Agenda Item #1

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

Minutes of the May 28, 2009, Meeting of the
Commission on Governmental Ethics and Election Practices
Held in the PUC Hearing Room, PUC Building,
242 State Street, Augusta, Maine

Present: Michael Friedman, Esq., Chair; Hon. Mavourneen Thompson; Walter F. McKee, Esq.; Hon. Francis C. Marsano; Hon. Edward M. Youngblood; Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:05 a.m., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the March 26, 2009 Meeting

Mr. McKee moved to accept the March 26 meeting minutes as amended. Mr. Marsano seconded. The motion passed unanimously (5-0).

Agenda Item #2. Request by Deborah Hutton for Investigation of Maine Leads

Former State Representative Deborah Hutton filed an application for an investigation with the Ethics Commission into whether Maine Leads qualifies as a political action committee (PAC), based on funding it provided to three PACs to promote citizen initiatives. Maine Leads has responded that there is no evidence to suggest that it has violated campaign finance laws.

Citing the statute and the Commission's rule regarding requests for an investigation, Chair Friedman said that the purpose of hearing this matter was to determine whether there were sufficient grounds for believing that a violation may have occurred.

Ms. Thompson disclosed that she knows Mr. Grant through his friendship with her son but said she did not see any reason to recuse herself.

Benjamin Grant, Esq., representing Ms. Hutton, stated that there will be two important ballot initiatives before the voters this fall and therefore full disclosure is necessary for these campaigns. He said the public will not have full knowledge of who is behind these initiatives because Maine Leads, up to this point, has been able to conceal the original source of the funding necessary to get these initiatives on the ballot. He said the contribution information should to be disclosed since, by its actions, Maine Leads does qualify as a political action committee (PAC) under the law that was applicable at the time those activities occurred. He said the major purpose of Maine Leads was to advocate for the passage of the ballot questions and they solicited funds in order to influence a ballot question. He said that the primary focus of the Commission's investigation should be on Maine Leads' major purpose. He said the publicly available information suggests that Maine Leads' major purpose was the initiation of these ballot questions. Maine Leads' website indicates that it did not engage in much activity other than the citizen initiatives. He said that a review of the campaign finance reports filed by the other PACs associated with the ballot questions indicates that Maine Leads contributed a significant portion of the funds used to pay for the collection of signatures. He said that they were unable to find any indication of expenditures by Maine Leads for any other purpose. He said that the only appearances of Maine Leads in the media were when it was commenting on these initiatives. He also said that the staff of Maine Leads and the PACs overlapped and this would seem to indicate that Maine Leads was heavily in the initiative process as well. Mr. Grant suggested that the Commission may want to consider several questions if it investigates Maine Leads:

- What other purposes is Maine Leads in business to promote in the past and now?
- What other activities did they engage in, in the past and now?
- What other expenditures have been made?
- What percentage of their operating budget is devoted to funding these initiatives?
- What was the content of the solicitation that was made to generate the funds for this initiative?

Ms. Gardiner asked for Mr. Grant's view of the third part of the PAC definition (§ 1052(5)(A)) that was in effect at the time when Maine Leads was formed in 2007 and to comment on its applicability and relationship to the fourth part of the definition.

Mr. Grant said that if Maine Leads' major activity had been contributing to the PACs, it would not be a political action committee under the third part of the definition. For that reason, they have focused more on

the fourth part of the definition. However, he said it is unknown what the other activities Maine Leads is engaged in and that is part of the reason for requesting an investigation. He said it appears that the staff has been heavily involved in gathering signatures and promoting the initiatives. If Maine Leads' activity was confined to that, then the third part of the definition might apply. His interpretation is that the third part applies to other activities other than contributing to PACs.

Ms. Gardiner asked whether Mr. Grant thought that part of what the Commission should investigate is what other activities Maine Leads' staff and the organization itself are doing directly on these initiatives. Mr. Grant confirmed that he did.

