



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

Approved, as amended: December 8, 2016

Minutes of the November 7, 2016, Special Meeting of the  
Commission on Governmental Ethics and Election Practices  
45 Memorial Circle, Augusta, Maine

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

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

Commissioner Matheson convened the meeting at 9:02 a.m.

The Commission considered the following items:

**1. Request by the Maine Democratic Party to Investigate Communications in House District 132**

Mr. Wayne said the Maine Democratic Party (the Party) had filed a request for investigation regarding certain communications involving a candidate in House District 132. Dr. David Edsall is a first-time Maine Clean Election Act candidate for House District 132. John Linnehan, a candidate for municipal office in Ellsworth, contacted Dr. Edsall about making an endorsement of Mr. Linnehan's candidacy and his tax plan. Dr. Edsall contacted Commission staff for guidance on whether or not he could do an endorsement. After Dr. Edsall agreed to do the endorsement, Mr. Linnehan paid for a mailer that went out to all households in Ellsworth and two ads in the Ellsworth American that included a picture of the two of them with Dr. Edsall wearing his campaign t-shirt. The Party asked the Commission to make a determination on whether these advertisements were an improper in-kind contribution to Dr. Edsall.

Katherine Knox, Esq., representing the Maine Democratic Party, appeared before the Commission. Ms. Knox said the Party contends that, because Dr. Edsall is wearing a campaign t-shirt in the picture, these ads and the mailer are promotions of Dr. Edsall's candidacy. She said in 2010 the Commission provided guidance to candidates about potential involvement in other candidates' campaigns. Ms. Knox said her understanding was that it was permissible for one candidate to endorse another as long as there was no mention of the candidacy of the endorser and no statements to promote the endorser's candidacy. She said the concern in this case is that the mailer and the advertisements provided a benefit to Dr. Edsall because they show a picture of Dr. Edsall wearing his campaign t-shirt, which clearly mentions his candidacy. Ms. Knox provided a copy of a

Facebook post in which Dr. Edsall refers to the t-shirt as his campaign uniform. She said there was apparently some discussion between the two campaigns about the communications but she did not have any facts about whether the final versions of the mailer or ads were approved by Dr. Edsall. Ms. Knox said these communications were disseminated in the rebuttable presumption period, which means any expenditure on a communication that names or depicts a clearly identified candidate after Labor Day is an independent expenditure unless a rebuttal statement is filed that it was not made with an intention to influence the election. She said that, as far as she knew, no such statement has been made.

Holly Lusk, Esq., counsel for Dr. Edsall, appeared before the Commission. Ms. Lusk noted there was an error in the complaint filed by the Party, which alleged Mr. Linnehan was wearing the t-shirt in question but it was actually Dr. Edsall wearing the t-shirt. She said these advertisements were not made to influence Dr. Edsall's election. There were discussions between Dr. Edsall and Mr. Linnehan regarding the communications, but Dr. Edsall only saw one side of the mailer and he did not review the newspaper ads. Ms. Lusk said this was simply a request from Mr. Linnehan for an endorsement from Dr. Edsall. She said Dr. Edsall followed up with Commission staff on whether he could do an endorsement and then followed that advice.

Mr. Lee asked for the dates of the newspaper ads and the mailer. Ms. Lusk said the mailer went out on October 18, the first newspaper ad ran on October 20 and the second newspaper ad ran on October 27.

Dr. David Edsall appeared before the Commission. Mr. Nass asked if this was his first time as a candidate. Dr. Edsall said it was. Mr. Nass asked if Dr. Edsall was aware that Mr. Linnehan had been a candidate multiple times. Dr. Edsall said he was aware that Mr. Linnehan had been a placeholder candidate for this seat.

Ms. Matheson asked what Dr. Edsall had seen and reviewed regarding the communications. Dr. Edsall said he considers this a serious matter, which is why he contacted the Commission before agreeing to provide this endorsement. He said he had seen early versions of the communications and had requested several items be removed because he thought they did not comply with the staff's advice. When he saw the final proofs of the mailer, Dr. Edsall said he had not thought the t-shirt

was a problem and did not believe it was prominent enough to make a difference. He said he did not see the newspaper ads and he only saw one side of the mailer.

