



Minutes of the January 27, 2016, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: Andre Duchette, Esq.; Michael T. Healy, Esq.; William A. Lee III, Esq.;
Margaret E. Matheson, Esq.; Hon. Richard A. Nass

Staff: Jonathan Wayne, Executive Director; Phyllis Gardiner, Counsel

Commissioner Matheson convened the meeting at 9:04 a.m.

The Commission considered the following items:

1. Election of Chair or Acting Chair

Mr. Healy made a motion to nominate Ms. Matheson to serve as Chair. Mr. Duchette seconded.
Motion passed (4-0; Ms. Matheson abstained).

2. Ratification of Minutes of December 16, 2015 Meeting

Mr. Nass moved to accept the minutes as written. Mr. Healy seconded.
Motion passed (4-0; Mr. Lee abstained).

3. Request for Waiver of Late-Filing Penalty – York County Republican Committee

Mr. Wayne stated that on September 8th the York County Republican Committee made a mailing purchase of almost \$650 for the Special Election for House District 19. It was required to file an Independent Expenditure within two days of the purchase but, due to the inexperience of its treasurer, did not file it until January 6, 2016. The Committee became aware of this filing requirement after it had contacted Commission staff with questions regarding its semiannual filing.

Edward Karytko, Vice Chair of the York County Republican Committee, appeared on behalf of the Committee. Mr. Karytko stated the treasurer has been in the position for a number of years and is very conscientious, but because the Committee has never done this type of expenditure in the past, the treasurer did not have any experience in reporting this type of expenditure. He stated there is not a guidebook for the counties like there is for candidates and did not know how local party committees were supposed to be aware of this requirement unless they checked the statutes all the time or called the Commission. Mr. Lee questioned who was responsible for oversight of the treasurer's work. Mr. Karytko stated he believed it would be the Chair and/or the Vice Chair but he

was unavailable to assist when this situation happened because of his personal involvement in the Special Election. Mr. Lee asked if the committee had called Commission staff to ask about filing requirements. Mr. Karytko stated he believed it depended on the person in the position and their level of knowledge whether they would call the Commission. He stated the local committees have a lot of volunteers and they may not know to call the Commission with questions about filing requirements.

Ms. Matheson stated the situation is unfortunate but the Commission often hears similar explanations all the time. She stated it might be a good idea to find a way to make this information more readily available to the local committees but believed Commission staff is readily available to answer questions. Mr. Karytko stated he had nothing but praise for Commission staff, but because there are so many volunteers involved at the local level, they may not know when they should contact the Commission.

Mr. Lee asked why the preliminary penalty calculated was different from the preliminary penalty listed in the agenda materials. Mr. Wayne stated staff had initially calculated the penalty based on an October filing due date but with further review, had determined the due date should have been in September. Mr. Lee stated that a 2% multiplier had been used to calculate the preliminary penalty but the incident occurred before the statute changed in November and questioned why a 1% multiplier had not been used to calculate the preliminary penalty. Mr. Wayne stated staff had considered this point when making its recommendation and the Commission has discretion to decrease the penalty. Mr. Healy questioned if the staff recommendation would change if the preliminary penalty were calculated under the old statute. Mr. Wayne stated staff would recommend a penalty between \$150 and \$200.

Mr. Duchette made a motion to find a violation and assess a \$150 penalty. Mr. Healy seconded the motion. Motion passed (4-0; Mr. Nass recused himself due to a personal conflict).

Mr. Karytko asked if he could discuss one more issue and stated he had just noticed the report due date was September 10th but he believed the expenditure was made after that date. Mr. Wayne stated payment for the expenditure occurred on September 8th. Mr. Karytko stated it was his

understanding the expenditure was made at the end of September or beginning of October. Mr. Wayne stated Commission staff would follow-up with him on this issue.

4. Rule-Making

Ms. Matheson asked whether there was anyone present to comment on the proposed rules. Mr. Wayne stated that the public comment period had passed. Mr. Lee stated Commission meetings are open to the public and questioned why they would not allow a member of the public to make a comment if they requested. Ms. Gardiner stated the Attorney General's office does not recommend allowing additional comments after the public comment period has ended unless the public comment period was reopened. Ms. Matheson asked if changes are made today, would the comment period have to be reopened. Ms. Gardiner stated that if changes are proposed that significantly affect the proposed rule, then the comment period would have to be reopened.

