



Minutes of the November 18, 2020, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: William A. Lee III, Esq., Chair; David R. Hastings, Esq.; Meri N. Lowry; Dennis R. Marble; and William J. Schneider, Esq.

Staff: Jonathan Wayne, Executive Director, and Phyllis Gardiner, Assistant Attorney General

Commissioner Lee convened the meeting at 9:06 a.m. The meeting was livestreamed via YouTube.

The Commission considered the following items:

1. Ratification of Minutes of the September 30 and October 16, 2020 Meetings

Mr. Lee said he and Mr. Wayne had suggested several minor amendments to the draft minutes. Mr. Wayne confirmed that the changes had been made. Mr. Schneider made a motion to adopt the September 30 minutes as amended. Mr. Marble seconded the motion. Motion passed 5-0.

Mr. Lee made a motion to adopt the October 16 minutes. Mr. Schneider seconded the motion. Mr. Lee made a motion to make a minor correction to page 13. Mr. Schneider seconded the motion.

Mr. Lee made a motion to adopt the amended minutes. Mr. Schneider seconded the motion. Motion passed 5-0.

2. Complaint - Statement of Sources of Income by Rep. John L. Martin

Mr. Wayne said legislators were required to file an annual statement of sources of income (SOSOI) that disclosed their sources of income but not actual dollar amounts. Kevin Bushey filed a complaint about Rep. John Martin's 2019 SOSOI, alleging that Rep. Martin had not reported being the Director of the Center for Rural Sustainable Development (CRSD). Rep. Martin responded that, since the 1970's, his position had been Assistant Professor of Political Science at the University of Maine at Fort Kent (UMFK). He said he had been assigned other duties from time to time, including the CRSD Director position. He said since he had been given the Director position, it had never been active.

Mr. Lee said the Commission had not dealt with this type of issue before. He asked about the notice and penalty language in subsection 3 of the statutory provision dealing with the failure to file the SOSOI within 15 days of being notified by the Commission and the provision that a statement is not considered filed unless it substantially conforms to the requirements of the statute. Mr. Lee asked

whether the 15-day notice must be provided if they found Rep. Martin's SOSOI did not substantially conform to the disclosure requirements. Ms. Gardiner said if the Commission made a finding that Rep. Martin's SOSOI did not substantially conform, which would make the filing late, they probably should give Rep. Martin the 15-day notice. However, he could choose to waive the right to receive the notice within 15 days. Mr. Lee said if they determined this was an intentional failure to file, they could refer this to the Attorney General's office for criminal prosecution. He asked if they had to provide Rep. Martin with the 15-day notice if the matter were referred. Ms. Gardiner said she did not believe the 15-day notice applied to the referral to the Attorney General's office.

Mr. Marble asked Mr. Bushey if he had contacted UMFK administration to clarify the information posted by UMFK. Mr. Bushey clarified that the documentation he sent to Mr. Wayne came from the University of Maine system, not UMFK. He said on October 23 he did send a letter to the president of UMFK, with a copy to the chairman of the Board of Trustees, but had not received a response.

Rep. John Martin appeared before the Commission. He said he had made adjustments to past SOSOI filings when he had taken on additional responsibilities at UMFK. He said in 2015 he had intended to retire and was asked to take on continued responsibilities to assist the president. The CRSD Director position was vacant and he was asked to take that on while UMFK decided whether or not it wanted to continue the program. He said, to this day, nothing had happened with that position.

Mr. Hastings asked if Rep. Martin was still teaching classes at UMFK even though he had retired. Rep. Martin said he was teaching a fall session and an independent study for students.

Mr. Lee asked for clarification about Rep. Martin's teaching status. Rep. Martin said his fall semester course had ended on Monday because students were returning home, but he was still doing independent study with a student and had two others he would be working with during the break. Mr. Lee asked if he had taught one or more classes in 2019. Rep. Martin said he had taught two night classes while the Legislature was in session but had found it very difficult to do. Mr. Lee asked if he had done any other work for UMFK in 2019. Rep. Martin said he was involved in raising the largest single contribution for the UMFK forestry program and was involved in other requests the president made throughout the year. Mr. Lee asked why UMFK listed him as the Director for the CRSD. Rep. Martin said he was given the title when the position became vacant in

2015 while UMFK decided whether or not to maintain the program. Mr. Lee asked for confirmation that this was a title without any associated responsibilities. Rep. Martin said that was correct.