Daniel Billings, Esq., representing Maine Leads, accompanied by Roy Lenardson, Executive Director of Maine Leads, responded to the complaint. Mr. Billings stated that when preparing to respond to the complaint initially, he was unsure exactly what law Maine Leads violated. He expressed concern that Ms. Hutton's complaint was based on guilt by association and conjecture and does not meet the statutory threshold for the Commission to initiate an investigation. Ms. Hutton's complaint failed to meet the standard that statements in the complaint be based on personal knowledge or identify the source of the information. He cited the allegation in the complaint that Maine Leads distributed leaflets and calculators in support of TABOR (Taxpayer Bill of Rights) and the automobile excise tax initiative at town meetings. Ms. Hutton did not provide any details about what town meetings were involved or who was allegedly distributed the materials and did not provide the source of the information. Mr. Billings said that, because Ms. Hutton's complaint did not meet the statutory requirements, the appropriate procedure would have been for the Commission staff to request more information from Ms. Hutton before putting the matter on the agenda. He said that this was an important point because a person who is being accused of violating the law is entitled to know the substance of the allegation.

Mr. Friedman asked how many items outlined in Ms. Hutton's letter, in Mr. Billing's opinion, would constitute authorizing grounds for further investigation. He asked whether there would be sufficient grounds for undertaking an investigation if four of the statements in Ms. Hutton's application were true.

Mr. Billings said that the mere fact that a statement is true is not sufficient to support a request for an investigation. The statements would have to lead one to believe that a violation may have occurred.

Ms. Thompson asked if the scope of the contributions would have an impact on whether further investigation should take place, specifically the scope of the contributions in relation to the size of the budget of the PACs.

Mr. Billings said the contributions alone do not justify an investigation. He said that the contributions in relation to Maine Leads' activities may be relevant. However, the fact that the contributions are a large percentage of the PACs' budget is irrelevant. Referring to past electoral activity in Maine, he said PACs typically receive a large percentage of their funds from one source, pointing to the gaming referendums which were funded by Penn National as an example. The important issue is the major purpose of the contributing organization, he said, not whether the contributions to the recipient PACs constitute a large percentage of their funds.

Mr. Billings stated he agreed with the Chair that it was reasonable to use a probable cause standard with respect the Commission's review of an application for an investigation. He said that reciting mere allegations was not sufficient to pass that standard. Because the law has been amended, Maine Leads' activities need to be looked at in two parts – those activities before June 30, 2008 and those activities since the amendment in June 2008.

Mr. Billings stated that neither Mr. Grant nor the staff alleges that Maine Leads falls under the first part of the definition of PAC under the statute. Neither Ms. Hutton nor Mr. Grant suggests that the second definition of PAC applies to Maine Leads. However, the staff suggests that it may apply. He said that he was not aware of the Commission ever applying this definition to an organization. He said that the definition should be interpreted narrowly to apply only to those organizations that raise money from others and spend that money directly on the activities listed in the statute. It should not apply to organizations, such as Maine Leads, that make contributions to PACs. If not construed narrowly, it would apply to anyone who contributes to candidates, campaign, and political parties. He said the problem with the language was that anyone who gets money from someone and gives it to someone else could be considered a funding and transfer mechanism. He said that another problem with this definition was that it does not have any monetary threshold.

Mr. Billings said that he agreed with Mr. Grant's statement that the third part of the definition would not apply to organizations whose only activity was to contribute to a PAC.

Mr. Billings said that the fourth definition is the most applicable. He said that an organization must meet the three-part test under that definition: 1) it must have as its major purpose advocating the passage or defeat of a ballot question, 2) it must raise money for that purpose, and 3) it must spend more than $1,500 for that purpose. If it does not meet all three parts, it is not a PAC. Under Maine law, there was no ballot question at the time in question. An organization whose primary purpose was the collection of signatures to get an initiative on the ballot would not be a PAC under the law in effect at the time. None of the three initiatives at issue was a ballot question prior to June 30, 2008. Therefore, it was impossible for Maine Leads' primary purpose to be advocating the passage or defeat of a ballot question. Mr. Billings said that no one has come forward with any evidence that Maine Leads solicited any contributions for that purpose. Mr. Billings said that the third part of test includes looking at expenditures made for the purpose of collecting signatures to get an initiative on the ballot. He said it was important to note that the major purpose test does not include the collection of signatures, only the third part does.

In 2008, the statute was amended and now there are three definitions for PAC. Under the current law, Maine Leads would also not qualify as PAC under the first definition. The third definition applies only to candidate elections and is not applicable here. It is only the second definition that is applicable.

