



Minutes of the December 18, 2019 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; and Bradford Pattershall, Esq.

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

Mr. Lee convened the meeting at 9:04 a.m. He said the four Commissioners currently serving were present. The fifth seat is vacant, as it has been for the past 21 months.

Ms. Lowry said she wished to disclose that she served on the City of Portland Parks Commission with Dory Waxman. She served on the Land Bank Commission for a period of time when Ethan Strimling was the City Council representative. About 40 years ago, she served on the board of the Maine Women's Lobby when Betsy Sweet was the organization's lobbyist. After consulting with the Commission staff, she determined none of these relationships rose to the level of a conflict of interest or even the appearance of a conflict, or that they would impair her ability to consider the matters before the Commission impartially.

Mr. Nass disclosed that he had worked with Lance Dutson in the office of the Speaker of the House of Representatives for a couple of years. He had also served in the Senate and on the Taxation Committee with Ethan Strimling. He said these relationships would not affect his impartiality.

1. Ratification of Minutes of October 30, 2019 Meeting

Mr. Nass made a motion to adopt the minutes. Mr. Lee seconded. Mr. Lee said there were several minor typographical errors, which he suggested be corrected. The amended minutes had been distributed at the beginning of the meeting. Mr. Lee moved to amend the motion to adopt the minutes as amended. Mr. Pattershall seconded the amended motion. The motion passed (3-0-1, Ms. Lowry abstaining as she was not present at the October 30th meeting).

2. Audits of 2018 Maine Clean Election Act Candidates

Jennifer Connors and Marcus Pratt of Runyon Kersteen Ouellette (RKO) appeared before the Commission. Ms. Connors said the reviews of the 2018 MCEA gubernatorial campaigns have been completed and the final summary report has been distributed to the Commissioners. She said RKO tested 32 House candidates, 11 Senate candidates, three gubernatorial candidates, and two candidates selected by the Commission staff for review. Of those, 19 candidates had no exceptions or findings, representing 40% of the candidates tested. Of the remaining candidates, six had findings and the rest had minor reporting exceptions. The final reports for the three gubernatorial candidates were sent to the Commissioners in the meeting packet. The Betsy Sweet campaign had three findings and 22 exceptions; the Terry Hayes campaign had 23 exceptions; and the Garret Mason campaign had one exception.

In response to a question from Mr. Lee, Ms. Connors said a finding is more serious than an exception. A finding may be a violation of the Maine Clean Election Act (MCEA) and may result in a monetary penalty or an order to repay funds to the Maine Clean Election Fund. An exception is a minor reporting error, such as putting a transaction on the wrong report.

Ms. Connors said there were 16 candidates who did not properly report debts and obligations. RKO recommends that the Commission staff provide more education and training regarding the correct way to report debts and obligations as well as how to properly report reimbursements.

Ms. Connors said of the three findings for the Sweet campaign, two were of a similar nature involving improper reimbursement of pre-certification expenses with MCEA funds. The other finding involved accepting a seed money contribution that was over the contribution limit.

Mr. Lee asked what steps the Commission staff can take to reduce the number of candidates who improperly report debts and obligations. Mr. Wayne said, as a result of the auditor's recommendations after the 2016 election, the Commission staff had increased its efforts to get the word out to candidates that they must report debts and obligations in the reporting period when they were incurred, even if the candidate had not paid the invoice. He said this guidance is in the guidebooks and in the newsletters sent to candidates before reports are due. He said he will review the guidance and look for ways to improve it.

Mr. Lee noted that the Sweet campaign has requested a waiver of the requirement to repay the Maine Clean Election Fund for improper reimbursements and that a representative of the Sweet campaign was present to address the waiver request.

Frank O'Hara, the treasurer for the Betsy Sweet gubernatorial campaign, appeared before the Commission. Mr. O'Hara acknowledged the errors regarding reimbursements for campaign expenditures. He said Ms. Sweet withdrew her request for a waiver and would reimburse the Maine Clean Election Fund for the full amount mentioned in the staff memo.

Mr. Lee thanked Mr. O'Hara for his comments. He said there was no need for the Commission to take any action on this matter as the waiver request had been withdrawn.

