



Minutes of the July 25, 2018, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: William A. Lee III, Esq., Chair; Hon. Richard A. Nass; Meri N. Lowry, Esq.; Bradford A. Pattershall, Esq.

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

Mr. Lee convened the meeting at 9:03 a.m.

1. Ratification of Minutes of May 30, 2018 Meeting

Mr. Nass requested the following change on page 3 – replacing “Mr. Lee said the Commission did not believe she was being deceitful” with “Mr. Lee stated that he did not believe she was being deceitful.” Mr. Lee made a motion to accept the minutes as amended. Mr. Nass seconded. The motion passed (4-0).

First Executive Session

Mr. Nass moved that pursuant to Title 1 of the Maine Revised Statutes, section 405(4), the Commission go into executive session pursuant to Title 1, section 405(6)(E) and Chapter 1, section 5(2) of the Commission rules to consult with the Commission’s counsel concerning pending or contemplated litigation. Mr. Pattershall seconded. The motion passed (4-0).

Mr. Lee moved to come out of executive session. Ms. Lowry seconded. The motion passed (4-0).

3. Request for Waiver of Later-Filing Penalty – Rep. Heather Sanborn

Mr. Nass made a motion to take Ms. Sanborn’s matter out of order which was seconded by Mr. Pattershall and passed unanimously (4-0).

Ms. Lowry recused herself from participating in this matter as she had made a contribution to the candidate’s campaign. Ms. Lowry left the meeting room while this matter was under consideration.

Mr. Wayne said Representative Sanborn is running for Senate District 28 and was in a contested primary election for the Democratic nomination. On May 16, 2018, she ordered campaign literature and agreed to pay the vendor \$4,514. When she filed her June 1st report, she correctly reported a debt owed to the vendor. Three days later, on June 4th, she paid the vendor. The debt payment was made within the 24-hour reporting period, which is the 13 days before an election when a candidate is required to file a special accelerated report of expenditures of \$1,000 or more. Rep. Sanborn did not file a 24-hour report. The staff's view is that even though Rep. Sanborn had reported the debt in the June 1st report, she was required to file a 24-hour report on June 5th reporting the payment to the vendor. Rep. Sanborn disagrees with the staff's interpretation. The preliminary penalty for the late-filed 24-hour report is \$1,073. Rep. Sanborn requested a waiver of the penalty. The staff's recommendation is to reduce the penalty to \$300. Rep. Sanborn addressed the Commission and said that she did not believe a 24-hour report was required because the expenditure had already been disclosed in a report. The public as well as her opponent had access to the information that she had purchased three mailers, two of which had been paid for and one had not. Referring to the Commission's rules and candidate guidebook, Rep. Sanborn maintained that she disclosed the expenditure as the statute, rule, and guidebook dictate. When she reported the purchase of the mailers, including the debt for one of the mailers, on her June 1st report, she satisfied the statutory reporting requirement as she understood it. The debt payment on June 4th was not another expenditure that should trigger a 24-hour report. Rep. Sanborn said she is requesting a full waiver of the penalty and a finding that she was in compliance with the reporting statutes and rules. She said if she were to receive a penalty, it should be greatly reduced from the \$300 staff recommendation. The public and her opponent already had the information regarding the expenditure well before the election. She acted in good faith in believing the debt payment did not need to be reported a second time in a 24-hour report. She also said that after reviewing the penalties imposed on candidates in previous elections, her penalty seemed higher and unfair.

Mr. Lee explained that this is the first election cycle in which the revised penalty standard is being implemented after changes were made to campaign finance laws by the 2015 citizen initiative. Rep. Sanborn's matter is one of the first cases, if not the first, involving a late-filed report by a candidate to be considered under this new standard.

Mr. Nass said while he has concerns about redundant reporting, there are people who focus on the 24-hour reports during the lead-up to an election and they may not refer to the reports filed earlier. So the information in 24-hour reports may be the only information they see.

In response to a question from Mr. Pattershall, Mr. Wayne said the additional information contained in the 24-hour report is the fact that the campaign actually paid the debt and those funds are no longer available to the candidate. He said if a candidate incurs a debt and pays the debt in the same reporting period, the candidate only has to report the payment, not the debt. It is different if the debt and the payment occur in different reporting periods. He said if reporting the debt once when it was incurred satisfied the reporting requirement, then it would follow that it would not be necessary to report the payment in a subsequent report. However, Mr. Wayne said Rep. Sanborn acknowledges that the payment of the debt does have to be reported as an expenditure in the post-election report. The question is why is it not an expenditure for purposes of the 24-hour reporting requirement.

