



Minutes of the August 11, 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, and Phyllis Gardiner, Assistant Attorney General

Commissioner Lee convened the meeting at 9:09 a.m. The meeting was conducted by Zoom videoconferencing and livestreamed via YouTube.

Commissioner Lee announced that a confirmation hearing was being scheduled for the three nominees for the Commission and this would likely be Commissioner Nass' last meeting. Mr. Lee and Ms. Lowry expressed their appreciation for Mr. Nass' dedication and years of public service on the Commission and presented him with a plaque commemorating his service.

The Commission considered the following items:

1. Ratification of Minutes of the May 27, June 17, and July 13, 2020 Meetings

Mr. Nass made a motion to adopt the minutes, as printed, of all three meetings. Ms. Lowry seconded the motion. Ms. Gardiner noted several small corrections to the May 27 minutes: on page 3, the word "argument" was missing; and at the bottom of page 5, the word "to" was missing in the last full sentence; on page 6, just above Item 4, the word "sum" was missing; and on page 8, first paragraph, she questioned whether the sentence about Ms. Lowry being neutral was accurate. It was agreed to change the sentence to "Ms. Lowry said she was neutral regarding whether the matter should be considered at this meeting or a subsequent meeting." Mr. Nass amended the motion to accept the changes proposed by Ms. Gardiner. Ms. Lowry seconded the motion. Motion passed 3-0.

2. Request for Waiver of Late-Filing Penalty – Women's Leadership Fund PAC

Mr. Wayne said the Women's Leadership Fund was a political action committee (PAC) registered with the Commission. On July 3rd, Robert Carter, treasurer of the PAC, was informed that the PAC paid \$2,500 for a video produced by a television production company. Mr. Carter checked with

former Representative Paula Sutton, principal officer of the PAC, about the video and was informed that the video did not advocate for or against any candidate. On July 4th, Mr. Carter filed a 24-Hour Report for this expenditure. On July 6th, Mr. Carter called and spoke with Michael Dunn, the Commission's Political Committee Registrar, to make sure the expenditure had been properly reported. Mr. Dunn asked Mr. Carter if any candidate had been identified in the video and explained that because the video was going to be disseminated within the last 28 days before the primary election, the independent expenditure (IE) presumption applied if the video depicted any clearly identified candidates. Mr. Carter checked with Ms. Sutton and found out that Rep. John DeVeau, who had been speaking to the crowd, was captured in the video although he was not identified by name. Mr. Carter filed an IE Report on July 6th. However, because the PAC had not submitted a rebuttal statement within the statutory time frame, the presumption was not rebutted and the Commission staff considered the IE Report late. The staff sent a penalty letter to the PAC, notifying it of the preliminary penalty of \$100 and the right to request a waiver.

Mr. Lee said, for clarification purposes, that if the transaction fell within the filing timeframe for both the 24-Hour Report and the IE Report, the IE Report takes precedence. Mr. Wayne said the IE Report is specifically for paid communications that expressly advocate for or against candidates and includes an affidavit that affirmed the expenditure was made independently of the candidate. However, if a communication clearly identified or named a candidate and was disseminated within the 28 days before the primary election or after Labor Day before the general election, the communication was presumed to be an IE. He said there was an opportunity to rebut the presumption if the communication was not meant to influence an election, but the rebuttal must be filed within 48 hours of disseminating the communication.

Mr. Nass asked whether a person lost the right to challenge the presumption if they did not submit a rebuttal statement within the 48-hour period. Mr. Wayne said that would depend on how strictly the Commissioners interpreted the law. He said the last time this issue came before the Commission, he believed some of the Commissioners wanted to take a strict view about the rebuttal statement being filed within the statutory timeframe. Ms. Gardiner said the statute was specific that the presumption must be rebutted within 48 hours otherwise the presumption controlled. The Commission may take mitigating circumstances into consideration in determining the appropriateness of imposing a penalty. In response to Mr. Nass' concern about how this could affect the candidate appearing in the video, Ms. Gardiner said it was the group making the

expenditure that had to be concerned about the presumption, not the candidate. Ms. Gardiner said she believed that, in the prior case, the Commission held to firm to the timeframe for submitting a rebuttal statement even though some Commissioners may have had concerns about the timeframe.

