Agenda Item #7

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

Minutes of the August 26, 2010, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
2nd Floor, Augusta, Maine

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

At 9:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the July 29, 2010 Meeting

Mr. Youngblood moved to accept the minutes of the July 29, 2010 meeting as drafted. Mr. Duchette seconded the motion.

The motion passed unanimously (5-0).

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. Contributions by Robert C. S. Monks to Eliot Cutler

Mr. Wayne explained that Robert C.S. Monks had been serving as the treasurer and finance chair of the Eliot Cutler campaign. In October 2009, Mr. Monks contributed $750 to Mr. Cutler's campaign, which is the maximum contribution a gubernatorial candidate who is an unenrolled candidate is allowed to receive in the entire election cycle in accordance with Title 21-A, section 1015(1). Mr. Monks also contributed $750 in June 2010 to a political action committee, which in turn made a $750 contribution to the Cutler campaign. The PAC is controlled or is almost entirely controlled by Mr. Monks. The staff considers that

contribution to be an earmarked contribution from Mr. Monks to the Cutler campaign through the PAC as intermediary. Mr. Wayne said that the staff views the second contribution as an over-the-limit contribution.

Mr. Wayne said a civil penalty could be assessed as well, but the staff does not recommend this.

Mr. Michael Healy recused himself since Mr. Monks is being represented by an attorney from the law firm of which he is counsel and he has had represented a corporation of which Mr. Monks is an officer, director and shareholder.

Jamie Kilbreth, Esq., counsel for Mr. Monks, said a letter was submitted explaining the cause of the error. He said the PAC understood that it could make contributions to a candidate. When the Commission staff was consulted as to how to report the contribution on the PAC's report, it came to light that an error had been made. He said the funds were returned immediately at that point.

Mr. McKee asked Mr. Kilbreth whether he wanted to respond to the concern raised in the written comments from a member of the public that Mr. Monks, being the campaign treasurer for the Cutler campaign, should have been aware of the issue of earmarked contribution.

Mr. Kilbreth said members of the public are entitled to express their opinions; however, the Commission staff is more familiar with the issue and has done some research of the facts. He said the staff analysis recommending no penalty is appropriate and his client agrees with it. He said Mr. Monks has made great effort to comply with the statute and staff requests.

Daniel I. Billings, Esq., appearing as a private citizen, said he was surprised by the staff position in this matter. He said Mr. Monks is an experienced political activist and is involved in several political entities. The fact that Mr. Monk's was the treasurer for the Cutler campaign alone is sufficient justification for a penalty. Mr. Monks had the responsibility of ensuring the campaign complied with Maine campaign finance law. He said the Commission publishes a candidate guidebook which very specifically addresses this exact issue. This was not a matter of interpreting complex statutes. The staff has identified this as an issue that candidates and campaigns should be aware of and be concerned about. He said that Mr. Monks

should have familiarized himself with these requirements and regulations. The Commission should assume that he knew or should have known about these regulations and take that into account in assessing a penalty. In past matters before the Commission, it has taken into consideration the level of experience that a person has with campaign finance laws and reporting. In the case of assessing a penalty against Maine Leads, the Commission took into consideration that the person who headed that organization was a very experienced political operative and familiar with campaign finance laws. In the case of some local party committees, the Commission has taken into consideration the relative inexperience of volunteer treasurers. Mr. Billings said that the Commission should take into account Mr. Monks' past experience with political campaigns and his position in the Cutler campaign in determining whether a penalty is appropriate. Mr. Billings also said more analysis should be done with regard to whether the Cutler campaign was in violation as well. He said that at the time of the contributions in question, Mr. Monks was the treasurer of the Cutler campaign and involved with the PAC. Any knowledge that he had about the contribution from the PAC should be attributable also to the campaign. Thus the campaign knew it was receiving an over-the-limit contribution.

Mr. McKee stated the campaign did not receive any notice of this issue and it would not be procedurally before the Commission at this time.