Mr. Nass asked about the timing for legislative review if the Commission proposed changes that required additional public comment time. Mr. Wayne stated the Commission has missed deadlines in the past and not experienced any problems but stated he believed the Legislature would prefer to receive the rulemaking as soon as possible. Mr. Nass asked whether the Commission could approve part and hold back other segments. Ms. Matheson stated that Chapter 1 is routine-technical and would not require legislative review. She suggested the Commission start with Chapter 3 because it has a time constraint for submission. Mr. Healy suggested the Commissioners review the segments that they have issues with. Ms. Matheson agreed and stated the Commissioners should express their concerns as they go through the proposed changes.

Mr. Nass asked what prevented anyone from giving more than one qualifying contribution to the same candidate. Mr. Wayne explained that the statute prohibits that. Mr. Nass asked what happens if multiple family members make online contribution using the same credit card. Mr. Wayne stated that each family member has to do individual online contributions, listing their name and the name on the credit card. He stated Commission does do a comparison of the registered voter name and the credit card name as one of their certification checks. Mr. Wayne stated that with a credit card Commission staff knows the source of the money but cash could come from anywhere. Ms. Gardiner stated if a case needed to be investigated, the records could be subpoenaed.

Mr. Healy stated that under the current Rule, fraudulent contributions are invalidated but questioned if the proposed change, which gives the candidate the opportunity to prove they were not aware of the fraud, would make the fraudulent contribution valid. Mr. Wayne stated the contribution would still be considered invalid but the candidate would not be disqualified from participation in the Maine Clean Election Act. Ms. Gardiner stated that if the candidate had enough valid contributions, they could still be certified.

Mr. Lee stated there are a lot of registered voters who have very little computer experience who may need assistance with the online process and believed the proposed rule was a good change; Ms. Matheson and Mr. Nass agreed. Mr. Healy asked if someone could use their smartphone to solicit and collect online qualifying contributions. Mr. Wayne stated that was the intent and the system is designed that way. Mr. Healy stated he believed the Rules should greatly encourage credit cards and checks and discourage cash. Mr. Wayne stated the collection of cash is very convenient for some candidates and contributors but it is problematic for Commission staff when they are certifying candidates.

Mr. Lee expressed concerns about the security of the online contribution system. Mr. Wayne stated the system is used by many state agencies and there have not been any problems to date. Ms. Matheson stated that paragraph I is simply putting into the Rules current practice. Mr. Wayne agreed. Mr. Healy presented a scenario of a candidate knowingly submitting five fraudulent qualifying contributions but has enough valid qualifying contributions to be certified and questioned if the candidate would be certified. Mr. Wayne stated this does not happen often and staff talks with candidates about any problematic qualifying contributions. He stated the proposed changes formalize current practice.

Mr. Nass raised the issue of the batches of supplemental qualifying contributions and the greater potential for fraud with each submission. He questioned what could be done to a certified candidate who submits fraudulent supplemental qualifying contributions. Ms. Gardiner stated there is a provision in the statute that allows decertification of a candidate who submits fraudulent qualifying contributions and it can happen at any point during the campaign. Mr. Nass expressed concern that it would be too burdensome for a candidate to continuously police and be responsible for the

contribution process. Ms. Gardiner stated the presumption gives some protection to the candidate, unlike the statute which disqualifies a candidate for submission of fraudulent qualifying contributions. She stated the presumption allows a candidate to make the case that they did their due diligence, appropriately trained staff on collecting qualifying contributions and were unaware of any fraud. Mr. Healy stated it is very easy for a person to collect signatures without following proper procedure and not tell the candidate, especially if the deadline is very close. Mr. Nass stated he has a problem with an MCEA candidate paying someone to collect signatures for them and would prefer to see that banned.

Ms. Gardiner suggested adding a sentence to the end of paragraph J to make it clearer that if the candidate rebuts the presumption, he or she could still be certified. Mr. Lee asked what would happen to a candidate who may not have trained staff well, the campaign staff went out and collected improper signatures but the candidate honestly did not know or was negligent in their review. Ms. Gardiner stated that statute is clear that the burden is on the candidate to appropriately review anything that is being submitted in his or her name. Ms. Matheson asked if there is a training packet or information readily available on the appropriate collection of qualifying contributions and signatures. Mr. Wayne stated there are instructions in the Getting Started packet and staff is available to answer questions. He stated the expectation is that anyone who is collecting signatures for a candidate would turn their work into the candidate and it is the candidate's responsibility to review all signatures collected before submitting them to the Commission. Ms. Gardiner stated that anyone collecting signatures for a candidate should be signing their name as the circulator on the Receipt and Acknowledgement form.