Ms. Lowry said, in his response, Rep. Martin had provided a list of various duties he had been assigned since 1995. Rep. Martin said, if a position became vacant, UMFK would temporarily put him in the position until it was filled. Ms. Lowry asked if his salary had gone up since 1995. Rep. Martin said it had, based on the percentage of what non-union personnel received.

Kevin Bushey appeared before the Commission. Mr. Bushey asked if the Commissioners had viewed the webpages he had provided, which show an increase in salary for Rep. Martin from 2019 to 2020.

Mr. Hastings said it was his understanding that the SOSOI did not require listing monetary amounts, just a list of the positions that provided income of more than \$2,000. Mr. Wayne said that was correct.

Mr. Bushey asked Rep. Martin to confirm when he was appointed Director for CRSD because Mr. Bushey had a copy of a grant request signed by Rep. Martin in 2012 on behalf of CRSD. Rep. Martin said he was appointed to the position of director in 2015.

Mr. Lee said the matter before the Commission was related to Rep. Martin's 2019 statement. He said Rep. Martin listed his title as Associate Professor and Rep. Martin had said that he was teaching. Mr. Lee asked Mr. Bushey why he believed the statement was incorrect. Mr. Bushey said it did not include all salary sources. Mr. Lee asked Rep. Martin if his reported salary of \$34,000 was correct. Rep. Martin said he did receive an additional amount per course, and he received an additional amount for each independent study.

Mr. Hastings said they should focus on 2019, which was the year of the form in question. He asked Rep. Martin if the salary listed was just for teaching. Rep. Martin said that was correct.

Mr. Lee said the question before the Commission is whether Rep. Martin's 2019 statement of sources of income substantially conformed to the requirements of the statute.

Ms. Lowry said she believed that Rep. Martin had accurately reported his position as an Assistant Professor as he understood it. Mr. Schneider said he agreed with Ms. Lowry. He said the form required the listing of the source of the income and Rep. Martin had clearly established that the source of the income was his role as an Assistant Professor. Mr. Hastings said he agreed. He said

the form did not leave a lot of room for explanation and he believed it was clear that the source of work for Rep. Martin was UMFK. Mr. Marble agreed and said this was about this report, not about how the university system reports Rep. Martin's title. Mr. Lee also agreed and said the bottom line was that Rep. Martin had reported his position and the source of his income, which made the report substantially conforming.

Mr. Lee made a motion that there was insufficient evidence to investigate this complaint further. Mr. Marble seconded the motion. Motion passed 5-0.

3. Proposed Plan for Auditing Leadership PACs

Mr. Wayne said in 2017, the Commission staff had conducted an extensive investigation into a legislator's alleged use of his leadership PAC's funds for personal purposes. Using PAC funds that way was not illegal at that time. However, because the PAC had not fully reported its financial activity, some of the reports were found to be not substantially compliant and late and the Commission imposed a penalty of \$7,500. He said because of that incident along with a couple of other factors and some news reports regarding other leadership PACs, the Commission had had a discussion about whether it should be auditing leadership PACs. Mr. Wayne said leadership PACs were a subset of PACs and not defined in law. He said they were a PAC formed by a legislator to pay for costs associated with holding office, to pursue a leadership role and/or the costs of being a leader. He said traditionally, they were often one-person shows, but ideally there should be two people involved: a principal officer and a treasurer. He said there was a discussion about performing these audits in 2018 but circumstances prevented that from happening. In 2019, the Commission staff sent letters to the leadership PACs to inform them that the Commission would be conducting this audit after the 2020 election cycle. He said, in the interim, the Commission staff had been working with the PACs to make sure their balances were accurate. He said the Commission staff had identified 15 PACs for review and the staff memo laid out the process for conducting this audit if the Commission still wanted to do this.

In response to a question from Ms. Lowry, Mr. Wayne said the idea of auditing leadership PACs was something the Commissioners initiated. It was not clear to the Commission staff if the Commissioners intended the audit to be a one-time event or an ongoing process.

Mr. Lee asked if the amount of work would be reasonable or burdensome to conduct this mini audit; he wanted to be sure this was not too burdensome on staff. Mr. Wayne said he believed it was

reasonable, that he had discussed this with staff, and he believed this was completely workable. Mr. Lee said they could make a decision for the future based on the results of this audit.

Ms. Lowry said she believed it was a good time to proceed with the audit as described in the staff memo. She said there were less regulations on PAC spending and it would be interesting to see if there were any reporting irregularities.