3. Potential Finding of Violation and Penalty – Mills Inaugural Committee

Mr. Wayne provided a brief summary of the reasons why the inaugural committee was in violation of the law governing the transition and inaugural committees of a Governor-elect. He said that since the Commission's September meeting, the committee had been able to raise enough funds to pay the balance owed to the Augusta Civic Center. Throughout this process, the committee had been very cooperative and had received detailed advice from the Commission staff. The committee had complied with all aspects of the reporting requirements. The only issue of noncompliance, in the Commission staff's view, was that the committee did not stop fundraising on January 31st as required by the statute because it needed to raise additional funds to pay the invoice from the Augusta Civic Center, which was much higher than anticipated. Mr. Wayne said the Commission staff had provided notice to the committee that the Commission may be in a position to make a determination regarding a violation and penalty at this meeting. The committee responded in writing and is represented at the meeting today.

Michael Carey, Esq., of Brann & Isaacson, counsel for the Mills inaugural committee, appeared before the Commission. In response to a question from Mr. Lee, Mr. Carey said the committee recently received another invoice for \$2,600 which the committee is still reviewing but believes is valid. When that invoice is paid, the committee will have a cash balance of over \$4,000. The last donation received by the committee was in early December.

Mr. Lee said the issues before the Commission were whether to find the committee in violation of the requirement to cease fundraising on January 31st and whether to assess a penalty. The Commissioners discussed who would be responsible for paying the penalty. The statute states “a person” may be assessed a penalty of up to \$10,000 but does not specify who that person would be. Comparing it to the assessment of penalties against local and county party committees, the Commissioners agreed any penalty assessed would be against the inaugural committee.

Mr. Lee noted that the statute does not provide the criteria for determining a penalty. By way of comparison, Mr. Lee pointed to the criteria for granting a waiver for a late-filed candidate report: the degree of public harm, the proportionality of the penalty to the size of the campaign, and the level of experience of the candidate and treasurer. The political action committee (PAC) penalty statute has similar criteria but omits the consideration of the size of the campaign.

Mr. Nass said the statute is not only about disclosure of the source of donations to the committee. More importantly, it is also about a date certain for ending the fundraising activities of the committee so that the fundraising does not continue for too long into the legislative session.

Mr. Carey said, in the absence of explicit statutory criteria, he thought the degree of public harm and the committee’s transparency and good faith ought to be taken into consideration. There is a major distinction between an inaugural committee and committees involved in political campaigns. In this instance, the committee was not involved in an election. The information disclosed in the committee’s reports had no effect on the decision-making by voters or by other committees.

Mr. Lee asked Mr. Carey whether he thought experience should be a factor in determining a penalty amount. Mr. Carey said this committee’s activities are significantly different from those of a candidate or political committee involved in an election. The inaugural committee was primarily staffed by volunteers, none of whom had experience coordinating a large public event like a gubernatorial inauguration. If they had more experience, they may have noticed the contract with the Augusta Civic Center did not include some of the usual expenses in its estimate. For these reasons, he thought the use of experience as a factor was problematic in this matter.

Mr. Lee asked whether the Commission should consider the duration of the violation. Mr. Carey said the reasons for the time it took the committee to finish fundraising should not be considered. He said there was no incentive to drag this out as there may be in the context of a campaign.

Ms. Lowry said the duration of the violation has some significance, but it does not increase the harm to the public. The committee has been transparent throughout this process and no information was withheld from the Commission or the public.

Mr. Pattershall said there appeared to be a lack of due diligence in their review of the estimate provided by the Augusta Civic Center, considering the overage was nearly 50% more than the amount of the estimate.

In weighing how much the penalty should be, Ms. Lowry said she considered the unrealistic time frame established by the new statute, the fact that the Augusta Civic Center is a public entity, the actions the committee took to be fully transparent, the inexperience of the team planning the inaugural event, and the lack of public harm. Nevertheless, the statute expressly established a fundraising deadline and the committee's fundraising continued after the deadline. She proposed a penalty of \$2,000.

Mr. Lee asked Ms. Gardiner whether, in the absence of statutory criteria for assessing a penalty, it was appropriate to consider the harm to the public, the experience level of those working for the committee, the size of the organization, and the length of the violation. Ms. Gardiner said those are valid considerations, along with whether the deadline for ending fundraising is realistic, as Ms. Lowry mentioned, and that the committee's disclosure was above and beyond that which is statutorily required. She said all the facts and circumstances in this matter are relevant. The Commission is not restricted by the statute from considering those factors. Ms. Gardiner said the Commission has other statutes that provide the Commission the discretion to assess a penalty within a range without specifying the criteria for determining the amount of the penalty.

Mr. Lee moved that the Governor's inaugural committee violated 1 M.R.S. § 1051(4) by collecting funds beyond January 31st, but as there were a number of factors present which warranted the assessment of a penalty at the lower end of the range, that the Commission assess a penalty of \$2,000. Ms. Lowry seconded.