Mr. Nass asked how the proposed change went from allowing volunteers to collect signatures into paying staff to collect signatures. Mr. Wayne clarified that paragraph M was a suggestion from the Maine Citizens for Clean Elections because the citizen initiative does not address this issue. Mr. Healy asked if this is intended to pay staff a weekly salary to collect signatures or pay by the signature. Mr. Wayne stated neither option is prohibited by statute. Mr. Healy asked if the Commission has the authority to prohibit per signature payments. Mr. Wayne stated the Commissioners have the authority to make rules to ensure effective administrative of the statute. Mr. Nass stated he has a problem with paying staff per signature. Mr. Duchette stated he does not want to micromanage campaigns. Mr. Wayne stated they have the authority to make this rule and

the Legislature has the authority to overturn it. Mr. Lee stated that one of the biggest points of opposition to the citizen initiative was that this was taxpayer money and he believed there would be a lot of opposition to candidates using taxpayer money to get more taxpayer money. He stated that if they have the authority to make a rule prohibiting per signature collection, they should do it.

Mr. Healy asked if paragraphs L and M were in the existing Rules. Mr. Wayne responded that they are additions. Mr. Healy stated that if L and M were eliminated the law would be unclear about whether a candidate could compensate people for collecting signatures, so paragraphs L and M were an improvement. Ms. Matheson called for a straw vote on including L, M and N. Mr. Healy stated he would not vote against the current but would prefer to have additional language prohibiting per signature collection. Mr. Lee agreed. Mr. Duchette stated he did not agree with limiting how a candidate can spend their campaign funds regardless of the source of the funds. Ms. Matheson proposed eliminating these sections but including a report stating the Commissioners concerns. Mr. Nass stated it was currently a 3-2 vote for prohibiting per signature collection. Mr. Duchette questioned how an MCEA candidate could pay for signature collection if they could not use Clean Election funds. Mr. Healy stated they could pay by the hour, the week, etc. for signature collection, but not per signature, using Clean Election funds. Mr. Lee asked if there were any public comments on this topic. Mr. Wayne stated this was proposed by the Maine Clean Citizens for Clean Election and he was not sure they were completely happy with this proposal.

Mr. Healy made a motion to add the following sentence to the end of paragraph M: A candidate cannot pay for the collection of qualifying contributions on a per signature basis. Mr. Nass seconded the motion. Ms. Matheson stated she believed this is a good compromise. Ms. Gardiner suggested using the word “compensate” instead of pay to be consistent with the statute. Mr. Healy agreed with the suggestion. Ms. Matheson called for a vote and the motion passed (5-0).

Mr. Nass asked about the ability of MCEA candidates to solicit private contributions if the Clean Election Fund experiences a shortfall without having to submit the appropriate signatures. Ms. Matheson stated she believed staff had made a compelling argument. Mr. Nass asked if this meant MCEA candidates could solicit unlimited traditional funds. Mr. Wayne stated candidates would have to abide by current campaign finance limits. Mr. Nass asked what the consequences would be for an MCEA candidate who does something wrong while collecting traditional donations. Mr.

Wayne stated it would depend on the severity of the violation, but their certification could be revoked and they could be asked to return the Clean Election funds they had received.

Ms. Gardiner stated they had discussed adding a couple of sentences to other paragraphs. She stated that they could consider adding the following to paragraphs I, “fraudulent contributions must be rejected.” Mr. Lee asked what happens to the fraudulent contribution. Mr. Wayne stated it remained in the Clean Election fund but the contributor could request a refund. Ms. Gardiner suggested adding the following line in the middle of paragraph J, “a candidate is presumed to have confirmed that the individuals collecting the qualifying contributions submitted by the candidate actually received the required contributions from the personal funds of the contributors” and near the end of the paragraph “if the candidate rebuts the presumption, submission of the fraudulent qualifying contribution will not by itself disqualify the candidate from receiving Clean Election funds if the candidate otherwise qualifies.”

Mr. Nass made a motion to accept the staff proposal as outlined by Ms. Gardiner. Mr. Duchette seconded the motion. Motion passed (5-0).