Ms. Matheson asked who received the mailers. Ms. Lusk said the mailer went out to 4,114 homes in Ellsworth.

Mr. Lee asked Dr. Edsall to provide a timeline for his communications with Mr. Linnehan. Dr. Edsall said Mr. Linnehan had contacted him about an endorsement for his tax plan. There was no further contact until a meet and greet event held at the Hancock Republican Party headquarters in early October. At that event, Mr. Linnehan suggested they have their picture taken. It did not occur to Dr. Edsall that he was wearing his campaign t-shirt. Dr. Edsall said there were several calls about the communications and he had received a mock-up, which he approved after requesting several changes. He said he was not aware there were two sides to the mailer nor was he aware that the newspaper ads were different. Mr. Lee asked what was different in the mailer and the newspaper ads. Dr. Edsall said he remembered looking at the newspaper ad and thinking it was different. There was another picture of Mr. Linnehan and information about the meet and greet for Mr. Linnehan.

Ms. Matheson asked why he thought it was important to do this endorsement. Dr. Edsall said he did not think it was important; Mr. Linnehan asked him to do the endorsement and he felt uncomfortable saying no. Ms. Matheson asked if he was well-known in the area. Dr. Edsall said he was known in some circles in the Ellsworth area. He said he started campaigning in July and after he put up his signs, he noticed he had gained significant name recognition by the beginning of October.

Mr. Nass asked if he knew Mr. Linnehan before the campaign. Dr. Edsall said he had never met Mr. Linnehan prior to the State convention.

Mr. Lee asked if there were any other pictures taken of Mr. Linnehan and him. Dr. Edsall said other pictures were taken but not for advertising purposes. Mr. Lee asked what reason was given for taking the picture. Dr. Edsall said he understood it was to be used to support Mr. Linnehan's tax plan. He asked Mr. Linnehan for a copy of the tax plan and after reading it, he agreed to support it.

Mr. Pattershall asked if Dr. Edsall had talked with Commission staff about clothing. Dr. Edsall said he did not and it never occurred to him to remove the t-shirt for the picture.

Ms. Lowry explained that this is a request for investigation and they were not making a final determination in this matter. Mr. Nass said he would not support further investigation because of a t-shirt in a picture. Ms. Gardiner said they were not precluded from taking final action today if they felt they had sufficient facts. Mr. Lee asked if they would need the consent of the parties to make a final determination. Ms. Gardiner said there is nothing in the statute that suggests they need to obtain the parties consent if they feel they have sufficient facts to make a determination.

John Linnehan participated via telephone. Ms. Matheson confirmed Mr. Linnehan is currently running for city council and asked if he had had any other political activity in this election cycle. Mr. Linnehan said he had been asked to serve as a placeholder candidate for the Republican Party in House District 132 in the primary election. Ms. Matheson asked about his past political experience. Mr. Linnehan said he had run for State Senate about ten years ago. Ms. Matheson asked if he had been successful in that campaign. Mr. Linnehan said he was not.

Ms. Matheson asked for a timeline of the events in this matter. Mr. Linnehan said he is a one-issue candidate for Ellsworth City Council, which is to reduce property taxes in Ellsworth. He said one of Dr. Edsall's issues is tax reduction so he asked him for an endorsement to use in Mr. Linnehan's ads. Ms. Matheson asked how Dr. Edsall responded. Mr. Linnehan said Dr. Edsall asked to see his tax plan and then told him he would support it. Ms. Matheson asked if he had shared a first draft of the postcard with Dr. Edsall. Mr. Linnehan said he did and then he waited for Dr. Edsall to give his approval. Ms. Matheson asked if Dr. Edsall had requested some changes. Mr. Linnehan said he could not recall. Ms. Lowry said that Dr. Edsall had testified that he had requested removal of references to his candidacy. Mr. Linnehan agreed Dr. Edsall had requested that removal. Ms. Lowry said Dr. Edsall had also asked for removal of references to him as Dr. Dave. Mr. Linnehan said he made whatever changes Dr. Edsall requested. Ms. Matheson asked if he knew why Dr. Edsall had requested those changes. Mr. Linnehan said he assumed it was because of what the Commission staff had told him to do. Ms. Matheson asked if he had worked with or for any other campaigns for local or state office. Mr. Linnehan said he could not remember and he is not very active politically.