In response to a question from Mr. Hastings, Mr. Wayne said the audit would focus on a PAC's financial activity in 2020. However, if a review of a PAC's bank statements indicated a discrepancy with the campaign finance reports, the staff would likely work with the PAC to resolve it. He said if the Commission staff discovered anything that might trigger an investigation, they would seek guidance from the Commission on how to proceed.

Mr. Marble commended the Commissioners and staff who saw that it would be worthwhile to take the lessons learned from a review of an individual PAC and conclude that this was something that should be conducted more broadly. He said he agreed with Ms. Lowry's idea of conducting a one-time audit, then to regroup as a Commission to review the results and determine where to go from there. He said the only specific suggestion he had right now was to eliminate PACs with financial activity below \$10,000.

Mr. Schneider said he had concerns about singling out leadership PACs specifically. He asked if there was any indication that a leadership PAC was more likely to be mismanaged than other PACs. He said he was struggling to find the rationale for treating leadership PACs differently from other PACs. Mr. Wayne said there was not a demonstrated track record of problems with leadership PACs. However, there were several leadership PACs that were the subject of new reports regarding their financial activity. He said Mr. Schneider's comments were similar to the concerns expressed by former Commissioner Pattershall who was not sure that there was sufficient justification to launch an audit program for leadership PACs. Mr. Wayne said the concern was that there was a greater risk of inaccurate reporting by leadership PACs because they were controlled by one or two individuals. However, there was not a demonstrated record of problems. Mr. Dunn said no category of PAC had a bad track record. He said there may be fewer concerns about PACs founded by registered non-profits or for-profit businesses than leadership PACs, which have less structure and very limited internal oversight.

Mr. Schneider asked if the Commission had an auditor on staff. Mr. Wayne said they did not. Mr. Schneider said, as this was not being done by an auditor, it might be wiser to call this a review

rather than an audit. Mr. Lee agreed and said he had not anticipated this process would be as detailed as the audits conducted on the MCEA candidates. He said he believed it would be good to go forward with this process as outlined in the staff memo and then re-evaluate. Mr. Hastings agreed and said he did not see any harm with doing this as a one-time review, but he would not agree with this becoming an ongoing formal process at this point.

In response to a question from Ms. Lowry, Mr. Hastings and Mr. Schneider said they each had a leadership PAC in the past. Mr. Hastings said he had his PAC for only one-term and he believed he had been the only person associated with the PAC, so he could understand the concern about the lack of oversight.

Mr. Lee asked if the Commissioners were comfortable with the Commission staff conducting a review of the finances of the leadership PACs for 2020 as suggested in the staff memo. Mr. Marble agreed. Mr. Schneider expressed concern that they were unfairly singling out leadership PACs. He said he would be more comfortable with a one-time review of a sampling of all PACs. Ms. Lowry said she was comfortable with going forward with the proposed review because there was a structural difference between leadership PACs and other PACs. Mr. Schneider asked if they knew this was not true of other PACs. Ms. Lowry said that was her understanding. Mr. Wayne said most other PACs do have more people involved and there was a structural difference. Mr. Lee said he would like to see the results of this review and then consider how to proceed based on that review.

Mr. Lee made a motion that the Commission staff conduct a review of the leadership PACs selected by the Commission staff in the staff memo as proposed for the year 2020. Mr. Marble seconded the motion. Mr. Schneider suggested a friendly amendment: that the project was not intended to cast any aspersions on the honesty or ethical nature of the legislators with leadership PACs. Mr. Lee amended his motion: Without any suggestion of impropriety, they authorize the Commission staff to conduct a review of the finances of the leadership PACs as recommended in the staff memo for the year 2020. Ms. Lowry seconded the motion. Motion passed 5-0.

4. Staff Adjustments to PAC/BQC Reporting

Mr. Wayne said the staff had identified 17 situations since January 2019 in which a staff adjustment was made in a committee's report, either a contribution or expenditure, to zero out the committee's ending balance. He said there were two different situations in which these adjustments were done. The first situation was when a PAC wanted to dissolve but the campaign finance e-filing system indicated the PAC still had a cash balance even though the PAC's bank account had no remaining

funds. Because the PAC could not be terminated in the e-filing system until the cash balance was zero, the staff adjusted the PAC's balance to allow it to terminate. In the second situation, as a result of Mr. Dunn's diligence in confirming the accuracy of PAC reports, there were more balance discrepancies brought to light. Mr. Dunn would work with the PAC to identify the cause of the discrepancy and when necessary made a staff adjustment. He said the Commission staff had put a hold on doing any staff adjustments for now but may want to discuss restarting this process with the Commission in the future.

