



Minutes of the May 27, 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; Phyllis Gardiner, Counsel

Commissioner Lee convened the meeting at 9:12 a.m.

The Commission considered the following items:

1. Ratification of Minutes of March 10, 2020 Meeting

Mr. Nass said he had a question about a reference in the minutes about Stop the Corridor's activities related to municipal referenda or moratoriums and the Commission's jurisdiction over that process.

Mr. Lee said they would discuss that as Other Business. Mr. Nass made a motion to accept the minutes as proposed. Ms. Lowry seconded the motion. Mr. Lee said he had noted three minor changes to the minutes and asked if the motion was to accept the minutes with those three minor changes. Mr. Nass said it was. Motion passed 3-0.

2. Request to Investigate Polling by Collins for Senate

Mr. Wayne said that, under the law, if a person was deciding on whether to become a candidate and received funds or goods or services for the purposes of making that decision, they must keep track of those transactions. If they did decide to become a candidate, the law considered the funds, goods, or services received to be contributions to their campaign. John Jamison, of South Portland, filed a complaint alleging that Senator Susan Collins' federal campaign committee paid \$61,050 for two polls in 2017 as part of her consideration to run for Governor. He contended that she received a contribution in excess of the \$1,600 contribution limit for gubernatorial candidates. Mr. Jamison was unable to participate in the meeting.

Mr. Lee asked Ms. Gardiner if there was a statute of limitations regarding the filing of a complaint. Ms. Gardiner said there was no time limit expressly stated in this portion of the Commission's statutes covering campaign finance; there was a limit regarding the filing of legislative ethics complaints but not one for campaign finance complaints. Ms. Lowry asked if that meant the general statute of limitation of six years applied. Ms. Gardiner said the general law was that the statute of limitations did not run against the State unless it was expressly provided for in the statutes, so there was no limitation in this case. She said this did not mean they could not factor in the passage of time in their judgment as to whether this was an appropriate matter to investigate.

Mr. Lee asked if it was an oversight that there was no penalty associated with the possible violation of this statute. Ms. Gardiner suggested Mr. Wayne may be more familiar with the legislative history. Mr. Wayne said the staff had received questions in 2010 and during the 2011 Portland mayoral campaign, regarding the reporting of exploratory contributions and expenditures. In 2012, the Commission adopted Rules and made a statutory proposal in 2013, based on the federal "testing the waters" law to establish some clarity on how this kind of financial activity should be handled. He said he did not believe penalties were part of the statutory proposal. Ms. Gardiner said the other possible factor for the absence of a specific penalty was, if the person decided to become a candidate, then the contributions and expenditures had to be reported. If they were not reported, the statutory penalties applicable to the failure to file a report or a substantially non-conforming report would be applicable, which may be why there was no specific penalty criteria in this provision. Mr. Lee asked whether it would be the end of the matter if the Commission decided there was a violation. Ms. Gardiner said that was correct. Mr. Lee asked if they decided there were sufficient grounds to conduct an investigation, this background information could be taken into consideration along with the other facts and arguments that may be made. Ms. Gardiner said that was correct.

Joshua Tardy, Esq., and Megan Sowards Newton, Esq., co-counsels for Senator Susan Collins, appeared before the Commission. Mr. Tardy said they agreed with the Commission staff's legal analysis. He said the polls in question were a permissible federal campaign activity consistent with Senator Collins' history of polling as a candidate for federal office. He said it was typical activity for a candidate for U.S. Senate to test their brand, issues, and approval and disapproval ratings.

Mr. Lee asked Mr. Tardy why these polls would not be considered to have a dual purpose, especially the poll conducted in September 2017. Mr. Tardy said if this were a true exploration for

a run for any office other than U.S. Senate, the poll would have had extensive, layered information; asked more specific questions about the approval or disapproval of Senator Collins' position or record on specific issues; and would have been very expensive. He said it was their belief that a candidate for federal office could test whatever issue or race they were interested in as long as it was permitted under federal election law. Mr. Lee asked whether a poll could have a dual purpose if it contained questions about both senatorial and gubernatorial electability but had more specific questions regarding gubernatorial electability than the poll in question. Mr. Tardy said it was possible, but he would defer to his co-counsel on that question and how federal preemption would factor into that analysis. He said the important thing to focus on was that Senator Collins did not become a gubernatorial candidate and under Maine law, she was not required to report the expenditures for the polls to the Commission.

