

Minutes of the October 15, 2004 meeting of the
Commission on Governmental Ethics and Election Practices
Held in the Commission's Meeting Room,
PUC Building, 242 State Street, Augusta, Maine

Present: Chair *pro tempore* Andrew Ketterer; Hon. James Donnelly; Hon. Jean Ginn Marvin; Hon. A. Mavoureen Thompson. Staff: Executive Director Jonathan Wayne; Counsel Phyllis Gardiner.

At 9:00 a.m., Chair *pro tempore* Ketterer convened the meeting. The Commission considered the following items:

Agenda Item #1 – Ratification of minutes of September 29, 2004 meeting

Ms. Ginn Marvin moved, Ms. Thompson seconded and the members voted unanimously (4-0) to adopt the draft minutes of the September 29, 2004 meeting.

Agenda Item #2 – Request for Matching Funds by Green-Independent Party

Patrick Quinlan of the Green-Independent Party made a request for matching funds with respect to Portland legislative candidates. He believed that voter identification information received by Democratic legislative candidates constituted an in-kind contribution to their campaigns, and should trigger matching funds. An attorney for the State Democratic Party responded in writing that lists of voters that include voters' preferences are excluded from the legal definition of contribution under state law

The Commission Director explained that the staff recommendation was that the information being given should not be considered as a contribution. He explained that, according to the State Democratic Party, there were no costs associated with the gathering of this information. He said there were certain activities that are excluded from triggering matching funds and that he believed that this falls under those exceptions. The Director also expressed his belief that should the Commission decide this does count as a contribution, it would possibly cause a lot of future issues and that he felt it should not be considered a contribution.

Ms. Ginn Marvin asked how Mr. Quinlan knew that volunteers are doing the work as opposed to have a particular party paying people to do the voter ID. The Director replied that in this case Mr. Quinlan didn't assert to know for sure and that it seemed to come from second-hand information. Ms. Thompson commented that from her reading of the statute an entity could create a voter list and that it wouldn't be considered as a contribution.

Ben Micklejohn took the floor, and explained that it was his opinion that these voter ID activities had a legitimate market value. He felt that these activities didn't fall under the normal voter registration list exception. Mr. Micklejohn clarified that his group wasn't requesting matching funds, rather an inquiry as to whether the efforts to obtain the voter

information was all undertaken by volunteers. He explained that due to the scope and potential costs it seemed highly unlikely that this particular voter ID could have been performed completely by volunteer effort.

Mr. Ketterer questioned the idea of assigning a monetary value to this voter effort. Mr. MickleJohn replied that his organization was simply requesting an inquiry as to whether or not this voter ID was being done solely by volunteers. Mr. Ketterer commented that saying you work for a particular campaign doesn't necessary mean you are getting paid by that campaign. He also pointed out that staff is limited and that past practice has been to ask the parties in question what has happened, and that those parties respond, and in the absence of evidence of fraud the Commission takes them at their word. Mr. MickleJohn replied that it is important for clarification on this issue because it will affect future voter ID efforts by his group. He explained that the circumstances surrounding the Green Party have caused them to be cautious as to the various rules and regulations, and that a clarification on this issue would benefit them greatly.

Mike Mahoney, representing the Maine Democratic Party, took the floor. He stated that that the activity in question represents a voter list, which is covered under the exception. He also said that according to the factual information at the time of the meeting, all people involved in this activity were unpaid.

Mr. Donnelly asked if Mr. Mahoney saw a difference between providing a candidate polling information as opposed to a voter list. Mr. Mahoney replied that he would see a difference between these two items. He said that polling information may not be under the exemption, but that the information still comes from a voter list. Mr. Donnelly agreed with that assessment.

Doug Clopp of the Maine Citizenship Fund took the floor, and said that he agreed with the staff recommendation in this matter. However, Mr. Clopp felt that various issues had come up regarding voter lists that need to be addressed through Commission discussion and subsequent action. Mr. Clopp said that enhanced voter lists can cause problems as they do not clearly fall under the exemption.