Mr. Wayne said one of the factors the staff weighs in determining whether to recommend a penalty is the communication the staff has with the party involved. He said a showing of good faith does have some influence with the staff. He stated he understands the logic for assessing a penalty and that Mr. Billings made some good points. He said the staff did not recommend a penalty because of the circumstances under which Mr. Monks received advice about how the PAC should report the contribution. Regarding the PAC contribution, Mr. Monks relied on advice received from his associate, Jonathan Crasnick. Mr. Crasnick called the Commission office to find out how a PAC should report a contribution to a candidate. Unfortunately, there was a miscommunication regarding all the facts in this case. Nevertheless, the staff did not believe that there was a knowing or intentional violation of the contribution limits because it would be unlikely that Mr. Crasnick would call the staff to find out how to report a contribution he knew to be illegal. He also said it was obvious from the report itself that there was no attempt to conceal that the funds for the PAC's contribution came directly from Mr. Monks. If Mr. Monks or Mr. Crasnick thought about this more carefully, this situation may have been avoided. In addition, Mr. Monks does have a certain

degree of experience with campaign finance regulations. Mr. Wayne said, initially the staff did not support a penalty, but he believed there is sufficient justification for one.

Mr. McKee said he could see both sides of this issue and appreciated Mr. Wayne's assessment of the credibility of the parties involved.

Mr. Youngblood said the issue in his view was not whether Mr. Monks did or did not know the law, but rather whether he should have known the law in his position as treasurer of a campaign for governor and long time active donor to political campaigns. He said the Guidebook is very clear and ignorance of the law is not a defense. He would not support the staff recommendation.

Mr. Duchette agreed with Mr. Youngblood. He said people have come before the Commission in the past with even less experience than Mr. Monks and the Commission found them in violation and assessed a penalty. He said in this case there is no reason to step away from past standards.

Ms. Matheson agreed with the comments of Mr. Youngblood and Mr. Duchette.

Ms. Matheson moved that the Commission find that Mr. Monks made an improper contribution of $750 to the Cutler campaign in June 2010. Mr. Youngblood seconded.

Motion passed unanimously (4-0; Mr. Healy had recused himself).

Mr. Duchette said that given the facts that led up to the contribution being made, including that the PAC did seek advice from the staff about reporting the contribution, a nominal penalty of $100 was in order.

Mr. Duchette moved to assess a penalty of $100. Mr. McKee seconded.

Ms. Matheson stated she was thinking in the neighborhood of half the maximum amount.

Mr. Youngblood said he would not support the maximum.

Motion passed unanimously (4-0; Mr. Healy had recused himself).

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

Agenda Item #2. Request for Waiver of Late-Filing Penalty/Mark L. Chizmar

Mr. Wayne explained Mark L. Chizmar is a first-time candidate for State Representative, District 71, in Lewiston, and has asked for a waiver of the penalty. He was ten days late in filing a campaign finance report due on Tuesday, July 20, 2010. He was also late in filing his pre-primary report. The preliminary penalty for the late filing is $1,243.20. He said Mr. Chizmar was contacted on July 21, the day after the deadline. Mr. Chizmar did not file until ten days later. Mr. Wayne said there definitely was a lack of attention on Mr. Chizmar's part; however, the penalty is disproportionate to the harm created by the late filing. The staff recommended a $200 penalty.

Mr. Chizmar said he owns his own construction business and campaign finance reports are not part of his normal routine. He explained his treasurer, Dan Brooks, is new to this as well. He said his wife had knee surgery during the first reporting cycle. He said his treasurer told him he was doing the report and then went on vacation without letting him know he had not filed it. He said he is aware of the rules but does not feel the penalty is justified. He said he broke his back last September and did not work for eight months. He is still trying make up for lost work. He said he would appreciate any leniency shown by the Commission; however, he felt $200 was more than he could afford.

Mr. McKee stated he has two concerns. One is the prior penalty assessed from the May late filing and the second concern was the amount of time that had lapsed from when Mr. Chizmar received the phone call from the Commission stating he had missed the deadline again. He said there should have been a quicker response from Mr. Chizmar after the phone call made on July 21, especially since it was his second late offense.

