



Minutes of the June 24, 2020, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

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

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

Commissioner Lee convened the meeting at 9:12 a.m. The meeting was conducted by Zoom videoconferencing and livestreamed via YouTube.

The Commission considered the following items:

1. Ratification of Minutes of May 22, 2020 Meeting

Mr. Nass made a motion to accept the minutes as drafted. Ms. Lowry seconded the motion. Mr. Lee made a motion to amend the minutes noting there were three amendments to be made on pages 1 and 6. Mr. Nass seconded the motion. Motion to accept the amendments to the minutes passed 3-0. Motion to accept the amended minutes passed 3-0.

2. Request to Investigate the Gideon Leadership PAC

Ms. Lowry said she made the decision to recuse herself from consideration of the matter involving the Gideon Leadership PAC on the day before the meeting. She wanted to state the reasons for her decision because it was a reversal from her previous decision not to recuse herself and because her recusal would likely result in postponing any consideration of the matter because the Commission would lack a quorum to hear the matter. Regarding her previous decision not to recuse herself, she stated that she contributed to the Gideon campaign for U.S. Senate, but she did not have a business or close personal relationship with Sara Gideon, whom she has never met. She said because the statute governing conflicts of interest applicable to the Commissioners expressly provided that making a contribution did not create the type of close political relationship that would constitute a conflict of interest, she had decided last month that she could participate in this matter. However, when she read the materials for this meeting, she noted that the Gideon Leadership PAC was represented by Benjamin Grant, Esq., who was a candidate running for state representative in her district. She stated she has met Mr. Grant and was supporting his campaign with a small monthly

contribution. She said that, while this may not constitute a close political relationship with Mr. Grant or his client, the Gideon Leadership PAC, she was concerned that it gave the appearance of a conflict of interest. Therefore, she was reversing her previous decision and was recusing herself from consideration of this matter.

Mr. Lee said Ms. Lowry's recusal raised the issue of the vacancies on the Commission and the impact these vacancies have on the Commission's ability to hear matters in a timely manner. He expressed concern about what would happen if one or more them were to become incapacitated in some manner, which would result in the Commission not being able to function. He stated it was important that the vacancies be filled as soon as possible so the Commission may be fully functional. Mr. Nass said he has had to recuse himself in the past and appreciated and supported Ms. Lowry's decision in this matter. Ms. Lowry thanked Mr. Nass and apologized for the last-minute reversal of her recusal. Mr. Lee said he supported Ms. Lowry's decision because it was important for the Commission to be perceived as acting in an objective and impartial manner in order for its decisions to be accepted and credible.

The Commissioners did not take any action on this matter. It will be postponed until new Commissioners have been confirmed and sworn in.

3. Request to Investigate Vaccinate Your Family: Every Child by Two

Sarah Kenney, Cara Sacks, and David Boyer for Yes on 1 to Reject Big Pharma, and Robert Reynolds, Michael Saxl, and Amy Pisani for Vaccinate Your Family joined the meeting via Zoom.

Mr. Wayne said the complaint was made by Cara Sacks, the principal officer and campaign manager of the Yes on 1 to Reject Big Pharma political action committee ("Yes on 1"). The basis of the complaint was a digital advertisement on WMTW's website paid for by Vaccinate Your Family. He said if a member of the public clicked on the link in the ad, it would bring them to a webpage devoted to the recent change in Maine law for vaccinations on the website for Vaccinate Your Family, a national organization that promotes vaccination. Vaccinate Your Family disseminated two communications – a digital ad that cost \$20,000 and an additional webpage related to Maine on their organizational website. In the complaint, Yes on 1 stated the digital ad was in violation of Maine law because it did not have a disclosure statement. Mr. Wayne said the Commission staff did not believe the digital ad expressly advocated for or against the March referendum and, therefore, did not need to have a disclosure statement. In addition, anyone who

clicked the ad was redirected to the Vaccinate Your Family's website, where there was information that made it clear who paid for the digital ad. Mr. Wayne said the Commission staff was recommending no further action be taken on the issue of the disclosure statement.

