



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

Minutes of the May 24, 2017, 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., Hon. Richard A. Nass, Bradford A. Pattershall, Esq., and Meri N. Lowry, Esq. via telephone.

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

Commissioner Matheson convened the meeting at 9:05 a.m.

The Commission considered the following items:

1. Ratification of Minutes of April 18, 2017 Meetings

Mr. Lee made a motion to adopt the April 18, 2017 minutes with a minor correction to page 2.

Mr. Nass seconded the motion. Motion passed (5-0).

2. Request for Investigation – New England Opportunity Project

Mr. Wayne said the Maine Democratic State Committee (the Party) had filed a request for investigation against Rep. Lockman and the New England Opportunity Project (NEOP), about the lack of a top three funder disclosure on a mailer it sent during the last election cycle. He said this matter had been briefly discussed at their December 8th meeting as part of NEOP's failure to file an independent expenditure (IE) report for that mailing. The Commissioners had left it up to the staff whether or not to pursue the matter. Mr. Wayne said staff had decided not to follow-up on the non-disclosure in light of the penalty imposed for the late-filed IE report.

Katherine Knox, Esq., representing the Party, appeared before the Commission. Ms. Knox said the Party has serious concerns about NEOP's current operations and the mailings it was doing against current legislators, which she characterized as being extremely aggressive. She said the Party is more interested in having NEOP disclose its top three funders than having a penalty imposed. Ms. Knox said the Party also questions whether NEOP should be required to register as a PAC with the Commission.

Ms. Matheson said she believes this matter is limited to the issues discussed at their December 8th meeting and they could not consider NEOP's current mailings. Ms. Knox said she only raised the current mailings as evidence of NEOP's continued political and fundraising activities.

Mr. Lee said the Party could file a separate request for investigation on the new mailers. Ms. Knox said that because of when the new mailers were disseminated, she does not consider them to be independent expenditures which would require the top three donor requirement. However, if there is no directive from the Commission to require NEOP to disclose its top three funders for the mailer that went out before the election, the Party would consider filing a complaint on the PAC registration issue.

Mr. Lee asked what authority the Commission has to compel the disclosure if the violator refuses to provide the information. Ms. Gardiner said that is not addressed in statute. She said most other disclosure is tied to the filing of a report with the Commission. Mr. Lee asked about the legality of finding such a violation. He said if the funders were disclosed, there could be a nominal or no penalty at all; if not, a larger penalty could be imposed. Ms. Gardiner said the challenge may be that the Commission only has the authority provided in statute, whether expressly or implied, and she would want to look into this further before providing an opinion. Ms. Matheson said this is a case of first impression because the nature of this type of violation is a one-time event. Ms. Gardiner said the statute does provide for the kind of trade off Mr. Lee mentioned with respect to the attribution and disclaimer statements required on communications. She said section 1014(4) allows for the correction of the violation within 10 days and allows the Commission to assess no penalty; however, this language long predates the top three funder provision. Ms. Gardiner said she is unclear whether that provision is applicable in this matter. She agreed this is a case of first impression and a tricky question to resolve. Mr. Lee said they have authority to assess no penalty if the violator corrects the disclosure and asked if the implication is that, if the correction is not made, they have to assess a penalty for non-disclosure. Ms. Gardiner said she did not believe so.

Mr. Pattershall said the Commission does not have the authority to compel the disclosure and asked Ms. Knox what other outcome would satisfy the Party. Ms. Knox said she has represented the Party on this type of violation and it never occurred her to decline, or recommend to her client to decline, to comply with this requirement. Mr. Pattershall said he did ask Rep. Lockman and he declined to provide the information. Ms. Knox said if NEOP would not provide the information, the Party would like to see a penalty imposed. Mr. Pattershall said there is nothing in the statute to compel the disclosure but he is convinced that if someone was fined enough,

they would comply. Ms. Knox reiterated that the Party's interest is to have the public disclosure but if that is not an option, it would be satisfied with the imposition of a penalty.

Mr. Nass questioned whether staff has the authority to gather this much information without a directive from the Commissioners to investigate. Mr. Wayne said the rules authorize staff to gather preliminary facts to provide the Commissioners with enough information to make a determination whether or not to investigate and/or potentially find a violation. Ms. Matheson said it would be difficult for them to make any determination with only the complaint and response to rely on. The additional information gathered by staff saves them a lot of time. Ms. Gardiner quoted from the Commission rules that before a matter comes before the Commissioners, "the Director may conduct such preliminary investigation as is deemed prudent and desirable. If the preliminary investigation suggests that a complaint is without factual basis, the Director may inquire of the complainant whether they want to withdraw the request." When the Director determines that it is ready for presentation to the Commissioners, it is brought before them and they control whatever investigation happens after that.