The motion passed (4-0).

4. Request for Waiver of Late-Filing Penalty – Unite Portland PAC

Mr. Wayne said this matter arose out of the Portland mayoral election and was referred to the Commission by the Portland City Clerk. Unite Portland PAC is a municipal PAC formed to oppose the re-election of Mayor Ethan Strimling. On September 1st, Unite Portland paid \$10,000 to a political consultant to produce a website and videos opposing Mayor Strimling. Unite Portland should have filed an independent expenditure report on September 6th. On September 26th, Unite Portland made another payment of \$4,664 for Facebook ads. The PAC should have filed another independent expenditure report within two days of the expenditure. However, the two independent expenditure reports were filed weeks after their due dates. The PAC filed an October Quarterly Report that contained multiple reporting deficiencies. The Strimling campaign filed a complaint with the Portland City Clerk, and Unite Portland subsequently amended that report. The preliminary penalty for both violations as calculated by the Commission staff is \$7,052. The Strimling campaign believes the penalty should be calculated differently, which would result in a higher penalty. Unite Portland stated it did not understand that it had to file independent expenditure reports and requested a waiver. The Strimling campaign requested an opportunity to be heard and argue for higher penalties.

Mr. Lee asked Mr. Wayne if the Commission has ever imposed a penalty under 21-A M.R.S. § 1004-C, which allows the Commission to double or triple the authorized penalty depending on whether the violation occurred less than 28 days or 14 days, respectively, before an election. Mr. Wayne said the provision was part of the 2015 citizen initiative, but the Commission had never used it to impose a penalty.

Daniel W. Walker, Esq., of Preti Flaherty, appeared before the Commission representing the Strimling campaign. Mr. Walker said that, like the previous matter before the Commission, transparency and public harm are the foremost issues in this matter. Unite Portland was formed for one purpose – to make independent expenditures opposing Mayor Strimling’s re-election. He said it did not make sense that the principals of Unite Portland did not realize the PAC had to file independent expenditure reports. Mr. Walker argued that the two late-filed independent expenditure reports should be treated as two separate violations and the penalties should be

calculated at 2% for the first late report and 4% for the second late report; not at 2% for both reports as the staff memo indicates. In addition, Mr. Walker urged the Commission to use § 1004-C to impose enhanced penalties due to aggravating circumstances.

Ms. Lowry said the Commission frequently deals with late-filings but it is unusual for someone to appear before the Commission to argue that a higher penalty be imposed on an opponent. She asked Mr. Walker what he thought would be the purpose of imposing an enhanced penalty on Unite Portland.

Mr. Walker responded the purpose would be to establish a precedent that an independent expenditure PAC cannot hide behind the excuse of inexperience if it fails to be transparent as the law requires. The statute does allow the Commission to take into consideration mitigating circumstances, but in this case, there are no mitigating circumstances. Unite Portland did not make a bona fide effort to comply with its reporting requirements. In fact, there is more evidence to support the argument for aggravating circumstances. Every time the PAC filed a report, the report had to be amended because it was not complete or accurate. In addition, the PAC was late in filing its independent expenditure reports. Inexperience was not a factor because the principal officer has been involved in political campaigns in Portland, the treasurer has just finished being involved in a contentious municipal referendum campaign, and the consultant hired by the PAC has years of experience working on political campaigns.

In response to a question from Mr. Pattershall regarding harm to the public, Mr. Walker said the City of Portland is not consistent in making campaign finance reports available online and sometimes it is necessary to go to the Clerk's office to get a copy of a report.

Mr. Pattershall said the Commission's past practice in cases like this has been to calculate the penalty for multiple late-filed reports by a candidate or committee at the same penalty percentage rate rather than to calculate them at different rates based on when the report should have been filed.

Mr. Walker said that, because the Portland City Clerk did not refer the first complaint to the Commission in a timely manner, the Commission did not take any action on the first late-filed report. Had she done so, the Commission would have dealt with these complaints at different times and a higher percentage rate for the second violation would have been warranted.

Mr. Lee said the rationale for assessing penalties at higher rates for multiple violations is that a committee has been placed on notice of the filing requirement at the time of the first violation. If the Commission had adjudicated a matter involving a prior late-filed report, then the committee would have had adequate notice that the preliminary penalty for the next violation would be calculated at a higher percentage. Ms. Lowry said if a committee filed additional reports late, it would be an indication that the first penalty at 2% was not sufficient to educate the committee about its reporting requirements and a higher penalty would be warranted.