Mr. Chizmar said he called his treasurer, Mr. Brooks, that day and told him the report needed to be done right away, but Mr. Brooks did not file it. He said he was not computer-savvy at all and relies on his wife for help with it. He explained that he did not ask Mr. Brooks what his computer experience was when

initially asking him to be treasurer. He said he and his wife filed the May report and it was extremely difficult to maneuver around the e-filing system.

Mr. McKee found it concerning that the report did not get filed until several days after Mr. Chizmar contacted his treasurer, which showed a lack of follow-up on Mr. Chizmar's part. He said the Commission tries to be understanding and allow some leniency for first-time candidates who miss a deadline; however, its job is to make sure that these reports are timely filed. The staff recommendation is a very significant reduction considering it is the second late filing and the second report was filed ten days late.

Mr. Chizmar said he has marked all future filing dates on his calendar and computer and will be sure to be more diligent going forward. He said his main concern is getting the penalty lowered because he cannot afford to pay that much money from his personal income.

Mr. Healy asked Mr. Chizmar if he picked Mr. Brooks to be his treasurer and assumed he knew of his qualifications to serve as treasurer.

Mr. Chizmar said he did chose Mr. Brooks but did not ask his qualifications.

Mr. Healy asked whether Mr. Brooks looked through the filing materials and got acquainted with the deadlines and requirements.

Mr. Chizmar said he did not.

Mr. Healy asked if there was any discussion between the candidate and treasurer as to who would be responsible for filing.

Mr. Chizmar said there were no such discussions.

Mr. McKee stated his concern about the lack of response to file the July report and the lack of coordination between Mr. Chizmar and his treasurer, Mr. Brooks, especially in light of the fact that Mr. Chizmar was penalized for a previous late-filed report. He said a second violation would warrant a quicker response

from the candidate after being notified by the staff. He said the fine is substantial but the reduction is substantial as well. Mr. McKee asked whether Commissioners would support a higher penalty than $200.

Ms. Matheson said she was concerned as well about the delay in filing this report since it was the second violation. The candidate should have paid greater attention when notified by the staff that the July report had not been filed by the deadline. She was inclined to think that this would not happen again with this campaign. She said that even if the penalty were lowered to $100, the Commission would still be sending a strong message about the importance of timely-filed reports and would still be consistent with prior determinations.

Ms. Matheson moved that the penalty assessed against Mr. Chizmar for the late filing be $100. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Agenda Item #4. Mailings by Maine Democratic Party concerning Deborah Simpson

Mr. Wayne explained that Brian Mello, Senate candidate Lois Snowe-Mello's husband and treasurer, sent a letter requesting the Commission consider whether three mailings sent by the Maine Democratic Party (MDP) concerning Senator Deborah Simpson were independent expenditures in support of her election. Mr. Wayne said he subsequently was informed by a colleague that Mr. Mello wanted to withdraw his request. Mr. Wayne called Mr. Mello and explained that the Commission will review the matter on its own and the staff recommendation is not binding on the Commission. Mr. Mello said he still wished to withdraw his request. Mr. Wayne said that, even though the request for an investigation had been withdrawn, the Maine Democratic Party has asked for advice from the Commission regarding whether the three communications at issue contained express advocacy in support of Sen. Simpson. This advice would help the MDP and other groups have a better understanding about where the line between express and issue advocacy was drawn.

Mr. McKee stated he is not inclined to go through an extensive analysis for an advisory opinion on this issue. He said all entities involved are aware of the rules and have counsel to advise them. He said the Commission should not be weighing in on every piece of campaign literature. This is not a crystal clear

area of the law but it is also not terribly difficult to undertake an analysis based on the law and the Commission's previous guidance.

Mr. Healy asked whether Mr. Mello had the right to withdraw the complaint without the Commission's approval and whether the complaint was still before the Commission notwithstanding his request to withdraw it.