Mr. Lee asked about the circumstances regarding the taking of the picture of Mr. Linnehan and Dr. Edsall used in the mailer and newspaper ads. Mr. Linnehan said he believed the picture was taken at the Hancock County Republican Committee open house. He said he did not recall if he had asked Dr. Edsall for an endorsement before the open house. Mr. Lee asked what the purpose of having their picture taken was. Mr. Linnehan said pictures were being taken and he suggested they have a picture taken. He did not think he had asked for an endorsement at that point. Mr. Lee asked when he asked for Dr. Edsall's endorsement. Mr. Linnehan said he was not sure of the timeframe but he believed it was approximately at the same time he was preparing the campaign literature.

Ms. Matheson asked if he had approached anyone else for an endorsement. Mr. Linnehan said he had not. Ms. Matheson asked why he sought Dr. Edsall's endorsement. Mr. Linnehan said Dr. Edsall is running to be the State Representative for the same town where he is running for city council. Ms. Matheson asked if the idea was to promote both campaigns in one mailer. Mr. Linnehan said the idea was to promote his campaign. He said Dr. Edsall is for lowering taxes and is running to represent his home town.

Mr. Nass asked if Mr. Linnehan was aware Dr. Edsall is an officer in a lakefront homeowners' association with approximately 300 members. Mr. Linnehan said he was aware of this because it came up during their discussion of his tax plan. Mr. Nass said lakefront owners would likely be supportive of Mr. Linnehan's tax position. Mr. Linnehan said he assumed any property owner in Ellsworth would be supportive of his plan. Mr. Nass said he believed this endorsement was all about Dr. Edsall's membership in the lakefront homeowners association.

Ms. Knox said there is no evidence and they do not mean to imply there was any intent to surreptitiously promote a candidacy in this case. She said she counsels her clients based on the 2010 guidance, which has nothing to do with intent but whether there was some sort of promotion or mention of a candidacy. Ms. Knox said she has specifically counseled at least three clients in this cycle to not participate in endorsements.

Mr. Nass said he does not see how a campaign t-shirt in a picture is promoting a candidacy but the production of talking points in the Progressive Maine PAC case is not promotion of a candidacy. Ms. Knox said the standards in the two cases are completely unrelated. She said the Commission

guidance from 2010 relates to endorsement of candidates; the Progressive Maine case had nothing to do with the endorsement of a candidate.

In response to a question from Mr. Lee, Mr. Wayne said candidates sometimes unintentionally receive something of value that puts their campaign out of compliance. The Commission staff routinely advises candidates to pay for the good or service as a remedy. If the Commission finds that Dr. Edsall received an in-kind contribution, they could ask Dr. Edsall to pay a percentage of the advertising costs with his MCEA funds as a remedy to bring his campaign into compliance.

Mr. Lee said there was no question in his mind that Dr. Edsall had no intention to violate campaign finance law. He called the Commission staff with his questions and he acted in good faith in following the staff's advice. The problem is the picture of him wearing a t-shirt that clearly identifies his candidacy on a mailer that went out to over 4000 households in his district. He said Dr. Edsall's campaign clearly received a benefit from the mailer. He believed it would be an equitable solution for Dr. Edsall to reimburse Mr. Linnehan some portion of the cost of the mailer. Ms. Gardiner said there is a provision in the Rules, Chapter 1, Section 7(11) that contemplates how to handle shared expenditures among candidates.