Mr. Lee said he found this interesting, but he did not want to impose a significant workload burden on the Commission staff by asking them to follow up on matters where they did not see significant impropriety. Ms. Lowry agreed.

Mr. Hastings said he had noted that PACs and BQCs were not required to maintain separate bank accounts and asked if that applied to leadership PACs. He asked how they were supposed to balance their accounts if they were not kept separate. Mr. Wayne said there was no requirement for PACs, including leadership PACs, to separate political spending from regular spending. He said the Commission staff was working on a statutory proposal for the December meeting to address this issue. He said they wanted to be sure that, for the PACs that were smaller or more informal, the financial, record-keeping and organizational requirements did not unduly burden their First Amendment rights to engage in political activity. He said the Commission staff believed it would be better if there were separate bank accounts. Mr. Dunn said most committees did maintain separate bank accounts and he had not received any indication that the committees were commingling funds.

Mr. Schneider said he appreciated the review and that he felt more comfortable about the staff adjustment process. He asked if all the PACs had reconciled their balances with what was on file with the Commission. Mr. Dunn said he was working with three committees to reconcile their discrepancies. He said his hope was that the staff adjustments would be phased out as a result of the balance review process. Mr. Wayne said there were a small number of committees that had not responded, and it was uncertain whether there were any discrepancies for those PACs.

Mr. Hastings said he was satisfied that the staff's process was effective and there was no widespread abuse of the system. Mr. Schneider and Mr. Lee agreed. Mr. Schneider said he believed it would be good if the Commission staff brought any large adjustments to the Commission for review. Mr. Wayne asked how large the adjustment had to be to bring it before the

Commission. Mr. Schneider suggested anything over \$1,000 should be brought to them. Mr. Wayne said that was an excellent suggestion.

5. Proposed Rulemaking

Mr. Wayne said this was a proposed rulemaking the Commission staff would like the Commission to consider. When proposing rule changes, the Commission staff usually has firm positions on how to address specific policy issues. He said this proposal was different because the Commission staff had proposed a direction but encouraged the Commission to listen to any comments received to ensure this did not cause any hardship or problems. Because these rules changes affected the Maine Clean Election Act (MCEA), they were major substantive rules that had to be approved by the Legislature before they could become final. He said the first policy area in the proposed rulemaking was whether a candidate, who registered as a traditionally financed candidate and had accepted contributions, was foreclosed from switching to being an MCEA candidate if they chose to run for a different office. This was based on an actual situation that arose this year. He said the other policy issue related to how candidates purchased goods and services with MCEA funds. He said there were candidates this year who entered into obligations to purchase goods and services and later reported to the Commission staff that they felt pressured to obtain more MCEA funds to pay for those goods and services. He said the Commission staff felt this was not an ideal practice, which could be addressed through guidance and advice or by making it a program requirement that candidates could not get into these types of situations. Mr. Wayne said if the Commission wanted to go forward with the process, they would invite public comments, conduct a public hearing via Zoom as part of the December 18 meeting and review the comments at their January meeting.

Mr. Marble said he had no problem with the rulemaking process but had a few concerns about the proposed rules. He said, based on his own experience in running for office, he did not understand how a candidate could make campaign plans and then change their mind. He said the second proposal did not make sense to him because a candidate should be financially responsible when making purchases. He said he was reluctant to add or modify rules that may unintentionally cater to people who were being a little irresponsible.

Ms. Gardiner said it was a minor technical point but, if they post the rule for public comment, the Commission was saying that it was its proposed rule and that the Commission was inviting public comment. She said this did not change the message Mr. Wayne was trying to communicate, which was that the Commission might take a different view in response to comments. She wanted to make

it clear that they would be taking a vote on the formal proposal of this draft of the changes to the rules, if that was what they chose to do, and asking the public to comment on this proposal as drafted.

Mr. Hastings thanked Ms. Gardiner for confirming his thoughts on this process. He said he shared Mr. Marble's concerns on these proposals, especially the second proposal.

Mr. Lee said if the Commission sent the proposed rule changes out for public comment that, in effect, was the Commission's preliminary endorsement of the changes. However, the Commission would not be foreclosed from making changes after receiving public comment.