Mr. Lee made a motion to provisionally accept Chapter 3 as amended. Mr. Duchette seconded the motion. Motion passed (5-0)

Ms. Matheson stated “parent entity” is not a defined term and suggested that an alternate term be used. She also questioned the use of “separate legal entity” in paragraph C. Ms. Gardiner explained that it does not have to be, that it is an accounting mechanism. Ms. Matheson asked if something from the original proposal had been lost in paragraphs C, D, and E. Mr. Wayne stated that he believed paragraph C was an improvement and it would be good to have the Rules address the situation of separate funds and sub-entities. Mr. Healy asked who is responsible for the disclosure when dealing with sub-entities. Mr. Wayne stated that the entity that fully funds the sub-entity would be responsible for disclosure. Mr. Nass stated that he did not see where this is covered in the statute and thinks this is an overreach. Ms. Gardiner asked if Mr. Nass was comfortable with paragraph C. Mr. Nass stated that paragraph is consistent with the statute. Ms. Matheson stated the proposed changes provide greater transparency. Mr. Nass stated that he did not believe that the initiative as drafted provides any authority to keep reaching back to find the original contributors.

Mr. Healy asked how can a statute be passed to force disclosure all the way back to the original source and if this proposal was an attempt to do that. Ms. Gardiner stated that paragraph C only covers the first layer of disclosure. Mr. Wayne stated this is simply a staff proposal in response to public comments and stated that the Commissioners could approve paragraph C and not approve paragraph D. He stated voters should focus on the issues not who is paying to get their attention. Ms. Gardiner stated the statute allows disclosure of the top three funders of that entity and if you have an entity that is fully funded by another entity, you could require disclosure of the top three funders from that entity. Mr. Lee asked if there is additional language in Title 21-A or elsewhere that would support this proposal. Mr. Duchette gave a scenario of the Legislature attempting to pass a bill to put warning signs on cigarette but a PAC named Healthy Maine Alliance is making expenditures against the bill and he would like to know that Phillip Morris is funding the PAC. Ms. Gardiner stated that disclosure can be helpful to identify the industry, professional group or interest group behind the expenditure. Ms. Gardiner stated there is some room for interpretation when considering what it means to be making an independent expenditure and what it means to be funding it. She stated the Commissioners could change the proposed rule to say “fully funded” and take out “controlled by” but this is where the Commissioners have some discretion for interpretation. Mr. Nass stated he believed it was up to the Legislature to amend the law not the Commission.

Mr. Lee asked if what is being proposed goes beyond what is covered in the statute. Ms. Gardiner stated she did not believe that and stated that paragraph C covers when the PAC is not a separate entity and paragraph D covers the fully-funded and fully controlled entity. Mr. Healy stated that he does not believe that paragraph D is all that different from what is currently in place. He stated that organizations are able to set themselves up in ways to ensure disclosure is impossible. Mr. Duchette stated that they needed to remove the politics from this review and stated that paragraphs C and D are not that big a change. Mr. Duchette asked if Mr. Nass’ concern was with paragraph D only. Mr. Nass stated it was and that he did not believe it was covered in the statute. Mr. Duchette stated that they are not trying to make statutory changes only rules to enforce the statute and what would Mr. Nass add or remove for him to agree to the proposal. Mr. Nass responded that he wanted paragraph D removed. Ms. Matheson stated that she thought the proposal is simply following established case law. Mr. Wayne stated that paragraph D is actually taking disclosure a step further

and that currently a PAC could report one major donor and that major donor would not be required to disclose its top three donors. Mr. Nass stated that he did not like the term “parent entity” because it implies that staff would keep looking for the parent entity. Ms. Gardiner stated the term “parent entity” could be removed and replaced with “fully funded or controlled” in both paragraphs D and E. Ms. Matheson clarified that in E you would have to change “any other political action committee” by adding “that does not fall under the parameters of paragraphs C or D.”

Mr. Lee stated he is bothered by the thought of the creation of shell entities in order to shield donors from disclosure. Mr. Nass stated that if parent entity is removed and there is no suggestion of continuously looking for the parent entity, he would be okay with the proposal. Ms. Matheson stated there were no comments on section 10 and she thought it would be less confusing.

Mr. Nass made a motion to final adopt Chapter 1 as amended. Mr. Lee seconded the motion. Motion passed (5-0).

Ms. Matheson expressed the Commission’s appreciation for the service of former Commission Chair Walter McKee and Commissioner Andre Duchette, whose terms have expired.

Mr. Healy made a motion, seconded by Mr. Nass, to adjourn. The motion passed. The meeting adjourned at 11:49 a.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director