Ms. Ginn Marvin moved and Ms. Thompson seconded to instruct staff to conduct a further inquiry regarding this issue. Ms. Ginn Marvin asked staff why it was necessary to wait until after the election to find out further details about the voter list and how it was created, and how would the Commission go about obtaining the information. Ms. Gardner replied that the further inquiry would go towards deciding if the voter list should be considered exempt. Ms. Ginn Marvin asked if there was a difference between volunteers calling requesting voter information and a paid company making those calls. Ms. Gardner said that the law doesn't differentiate between volunteers and a paid company. Ms. Ginn Marvin then said that from what she was hearing from staff, the Green Party could do a similar activity. The Director replied that he thought that would be the fairest course of action. Ms. Ginn Marvin stated that the Commission should look at this issue later on, but that Mr. Micklejohn deserved an answer today, as the decision made would affect the current election. Ms. Thompson questioned the Commission's role

as to this decision, because the Green Party is trying to get permission to do what the Republican and Democratic Party already do. Mr. Ketterer replied that the issue here is covered in state statute and that if the voter list is within the exception it doesn't matter whether or not it was paid for or not. Mr. Ketterer also said that this voter list should fall under the exception under the law, and that if the Commission decides to adopt the staff recommendation, then the Green Party could see the decision as a blueprint for what to do for this election as well as future elections. Mr. Donnelly stated his opinion that this voter list falls under the exception. Ms. Ginn Marvin clarified her motion as to the inquiry being whether or not the Commission wants to be exempting items that people are paying money to obtain. Mr. Ketterer replied that he felt the Commission should focus on the motion at hand. After discussing various procedural matters concerning the proposed motion, the Commission voted 1-3[how do you want me to record the votes?], the motion was defeated, and Mr. Ketterer stated that there would not be a further inquiry.

Agenda Item #3 - Complaint by Representative John Churchill

The Commission Director explained that a PAC called the Business Minded Democrats had sent out one of two mailings dealing with Ray Wotton and John Churchill. Mr. Churchill believed that information in the literature regarding his voting record was inaccurate, and had asked for a determination by the Commission whether he was entitled to matching funds.

Dan Billings, an attorney representing Mr. Churchill, took the floor. He requested that the complaint be tabled, and indicated that there may be a resolution to this complaint not requiring Commission action. Mr. Donnelly moved, Mr. MacTaggart seconded, and the Commission voted unanimously to table the agenda item.

Mr. Billings then spoke to the second mailing and stated that since no rebuttable presumption had been presented, should the ad go forth, matching funds should be triggered. He said that in his opinion the purpose of matching funds was to fight against sham advocacy, and that this ad clearly was meant to influence the election and therefore should trigger matching funds. He said the intent of the law was to get at ads that don't use "magic words" and to try to prevent attempts to get around the law. Also, the name, makeup and previous activities of this PAC clearly indicate that they were intending to influence the election. In this case, according to Mr. Billings, you have a partisan PAC whose intent is to support business minded candidates, and that their intent in this case was to influence the election. This group had every right to communicate the information, except that Mr. Churchill would get matching funds as a result.

Ms. Thompson requested input from staff before proceeding with questions for Mr. Billings. The Commission Director summarized the mailings that were being discussed, and stated that the issue was that the Business Minded Democrats had intended the mailing to go out before the 21 day period. However, due to an error by the Bangor Letter Shop, the mailing was sent out during the 21 day period. The staff recommendation was to award matching funds, as the staff felt that this ad was clearly intended to influence the

election. The Commission Director then summarized for the Commission the laws concerning independent expenditures.

Mike Mahoney, representing Business Minded Democrats, took the floor. He expressed that this PAC wanted clarification in regards to where the line between issue advocacy and sham advocacy is drawn. Mr. Mahoney disagreed with the Commission Director and Mr. Billing's opinion in this matter, and felt that this would not trigger matching funds. He pointed out that there is nothing in the statute that would support considering the source of the ad when deciding if an ad should trigger matching funds. According to a memo sent out by the Commission Director, the content of an ad is extremely important in determining if matching funds should be triggered. Mr. Mahoney also stated that the descriptions of the various bills depicted in the ad very closely followed the exact titles and language used in the bills themselves. Mr. Mahoney also contended it was impossible to know exactly how a voter would react in regards to Mr. Wotton or Mr. Churchill's voting record. He also brought up the possibility that Mr. Wotton could conceivably come before the Commission and request matching funds based on this ad.