Mr. Wayne said Yes on 1 also contended that Vaccinate Your Family should have registered as a ballot question committee (BQC) because of the money it spent to oppose the referendum. Mr. Wayne said Vaccinate Your Family's response was that they were not expressly advocating on their website or in the digital ad for or against the referendum. Mr. Wayne said in 2008 the Commission provided guidance to organizations spending money to initiate or influence ballot question elections. Mr. Wayne said the guidance contained the following language, which the staff believed was very meaningful in determining what expenditures had to be reported: "... communications and activities which ... are susceptible of no reasonable interpretation other than to promote or oppose a ballot question." He said when the Commission staff reviewed the material provided by Vaccinate Your Family, there was information about policy issues and vaccinations but no language urging the public to vote for or against the referendum. Mr. Wayne said the Commission staff was recommending that Vaccinate Your Family not be viewed as a BQC.

Mr. Lee said this matter involved two basic issues: the missing disclosure on the digital ad and whether Vaccinate Your Family qualified as a BQC. Mr. Lee commented that both issues required the Commission to first determine whether the digital ads or website contained express advocacy and then whether the digital ads and website should be viewed in conjunction or as separate from each other.

Michael Saxl, Esq., and Amy Pisani, Executive Director of Vaccinate Your Family, appeared before the Commission. Mr. Saxl said Vaccinate Your Family agreed with the Commission staff's recommendations. He said Vaccinate Your Family stipulated that it spent more than \$5,000, but the advertisement was informational and did not contain any language intended to influence or initiate an election. He said Vaccinate Your Family was a non-profit organization whose mission is to promote public information about the importance of vaccinations. He said the digital ad was run to provide the public with important, science-based information about the importance of vaccinations at a time when there was a measles outbreak in Maine and a lot of disinformation regarding vaccinations was circulating in the public.

Mr. Lee asked about the failure to comply with the disclosure requirement. Mr. Saxl said a disclosure was not necessary because there was no express advocacy. Moreover, he said anyone clicking on the ad was redirected to Vaccinate Your Family's website and it was clear who paid for the ad.

Mr. Nass said this was one of those issues that was always swirling around in the public and even though Vaccinate Your Family has been promoting a certain point of view on this topic for a while, this ad gave the appearance that the organization was getting involved in politics. He asked Mr. Saxl to address this perception. Mr. Saxl said the Commission's guidance, the law, and the Commission's precedents were very straightforward in this matter. He said this was an informational advertisement with none of the "magic words" that would trigger the need for the organization to register as a BQC.

Ms. Lowry said she believed there must be a bright line between informational advertising and election advertising. It was important that organizations were able to exercise their First Amendment rights without fear of having complaints filed against them.

Mr. Lee agreed there was information on the website about the importance of vaccinations but noted there was also information about the upcoming referendum. He asked if that created a strong suggestion to vote for or against the ballot question. Mr. Saxl said the ad was consistent with Vaccinate Your Family's mission. It encouraged readers to "learn" about the issues and that if the reader wanted additional information on this matter, they should look to someone who has ideas consistent with Vaccinate Your Family. There was no language encouraging a vote for or against a ballot question. Mr. Lee asked if the reference to the election crossed the line without actually using the language. Mr. Saxl said it did not because electioneering language was not used and, unless the law was changed, the ad did not violate the law.

David Boyer and Cara Sacks, campaign manager for Yes on 1, appeared before the Commission. Mr. Boyer said they felt strongly that the ad was meant to influence the election because it was purchased at the height of the campaign, named No on 1 as their partner, and pushed people to No on 1's website. He said that earlier in the campaign, Vaccinate Your Family paid for and donated a poll that cost \$45,000, which was used to determine the best arguments to be made during the campaign. He said both Vaccinate Your Family and No on 1 have the same information on their websites. He said there was clear collaboration between these two organizations and questioned

whether there were in-kind contributions that had not been reported. He said he believed the Commission would be setting a dangerous precedent if it did not find a violation. It would be allowing a lot of dark money into Maine politics by creating a loophole for organizations to avoid registering with the Commission because they did not use electioneering language in their advertising.