Mr. Wayne said the Commission staff was fine if the Commission only wanted to go forward with part of the rulemaking but not all of it. Mr. Lee said he thought the reason for one of the proposals was because of a situation of a candidate switching funding methods that occurred this year. Mr. Wayne said that was correct. He said the staff's policy had been that a traditionally financed candidate who had collected non-compliant seed money contributions could not switch to be MCEA candidate running for the same office. He said the proposal provided a narrow door for candidates who started out as traditionally financed while running for one office to switch to MCEA funding if they were recruited or decided to run for a different office.

Mr. Hastings said he agreed with the concept behind the proposal because the financial commitment of running for a House seat versus a Senate seat was very different. He asked if the candidate still had to meet all the normal deadlines. Mr. Wayne said they would have the same qualifying period as candidates who had not switched. He said under the proposal, they would have to ask permission one month before the certification deadline. Mr. Hastings said he was fine with this proposed change, but he had a problem with the second proposed rule change.

Mr. Marble asked why, if there was only a small number of candidates who may be affected by this, the Executive Director would not make this decision, as Mr. Wayne had in the case he mentioned, instead of changing the rules. He questioned whether a rule change was necessary.

Mr. Lee asked about the written guidance mentioned in the proposed rule. Mr. Wayne said if this change went into effect, the Commission staff would add general guidance to the candidate guidebook but provide specific guidance to any candidate who made a request. Mr. Lee asked if this had only happened this one time. Mr. Wayne said he would have to look into that because he was unsure if it happened one time per election cycle or not. He said there had been a lively

discussion among the Commission staff when this request came up this year, with divided opinions on whether or not it should be allowed. He said this did not have to be dealt with by a rule, the Commission staff could develop a written policy, have Ms. Gardiner and the Commission review and approve it, which would be the guiding principal going forward.

Regarding the second proposal, Mr. Hastings said he did not think they should be making rules for common sense and expressed concern that this could prevent someone from getting some campaign service because they were waiting for the funds to come through. He said if a candidate was not financially responsible, other violations could be triggered. He said he was concerned about constraining an MCEA candidate from doing something a traditionally financed candidate could do. Mr. Lee said if an MCEA candidate entered into obligations based on funds for which they intended to qualify but did not, that candidate could be sued by the vendor or, if they chose to pay for the service with their own funds, the candidate could be found in violation. Mr. Wayne said that was correct and had happened in the past. Mr. Lee said it appeared the proposed rule was basically saying “Don’t be stupid” and said he would prefer to see this as guidance. Mr. Wayne said if three of the Commissioners had concerns about this proposal, then the Commission staff would withdraw the proposal. Ms. Lowry said she was persuaded by the other Commissioners’ concerns. Mr. Lee asked if this should be addressed in the Commission guidance. Mr. Hastings agreed. Mr. Lee asked Mr. Wayne if he wanted a vote on this. Mr. Wayne said there should be a motion on what they wanted to go forward on.

Mr. Lee asked for thoughts on the first proposal. Mr. Schneider said he thought it would be better to handle this by a rule rather than guidance. Mr. Hastings said if the Commission staff has had to guess about the intent of the statute, it would be better to put into rule what they had done in practice. Mr. Marble agreed and said that, after listening to the discussion, he believed this would give some support to the staff.

Mr. Lee made a motion to post the first proposed rule change for public comment. Ms. Lowry seconded the motion. Motion passed 5-0.

Ms. Lowry asked if, rather than making a motion, it would be better if they were silent about the second proposal. Mr. Wayne said either option would be fine. Ms. Lowry said she would prefer to be silent on this issue and have no vote at all. Mr. Schneider said he thought that was the right way to go and that this issue would be better addressed in the form of guidance for candidates. Ms. Lowry said she would be fine that motion.

Mr. Lee made a motion that the Commission staff provide guidance in its publications for candidates to the effect that candidates should be careful not to enter into obligations to pay for campaign goods or services prior to qualifying for fund revenues sufficient to pay for those goods or services. Mr. Marble seconded the motion. Motion passed 5-0

Mr. Schneider said it would be good if the Commission staff could report back on how this guidance worked after the next election.

Adjournment

Ms. Lowry made a motion, seconded by Mr. Hastings, to adjourn. The motion passed. The meeting adjourned at 11:33 a.m.

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