Mr. Walker said the initial violation occurred when Unite Portland filed an independent expenditure report late. The obligation to report arose when the PAC spent money on September 1st, triggering a report that was due on September 6th, but it was not filed until October 24th. That was the date when the first violation occurred. Similarly, the PAC should have filed a second independent expenditure report on September 29th, but that report was not filed until October 22nd. That was the date of the second violation.

Mr. Lee said the violation was the failure to file the reports. He asked Mr. Walker whether the dates of the violation should be September 6th and September 29th because the violations occurred when the PAC did not file the required reports. Mr. Walker said the PAC was in violation at those points and the late filings were the events that triggered the aggravating circumstances in § 1004-C.

Ms. Gardiner said this matter raises interesting questions of how to interpret § 1004-C, which the Commission has not had an occasion to address before this. The failure to file an independent expenditure report within two days after making the expenditure is when the violation occurred, but it is a continuing violation until a report is filed. The violation is not a single instant in time. The PAC is still in violation until the report is filed. She said she was not suggesting, however, that the failure to file and the late filing are separate violations. The failure to provide the public with the information that should have been disclosed is ongoing until the report is filed. Ms. Gardiner said she would be interested in hearing how both the counsel for the Strimling campaign and Unite Portland would interpret this provision.

James T. Kilbreth, Esq., of Drummond Woodsum, appeared before the Commission on behalf of Unite Portland. Mr. Kilbreth said Unite Portland acknowledges it made mistakes. The PAC does not contest that the reports were filed late and recognizes a penalty is appropriate. However, he disagreed with Ms. Gardiner's continuing violation analysis. The violation for a late-filed independent expenditure report occurs if the report has not been filed within two days after the expenditure is made. He does not think it is a continuing violation. He said it would be appropriate and fair to treat the two violations as arising out of the same circumstances and to calculate the penalty at 2% for both late reports.

Regarding § 1004-C, Mr. Kilbreth said the term "aggravating" has customarily encompassed concepts such as willfulness and intent to deceive. Contrary to Mr. Walker's statements, the PAC did not act in a willful manner or with an intent to deceive. Mr. Kilbreth said it is important to consider the policy behind § 1004-C, which is to deter and punish anyone from making large expenditures close to an election without disclosing those expenditures in a campaign finance report. For that reason, September 6th should be considered the date on which the violation occurred when considering whether § 1004-C is applicable.

Mr. Kilbreth said the Commission should also consider proportionality in its penalty assessment. The penalty suggested by the Strimling campaign is highly disproportionate and nearly equal to the entire amount of money raised by the PAC. Mr. Kilbreth said to treat a municipal committee more severely than a statewide committee was disproportionate in the context of a municipal election.

Another important point for the Commission to consider is the degree of harm to the public. The October Quarterly Report disclosed all the contributors to the PAC. Mr. Kilbreth said the most important purpose of campaign finance disclosure is to show the source of funding. All the PAC's funders were disclosed on October 7th. The PAC also disclosed Lance Dutson's role in the LLC hired by the campaign, even though it was not required. The PAC worked diligently with Commission staff to make sure it made the corrections to the reports recommended by the Commission staff. The PAC did not make any expenditures at the last minute before the election, which is what § 1004-C concerns. Mr. Kilbreth said there was no harm to the public due to the lack of disclosure nor was there any intent to hide the PAC's funders or expenditures.

Mr. Kilbreth said the individuals involved with the PAC did not have experience with independent expenditures. They may have had experience working on a candidate campaign or referendum, but in that capacity, they would not have been involved with making independent expenditures and filing independent expenditure reports.

Dory Waxman, the principal officer of Unite Portland PAC, appeared before the Commission. In response to a question from Mr. Lee, Ms. Waxman said she has been involved in many candidate campaigns as the treasurer. However, her role in those campaigns was limited to reviewing reports and she did not manage the day-to-day financial operations of the campaigns. Due to family medical issues, she was not available for most of the month of October, except for reviewing the campaign finance reports.

Mr. Kilbreth said the PAC's treasurer, Eliot Vrana, had only worked on one other campaign, which involved a municipal referendum, as the treasurer. That campaign did not involve independent expenditures.

In response to a question from Mr. Lee, Mr. Walker said he did not think the preliminary penalty sent a strong enough message to deter other PACs from failing to file timely campaign finance reports and that was the reason for requesting the enhanced penalty.

Mr. Lee said he saw three issues for the Commission to consider: first, to determine whether § 1004-C is applicable; second, whether to calculate the penalty for both late-filed reports at the 2% rate; and third, whether to reduce the preliminary penalty.