Ms. Sowards Newton said in the Bunning case cited in the Commission staff memo, a federal court of appeals concluded that state law was pre-empted by the Federal Election Campaign Act and that the state was precluded from investigating Representative Bunning's expenditure on a poll. She said both West Virginia and New York laws were evaluated by the Federal Election Commission (FEC), and, in both cases, the FEC found there was clear preemption by the federal law.

Mr. Lee asked Ms. Gardiner for her comments on whether the federal preemption would prevent the Commission from investigating an expenditure by a federal candidate committee that had a dual purpose. Ms. Gardiner said she believed it was clear that the federal preemption was strong. She said if Senator Collins had decided to become a gubernatorial candidate any expenditures or contributions in furtherance of her candidacy would have been required to be reported. If Senator Collins had decided to become a candidate for Governor, the State would clearly have jurisdiction to investigate. Ms. Gardiner said because Senator Collins did not decide to become a state candidate and the poll was conducted to gauge Senator Collins' approval on a number of issues, federal preemption would apply in this case. Mr. Lee asked about the impact of the Schwarzenegger case referenced by Senator Collins' counsel. Ms. Gardiner said she thought counsel for Senator Collins was significantly overstating what that case meant in this context. She said the Commission had experience with that case in another investigation regarding the National Organization for Marriage approximately ten years ago. There was a First Amendment privilege that could be asserted to protect certain sensitive information from being disclosed, but there was a

fairly high threshold to establish such a claim of a First Amendment privilege. She said it required a showing that there were threats, harassment, reprisals, risk of membership withdrawal, or discouragement of members. In other words, the person asserting the privilege would have to show that their associational rights were infringed. If a party asserting the privilege makes that showing, then the other side, which in this case would be the Commission, would have to show that the information sought was rationally related to a compelling interest and was the least restrictive means for obtaining the desired information. The National Organization for Marriage asserted this privilege in a Commission investigation, but the Commission was going to keep the confidential information protected under the Commission's statute (21-A M.R.S. § 1003(3-A)). She said a court could find that statute provided adequate protection and she doubted there could even be a prima facie showing of a First Amendment privilege in this context regarding the results or purpose of the poll. She said the Commission had a very solid confidentiality statute that protected sensitive campaign information from public disclosure, which would make it very difficult for a First Amendment privilege claim to be made. She did not believe this issue was a significant factor in this case but said the Commission did need to be sensitive to First Amendment rights in any matter. Ms. Gardiner said she would not suggest the Commission dismiss any concerns about this issue, but there is an important test that must be met before the Commission or any court would say there is an actual privilege that would bar inquiry into these areas.

Mr. Nass said he did not believe there was any point in undertaking an investigation of this matter and said he was willing to make a motion to not investigate. Ms. Lowry said she did not believe there was anything to investigate and was satisfied the poll had a federal purpose.

In response to a question from Mr. Lee, Mr. Tardy and Ms. Sowards Newton said that Senator Collins routinely conducted polls whether she is in an election cycle or not. Mr. Tardy said he believed Senator Collins has conducted at least ten polls since the 2017 poll at issue. Mr. Lee said it could make a difference for him if the only polling Senator Collins did was during a gubernatorial election cycle, but the polls done in 2017 were just two of the many polls she routinely conducts.

Mr. Lee said he agreed with Ms. Lowry and Mr. Nass for several reasons. Though not determinative in deciding whether to investigate, the age of the alleged violation was a factor to consider. In addition, there was a significant federal preemption question. If the Commission were to find a violation, there was no penalty attached to it. He said that was another factor to weigh

when considering whether to expend Commission resources on an investigation. Mr. Jamison filed the complaint but was not present to argue his case or to be questioned by the Commissioners. Mr. Lee said he did not find that there were sufficient grounds to believe a violation may have occurred.

Mr. Nass made a motion to adopt the Commission staff's recommendation against conducting an investigation for the reasons stated on page 5 of the memo. Mr. Lee seconded the motion. Motion passed 3-0.