Under that definition, the Commission must determine whether Ms. Hutton has come forward with sufficient grounds to believe that Maine Leads had a major purpose of initiating, promoting, defeating or influencing a candidate election, campaign or ballot question and has spent more than $1,500 for that purpose. He said that the contributions that Maine Leads made prior to June 30, 2008 should not be considered in that analysis since those contributions were made prior to the amendment. In addition, the majority of the signatures were collected prior to June 30, 2008 and the process was completed in November 2008.

Regarding the staff's suggestion that § 1056-B may apply and that Maine Leads could qualify as a ballot question committee, Mr. Billings responded that for the same reasons given earlier, there were no ballot questions until April 2009 (when the Legislature rejected the excise tax bill). He said that no evidence has

been offered to show that Maine Leads has spent more than $5,000 since April 2009 to influence the ballot questions at issue.

Mr. Friedman restated that the purpose of the discussion was to determine whether there are sufficient grounds to warrant further investigation, not to conduct a full discussion of all the issues.

In response to a question from Ms. Thompson, Mr. Wayne stated that the legislative intent behind the current definition of political action committee is that the term “major purpose” encompasses advocating that something become a ballot question and includes the signature gathering stage.

More discussion followed regarding the definition of a PAC and a ballot question.

Mr. Billings stated that in 2007 there were no ballot questions created, so Maine Leads could not have been created with the major purpose of influencing a ballot question. The Legislature could have used the term “campaign” if it wanted to cover a broader range of activities but it choose to use the narrower term “ballot question.”

Ms. Gardiner said that in 2007 the Legislature changed the process for ballot questions. She said the Secretary of State used to put the question on the circulated petition forms; however, after the 2007 change, the actual ballot question did not appear on the petitions. Instead, the petitions contained the initiated bill and a summary of the bill. Now, the ballot question is not actually written until the session during which the Legislature considered the initiated bill has adjourned.

Mr. Wayne confirmed that the Legislature’s concern was to make the public aware of how and by whom these ballot questions get started.

Mr. McKee stated that this phase only required the Commission to review Ms. Hutton’s request to determine whether it showed grounds for future investigation. He said this is not the time for several people to weigh in on the matter; the focus should be only whether to investigate further at this point.

Mr. McKee moved to find that the reasons stated in Ms. Hutton's request show sufficient grounds for believing that a violation may have occurred and that an investigation be conducted. Mr. Marsano seconded.

Mr. Youngblood asked whether the scope of the investigation should be included in the motion.

Mr. Friedman said that the Commission should first decide whether there are sufficient grounds for an investigation and then focus on the specific issues to be included in the investigation.

The motion passed (5-0).

Mr. Friedman suggested the Commission staff and counsel get together and identify the areas that are to be investigated in order for both sides know where any potential violation may have occurred.

Mr. Marsano said there are two different issues. The first is what is the meaning of the statute in place at the time the $75,000 was contributed. The second is what the meaning of the phrase, "of a ballot question" really is. He said this will clarify what the Legislature intended with the law and how the law should be applied in this case.

Mr. McKee suggested that the Commission should not restrict the staff in terms of what should be investigated. He said he supports allowing the staff to do what they feel necessary with regard to the investigation.

Ms. Thompson asked whether affidavits would be required and whether the Commission should authorize that procedure in advance.

Mr. Wayne said because this is a contested matter, it may be prudent to have that authorization from the Commission members in place.

Mr. McKee said that would be a good idea.

Ms. Thompson said the question is whether Maine Leads should have filed a PAC registration. She said this has been investigated before by the staff and the information has been brought back with a recommendation.

Mr. Wayne stated that one of the difficulties with this matter is that Maine Leads, while recognizing their obligation to disclose electoral activities, does not feel some information should have to be made public with regard to their organization's other activities. Mr. Wayne requested guidance on the level of specificity regarding their activities.

Ms. Thompson said their tax form should be a guideline.

Mr. McKee said they cannot have it both ways. If they claim that their major purpose is not influencing an election, then they should provide some evidence to that effect.

Mr. Friedman said the investigation should be conducted in the regular manner and if an objection is made by Maine Leads, it will be determined whether to subpoena the information. He said the investigation should not be limited, it should be a full investigation. He said he does not want the staff to feel their hands have been tied.

