



Minutes of the June 27, 2018, 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, Esq.; Hon. Richard A. Nass; Bradford A. Pattershall, Esq.

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

Mr. Lee convened the meeting at 9:01 a.m.

1. Insufficient Allotment to Make Payments Owed to MCEA Candidates – FY 2018

Mr. Wayne said approximately 200 candidates have qualified for the Maine Clean Election Act program in this election cycle. These candidates believed, as did the Commission staff, that they would receive the full amount of funding for which they were eligible. However, due to the current status of the Commission's budget, the Commission's spending authority is very limited for the remainder of this fiscal year ending on June 30th. The initial payments for the general election were made to all candidates last week. One hundred and twenty candidates have gone through the effort to collect additional qualifying contributions (QCs) and are eligible to receive supplemental payments beyond the initial payment. The Commission should be disbursing about \$1,378,025 in supplemental payments to candidates. The amount the Commission is authorized to spend, however, is only \$397,958. The maximum amount that can be paid out is 28% of what is owed to the candidates. The Commission staff proposes prorating the supplemental payments across the board. This matter is before the Commission to see if the Commission agrees with this approach.

Mr. Lee asked why there is such a discrepancy between the amount allotted and the amount needed. Mr. Wayne explained the biennial budget is prepared a year and a half before the new biennium begins. There is always a great deal of uncertainty when planning that far ahead for a program like the Maine Clean Election Act program. One factor that complicates the budget process is that the Commission is not allowed to include the cash reserves from the previous biennium as revenue in the budget for the next biennium. In the late summer of 2016 when the Commission staff was preparing the biennial budget, the staff knew there would be \$2 million in

the Maine Clean Election Fund at the beginning of the current biennium but it could not be included in the budget for fiscal years 2018 and 2019. Thus, the budget submitted to the Legislature understated the actual cash available in the account and the amount that would be spent. The way this situation has been handled in past years has been to submit a financial order to the Governor after the first fiscal year of the biennium to bring the cash balance forward into the second year of the biennium and to increase the Commission's spending authority. Mr. Wayne said the process of submitting financial orders has not been a problem in the past 15 years and the staff had no reason to anticipate that the Governor would refuse to sign the financial orders submitted to him this year.

Mr. Pattershall asked if a financial order was needed in fiscal year (FY) 2016. Mr. Wayne said a financial order was submitted to the Governor and he signed it. In response to a comment by Ms. Lowry, Mr. Wayne said the Commission has approximately \$5 million in the Maine Clean Election Fund; however, it does not have the permission to disburse those funds. As an agency, the Commission has done everything it can to make sure that candidates know the rules of the game so they can decide whether to participate in the program. The candidates have done what was expected of them to be eligible for public campaign funds and they are owed these funds. The lack of a resolution of the budget problems essentially changes the rules in the middle of the game.

Robert Howe, of Howe, Cahill & Company, appeared before the Commission on behalf of the Maine Citizens for Clean Elections. Mr. Howe said the only fair approach to the distribution of funds is to apply the same percentage – 28% as suggested by the staff – across the board for all candidates. In responding to a question from Mr. Nass, Mr. Howe said the Commission should make its decision quickly. Mr. Howe said that candidates are not the only ones who are impacted by this problem. Thousands of registered Maine voters have made qualifying contributions to support these candidates and these voters also deserve to have the program work as intended.

Ben Grant, Esq., of McTeague Higbee, appeared before the Commission on behalf of the House Democratic Campaign Committee (HDCC). Mr. Grant said the HDCC supports the proposal to prorate the distribution of funds and to have the proration apply equally to all candidates regardless of which office they are seeking. He agreed with Mr. Howe that the Commission should make its decision regarding this matter quickly.

Mr. Lee asked whether the Legislature could fix this problem of paying candidates what they are owed. Mr. Wayne explained the time for Legislature to take steps to resolve this issue in FY 2018 has passed. The staff needs to send the payment vouchers for supplemental payments to candidates to the Department of Administrative and Financial Services within the next 48 hours. If the Legislature meets in July, it could address the issue of paying candidates in FY 2019. Mr. Grant said that if the Legislature meets in July, it could also decide to make whole the candidates who received a reduced supplemental payment in FY 2018.

Mr. Lee said he could see the potential for litigation regarding this matter and asked whether the staff or Commission counsel has received any notification of such litigation. Ms. Gardiner said she has not received any communications regarding litigation. Mr. Wayne explained he was told by a legislative leader that litigation is likely. Mr. Wayne also said he received a FOAA request for his communications with the executive branch, which could be an indication that litigation is being considered.

Joseph Greenier, a concerned citizen and former Senate candidate, stated all candidates participating in the Maine Clean Election Act program should receive the same amount for supplemental payments.

In response to a question from Mr. Lee, Mr. Wayne explained that the usual procedure for making supplemental payments is that candidates would get the level of funding they qualified for as they turned in additional qualifying contributions. In 2016, candidates would submit additional qualifying contributions over the course of the summer and fall. Because candidates were notified that supplemental payments may be reduced in FY 2018, the pace of candidates' submissions was accelerated and there was a "run on the bank" where candidates gathered many additional qualifying contributions in order to qualify for as much supplemental funds as possible. In response to questions from Mr. Lee and Ms. Lowry, Mr. Wayne said the staff had communicated with candidates by email since May to alert them of this issue and the possibility of reduced supplemental payments.

Shawn Roderick addressed the Commission on behalf of Senate Republican candidates. He said it was fair to say that candidates knew about the funding issue for FY 2019. However, he said candidates were not aware that there was a funding issue for FY 2018.