Mr. Lee said the prior case involved a mailer that clearly identified former Representative Jeffrey McCabe who was running for State Senate. The same question regarding the timeliness of a rebuttal statement was discussed at length and the Commission determined that, even though the timeframe to file a rebuttal statement was short, if no statement was filed within 48 hours, the presumption became, in essence, irrebuttable.

Robert Carter, treasurer of the Women's Leadership Fund PAC, appeared before the Commission. He said he filed the 24-Hour Report after talking with Ms. Sutton, but he still had some concerns, which was why he called the Commission on the following Monday and spoke with Mr. Dunn. He said he found the language about the rebuttal confusing and would have missed the 48-hour window because he did not know about it until he spoke with Mr. Dunn on July 6th. He said he did attempt to correct the problem by filing the IE Report as soon as he knew one had to be filed.

In response to a question from Ms. Lowry, Mr. Wayne said the Commission staff believed this communication was made independently of Rep. DeVeaue's campaign, based on the affidavit filed with the IE Report. Rep. DeVeaue would not be required to report receiving an in-kind contribution.

Mr. Lee said he believed it would be fairer if the statute were revised to change the rebuttal period to two business days instead of within 48-hours of the expenditure.

In response to a concern raised by Mr. Nass, Ms. Gardiner said the candidate was not affected by this matter; the issue was whether the group making the expenditure on the communication was in compliance or not. She said it did not impact the candidate's right to participate in political speech at all. She said the presumption, by its very nature, seemed somewhat rigid because it was objectively defined; it did not depend upon a person's motivations or other subjective factors.

In deciding whether to find a violation and impose a penalty in this case, Mr. Lee said it was important that the Commission also keep in mind that whatever the decision was, it will set a precedent. He said the Commission may waive a penalty in whole or in part if the penalty was disproportionate to the level of experience of the treasurer, the size of the campaign, or the harm to the public as a result of the late-filed report. Mr. Lee agreed with Mr. Nass' statement that the purpose of the video was not to advocate for a candidate; the candidate just happened to be in the

video. There would be harm to the public if there had been advocacy for the candidate but the expenditure for the communication was not reported in time.

Mr. Nass said he believed they should recognize the violation and determine an appropriate penalty because they should be consistent and guard against the potential for abuses in the future.

Ms. Lowry said she was satisfied that \$100 was a nominal penalty and she was comfortable with that amount. Mr. Lee said \$100 was the statutory penalty unless they grant the waiver request. Ms. Lowry said she could see a reduction to \$50 but she was comfortable with the statutory penalty. She did not believe there had been any significant harm to the public.

Mr. Nass said he believed they should find a violation and he was comfortable with no fine but would accept Ms. Lowry's suggestion of a \$50 fine.

Mr. Lee made a motion to find a violation of the IE reporting requirement but because there was virtually no harm to the public, to reduce the statutorily calculated penalty of \$100 to \$50. Mr. Nass seconded the motion. Motion passed 3-0.

3. Request for Waiver of Late-Filing Penalty – Stan Gerzofsky

Mr. Lee said Mr. Gerzofsky had contacted the Commission this morning to ask for a postponement because his arrangements to participate via Zoom had failed and he would only be able to participate by telephone. Mr. Gerzofsky said he would prefer to appear before the Commission. Mr. Lee said he had granted the continuance because Mr. Gerzofsky had lost the primary so there was limited harm to the public if this matter were delayed until their next meeting.

4. Updated Guidance on Reporting as a Ballot Question Committee

Mr. Wayne said when the statute regarding ballot question committees (BQC) was enhanced by the Legislature in 2008, the Commission created a guidance memo on whether an organization qualified as a BQC and, if it did, what financial activity needed to be reported. He said over time, the statute had changed, and the Commission staff believed it was time to update the guidance and have the Commissioners review and approve the revised guidance as they had the original guidance.

Mr. Nass asked if Mr. Wayne expected the Commission to vote on this guidance today. He expressed concern that there were going to be three new Commissioners soon, who may benefit from participating in a review and discussion of this matter. Ms. Lowry said she was comfortable going forward with this matter today because this was simply an update. Mr. Nass said he agreed

with Ms. Lowry but questioned whether there was a pressing reason to do this now. Ms. Gardiner said she believed there was a strong argument to have the current Commissioners adopt the revised guidance due to their experience in dealing with these issues over the years. Ms. Gardiner said, generally, you would want the best guidance available in preparation for an upcoming election. Mr. Nass thanked Ms. Gardiner and said he had no objections with approving the guidance at this meeting.

