



Minutes of the October 31, 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 9:02 a.m.

1. Ratification of Minutes of August 16, August 29 and September 26, 2018 Meetings

Mr. Lee moved to adopt the minutes of the August 16th, August 29th, and September 26th meetings. Mr. Pattershall seconded. Mr. Nass suggested changing the word “of” to “over” in first paragraph on page 3 of the August 16th minutes. Mr. Lee accepted a friendly amendment to his motion. The other Commissioners agreed. Mr. Lee restated the motion: To adopt the minutes of all three meetings as amended. The motion passed (4-0).

2. Request to Rebut Presumption of Independent Expenditure – New England Citizens for Right to Work

Mr. Wayne said this issue arose last week. It relates to a mailing done by New England Citizens for Right to Work (NECRW), which advocates for the passage of right to work laws. NECRW is based in New Hampshire. The question presented is whether the mailing is an independent expenditure for which NECRW should have filed a report. The mailing is presumed to be an independent expenditure if it is disseminated after Labor Day and names or depicts a clearly identified candidate. The person who made the expenditure may attempt to rebut the presumption by filing a statement with the Commission stating the expenditure was not made for the purpose of influencing the election and submitting evidence to support the statement. NECRW filed rebuttal statements on October 23rd. Mr. Wayne said that he could only recall three examples of rebuttal statements being filed with the Commission in the 15 years this law has been in place.

Ms. Lowry asked whether, if NECRW was not successful in rebutting the presumption, the staff would proceed with its usual late-filing penalty procedures. Mr. Wayne said that, barring any contrary direction from the Commission, this would be handled in the same way any late-filed independent expenditure report would be handled.

Mr. Lee said the threshold question is whether the communication fits within the definition of “voter guide” and is, therefore, not an independent expenditure, regardless of the amount spent per candidate. Ms. Gardiner agreed.

Mr. Lee clarified that the 48-hour period for submitting a rebuttal statement with the Commission begins at the time the expenditure for the communication is made, not the time or date the communication is disseminated. He asked whether the broad definition of “expenditure” in the Commission’s rules would apply in this instance. Mr. Wayne confirmed that it would. However, he cautioned that political activists and candidates may not be thinking that placing an order would trigger a reporting requirement.

Mr. Lee asked whether, if a rebuttal statement is not filed within the 48-hour period, the presumption becomes irrebuttable. Ms. Gardiner confirmed the Commission determined the presumption would be irrebuttable under those circumstances during its deliberations on the matter of a mailing by the New England Opportunity Project during the 2016 general election.

In response to a question posed by Mr. Pattershall, Ms. Gardiner said the statute creates a presumption. The person making the independent expenditure may choose to rebut the presumption or the person could also simply accept the presumption and file a report if one is required. Mr. Pattershall then asked whether the statute is being interpreted to mean that the only way for a communication, which did not fit within one of the exclusions, to avoid being subject to the independent expenditure statute is for the person to submit a rebuttal statement within 48 hours and that the Commission cannot look at the totality of the circumstances to make a determination. Ms. Gardiner and Mr. Lee confirmed that is how the statute was interpreted in the recent case involving the New England Opportunity Project.

McKayne Boedeker, the executive director of NECRW, appeared before the Commission. He said the purpose of NECRW’s candidate survey program is to educate supporters and the general public about the importance of the right to work issue and inform them about their candidates’ positions on the issue and to encourage NECRW’s members to lobby their candidates. He said that was the sole purpose of the mailing. He said he was requesting the Commission find that the

mailings fall under the exclusion for voter guides or, in the alternative, to find that the mailings are not independent expenditures because their purpose was not to influence an election.

The Commissioners discussed the sequence that its review should take. Mr. Lee said the Commission should first determine whether the voter guide exclusion would apply to the mailings. If it does, the matter is settled. If not, the Commission should then take up the question of the timing of the expenditure and the rebuttal statement.

Mr. Lee said it struck him that the majority of the communication was not a voter guide but was primarily advocating in support of an issue. He asked Mr. Boedeker to explain how the communication could fit within the statutory exclusion for voter guides.

Mr. Boedeker said the communication contained the candidates' responses and the survey itself.

Mr. Lee pointed to several statements in the communication which he said did not appear to be candidate responses as much as advocacy for a particular position. He said when looking at the whole communication, it seemed that most of it was advocating in support of an issue rather than informing the reader about the candidates' responses.

Mr. Boedeker said that many voters who are not engaged in the political process might not know what right to work is and need an explanation.

Mr. Pattershall pointed out that NECRW took the effort to submit the rebuttal statements and voluntarily included the disclaimer statement on the communication and asked Mr. Boedeker why the group decided not to file an independent expenditure report since it would have been about the same level of effort.

Mr. Boedeker said NECRW wants to continue to engage in grass roots activity about this issue and is seeking some clarity about whether it was necessary to go through the reporting process.