Mr. Wayne said there is no rule on withdrawal of issues that come before the Commission. He said the original request was asking whether a report should have been filed and the Commission has an interest in enforcing compliance with reporting requirements. If the Commission determined that one or more of the mailings contained express advocacy, it would be within the Commission's jurisdiction to require a report to be filed regardless of whether Mr. Mello withdrew the complaint.

Mr. Healy said that he presumed that if Mr. Mello's complaint clearly showed that a violation occurred, the person who committed the violation could not avoid any consequences simply because the complaint had been withdraw.

Mr. Wayne said if that were the case, the staff would consider it an enforcement matter, engage in some fact-finding, and bring it to the Commission's attention.

Mr. Healy said he was reluctant also to give advisory opinions, particularly when the factual record is not complete as is the case here. He said judgments based on a review of the full factual record can be quite different than a judgment based only on a review of the documents.

Mr. McKee said once determinations begin on each piece of literature, it will open a flood gate.

Mr. McKee moved to decline to address the issue of making advisory opinions on express advocacy literature. Mr. Youngblood seconded.

Motion passed unanimously (5-0).

Agenda Item #5. Emergency Rulemaking

Mr. Wayne explained that on August 19, 2010, the U. S. District Court issued a decision and order (*National Organization for Marriage vs. McKee* (Docket No. 1:09-cv-538-DBH)) invalidating the filing schedule in the Commission's Rules for independent expenditures that exceed $250 per candidate stating that it was too burdensome. He said the court found the rule requiring a report to be filed within 24 hours for expenditures over $250, no matter when the expenditure occurred, to be too burdensome. However, if the expenditures are made close to the election, an expedited reporting schedule is justified because the state has an interest in providing information to voters about who is spending money on elections. As a result, the state of Maine is currently without a rule that tells independent spenders when to file reports, Mr. Wayne explained. He said an emergency rule, which would be in effect for 90 days, is permitted under the Administrative Procedure Act. He said the staff's proposal takes into consideration the court's concern regarding the burden on the filer and the importance of the public having information about who is raising and spending money to influence the election. Independent expenditure reports are also an important factor in calculating matching funds under the Maine Clean Election Act.

Mr. McKee asked whether the issue to be addressed by the emergency rule was only one of the timing for filing reports.

Mr. Wayne confirmed that it was and stated that the independent expenditure statute was still in force. However, as of the date of the court's decision, August 19, 2010, there is no schedule for reporting expenditures greater than $250.

Mr. McKee opened the hearing for public comment.

Alison Smith, co-chair, Maine Citizens for Clean Elections, said MCCE recognized the need for emergency rulemaking as a result of the District Court's decision. She said back in 1996 one of the key components of the Maine Clean Election Act was, and remains, the matching fund system. She said it is a very successful part of the Act and it is why so many candidates take part in the program. She said the MCCE requests the Commission make as few changes to the rule as possible in order to address the concerns of the court, while keeping the rule simple and easy to understand. She said that the MCCE thought that there is adequate justification to retain the 24-hour reporting requirement because, at this point, the election was

only two months away. She also pointed out that many voters are voting early. These voters do not have the benefit of the communications made during the last few weeks before the election but they should be able to know who is making independent expenditures during this time period. She said the current reporting schedule is appropriate for the current election cycle and it is not too early to start an expedited reporting scheme.

Ms. Smith said that the MCCE thought that the staff's proposed rule is overly complicated, changes too many parts of the existing system, and may actually create a greater burden on filers than the existing system. She cautioned against changing the law so much that it could allow spenders an opportunity to deliberately delay spending funds. She said her specific objections to the proposed emergency rule were:

- The upcoming quarterly reporting date should remain the same (October 10).
- There should be just one new reporting period for expedited reports instead of the two new periods as proposed by the staff.
- The 24-hour reporting requirement could be retained without running afoul of the court's decision if the amount that triggers the reporting requirement were changed to $500 from $250.
- The requirement to report should be triggered by single expenditures only, not aggregated expenditures, even though that may reduce disclosure.
- A single date certain, *e.g.*, Labor Day, should be selected for the beginning of the expedited reporting period.
- There should be no change to the expedited reporting period that starts after the 14th day before the election.