Mr. Ketterer asked if the Bangor Letter Shop's error in creating the ad contributed to this issue. Mr. Mahoney replied that in his opinion the real issue was whether or not the ad was designed to influence the election. The Commission Director asked if Mr. Mahoney agreed that the law states that the Commission must determine if an ad had any intent to influence the election. Mr. Mahoney replied that he did agree with that reading of the law, but that this ad was not designed to influence the election. The Commission Director then asked what the intent of the PAC was when it sent out the ad. Mr. Mahoney replied that he thought the intent was to give voters a clear scorecard on where these two candidates stood and let the voters make their own decision. The Commission Director asked if this ad would go out regardless of whether or not matching funds are issued, and Mr. Mahoney replied he didn't know. The Commission Director asked if the objective nature of the information takes away from the ad's possible intent of influencing the election. Mr. Mahoney replied that he didn't see how issue groups can put together report card votes on certain issues with different candidates and have those be considered not influencing the election and then have this ad be considered influencing the election. He stated that his opinion of the law was that an ad must go one way or another and that this ad didn't make that distinction, therefore matching funds shouldn't be triggered. Ms. Gardner asked that if this PAC didn't intend for this ad to influence the election then why was this ad going out. Mr. Mahoney replied that the group was simply giving out straight up information to voters.

Ms. Ginn Marvin asked if it was correct that this PAC, which was started by a sitting Democratic Representative, was only trying to send out mailings that are just informational and not designed to influence a voter one way or another. Mr. Mahoney replied that the source is not relevant under the guidelines that the Commission has put forth and that therefore the source should not be considered. Furthermore, the purpose of the PAC is to support business minded candidates, regardless of party affiliation. Ms. Ginn Marvin stated that the description of the bills in the ad are slightly misleading, and that she didn't think voters would be against health care or protecting consumers against

unfair prescription drug costs, and that she questioned whether or not, on the issues, a voter could go one way or another. She also pointed out that in a previous Commission meeting the Commission asked the Director if a mailing similar to this was mailed in the 21 day period would matching funds be triggered, and the Director had said yes.

Doug Clopp took the floor, and said that the ad in question was exactly the kind of ad that the law was designed to go after and that matching funds should be triggered. He expressed his opinion that this ad was sham advocacy, and pointed out various languages that would suggest the ad was designed to influence the election. Mr. Clopp said that this doesn't mean groups can't send out ads like this, it just means matching funds can and should be triggered. As to the timing, as long as it arrives on doorsteps within the 21 day period, the circumstances surrounding the timing of the mailing are irrelevant, and that matching funds should be issued. Ms. Thompson stated that it was tricky ground for a governmental entity to make judgments on what they believe is a person's intent, and that this, to her, was what the law was asking the Commission to do. She then asked which candidate would get the matching funds if the Commission decided that matching funds should be issued. Mr. Clopp replied that if Mr. Wotton felt he was harmed by this ad and believed he deserved matching funds, he could come before the Commission and request matching funds, as Mr. Churchill had. He pointed out that he didn't know of very many PAC's with a name like Business Minded Democrats that were supporting business minded republicans. Ms. Thompson replied that she felt conflicted on this issue after taking into account Mr. Clopp's points as well as concern over the possibility of granting both candidates matching funds, and this was a very gray area that the Commission should give serious thought to in the future. Ms. Thompson asked about possible records of the actual discussion in the Legislature concerning intent with regards to this law. Mr. Clopp replied that there were no written records available but that the Legal and Veterans Affairs Committee did the most work on this issue, and they would be the best place to go for that information.

Ms. Ginn Marvin moved and Mr. Ketterer seconded to adopt the staff recommendation for discussion purposes. Mr. Donnelly said that he would support the staff recommendation. Mr. Ketterer stated that this appeared to be what the legislature intended to capture in the 21 day window, and that he felt that the only problem with the ad was that it was sent out during the 21 day period. Mr. Ketterer stated that because it was sent out during this 21 day period, he would support the motion. Ms. Thompson reiterated her concerns over including the source into the deliberations on this issue and expressed doubt over possibly setting a concrete precedent on an ambiguous issue, and that she would be unable to support the motion. The Commission voted 3-1 (Ms. Thompson dissenting) to adopt the staff recommendation and to trigger matching funds for Mr. Churchill.

Mr. Donnelly moved, Ms. Thompson seconded, and the Commission voted unanimously to adjourn.