Mr. Lee said he believed they were all comfortable with the revised guidance and asked if they needed to vote on adopting the updated guidance. Mr. Wayne said he believed the prior guidance had been approved by a vote of the Commission. Mr. Nass made a motion to adopt the proposed registration and reporting ballot committee guidance. Mr. Lee seconded the motion. Motion passed 3-0.

5. Guidance on Paid Communications Relating to the New England Clean Energy Connect (NECEC) Transmission Project

Mr. Wayne said the Commission staff was proposing a separate guidance document that would relate to advertising, mailings, and other paid communications about the NECEC or the ballot question regarding the NECEC. He said the Commission staff believed it would be appropriate to alert the organizations that the Commission would presume that an expenditure on a communication was made for the purpose of influencing the ballot question if it met the following four criteria: 1) the payment was for services to design, produce or disseminate a communication that was disseminated to the public during the period of September 7 to November 3; 2) the communication was disseminated by direct mail, robocalls, or advertising on a broadcast or cable television station, radio station, internet website, social media outlet (e.g., Facebook), or newspaper; 3) the communication indicated support for or opposition to the NECEC transmission project or hydropower, or made positive or negative statements about the project or hydropower; and 4) the payment for the communication exceeded \$500. He said if all four of the criteria applied, the Commission staff would alert the spender that the Commission viewed the communication as an attempt to influence the election and that a report would need to be filed.

Ms. Lowry asked if there was a reason to extend the reach of this guidance to make it applicable in other campaigns as well as NECEC. She said she had concerns about addressing one specific issue without having the guidance also apply to all ballot question campaigns in the future.

Mr. Wayne said it is somewhat difficult for the Commission staff to provide advice to organizations that have non-electoral purposes in disseminating communications on a public policy issue, such as same-sex marriage, hunting, or gun control. Communications such as these should not get caught up in campaign finance reporting. He said the staff felt there were reasonable grounds to establish a narrow presumption regarding communications related to NECEC because there were not many reasons to have paid advertising on NECEC within the next two months unless the purpose was to influence the election. He said he was unsure about trying to make the presumption more broadly applicable because of the wide range of variables that may need to be taken into consideration in weighing whether the presumption applied in a specific case.

Ms. Lowry asked Ms. Gardiner if this guidance would be more vulnerable to challenge because it was specific to one ballot question. Ms. Gardiner said this was guidance and not enforceable. She said it was a way for the Commission to communicate to the parties involved in the ballot question how the Commission was interpreting the phrase “no other reasonable interpretation than to promote or oppose a ballot question” with respect to communications regarding this ballot question. She said making the guidance more general had the potential for sweeping in general policy discussions and communications which were not intended to be captured by campaign finance law. Ms. Gardiner said when the Commission staff brought this guidance to her, she was persuaded that it made sense to issue some very specific guidance for this ballot question. The Commission may want to issue similar guidance specific to future ballot questions. She said this was not a presumption that could only be rebutted within a certain time frame and there were no other restrictions on rebutting the presumption. She said the guidance was to provide notice that the Commission would expect them to file a report for these types of paid communications. They could attempt to rebut the presumption if the communications were for some reason other than influencing the election. Ms. Gardiner said, for these reasons, she thought this guidance was more helpful than restrictive.

Mr. Nass said BQCs have a \$5,000 threshold and noted that this guidance had a \$500 threshold. He asked if that would be problematic. Mr. Wayne said the \$5,000 threshold still applied and the reason for the \$500 threshold was to give some breathing room for small spenders to express themselves without having to register with the Commission. Ms. Gardiner said \$500 was threshold for the requirement to include an attribution statement on ballot question communications under

§ 1055-A, which seemed like a logical connection point for this guidance. Mr. Lee said he was comfortable with this guidance and said he believed people have the right to have the rules spelled out as clearly as possible.

Mr. Nass made a motion to adopt the Guidance on Paid Communications Relating to the New England Clean Energy Connect (NECEC) Transmission Project. Ms. Lowry seconded the motion. Motion passed 3-0.

Executive Session

Mr. Lee made a motion to go into Executive Session pursuant to Title 1, section 405(6)(E) to discuss with counsel pending litigation. Mr. Nass seconded the motion. Motion passed 3-0.

Adjournment

Mr. Lee made a motion, seconded by Mr. Nass, to adjourn. The motion passed. The meeting adjourned at 11:06 a.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director