Mr. Nass asked how Mr. Boyer knew the number of people who viewed the digital ad on WMTW. Mr. Boyer said the ad was available for anyone who visited WMTW's website to click on and said it was unknown how many other websites hosted this ad. Mr. Nass asked who received the \$20,000 payment from Vaccinate Your Family. Mr. Boyer said the digital ad firm received the money and paid other vendors to promote the ad. Mr. Nass asked how he knew the ad was viewed 3,000,000 times. Mr. Boyer said the number of impressions was listed in the document provided by No on 1 and in the Commission staff's memo.

Mr. Saxl said Mr. Boyer had given an inaccurate description of what is an impression. He said an impression means there was an opportunity for an individual to view the ad; an impression is not clicking on the ad or a link in the ad to get further information. Mr. Wayne clarified that the Commission staff's memo mentioned that the advertisements were widespread with over 3,000,000 impressions, which was based on the impression counts in the invoices provided by Vaccinate Your Family.

Ms. Lowry said it was her understanding that an impression was created by anyone going to WMTW's website regardless of whether they clicked on the ad. Mr. Boyer said 3,000,000 impressions meant the ad was viewed that many times whether or not the person wanted to see it. Ms. Lowry asked Mr. Boyer about the link to No on 1 he referenced. He said the link was to Maine Families for Vaccines' website. Mr. Boyer said the digital ad link sent people to a landing page on the Vaccinate Your Family website that included a reference to the March 3 election and a link to the No on 1 website. He said he believed this crossed the bright line by mentioning the election date, as well as, sending people to the No on 1 website.

Mr. Lee asked why Yes on 1 was pursuing this matter now because the election had already been held. Mr. Boyer said they were pursuing it because this kind of electioneering activity would set a dangerous precedent for future campaigns. Ms. Sacks said the complaint was filed when they first

saw the ad, which was before the campaign ended; it has taken this long for the matter to be scheduled for a meeting.

Mr. Lee asked if Mr. Boyer still believed there was a disclaimer violation after hearing the arguments that have been made and, if so, why. Mr. Boyer said they were more concerned that Vaccinate Your Family did not register as a BQC than they were about the disclosure violation. He said they did not know how many ads this organization ran, and he still believed there should have been a disclosure statement on the ads. Mr. Lee said, when you look at the digital ad, without clicking on any links, there was no express advocacy and asked if Mr. Boyer agreed with that statement. Mr. Boyer agreed but again said the totality of the circumstances – the ads, the websites, the relationship between the organizations – told a different story. Mr. Lee said they were focusing on the digital ad, not on what happened when you click a link. Mr. Boyer said the digital ad invited the viewer to click the link, which was when the viewer saw the election date and that constituted express advocacy on this issue.

Mr. Lee referred to the Commission's guidance about express advocacy in ballot question elections, especially the section on communications that "are susceptible of no reasonable interpretation other than to promote or oppose the ballot question," and asked Mr. Boyer how someone was supposed to conclude that a digital ad, such as the one at issue here, would be express advocacy. Mr. Boyer said if the ad and the website were meant to be educational only, the election date would not have been listed on the Vaccinate Your Family website. Mr. Lee said if the first click sent the viewer to a page that only had express advocacy about the ballot question, he could understand their concern. However, the first click brought the viewer to a page with educational materials. Mr. Boyer said this was an organization closely connected with the No on 1 campaign, which it called its partner. It paid for a poll that provided a lot of helpful information to the No on 1 campaign and paid for digital ads that support No on 1's position. He did not see the difference between one click or two clicks to get to information that is obviously meant to influence an election. Mr. Boyer agreed that the Commission should have a bright-line rule to protect First Amendment speech but disagreed that the digital ad did not meet that standard.

Mr. Saxl said, based on the Commission's guidance, there was no express advocacy in the ad. He said if that guidance was incorrect, it should be corrected. He said Mr. Boyer was a very accomplished campaign manager, who knew that the average click-through rate for a little banner ad was about .06%, which was a good click through rate. He said if you had that click-through rate

when people clicked the first link and maintained that rate when they clicked the second link, it would still only be 108 people out of 3,000,000 impressions and the cost would have been minimal.

