the December 29 meeting, the Commission could make a final determination as to the amount and provisionally adopt the rule. The Commission could revert back to the originally proposed \$100,000 if that was its decision without additional public comment since that rule had already gone through a hearing and comment period.

Meeting adjourned at 12:15 p.m. on the motion by Mr. McKee, which was seconded by Ms. Thompson and passed unanimously (4-0).

Respectfully submitted,

Jonathan Wayne, Executive Director

Attachment: Benjamin Dudley letter

BENJAMIN DUDLEY
9 PONCE STREET, PORTLAND, MAINE 04101 TEL: (207) 712-0891

November 23, 2008

**Attachment to
November 24, 2008
Commission Meeting Minutes**

Jonathan Wayne
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, Maine 04333

Dear Mr. Wayne:

This letter is in response to your November 17 memo regarding "Agenda Item #4" for the upcoming Commission meeting.

I respectfully disagree with your recommendation to reduce the \$10,000 penalty against the Fed Up With Taxes PAC (FUWT) for their late filing of two 24-hour reports last month.

In establishing a penalty, Title 21-A, §1062-A, paragraph 2 gives the Commission discretion around a number of factors, including "harm suffered by the public" and other enumerated "mitigating circumstances" (i.e., intervening emergencies, Commission staff error, and other impediments to timely reporting despite "a bona fide effort".)

In your memo, you propose a penalty reduction for the following reasons: (a) your belief that a \$10,000 fine would be disproportionate to the harm to the public, (b) your belief that FUWT did not intend to conceal expenditures, and (c) that FUWT's ability to pay the larger fine should not be a determinant in assessing the final penalty.

With respect to the public harm question, you suggest that a \$10,000 fine would be disproportionate because (a) it was a brief delay in filing of 2 to 2 ½ days over a weekend, and (b) assessing the maximum penalty will be perceived as too harsh.

The Legislature established 24-hour reporting for the purpose of timely public access to information about late campaign expenditures. With respect, to think of a late 24-hour filing as less significant because it was only 2 days late appears to miss the point. To think of it this way is analogous to an employer saying about an employee failing to report for work, "Joe didn't show up on Monday or Tuesday, but he was here on Wednesday, so he wasn't that late." The fact is, it took FUWT twice the time it should have to file appropriately.

I must also emphasize the sheer magnitude of the expenditures in question (as you also did in your memo): \$750,000. To put some perspective on this, this figure is 170% of the opposing PAC's expenditures for the entirety of the campaign cycle. As a decision-maker for Health Coverage for Maine PAC, during the final weeks of the campaign, I did check the Ethics Commission website multiple times daily for this information in order that our expenditure decisions could be informed by it (as FUWT was free to do with our reports). FUWT's error meaningfully deprived the public of information it was entitled to have.

Government penalties should be proportionate, so I laud you for your concern about how the Commission will be perceived by the interested public in levying the maximum fine. It is difficult to set a monetary value on this harm, but fortunately the Legislature has already done so (§1062-A, paragraph 3). Proportionality may also be found in the Legislature's setting a statutory maximum penalty (§1062-A, paragraph 4). FUWT stands to benefit significantly by virtue of the maximum penalty; your penalty matrix for the report due on 10/25 calculates that without the maximum, FUWT would face a \$67,376.52 fine. It is fair to say that with the maximum \$10,000 penalty, FUWT will receive leniency amounting to more than \$57,000.

With respect to the intent question, absent "relevant evidence presented that a bona fide effort was made to file the report in accordance with the statutory requirements" (§1062-A paragraph 2), the statute gives the Commission no authority to take into account a violator's intent to file.

With respect to ability to pay, in establishing the basis for Mr. Dale's intent to file on time, you also reveal him to be someone who has thorough understanding of the filing requirements. Paragraph 2 actually stipulates that a reduction may apply to violators who are less sophisticated:

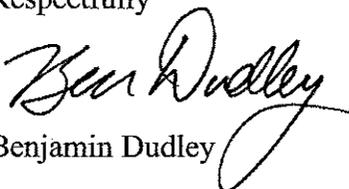
"The Commission may waive a penalty if it is disproportionate to the level of experience of the person filing the report . . . "

Ironically, your argument to reduce FUWT's fine because of intent, actually makes the case against any reduction. Related to Mr. Dale's detailed understanding of filing requirements, high expectations for FUWT's full compliance should be expected given the resources available for professional oversight; their total reported expenditures to date are \$3.8 million (with the 42-day post-general report still to come).

In conclusion, a reduction in FUWT's penalty would be inconsistent with other fines levied by the Commission during this campaign cycle (e.g., the maximum \$5,000 fine against the Maine Democratic Party, also for an error made by one of their vendors). It would also render ridiculous any notion of penalties as a deterrent to non-compliance; a \$1,000 penalty would amount to merely .14% of the late-reported expenditure.

FUWT has met none of the criteria that would merit a reduction in penalty, let alone a reduction of 90%.

Respectfully


Benjamin Dudley