Rep. Lawrence Lockman, president of NEOP, appeared before the Commission. Rep. Lockman pointed out that in the staff recommendation, staff stated its belief that NEOP had been penalized and learned a lesson. He said he agrees with that statement and that NEOP would be in compliance in the future. He said the Commission's decision on the IE violation was based on the timing of the mailing and while he still did not believe the mailing was an IE, he respects the Commission's decision.

Mr. Lee asked why there was no top three funder disclosure. Rep. Lockman said he did not believe the mailer was an IE at the time it was produced, so it was not necessary. Mr. Lee asked if Rep. Lockman would provide that disclosure now. Rep. Lockman said NEOP is a 501(c)(4) and donor identity is confidential. Mr. Lee said Rep. Lockman had agreed to disclose funders in the future and asked why he would not do so now. Rep. Lockman said NEOP has no intention of making any independent expenditures in the future. In response to a comment by Mr. Pattershall, he said the mailer clearly identified who was doing the mailing and the primary goal of the mailer was to fundraise and raise awareness of an issue. Mr. Lee asked if Rep. Lockman had any additional information he wanted to share. Rep. Lockman said he believed all the information is before them.

Mr. Lee said he did not think that Rep. Lockman intentionally failed to disclose NEOP's top three funders because, at the time of the mailing, he did not believe the mailer was an IE. He said if they decide to impose a civil penalty, the Commission should take into consideration that the failure to disclose the donors stems from the same facts as the failure to file the IE report, which did result in a penalty. Ms. Matheson said the penalty could be no more than 100% of the expenditure, which in this case would be \$4,205.06.

Mr. Pattershall said he believed there is a violation and a civil penalty should be imposed, but he did not believe they could compel disclosure of the top three funders. Mr. Lee agreed and said that they could take the previous penalty into account when imposing a penalty in this matter because both violations arose out of the same set of circumstances. He asked Mr. Wayne if that was a factor for not bringing this matter back before them. Mr. Wayne said that it was. He also said he was persuaded by Rep. Lockman's explanation for his reasons to believe that it was not an IE and did not need to include the top three funders.

Ms. Lowry said NEOP paid the penalty, but that apparently was not particularly meaningful because Rep. Lockman was still claiming this is not an IE and disclosure is not required. She said she is comfortable with a separate penalty being assessed for the lack of disclosure. Ms. Lowry said the statute is designed to require disclosure and she wants to honor that provision.

Mr. Nass made a motion to adopt the staff recommendation to find a violation but assess no additional penalty. Motion failed due to lack of a second.

Mr. Lee made a motion to find a violation for the failure to disclose the top three fundraisers for this IE communication and assess a penalty of \$250. Ms. Matheson seconded the motion. Mr. Pattershall and Ms. Lowry indicated that they were in favor of a higher penalty. Motion passed (3-2; Ms. Lowry and Mr. Nass opposed).

3. Request to Investigate Residential Address of 2016 House Candidate Aaron Carroll

Mr. Nass said he would recuse himself from consideration of this matter due to his involvement in Limerick town politics. He said he would appreciate further discussion on the topic of a candidate's residential address at another time.

Mr. Wayne said, because no one was present for this matter, Rep. Hamann had requested that his matter be taken out of order so he could return to the State House. Mr. Pattershall made a motion, seconded by Mr. Lee, to table discussion of this matter until later in the meeting. Motion passed (4-0; Mr. Nass abstained).

Mr. Wayne said in 2016 Aaron Carroll unsuccessfully ran as an MCEA candidate for House District 21. Stephen McLean, a resident of Limerick, filed a request for an investigation claiming that Mr. Carroll did not actually live in House District 21 and should not have received public funding. In his request for investigation, Mr. McLean stated Mr. Carroll lived with his family at 61 Elm Street and that he saw Mr. Carroll's children get on the school bus there.

In his response, Mr. Carroll, who could not be present due to personal circumstances, stated he had moved to 140 Elm Street in March 2016 because he was having marital difficulties and had intended to remain there after the election. He provided several documents with the 140 Elm Street address as proof of residence.

Mr. Wayne said the Secretary of State's office qualifies candidates for the ballot and he has doubts about whether the Commission could address this issue. Mr. Pattershall agreed this is a jurisdictional issue and it does not appear that the Commission has any statutory authority. Ms. Gardiner said the Secretary of State's office only has authority over challenges to a person's eligibility to be a candidate if the challenge is filed within a limited timeframe, which has already passed in this case. She said that even the Secretary of State does not have the authority to review a candidate's eligibility after the deadline for filing a challenge has passed. Ms. Gardiner agreed with Mr. Pattershall's statement that regardless of where the facts led, the Commission does not have jurisdiction over challenges to a candidate's residency and does not have the statutory authority to revoke a candidate's certification based on a successful challenge to a candidate's residency. Ms. Gardiner said that it would require a statutory change to the Maine Clean Election Act to do so.