Mr. Lee said he was not inclined to apply § 1004-C in this matter as the late-filing penalty calculation already enhances the penalty for each day a report has not been filed. For him to apply § 1004-C, there would have to be something truly exceptional about the violation.

Ms. Gardiner said she wished to add to her previous comments after listening to the discussion on how to determine when a violation occurred for the purposes of § 1004-C. Even though a violation may be continuing in one sense, for the purposes of § 1004-C, the focus should be on whether the violation first occurred within the 28 or 14 days before the election. If the violation occurs very close to the election, the severity of the violation could be significant if the public and candidates were left in the dark about the expenditure. The routine penalty calculation may not result in a penalty that is sufficiently high enough for the violation or to deter others.

In response to a question from Mr. Pattershall, Ms. Gardiner said the enhanced penalties under § 1004-C could be applied to the statutorily calculated preliminary penalty for a late-filed report; § 1004-C could also be applied to a preliminary penalty the Commission has reduced after considering any mitigating circumstances. The Commission is not limited to applying § 1004-C to the statutorily calculated preliminary penalty only.

The Commissioners agreed they would not invoke § 1004-C in this matter and the preliminary penalty for both reports would be calculated at the 2% rate.

Mr. Wayne said the people involved in this PAC did not have the same level of experience as individuals involved in larger, statewide PACs, who make a large number of independent expenditures in legislative races. That is an important consideration in determining a proportional penalty that would be consistent with past practice and that would be used as a basis for future penalties.

Mr. Nass moved that the Commission adopt the staff recommendation to assess a penalty of \$1,250 for the first late report and \$750 for the second late report. Mr. Lee seconded.

The motion passed (4-0).

5. Request for Waiver of Late-Filing Penalty – Philip Spiller

Mr. Wayne said Philip Spiller was a first-time candidate running for mayor of the City of Westbrook. Mr. Spiller was acting as his own treasurer. He made three expenditures which should have been reported in 24-hour reports, but he did not. The combined preliminary penalties total \$2,395. Mr. Spiller has requested a waiver. The staff recommendation is a penalty of \$300 per report, which is in keeping with the Commission's past penalties in similar matters.

Philip Spiller appeared before the Commission. Mr. Spiller outlined some of the factors that contributed to his filing the reports late. His treasurer unexpectedly resigned and Mr. Spiller assumed those responsibilities. In addition, Mr. Spiller had some serious health issues at the same time he was campaigning and working full time. Mr. Spiller said Angela Holmes, the City Clerk of Westbrook, did an excellent job in providing information to candidates by email. He also met with Ms. Holmes at the beginning of his campaign to receive some training on his

responsibilities as a candidate. However, at the training, he was more focused on the regular 11-day pre-election and 42-day post-election reports; the 24-hour reporting requirement did not register with him. Mr. Spiller said his failure to file the reports was not intentional, he had no intent to deceive the public, and he also did not believe there was significant harm to the public. Mr. Spiller said he was not requesting a full waiver. He said he took responsibility for the late filings and accepts that some penalty is warranted.

Angela Holmes, City Clerk for the City of Westbrook, appeared before the Commission. In response to a question from Mr. Lee, Ms. Holmes said she initially has contact with candidates when they express an intent to run for office. She also offers first-time candidates the opportunity to meet with her to go over the campaign finance requirements. During the one-on-one training with a candidate, she goes over the highlights of the candidate guidebook provided by the Commission staff. The meeting with Mr. Spiller was about 20 minutes long. She also sends out periodic emails to remind candidates of the reporting requirements and deadlines, including those for 24-hour reports.

In response to Mr. Lee's invitation to respond to Ms. Holmes presentation, Mr. Spiller said he had no further comments.

Mr. Lee said there was an abundance of communications from Ms. Holmes to the candidates. He said he did not see any mitigating circumstances that would warrant a lower penalty than the one recommended by the staff.

Mr. Pattershall moved that the Commission accept the staff recommendation and impose a \$300 penalty for each late 24-hour report for a total of \$900. Mr. Nass seconded.

The motion passed (4-0).

Other Business

Mr. Wayne said Representative Kent Ackley, who sits on the Commission's oversight committee (Veterans and Legal Affairs Committee) asked him to inquire whether the Commission would have an interest in limiting the financial activity of foreign nationals in ballot question elections. Mr. Lee said he would like to have much more information before weighing in on that subject. The other Commissioners agreed more information is needed.

Mr. Pattershall moved that the Commission adjourn. Mr. Nass seconded.

The motion passed (4-0).

The meeting adjourned at 1:53 p.m.

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