Ms. Matheson agreed with Mr. Lee that there was no intentional violation on Dr. Edsall's part, but she did think that Dr. Edsall did receive a benefit from the communications. Mr. Pattershall said that is making this a strict liability issue, whereas the statute includes intent as a factor. He said given the definition of contribution, the question is whether this advertisement was made for the purpose of influencing the nomination or election of Dr. Edsall. He does not believe there was any intent to influence his election. In addition, Mr. Pattershall said that, according to statute, any expenditure made by any person in cooperation, consultation or in concert with or at the request or suggestion of a candidate is deemed to be a contribution to that candidate. Dr. Edsall did not ask for these communications to be made. Mr. Linnehan approached him for an endorsement. Mr. Pattershall said he agreed that Dr. Edsall's campaign received a benefit but questioned whether it should be considered a contribution. He said there has to be some intent for the communications to benefit Dr. Edsall; however, it is clear to him that the purpose was to benefit Mr. Linnehan's election, not Dr. Edsall's.

In response to a question from Mr. Lee, Ms. Gardiner said they should avoid using a subjective standard to determine purpose. A great effort was made to draft campaign finance laws to use an objective test when determining whether a statutory requirement was met or if a violation may have occurred. If the communications in this case were viewed as independent expenditures, the Commission would apply an objective test to determine whether the communications were made within the presumption period before an election and named or depicted a clearly identified candidate. If so, the expenditure is presumed to be for the purpose of influencing the election regardless of the spender's intent, unless the spender can successfully rebut the presumption. She said because there was some coordination between these two candidates, the expenditure should not be considered an independent expenditure. While this case does not fit into the independent expenditure statute, that statute is an example of how an objective test is applied to avoid trying to guess what was in the spender's mind when the expenditure was made. She said the endorsement guidance from 2010 also tries to establish an objective test. If the communication does not mention the endorser's candidacy and does not contain promotional or supportive statements regarding the endorser, then it meets the objective test and is not a contribution. She cautioned them to not read "purpose" to suggest that it means what is in the mind of the person paying for the communication because that goes down a slippery slope in the First Amendment area and the campaign finance area. Ms. Gardiner said they may want to do some rulemaking or suggest clarification to the statute to make future cases easier to deal with. Mr. Lee asked if the Commission advice in this regard has ever been adopted as a rule. Ms. Gardiner said it had not.

Ms. Lowry said she is satisfied there was no intentional violation in this case and Dr. Edsall paid attention to the staff guidance and tried to follow it. The fact that Dr. Edsall was wearing the campaign t-shirt was overlooked. She asked Dr. Edsall how much he had left in MCEA funds. Dr. Edsall said he had approximately \$700.

Dr. Edsall expressed concern about professional repercussions if he is found to have made an ethical violation. In response to Dr. Edsall's concern, Ms. Gardiner said the Commission's official name, the Commission on Governmental Ethics and Election Practices, is often shortened to the Maine Ethics Commission, and that can create the misimpression about the role of the Commission and the scope of its authority. In the medical arena, "ethics" is clearly defined. However, in the context of the Commission's authority, the term "ethics" refers to the Commission's role in

providing advice to Legislators on matters of legislative ethics, which is governed by a separate statute and is distinct from the campaign finance statutes. She assured him that the matter before the Commission is not an ethical violation; it is a matter of campaign finance law. Dr. Edsall said that was not how the newspapers portray this matter. Ms. Lowry asked if it was fair to characterize Ms. Gardiner's advice as reference to their role as administering campaign finance law rather than making an ethical determination. Ms. Gardiner agreed.

Mr. Lee said if the 2010 guidance had been adopted as a rule, this case would be an easier matter to decide. He said if Dr. Edsall reimbursed Mr. Linnehan with MCEA funds for the benefit his campaign received, they could dismiss the investigation and there would no finding of a violation. Ms. Lusk said she would need to consult with her client before making any decision.

Ms. Lowry said this matter is somewhat different from the usual cases that involve the reduction of a penalty. In this case, the Commission may be trying to monetize the benefit that Dr. Edsall received from the mailer. She said the Commission should consider that Dr. Edsall had no intent to violate the law but that his campaign may have received a benefit that should be accounted for. Ms. Lowry said she would be comfortable with a \$250 reimbursement from Dr. Edsall's campaign to Mr. Linnehan.

Mr. Lee said there are four possible options today: no investigation, order an investigation, make a finding of a violation, or they could dismiss this if some reimbursement were done with MCEA funds. Ms. Lowry asked if he was suggesting they did not have to set a monetary amount. Mr. Lee said that would be part of option 4, but he would not call this a violation.