Mr. Lee asked if it is a good idea to propose a legislative change to give authority to the Commission to investigate and impose penalties on this issue. Mr. Wayne said it is a good idea for future consideration. He said this is the first complaint received by the Commission but that

staff has heard rumors about this issue involving both MCEA and traditionally financed candidates over the years.

Mr. Lee made a motion to not conduct an investigation based on the lack of jurisdiction. Ms. Matheson seconded the motion. Motion passed (4-0; Mr. Nass had recused himself in this matter).

4. Request for Waiver of Penalty – Jenna Mehnert

Mr. Wayne said Jenna Mehnert is a lobbyist for National Alliance on Mental Illness-ME (NAMI-ME). Ms. Mehnert indicated on her registration that she would exceed 8 hours of lobbying in January. Her first lobbyist report was due on February 15th but she did not file it until February 18th. In her request for a waiver, Ms. Mehnert said there had been an error with the e-filing system and misinformation provided by staff.

Jenna Mehnert, Executive Director for NAMI-ME, appeared before the Commission. Ms. Mehnert said she had not actually met the 8-hour threshold in January but had listed that date just to be on the safe side. She said her assistant files the lobbyist reports on her behalf, but that her assistant had not received new log-in credentials for the current year. Ms. Mehnert said when her assistant logged into the e-filing website and did not see a report due, she called the Commission and was told that if there was no report showing in e-filing, no report had to be filed. Shortly thereafter, they received a notice about a late report. Ms. Mehnert said she and her assistant were not aware that the user name and password change each year. Ms. Mehnert said this is her first late-filing violation.

Ms. Matheson asked Mr. Wayne how long the current system has been in place. Mr. Wayne said it became active in 2014. Ms. Matheson said this does not sound like an e-filing problem to her. Mr. Nass said Ms. Mehnert's argument is not compelling and he agrees with the staff recommendation.

Mr. Lee made a motion to find an unintentional violation resulting in the late-filing of the January lobbyist report and to adopt the staff recommendation of a \$100 civil penalty. Mr. Nass seconded the motion. Motion passed (5-0).

5. Request for Advisory Opinion by Hon. Scott Hamann

Mr. Wayne said Rep. Scott Hamann had submitted a request for advisory opinion regarding whether he could influence LD 1548, a bill to establish the purchase and distribution of Maine food products to low income Mainers. Rep. Hamann works for a non-profit organization that may bid on the contract if the bill is approved.

Rep. Scott Hamann appeared before the Commission. Rep. Hamann said the bill had received a minority ought to pass with an amendment that shifts the funding from FAME to the Treasurer's office and the administration from FAME to the Department of Agriculture. Ms. Matheson asked if there is any other information he wants to share. Rep. Hamann said no, but because his employer may bid and be awarded a contract because of this bill, he wanted to make sure this would not be a conflict for him.

Mr. Nass said he does not see any kind of conflict but appreciates Rep. Hamann's diligence in seeking an opinion on this matter. Mr. Lee said he agrees with the analysis in the draft advisory opinion.

Mr. Nass made a motion to adopt the draft advisory opinion. Mr. Pattershall seconded the motion. Motion passed (5-0).

6. Update on Audits of 2016 Maine Clean Election Act Candidates

Mr. Wayne said the Commission contracted with Runyon, Kersteen and Ouellette to conduct the 2016 audits of Maine Clean Election candidates. He said they had completed 10 audits; only one had exceptions.

Casey Leonard, partner, and Jennifer Connors, senior manager, of Runyon, Kersteen and Ouellette, appeared before the Commission. Ms. Connors said they would be auditing 49 candidates. She said there are two tiers of candidates: one tier for candidates who received and spent more money and a second tier for candidates who received and spent less money. Ms. Connors said all the candidates were assigned a number and they applied a random number generator initially to the first tier and then the second tier to select the candidates to be audited.

Mr. Lee asked for the ratio of candidates being audited. Mr. Wayne said it is a 1-in-5 ratio. Mr. Pattershall said a 1/5 sample size is very significant. Mr. Nass asked if there is another way to

get on the audit list. Mr. Wayne said staff did recommend several candidates for audit for cause. Mr. Nass asked if those candidates are in addition to in the 49 candidates selected for audit. Ms. Conners said they are included in the 49.

Ms. Conners said in February they mailed notification letters requesting bank statements, proofs of payment, vendor invoices, and receipts for identified expenditures. She said they verified that all transactions are reflected in the bank statements and accurately reported in the campaign finance reports.

Ms. Matheson asked them to explain the Fitzgerald exceptions. Ms. Conners said they had found five exceptions: three expenditures were reported with the date the check cleared instead of the actual transaction date; one incorrect vendor; and one travel reimbursement that included a labor charge. Mr. Nass asked if any of these would be considered violations. Mr. Wayne said staff had not reviewed these exceptions to determine conformity with reporting requirements.

Mr. Pattershall made a motion, seconded by Mr. Lee, to adjourn. The motion passed. The meeting adjourned at 11:31 a.m.

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