Mr. Nass said the Legislature established the 24-hour reporting system to create a separate type of report in addition to regular campaign finance reports. The purpose was to quickly disclose substantial campaign activity in the days leading up to an election. He supported the \$300 penalty recommended by the staff.

Joshua Tardy, Esq., appeared before the Commission, not on behalf of a client but as an attorney who represents clients before the Commission. He said he agreed with Rep. Sanborn's and Kate Knox's analysis and interpretation of the statute and rule. He said the fact that nearly one-third of candidates audited in 2016 misinterpreted the definition of expenditure and did not report debts when they were incurred is a significant indication of the level of confusion regarding debts. In this case, there was no harm to the public. He did not think the Commission had to find a violation in this matter, but if they do the penalty should be one dollar.

Mr. Pattershall did not support finding a violation. He said the guidance about reporting debts and payments in a 24-hour report is poor. He said even if the guidance had been better, he would still consider Rep. Sanborn in compliance with the statutes and the rules.

Mr. Lee said that having heard Rep. Sanborn's argument and discussing the issues with the other Commissioners, he was now inclined to agree with Mr. Pattershall and find no violation. He said that, if the guidance given to candidates had been clearer and addressed this specific situation, he may have decided differently.

Mr. Nass maintained that the Legislature created two different reporting systems and the payment of the previously reported debt should have been reported in a 24-hour report.

Mr. Pattershall made a motion to find no violation. Mr. Lee seconded. The motion passed (2-1, Mr. Nass opposed).

Responding to a question from Mr. Lee regarding improvements to the guidance and policy on 24-hour reporting, Mr. Wayne said it would be preferable for the Commission to decide what the policy should be for reporting debts and debt payments and suggested that the staff develop a proposed rule change to be presented to the Commission at a future meeting.

Ms. Lowry rejoined the meeting.

2. Update on Maine Clean Election Act Program

Mr. Wayne said the Commission was only able to pay out about 26% of the amount owed to the 128 candidates who qualified for supplemental payments in June due to the insufficient allotment remaining in the Maine Clean Election Fund in the last month of fiscal year 2018. The Commission owes more than \$1 million to candidates that it is unable to pay because of the negative allocation in the budget for the Maine Clean Election Fund for fiscal year 2019. This is due to a mistake in the 2018-2019 biennial budget bill. This issue is still under consideration by the Legislature and the staff is hopeful the Legislature will address the issue soon.

Mr. Wayne said there are two candidates, Marc Andre and Kathy Javner, who did not receive their initial payments for the general election because the results of their primary elections were not known when the disbursements to other candidates were being made. Terry Hayes is the only MCEA gubernatorial candidate and is owed \$259,000 and the uncertainty of whether she will receive those funds is very problematic for her campaign.

Mr. Wayne said the staff had invited candidates and other interested parties to offer comments on the question of whether the Commission has the legal authority to authorize MCEA candidates to accept private campaign contributions. The Commission may authorize candidates to do so if it finds there are insufficient funds to pay candidates. However, that is not quite the position the Commission is currently in. The Maine Clean Election Fund does have sufficient funds to pay candidates. The problem is that the Legislature has not given the Commission the budgetary authorization to make the payments.

In response to a question from Mr. Lee, Ms. Gardiner explained that the civil litigation brought by the Maine Citizens for Clean Elections and some candidates and contributors involves supplemental payments to candidates affected by the Governor's decision to not sign financial orders to increase the allotment in the Maine Clean Election Fund in June. The defendants in that case, the Governor and the Commissioner of the Department of Administrative and Financial Services, argued that the Commission could remedy the situation by allowing private fundraising and that it was reasonable to interpret the phrase "insufficient revenues" in the statute to mean unavailable funds due to the Governor not signing the financial orders. The plaintiffs argued that interpretation is not the plain reading of the statute. Ms. Gardiner said the court may be addressing this issue in its decision.