Mr. Duchette said that he also wanted to keep the changes to the rule as simple as possible. He said the court was concerned that there was no time limit on the expedited reporting requirement. He asked Mr. Wayne whether he thought it made sense to identify a date certain on which the expedited reporting schedule would begin and leave the rest of the rule untouched.

Mr. Wayne said the staff and counsel want to reduce the risk of a court challenge to the emergency rule and that the staff was open to some of Ms. Smith's suggestions regarding a single expedited reporting period prior to the 14th day before the general election. Mr. Wayne asked Ms. Smith if she thought that the

catchall reports due on October 5 and 19 would be adequate to get matching funds to candidates, if the expedited reporting requirement were to be tied to a single expenditure of $250 or $500.

Ms. Smith said that she would defer to people who worked on candidate campaigns.

Mr. Healy asked Ms. Smith whether $250 in matching funds would have a material effect on a campaign and, if not, what amount should trigger the reporting requirement.

Ms. Smith explained that when the rule was originally made, the $250 amount was considered a large contribution. The independent expenditure rule also used that amount as the threshold for expedited reporting because it was already established that $250 was considered a large amount in a campaign. However, she said that people who are involved in candidate campaigns would be better qualified to answer that question.

Mr. Wayne explained that the suggestions by Maine Citizens for Clean Elections were very persuasive. He said that he would support making a single expedited reporting period starting on Labor Day (September 6) and ending on the 14th day before the election (October 19) in which single independent expenditures greater than $250 would be reported within 48 hours of the expenditure. Expenditures of $250 or less would be reported in the catchall reports due on October 5 and October 19. The staff continues to be in favor on moving the October 10th deadline to October 5.

Ms. Gardiner clarified that paragraph A in the original staff proposal would remain unchanged but that the two sections of paragraph B would be condensed into one, stating that expenditures greater than $250 made on or after Labor Day would be reported within 48 hours of making the expenditure.

Mr. Daniel I. Billings, Esq., speaking on behalf of the Senate Republican campaign effort, said the need for an emergency rule making was justified. He said candidates are very concerned about the effect that the court's decision and the proposed emergency rule would have on their campaigns' matching funds. He said that, while he found the staff's proposed emergency rule complicated, the changes to the proposed rule were improvements. He said the concern about multiple, small expenditures being made to evade the reporting requirement has not been an issue in the past. However, he said this new change, *i.e.*, having the

reporting requirement triggered by a single expenditure of $250, may increase the incentive to game the system. He suggested having a cumulative threshold amount ($500 for example) to prevent this. So that once the independent expenditures for or against a candidate exceeded $500, a report would be required. If more than $500 were spent on that candidate again, then another report would have to be filed. He said from past experience, the expenditures close to the election are usually larger, so thresholds have not been a factor.

Mr. Healy asked Mr. Billings what amount of matching funds would be meaningful in the final days before the election.

Mr. Billings said it would depend upon the office, House or Senate, whether it is a contested race, and what the campaigns have planned. In hotly contested races in which there is a strong likelihood that matching funds will be distributed, some candidates will plan early in the campaign to spend the initial distribution of public funds on mailings and other activities that require advance planning and will plan on using matching funds on other activities that can be done quickly, such as last minute newspaper ads or automated phone calls. A significant number of phone calls can be made relatively inexpensively. He said even a small amount of money can be material, depending upon when it is received and what it is used for.

Ms. Matheson asked for clarification whether the current rule would cover the concept of cumulative expenditures.

Mr. Billings confirmed that it did but said that the problem with the current rule is that once someone has spent more than $250, each subsequent expenditure of any amount has to be reported. The court found that too burdensome. His suggestion was to have cumulative up to $250 or $500 and then not have to report until you have passed the threshold again.

Ann Luther, co-chair of Maine Citizens for Clean Election, clarified for the Commission that they supported using the concept of cumulative expenditures, not single expenditures, in determining whether the reporting threshold has been met.