Mr. Lee asked Mr. Wayne to clarify what communications were sent to candidates. Mr. Wayne explained that the emails to candidates addressed both funding problems. He said he regrets if

the information about the funding problem for FY 2018 was not sufficiently prominent, but the emails to candidates did include that information.

Mr. Roderick said the proposed prorated amounts were not fair and that perhaps candidates should get the first level of supplemental payments instead of the prorated amount. Ms. Lowry asked Mr. Roderick what he would have done differently had he known about the funding problem for FY 2018. Mr. Roderick responded that he may have pushed candidates to collect more qualifying contributions in order to receive more supplemental funds before July 1st.

Mr. Lee stated that he and Mr. Nass were willing to meet with the Governor to come to an agreement regarding the financial order; however, that meeting never occurred.

The Commissioners discussed the options for handling the funding shortfall for supplemental payments in FY 2018. Mr. Nass said the Commission should proceed with the staff recommendation and apply a uniform percentage and prorate the payments to the candidates. In response to a question from Mr. Lee, Mr. Wayne confirmed that if there is a legislative fix in FY 2019, candidates who received a partial payment would receive the remainder of the supplemental funds they were owed. It is not likely there would be a legislative fix in the next 48 hours for FY 2018.

Mr. Lee made a motion to distribute to each clean election candidate an amount of money equal to what they are qualified to receive so far multiplied by a fraction, the numerator of which is the amount of money the Commission has allocated to distribute and the denominator of which is the total amount of money which the candidates would be qualified to receive. Mr. Pattershall seconded. The motion passed unanimously (4-0).

2. Inability to Make MCEA Payments after July 1 – FY 2019

Mr. Wayne gave a summary of the actions which led to the negative allocation in the Maine Clean Election Fund in FY 2019. He also provided the Commissioners with an update on the efforts of the House chair of the Veterans and Legal Affairs Committee to use the errors bill to resolve the negative allocation issue. However, the issue remains unresolved. A practical question being asked by candidates is whether participating candidates would be allowed to collect traditional campaign contributions if MCEA funds are not available because of the negative allocation even though there are funds in the Maine Clean Election Fund.

Mr. Lee asked if a participating candidate could opt out of the MCEA program, return the clean election funds received, and become a traditionally financed candidate or, in the alternative, could the candidate not return the money and still be authorized to collect traditional campaign contributions up to the amount for which they would have qualified.

Mr. Wayne said there is nothing in the law saying that participating candidates can back out of the MCEA program. There is also nothing in the law specifically saying that they cannot. However, the staff interpretation has been that, by participating in the program, candidates have made an affirmative commitment not to raise private funds for their campaigns. Ms. Gardiner stated the statute does contemplate a situation where the Commission does not have enough money to pay candidates. If that were to happen, the Commission could authorize participating candidates to raise private funds. However, the factual predicate necessary for the Commission to allow candidates to raise private funds is a determination that there are “insufficient funds” in the Maine Clean Election Fund to pay candidates. Currently, there is approximately \$5 million in the Fund.

Mr. Howe said Maine Citizens for Clean Elections would rather not see participating candidates resort to raising private contributions but it takes no position whether it is legally permissible.

Mr. Roderick asked the Commission how replacement candidates would be handled if they wanted to participate in the program. Mr. Wayne explained that replacement candidates are those who take the place of candidates who won a primary election but who withdraw from the race by early July. Replacement candidates are chosen by party committee caucuses in the candidate’s district. In the current situation, it is uncertain whether any replacement candidates will be able to receive clean election funding.

Mr. Roderick asked if there was any validity to the news that staff budget may be affected by this issue. Mr. Wayne explained it would not be affected. However, the Commission’s ability to pay for contracted services, such as the IT vendor or auditor, would be affected.

Mr. Lee asked if there was anything the Commissioners could do to assist in moving this issue toward a resolution. The Commissioners discussed various options for communicating with the Legislature. Mr. Nass said he was pessimistic that approaching the Legislature would yield positive results.

The Commissioners discussed the issue of whether participating candidates can be allowed to raise traditional campaign contributions if there is no legislative fix to the negative allocation problem. On the one hand, Ms. Lowry stated the inability of the Commission to make payments to candidates has the same impact on them as would an insufficiency of funds in the Maine Clean Election Fund. On the other hand, Mr. Lee said the plain language of the statute indicates that there would have to be an actual lack of funds preventing the payments from being made. He said the Legislature probably never contemplated that the Commission would not be able to make payments even though there were sufficient funds in the account. Mr. Nass said that he was in favor of the Commission receiving comments from candidates and the public about whether participating candidates can be released from the fundraising restriction of the Maine Clean Election Act. The Commission directed Mr. Wayne to send an invitation to interested parties to solicit comments on the issue of allowing MCEA candidates to raise private contributions.

Mr. Greenier requested that the Commission reconsider its decision to prorate the supplemental payments, and that the funds be distributed such that all MCEA candidates are on the same level playing field. Ms. Lowry and Mr. Lee said they were not inclined to change their minds on the matter.

After discussing various options for scheduling the next meeting, the Commission decided to keep the meeting date of July 25, 2018, in order to give interested parties enough time to submit comments on whether MCEA candidates can be allowed to raise traditional campaign contributions and for the staff to review the comments and prepare a memorandum for the Commission's consideration.

Other Business:

Mr. Wayne updated the Commissioners on the e-filing system upgrade and upcoming launch date of July 2nd.

Mr. Nass made a motion, seconded by Ms. Lowry, to adjourn. The motion passed (4-0).

The meeting adjourned at 12:12 p.m.

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