Ms. Thompson said that past investigations have been thorough and professional, but not over reaching.

Mr. Friedman stated the staff should conduct the investigation in the fashion that it thinks is appropriate and after the investigation, it will be dealt with by the Commission.

Mr. Friedman moved to permit the Commission staff to conduct a preliminary investigation based upon the complaint filed by Ms. Hutton into whether the statutory violations alleged in the complaint may have occurred. Mr. McKee seconded.

The motion passed (4-1, with Mr. Marsano opposing).

Agenda Item #3. Misuse of Maine Clean Election Act Funds/Dana Kadey

Mr. Wayne explained that Dana Kadey was a Maine Clean Election Act candidate for State Senate in the 2006 and 2008 elections. At its August 2008 meeting, the Commission determined that some of Mr. Kadey's expenditures in his 2008 Senate campaign were not campaign-related and required him to return a portion of the MCEA funds he received. The Commission staff completed its review of his 2006 campaigns. While many of the goods and services purchased were appropriate, the staff identified some purchases that appeared primarily personal in nature and had only a tenuous relationship to the campaign, such as a weed trimmer and other tools, game scouting camera, roof racks and camping equipment. He said Mr. Kadey's campaign failed to sell certain goods after the election for fair market value, and return the proceeds to the state. Mr. Wayne said several items should be disallowed as personal. The staff was also concerned that some expenditures were mischaracterized, for example, Mr. Kadey reported that the game scouting camera was "sign materials." Mr. Wayne outlined the staff recommendation that the Commission:

- Request Mr. Kadey return $2,546 of MCEA funds to the State of Maine;
- Find Mr. Kadey in violation of the MCEA for using public funds to purchase personal goods;
- Assess a civil penalty of $500 for that violation; and
- Find Mr. Kadey violated the MCEA by failing to report the expenditures according to procedures established by the Commission, but assess no penalty.

Mr. Wayne said there has been a pattern of purchasing personal goods by the Kadey campaign. He said it appears Mr. Kadey has either neglected his responsibilities as a candidate or he has intentionally purchased these personal items with MCEA funds.

Mr. Kadey was not present at the meeting. Mr. Wayne reviewed the procedures and the steps the staff took to notify Mr. Kadey of this meeting, which included written notices sent through the U.S. Mail, e-mail, and telephone messages. Mr. Wayne also said he understood from a news reporter that Mr. Kadey had recently had a conversation with the news reporter regarding this meeting today.

Mr. Friedman confirmed that Mr. Kadey has had sufficient notice of today's proceedings.

Mr. Youngblood moved to accept the staff recommendations, specifically 1) to require Mr. Kadey to return $2,546.63 in Maine Clean Election Act funds; 2) to find that Mr. Kadey violated 21-A M.R.S.A. § 1125(6) by spending MCEA funds for personal purposes unrelated to his 2006 and 2008 campaigns and to assess against him a civil penalty of $500; and 3) to find Mr. Kadey in violation of 21-A M.R.S.A. § 1125(12) for not reporting his 2006 campaign expenditures according to procedures established by the Commission. Mr. McKee seconded.

Mr. Marsano stated that, when Mr. Kadey appeared before the Commission, Mr. Kadey made the point that some purchases were made to avoid making any in-kind contributions to his campaign. Mr. Marsano said that at the time he thought that this point merited consideration. However, after having considered it, he has rejected it because he does not see any credible reasoning to justify these purchases on that basis.

The motion passed (5-0).

Agenda Item #4. Failure to File Reports/Androscoggin Republican County Committee (Withdrawn)

Agenda Item #5. Audits of 2008 Maine Clean Election Act Candidates

Mr. Wayne introduced Bob Morrill, the new Commission auditor. In late March and April, the Commission staff completed five audits of 2008 Maine Clean Election Act candidates that found no exceptions. The staff is hopeful that a majority of the remaining audits will be completed for the Commission's July meeting.