Kate Knox, representing the Libby Mitchell for Governor campaign, said the proposal to begin the expedited reporting period on Labor Day seems to work best in her opinion. However, she is concerned about expenditures being made between now and Labor Day since those expenditures do not have to be reported until October. Campaigns frequently make major purchases in advance. She said there is a risk that an entity could make a very large media buy on September 1 and not have to report that expenditure until October. She suggested adding another catchall report in September that would capture those expenditures made before the reporting period beginning on Labor Day. She said the MCEA candidates need to be aware of expenditures as soon as possible, so timing is critical. She expressed concern over allowing single expenditures since they could be divided up to avoid reporting requirements during a certain period.

Mr. Healy asked whether a catchall report on Labor Day would resolve her concern about capturing expenditures made between now and Labor Day.

Ms. Knox said a catchall report on Labor Day would cover her concerns.

Mr. Duchette asked if a 48-hour or 24-hour reporting requirement would make a difference.

Ms. Knox said 48 hours would be acceptable; however, a "two business days" time period is less acceptable.

Ms. Matheson asked what the timing was for the emergency rulemaking.

Ms. Gardiner said the emergency rule would need to be reviewed and approved by the Office of the Attorney General and take effect upon filing with the Secretary of State, unless an effective date is set in the rule. She encouraged the Commission to put in either an effective date or a date certain when a report was due, such as Labor Day, to give the people who would be effected by the rule change some period of time before a reporting obligation takes effect.

Alison Smith, in summary, said MCCE supports:

- the Labor Day catchall report that covers spending between now and Labor Day,

- Labor Day would begin the new expedited reporting period,
- pair the $500 threshold with 24-hour reporting period or $250 with 48-hour reporting period,
- the threshold would be based on cumulative expenditures in a single race, and
- changing the date of the October catchall report to October 5 is less of an issue if there is a Labor Day catchall report.

Mr. Healy asked if the Labor Day catchall report should apply to all races or just the gubernatorial race.

Ms. Smith it should apply to all races.

Mr. McKee closed the public comment period.

Mr. McKee asked whether it would make more sense to set the deadline for filing the report on September 7 as opposed to Labor Day since it is a holiday.

Mr. Wayne said September 7, the day after the holiday, would make more sense.

Ms. Matheson said she would support keeping the $250 and 24-hour reporting requirements since they have worked in the past and there is sufficient justification for the requirement.

Mr. Duchette, recognizing the need to satisfy the court, suggested that the emergency rule:

- Require a catchall report due on September 7,
- Retain the $250 cumulative expenditures threshold but change the reporting deadline to 48 hours starting on September 7,
- Keep the quarterly report deadline of October 10,
- Have the $250 threshold based on aggregate expenditures per candidate, and
- Keep everything else in the existing rule the same.

Mr. Duchette moved that the Commission adopt an emergency rule effective immediately that would establish a September 7th deadline for reporting independent expenditures made prior to September 7, and

establish a 48-hour reporting deadline for all independent expenditures aggregating over $250 per candidate made between September 7 and October 19. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Other Business

Mr. Wayne said a replacement candidate arrived at the Commission one hour late on the deadline for certification on August 25. He was advised by staff that he would be denied certification because he had not submitted his papers by 5:00 p.m. The candidate indicated that he wishes to appeal. The Commission is required to hold a hearing on his appeal within 5 days of the appeal being filed.

Mr. Wayne also explained there is a provision that the Commission is required to meet every two weeks in the 60 days before the election. He said he would send an e-mail around to the Commission members in order to schedule these meetings as well as an update on the probable appeal.

EXECUTIVE SESSION

Mr. McKee moved to go into executive session in accordance with Section 405, subsection 6(E) of Title 1 for the purpose of discussing pending litigation. Mr. Youngblood seconded the motion. The motion passed unanimously.

Mr. McKee moved to come out of Executive Session. Ms. Matheson seconded. The motion passed unanimously.

Mr. Youngblood moved to adjourn. Ms. Matheson seconded. The motion passed unanimously.

Meeting adjourned at 11:30 a.m.

Respectfully submitted,

Jonathan Wayne, Executive Director