Ms. Lusk said she believed the law is clear. She said the Commission needed to evaluate what was the purpose of sending a particular piece of campaign literature and in this case, the purpose of the literature was not to benefit Dr. Edsall's campaign. Ms. Lusk said it would come down to how the Commission handles this so it is not harmful to Dr. Edsall's professional reputation.

Mr. Lee said the argument being made by Mr. Pattershall and Ms. Lusk is all about intent. It appears that the purpose here is to elect Mr. Linnehan to office, not Dr. Edsall. He asked how they are supposed to view this as a contribution to his campaign when they have to work around the phrase, "made for the purpose of." Ms. Knox said part of the problem here was that the definitions



and the guidance do not fit together neatly. She said that while she understood Mr. Pattershall's comments, the problem was if they only look at the definition of contribution in isolation and do not also look at the definition of expenditure, it could create a loophole for MCEA candidates to obtain a significant benefit through coordination with others on expenditures for communications that are ostensibly for some other purpose, such as supporting a ballot question, but which clearly depict the candidate in a very positive light. Ms. Knox said the picture in the mailer clearly depicts a candidate and under the rules this should have been reported as an independent expenditure or Mr. Linnehan should have submitted a rebuttal of the presumption. Mr. Pattershall agreed and said he was leaning toward viewing this as an independent expenditure. He did not see any evidence that Dr. Edsall coordinated this expenditure with Mr. Linnehan. Ms. Knox said she does not believe nor is there any evidence that Dr. Edsall actively solicited this spending on behalf of his campaign. However, there were conversations about the advertisements and there was a benefit to Dr. Edsall's campaign which should be accounted for in some way, either as an independent expenditure or a contribution to Dr. Edsall's campaign. She said she was empathetic to Dr. Edsall's professional concerns, but she does not believe that should be a consideration in their deliberations and deciding upon a remedy. The outcome should be fair and consistent regardless of a person's profession.

Mr. Pattershall asked if she believed Dr. Edsall's t-shirt was direct advocacy. Ms. Knox said under the rebuttal presumption, the standard get tighter as the election gets closer and the standard is whether the communication names or depicts a clearly identified candidate. Ms. Matheson said this was the basis for the 2010 guidance on endorsements. Ms. Knox agreed and said if this had happened in July, that standard would not apply.

Mr. Lee asked Ms. Gardiner if this could be viewed as an independent expenditure by Mr. Linnehan because the communications between the two candidates were for the purpose of supporting Mr. Linnehan's election and the benefit to Dr. Edsall's candidacy was a by-product. Ms. Gardiner said this case does not fit within the independent expenditure statute because of the consultation between the candidates. She said she believed this case fits better under Chapter 1, Section 7(11) of the Rules as a shared expenditure or an inadvertent in-kind contribution. Ms. Matheson said she was inclined to view this as a shared expense. She said approximately \$3,000 was spent on the mailer and two newspaper ads and if Dr. Edsall filed an amended campaign finance report to report

payment of 10% of the cost, she would support no further investigation and no finding of fault or violation. Mr. Lee said he supported Ms. Matheson's suggested resolution.

Mr. Lee made a motion that, provided Dr. Edsall amends his campaign finance report to include a \$300 payment to Mr. Linnehan based on the publications that took place on October 18, 20 and 27, there be no further investigation. Ms. Lowry seconded the motion and said if Dr. Edsall does not file an amended report, they would reconsider whether further investigation would be required. Ms. Lusk asked if the minutes would reflect that there was a finding of no wrongdoing against Dr. Edsall. Mr. Lee said if they make the decision to not conduct an investigation, it means there are not sufficient grounds to conduct an investigation. Motion passed (4-1; Mr. Pattershall opposed).