Agenda Item #6. Request by Rep. Andre Cushing regarding Lobbyist Disclosure

Mr. Wayne explained that Ginette Rivard, the Vice President of the Maine State Employees Association (MSEA), who was listed as a lobbyist associate on the MSEA's lobbyist registration, was nominated to serve on the Workers' Compensation Board. There is a statutory prohibition against a registered lobbyist serving on the Workers' Compensation Board. Mr. Wayne explained that the Commission received a letter from MSEA's Executive Director, Tim Belcher, stating that Ms. Rivard should be removed from the registration and that she did not meet the statutory requirements for being a lobbyist associate. Ms. Rivard's appointment has since been confirmed and she is serving on the Board. Mr. Wayne stated that

whether Ms. Rivard is eligible to be on the Worker's Compensation Board is not within the Commission's jurisdiction. Rep. Andre Cushing has raised concerns about whether the MSEA is properly and accurately disclosing its lobbying activity, specifically with respect to Ms. Rivard.

Rep. Andre Cushing said his main concern was that associations accurately record and document the time spent by officers of the association on activities that count toward the 8-hour threshold for registering as a lobbyist. He said that he was not here to testify on whether Ms. Rivard is eligible to be on the Worker's Compensation Board and recognized that the Commission does not have jurisdiction over that issue. Rep. Cushing referred to several dates on which Ms. Rivard either testified before a legislative committee or was present and in the company of the MSEA's lobbyist at a committee hearing. He said that given the distance that Ms. Rivard must travel from her home in Aroostook County and the time she spent on legislative matters, it is reasonable to ask whether she has been compensated for her time or reimbursed for her travel expenses. He requested the Commission investigate the manner in which associations account for the time they document for the activities of their officers that regularly attend the Legislature in the company of the association's lobbyist.

Mr. Joseph Greenier of Stockton Springs stated that he agreed with Rep. Cushing's request and the public has the right to know who is working behind legislation.

Roberta de Araujo, Esq., general counsel for MSEA, explained the role and structure of MSEA and said that Ms. Rivard is not an employee of the Association but is a state employee. She does spend a great deal of time on behalf of the Association's members working on issues at the Legislature. Ms. de Araujo said MSEA is very cognizant of the lobbyist registration law and takes it very seriously. She said in order to be required to register, Ms. Rivard would have to have been employed by the Association or the principal lobbyist and spend more than eight hours in a calendar month engaged in lobbying. She said that Ms. Rivard has not met the statutory requirements and has not been compensated for her time. The MSEA can state unequivocally that during the time period raised in the complaint and since her name was removed from the lobbyist registration, Ms. Rivard was not an employee of the union and did not engage in lobbying in excess of eight hours in a calendar month for which she was compensated. She stated that this complaint is without basis and requires no further action by the Commission.

Mr. McKee said the issue was raised by Rep. Cushing with good reason; however, the explanation given by Mr. Belcher was satisfactory. He said that the testimony indicated that Ms. Rivard was not an employee of the union and did not engage in lobbying activities for more than eight hours in a month. Even if she had, she did not receive compensation or reimbursement from the union.

Mr. Friedman stated that the issue before the Commission was whether Ms. Rivard had engaged in lobbying activities in excess of eight hours in April and May 2009, the period in which Ms. Rivard was no longer registered as a lobbyist associate. He said the Commission could choose to investigate that or accept the explanation of MSEA's counsel and not investigate further.

Mr. Wayne stated, in his opinion, there were not sufficient grounds to find that an investigation is necessary. He said it appears MSEA understands what is required under the lobbying statute.

Mr. McKee made a motion that the Commission find that for the time period alleged in the complaint, Ms. Rivard was not a lobbyist and was not lobbying as defined in Title 3, Chapter 15, and to take no further action. Ms. Thompson seconded the motion.

The motion passed unanimously (5-0).

Agenda Item #7. Schedule for Rule-Making

Mr. Wayne explained that the Appropriations Committee has made a decision that in the 2010 election, payments to MCEA candidates should be reduced by 5% in order to reduce the overall cost of the program. He said the Appropriations Committee has transferred approximately $485,000 from the MCEA account to cover other governmental expenditures. He said to make up for the 5% cut in their funds, MCEA candidates will be allowed in the 2010 election to raise a certain amount of private contributions. He said the Commission is being directed by the Legislature to conduct a rulemaking to clarify how candidates will be allowed to raise these private funds. Mr. Wayne said this rulemaking needs to be complete by the end of September in order to be implemented in a timely manner.