Mr. Lee asked Mr. Wayne if the staff's position would be different if, when the viewer clicked the link in the digital ad, they were sent directly to the No on 1 website. Mr. Wayne said there were so many hypotheticals and different ways that people structure their advertisements that he would need to give this some consideration. He said he would like to provide some additional information about the guidance document. He said he believed Mr. Boyer had made some good points. The standard in the statute was that an organization qualified as a BQC based on their expenditures to initiate or influence a campaign. The Commission tried to provide an interpretation that struck the right balance between making sure election-related speech was reported in campaign finance reports but did not impede a person's ability to talk about policy issues. He said this advice was adopted 12 years ago before the same-sex marriage issue was settled via a ballot question. He said the ACLU of Maine sought guidance from the Commission because it wanted to engage in a public information campaign about this issue, but they were concerned about the possibility of this issue becoming a ballot question and they had no intention of becoming involved in that process. Mr. Wayne said the exact language in the guidance was brought before the Commission and was adopted in 2008. He said he did have some misgivings that it could, in isolated situations, create a loophole that allowed someone to tailor their message, so it did not get caught up in campaign finance reporting. He said the guidance has not caused a lot of problems during the past 12 years. However, he said he did have concerns about using an express advocacy standard to determine whether an expenditure was made for the purpose of initiating or influencing a ballot question election. Nevertheless, Mr. Wayne said the Commission staff recommend a conservative approach today and that it was better to stand by the existing standard. He said the Commission staff may bring this guidance before the Commission in the future for review and possible amendment.

Mr. Nass said these are difficult cases to decide, but said he supported the staff recommendation.

Ms. Lowry said she was satisfied that the communication was meant to be educational and also supported the staff recommendation. Mr. Lee asked if she believed it was time for the Commission staff to review and refine the guidance in order to avoid the issues raised by Mr. Boyer in the future.

Ms. Lowry said she did not believe it was necessary at this time but said she would be interested to see proposed language from staff. Mr. Nass agreed and said he looked forward to reviewing the staff's suggested refinements on this guidance. Mr. Lee agreed with Ms. Lowry and Mr. Nass that

this case did raise the need for re-examination of this guidance but for today, he said people should be able to rely on the Commission's guidance.

Mr. Nass made a motion to adopt the staff recommendation to not investigate this matter.

Ms. Lowry seconded the motion. Motion passed 3-0.

Executive Session

Mr. Wayne suggested that the Commission go into Executive Session to discuss a recently filed lawsuit against the Commission and an intra-agency memo regarding future plans for the investigation. Ms. Gardiner recommended the Commission go into Executive Session to discuss the pending litigation but to hold off on discussing the memo at this time. Mr. Lee made a motion to go into Executive Session pursuant to Title 1, section 405(6)(E) to discuss pending litigation with counsel. Ms. Lowry seconded the motion. Motion passed 3-0.

Other Business

After coming out of executive session, the Commissioners discussed the following:

Mr. Lee said, as part of the Governor's re-opening plans, the Commission could resume holding in-person meetings in September. Mr. Nass said he did not have any strong feelings regarding in-person versus remote meetings. Ms. Lowry said she anticipated still being on lock down in September. Mr. Wayne said it would be up to the Commissioners, as well as the State's legal authority when the Commission resumed in-person meetings.

Mr. Lee asked about the status of the Commission nominees. Mr. Wayne said he had talked with the Senate chair several weeks ago about scheduling the confirmation hearings as soon as possible. Mr. Nass said he thought both nominees had been confirmed. Mr. Wayne said the Legislature adjourned the day before the confirmation hearings were scheduled to happen.

Ms. Lowry asked about future meeting dates. Mr. Wayne said he would send an email with proposed future meeting dates.

Adjournment

Mr. Nass made a motion, seconded by Mr. Lee, to adjourn. The motion passed. The meeting adjourned at 11:25 a.m.

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