## **2. Request by Maine Democratic Party to Investigate Joint Postcard Mailing**

Mr. Wayne said the Maine Democratic Party on Saturday filed a request for investigation into a postcard mailing that featured Senator Andre Cushing and David Hagan, a candidate for House District 101. The Maine Democratic Party raised the following issues: there is no disclosure of who paid and authorized the mailer and, if Senator Cushing paid for the mailing, it was a contribution to Mr. Hagan's campaign. Mr. Wayne said he had received an email from Senator Cushing informing him that the costs were split between Mr. Hagan and himself and the costs were reported in 24-Hour Reports filed by both candidates. Mr. Wayne said Senator Cushing did acknowledge the disclosure was missing and said he would follow-up with the vendor.

Katherine Knox, Esq., representing the Maine Democratic Party, appeared before the Commission. She said the complaint was filed because of the lack of a disclosure statement and the allocation of cost; the second issue regarding who paid for the mailer has been resolved.

Joshua Tardy, Esq., counsel for Senator Cushing and Mr. Hagan, appeared before the Commission. Mr. Tardy agreed the disclosure statement was missing but said this is a common mistake. He said this is a sophisticated and experienced vendor, who billed both Senator Cushing and Mr. Hagan for the mailing but simply failed to add the disclosure statement.

Ms. Matheson asked if the candidates had seen a proof for the mailer. Mr. Tardy said a proof was circulated but at the same time the vendor sent an email to both campaigns about how to split the

costs. He said at this time of year, there are a lot of political mailings and he did not believe one postcard without a disclosure statement was harmful to the public. Ms. Lowry said the email from the vendor to the candidates about how to split the costs is more about billing than disclosure. Mr. Tardy said he reviews a lot of proofs and mistakes happen.

Ms. Knox agreed these mistakes do happen but she believed the person paying for the mailing should be held accountable for the mistake. She said one of the first things she looks for when reviewing a mailer is the disclosure statement and, while the vendors can be very helpful, it is the responsibility of the person paying for the mailing to make sure the mailing is correct. Ms. Knox said review of the disclosure statement is more critical now that there is the requirement to list the top three funders in the disclaimer statement.

Mr. Lee asked if staff required additional information before making a recommendation on this case. Mr. Wayne said this complaint was just filed and the Commissioners may want to allow the candidates a chance to respond. He said he believed staff would make a recommendation to find a violation and, based on past violations, the assessed penalties have ranged from no penalty to \$250. Mr. Wayne said the maximum penalty used to be \$5,000, but the citizen initiative increased the penalty to 100% of the cost of expenditure. Mr. Lee asked how frequently this type of violation comes before the Commission. Mr. Wayne said, depending on the election year, there have been up to 3 complaints brought before the Commission.

Mr. Lee asked if Ms. Knox and Mr. Tardy believed the Commissioners have enough information to make a decision in this matter. Mr. Tardy said that if the Commission was going to find a violation, he believed the two candidates should have an opportunity to appear before the Commission. In response to a question from Mr. Lee, Ms. Gardiner said they could vote to find a violation but defer imposition of a penalty to another meeting or reschedule the entire matter to be heard at subsequent meeting.

Mr. Pattershall said the statute allows an error by the printer to be taken into consideration when deciding on a penalty. He said he would be in favor of finding a violation and a modest penalty. Mr. Lee asked about allowing the candidates the opportunity to appear before the Commission. Mr. Pattershall said they could reschedule the matter to another meeting. Mr. Tardy said he believed both candidates would accept responsibility for the error, but Mr. Hagan is a first-time candidate

and might want an opportunity to appear before the Commission. Ms. Matheson said it sounded like they should table this matter.

Mr. Lee made a motion to postpone this matter until the December 8<sup>th</sup> meeting to allow an opportunity for the candidates to appear or file a response. Mr. Pattershall seconded the motion. Motion passed (5-0).

Mr. Wayne said he had received a request for investigation filed by the Senate Republican caucus regarding a television ad by the Maine Democratic Party that does not contain appropriate disclosure. Ms. Knox said she could not respond because she had not even seen the complaint. Ms. Gardiner said the Commission has an obligation to address a complaint within two business days unless the parties agree to postpone. The parties agreed to have this matter heard by the Commission at the December 8<sup>th</sup> meeting.

Ms. Lowry made a motion, seconded by Mr. Nass, to adjourn. The motion passed. The meeting adjourned at 11:58 a.m.

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