Marc Andre, the Republican candidate for House District 110, appeared before the Commission. He said he was in a contested primary election which he won by seven votes. His opponent requested a recount on June 19th. Because the Secretary of State's office was busy with processing the races subject to ranked choice voting, the final result of the recount was delayed until July 6th. Mr. Andre said he was the presumptive nominee on June 12th and should have received a payment for the general election soon after the primary. He stated his opponent in the general election is a MCEA candidate and has received funds and this put him at a huge disadvantage as he is unable to campaign without funds.

Mr. Lee asked if the staff had taken any steps to be prepared to pay the eventual winner after the recount. Mr. Wayne said the staff requested that the Office of the Controller cut two checks – one for Mr. Andre and one for his opponent, Jacob Imes – and hold those checks until the result of the recount was known. The Controller denied that request.

Mr. Nass inquired about the other candidate, Kathy Javner, who did not receive a payment for the general election. Mr. Wayne explained that Ms. Javner was also in a close primary election and the staff was waiting to see if that race would also be subject to a recount. As a result of an administrative error by the staff, Ms. Javner did not receive the initial payment.

Mr. Lee asked Ms. Gardiner if the pending litigation regarding the release of Maine Clean Election Funds could have an impact on Mr. Andre and Ms. Javner. Ms. Gardiner said if the court determines that the Governor did not have discretion to withhold distributions required to be made by statute, that decision could cover this situation because the distributions to Mr. Andre and Ms. Javner are required by statute. She said it was also possible there could be a

declaratory judgment that the distribution of funds was required but no injunction ordering the Governor to make the distributions. There have been prior court decisions stating the courts may not issue an injunction to the Governor.

Joshua Tardy, Esq., appeared before the Commission on behalf of the Senate Republican caucus. Mr. Tardy said the Commission could reasonably decide that the funds available to candidates are insufficient because they are unavailable for distribution, thereby allowing candidates to raise private funds for their campaigns. At some point the Commission will have to decide this issue but it does not need to decide today.

Robert Howe, on behalf of the Maine Citizens for Clean Elections (MCCE), appeared before the Commission. Mr. Howe explained the court case filed by MCCE was intended to address the issue that supplemental payments were not being distributed because of the Governor's refusal to sign the financial orders necessary to give the Commission access to the funds. MCCE's lawsuit did not address the issue of the negative allocation for fiscal year 2019, hoping that the Legislature would fix that problem. MCCE's position is that the law requires the Commission to find that there are insufficient funds in the Maine Clean Election Fund in order to allow MCEA candidates to raise private contributions. The Fund does have sufficient funds and the current situation does not change that. Mr. Howe said he agrees with Mr. Tardy that a decision should not be made today.

Jayne Crosby Giles, the Republican candidate for Senate District 11, appeared before the Commission. Ms. Giles expressed her concern that certain candidates had more access to information about the status of the discussions regarding clean election funding in the Legislature and, therefore, had a greater sense of urgency and collected more additional qualifying contributions than those candidates who did not have access to the same information. The result is that in some races there is a significant disparity between the clean election funding received by the candidates. She said her race was an example of that. Her opponent is currently the House Majority Leader and was eligible for all eight levels of supplemental payments, while Ms. Giles was eligible for three. Since the reduced supplemental payments have already been distributed to candidates, Ms. Giles said candidates should be allowed to raise private contributions in order to close the funding gap. Ms. Giles also said the fact that the Commission cannot access the funds means that there are insufficient funds and MCEA candidates should be able to raise private contributions.

Shawn Roderick, on behalf of the Senate Republicans, appeared before the Commission. Mr. Roderick said there are four replacement Senate Republican candidates who are running as MCEA candidates without knowing if the funds will be available. He has advised the candidates to follow the rules for being a MCEA candidate with respect to seed money contributions and qualifying contributions, and if there is no fix to the negative allocation issue, they can switch to traditionally funded candidates.

Second Executive Session

Mr. Lee moved that pursuant to Title 1 of the Maine Revised Statutes, section 405(4), the Commission go into executive session pursuant to Title 1, section 405(6)(E) and Chapter 1, section 5(2) of the Commission rules to consult with the Commission's counsel concerning pending or contemplated litigation. Mr. Nass seconded. The motion passed (4-0).

Mr. Lee moved to come out of Executive Session. Ms. Lowry seconded. The motion passed (4-0).

Mr. Nass made a motion to adjourn. Mr. Pattershall seconded. The motion passed (4-0).

The meeting adjourned at 12:30 p.m.

Respectfully submitted,
/s/ Jonathan Wayne
Jonathan Wayne, Executive Director