Mr. Wayne proposed a brief meeting on June 15 in order for the Commission to agree to accept public comments on proposed rule changes submitted by the Commission staff. He said at the regular meetings in

July and September, the Commission would hold a public hearing in July and adopt the rules at the September meeting.

Other Business

Mr. Friedman proposed the question to the Commission as to whether the Commission should consider complaints filed by out-of-state complainants who have no nexus with Maine.

Ms. Thompson said that the evidence presented to the Commission would determine whether an investigation is warranted.

Mr. Friedman questioned whether it should be heard. He said this Commission is the Maine Ethics Commission, created by Maine citizens for the benefit of the Maine electorate, by applying Maine laws with respect to issues involving Maine elections. He wondered what the negative consequences would be if people with no real connection to Maine were permitted to bring complaints before this Commission and obtain a full hearing on their complaint.

Mr. Marsano said that he would like to know what the law is on this issue. Unless he knew what the law is, he did not want to suggest that the Commission should not hear from people who might have relevant information on an issue which could be of significant importance to the people of Maine. He said that if an issue needs to be discussed, the Commission should do it.

Ms. Thompson said time involved in hearing a complaint and the Commission's deliberations should not be a relevant concern of this Commission.

Ms. Gardiner said the statute (21-A M.R.S.A. § 1003) stated "A person may apply in writing to the commission requesting an investigation…." "Person" is defined as "an individual, committee, firm partnership, corporation, association or organization." The statute does not refer to residency or citizenship. She said it may be appropriate to propose to the Legislature that it narrow the definition of person to citizen or resident of the state of Maine. Even though the current definition is broad, the person bringing the complaint does not have standing and is not a party to the hearing, though the Commission routinely gives them an opportunity to present testimony to the Commission. Once the complaint is filed

and the Commission has made a determination as to whether to proceed with an investigation, the complainant's job is done. No matter who brings the complaint, if the Commission determines that there is probable cause to warrant an investigation, the Commission goes forward because it believes that there has been a violation, not because the person who brought the complaint has standing or has been aggrieved in some way.

Ms. Gardiner said there will be proposed changes to the Commission's hearing rules brought forward in the near future. She said currently, there is only one general rule about hearings and it does not distinguish between the different types of hearings the Commission is authorized to conduct.

Ms. Thompson brought forward the Scarborough Village Partnership issue which was discussed at the previous meeting. She expressed concern regarding the lack of public transparency by all the parties involved. She said that there was evidence provided that the hearing that was not available to the staff when they made their recommendations, specifically regarding focus groups had been conducted and that expenditure was not taken into consideration in terms of when the PAC should have registered and the inaccurate and untimely reporting of an in-kind contribution consisting of the payment to a consultant. Ms. Thompson said that if those two pieces of information are correct then there may be additional penalties that should be imposed on the PAC. She asked whether the Commission should re-open that particular matter.

Mr. Marsano said that he would be in favor of re-opening this matter because certain questions remain unanswered. He said that the issues and facts presented to the Commission were complicated. While the Commission made its decision based on the evidence before it at the hearing, there could be some benefit in revisiting certain issues in order to have a better understanding of what really happened.

Mr. Friedman said reopening an issue is not a good idea. He said both parties have the option of an appeal if they wish to do so. He said it would be setting a bad precedent for the Commission to reopen a decision that was made based upon evidence presented.

Ms. Thompson stated that she would not want to reopen a decision. She believes that there is new evidence that would impose additional penalties.

Ms. Gardiner said that the two pieces of information – the focus groups and the in-kind contribution of the consultant fee – were discussed before the findings and conclusions were made. For that reason, it would be difficult to say that this would be a new inquiry. Procedurally, it would be a reconsideration of the Commission's decision.

Mr. Marsano recalled that the Commission did talk about withholding its decision at the last meeting; however, in the final analysis, the Commission decided to go with the conclusions that were made to bring the issue to a close.

Mr. McKee agreed that it should not be reopened or reconsidered.

There being no further business to discuss, Mr. McKee moved to adjourn. Mr. Marsano seconded.

The motion passed unanimously (5-0).

Respectfully submitted,

Jonathan Wayne, Executive Director