Mr. Lee said the first question before the Commission was whether the communication qualified as a voter guide under the statutory definition: Does the communication consist primarily of candidates' responses to surveys and questionnaires and contain no advocacy for or against any candidate? He said he did not think the communication passed the first prong of the test because it is not primarily a collation of candidates' responses to surveys or questionnaires. It is a strong advocacy piece for a particular position. If the Commissioners agree with him on that point, then the communication does not fit within the voter guide exclusion. If not, then the next step is to consider whether the communication advocates for or against a candidate.

Ms. Lowry said she also did not think the communication was a voter guide because it did not primarily consist of candidates' responses to questionnaires and surveys.

Mr. Pattershall said he thought the communication did meet the criteria for a voter guide. He said the entire thrust of the communication was to tell voters what the positions of the candidates were on the issue based on the survey results and to encourage voters to lobby their candidates to support right to work laws.

Mr. Nass said the Legislature created this exception for voter guides but there is little guidance on how to determine if something is a voter guide. He was reluctant to try to force these kinds of communications into a formula. Mr. Nass said he favored issuing an advisory opinion to provide some guidance to this group and others going forward.

Mr. Lee said the analysis is a balancing test and to be a voter guide the communication must be primarily candidates' responses to surveys and that meant that more than 50% of the communication had to be about those responses. This communication was primarily arguing for a position on the right to work issue and drew upon academic studies and job reports from other states and statements about the impact of right to work laws. In his view, most of the contents were not based on the results of candidate surveys. The candidates' responses were almost incidental. Mr. Lee said someone could disseminate a treatise on a particular issue and tack on some candidate survey results and call it a voter guide. He said there is nothing stopping a person from doing that, but if they do, it is not really a voter guide and they should file a report if one is necessary.

Mr. Pattershall said the communication does not advocate for the election or defeat of a candidate. It encouraged voters to contact candidates and to advocate for the candidates' support for the issue.

Ms. Lowry said she viewed the communication to be advocating for or against candidates. Certain candidates are featured in a more positive light because of their support for right to work laws.

Mr. Nass said he considered the communications to be voter guides.

Mr. Lee asked Ms. Gardiner what the next steps would be if the Commission's vote was deadlocked on the issue of whether the communication was a voter guide. Ms. Gardiner responded that may be as far as the Commission could go and the question would be unresolved.

If the Commission was deadlocked on the issue of whether the communication met the criteria for an exclusion, there would be no finding of a violation because there would be no determination that there was any reportable activity.

Mr. Lee asked if the analysis of whether a communication met the criteria for an exclusion should precede the rebuttal presumption analysis. Ms. Gardiner said the exclusions would apply whether the communication contains express advocacy (21-A M.R.S. § 1019-B(1)(A)) or whether the communication was disseminated after Labor Day and named a clearly identified candidate without any express advocacy (21-A M.R.S. § 1019-B(1)(B)). If the communication met the criteria for an exclusion, it would be removed from further analysis.

Mr. Lee moved that the voter guide exclusion under the independent expenditure statute does not apply because the mailing did not consist primarily of candidates' responses to surveys and questionnaires. Ms. Lowry seconded.

The motion failed. Mr. Lee and Ms. Lowry in favor; Mr. Nass and Mr. Pattershall opposed.

Mr. Pattershall moved that the exclusion in § 1019-B(5)(D) applies and removes the mailing from the definition of independent expenditure because it does not advocate for or against any candidate. Mr. Nass seconded.

Mr. Pattershall said the communication included postcards to send to candidates, encouraged voters to lobby their candidates, and did not have any explicitly negative message about any candidates.

The motion passed (3-1; Ms. Lowry opposed).

Mr. Lee said that to be covered by the exclusion, a communication had to meet both prongs and the Commission found that this communication only met one.

Ms. Gardiner said since the Commission is deadlocked on the question of whether the communication is a voter guide, it does not seem to make sense to move on to a rebuttable presumption analysis.

Mr. Lee asked if the person making the expenditure has the burden to show that a communication is covered by an exclusion. Ms. Gardiner responded that there is nothing in the language of the statutes or rules that indicates where the burden lies to show if an exclusion applies. In contrast, the independent expenditure statute is clear that the person attempting to

rebut the presumption has the burden of proof to show the expenditure was not made to influence an election.

The Commissioners discussed how the rebuttable presumption provision and the exclusions provision of the independent expenditure statute interacted with each other and what the potential impact of a deadlocked vote would mean in determining whether a communication should be treated as an independent expenditure. They agreed it would be beneficial if Commission counsel could look further into the issue and provide the Commission with her assessment at a later meeting.

Mr. Pattershall said that if, as a result of counsel's research, it may be possible that there are additional steps for the Commission to take in determining whether NECRW has to file a report or whether the NECRW successfully rebutted the presumption. However, for the purpose of calculating any potential penalty, the clock would stop as of the date of this meeting. The other Commissioners agreed.

Mr. Wayne said the staff had raised a question about whether NECRW complied with the PAC registration requirement. Based on the Commission's discussion and vote on whether the communication contained advocacy for or against any candidate, the staff will not be pursuing further inquiry into that matter.

Mr. Nass moved to adjourn. Mr. Pattershall seconded. The motion passed.

The meeting adjourned at 11:33 a.m.

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