3. Request for Waiver of Penalty – Maine Street Solutions – Protect Schools

Mr. Wayne said under the Maine election law a major contributor is an organization that contributed \$100,000 or more to a political action committee (PAC) or ballot question committee (BQC) for the purpose of influencing a ballot question election. Under this law, the PAC or BQC that received the large contribution was required to give notice, within five calendar days, to the large contributor that the contributor must file a one-time report with the Commission describing itself and its financial activity to influence the election. Maine Street Solutions-Protect Schools was a BQC formed to oppose the Yes on 1 campaign which sought to repeal the recently enacted changes to the immunization requirement for public school attendance. The BQC received a \$250,000 contribution from Pfizer, Inc. on February 5th and was required to send notice of the requirement to file a major contributor report to Pfizer by February 10th. However, the BQC did not notify Pfizer until February 11th. Nevertheless, Pfizer did file the major contributor report on time on February 18th. In the Commission staff's view, the late notice to Pfizer did not result in any harm to the public. He said the Commission had considered a similar issue at its March 10th meeting and had imposed a \$2,500 penalty. He said the preliminary penalty for this violation was \$25,000 but the staff believed that was excessive and was recommending a penalty of \$2,000.

Mr. Lee asked how many days late the notice from the PAC was in the prior case. Mr. Wayne said he could not recall how many days late that PAC was in notifying the major contributor, but the late notice had an impact on when the reports were required to be filed with the Commission. Had the notice been timely given, the major contributor report would have been filed three weeks earlier than it was.

Mr. Nass asked why the law applied only organizations and not individuals. Ms. Gardiner said she believed the purpose was to have an organization report its funding sources. Whereas, if the

contribution came from an individual, the assumption was that the individual would likely not be soliciting money from other people for that individual to give to the PAC. She said the focus of the law was on entities who might raise money from other sources.

Michael Saxl, Esq., appeared before the Commission, on behalf of Maine Street Solutions-Protect Schools. He said they stipulated to all the facts as presented by the Commission staff. He said there was a misunderstanding on the part of the treasurer who thought the notice had to be sent within five business days, but the requirement was that it be sent within five calendar days. He said they did not believe there was any public harm as a result of the late notice because the BQC issued a press release and notified the Commission on the day it received the contribution from Pfizer. Additionally, Pfizer filed the major contributor report on time. He said they were hoping for a substantial reduction in the penalty, commensurate with other penalties imposed by the Commission.

Mr. Lee suggested that it would prevent confusion if the Commission's published guidance specified when a deadline was calculated using calendar days, as opposed to business days. Mr. Wayne agreed and said the Commission staff would take that into consideration when drafting or revising its written guidance.

Mr. Lee said he supported the staff recommendation to reduce the preliminary penalty of \$25,000 to \$2,000. Mr. Nass said he agreed with the Chair about accepting the staff recommendation.

Mr. Nass made a motion to accept the Commission staff's recommendation of reducing the penalty from the statutorily pre-calculated of \$25,000 to \$2,000. Mr. Lee seconded the motion. Motion passed 3-0.

4. Request for Waiver of Penalty – Eliza Donoghue

Mr. Wayne said Ms. Donoghue is the registered lobbyist for Maine Audubon Society. Ms. Donoghue was required to file a report on February 18, 2020. On February 11, 2020, Ms. Donoghue logged into the e-filing system and attempted to file the report; however, the system did not register the report as filed. Two emails reminding Ms. Donoghue to file the report were sent to her but she was on vacation and did not see the reminders. She filed the report as soon as she got back from vacation and saw the reminders. Mr. Wayne said the preliminary penalty was \$100 and

staff was recommending a reduction to \$50 because Ms. Donoghue did make a good faith effort to file the report.

Eliza Donoghue, Esq., appeared before the Commission. Ms. Donoghue said when she initially tried to log into the system to file the report, she was not able to access the reports that were due in 2020. She contacted the Commission staff and discovered she was trying to access her 2020 account using her 2019 credentials. She said the Commission staff merged her 2019 and 2020 credentials and she was able to access her account for 2020. She was not sure what went wrong with filing the report but wondered if it had something to do with the merging of her credentials.

Mr. Lee asked if the system had a confirmation feature when someone filed a report. Mr. Wayne said the system provided an onscreen confirmation that the report was successfully filed and also sent a confirmation email. Mr. Lee said he does not recall any similar cases involving lobbyists. Mr. Wayne said many lobbyists just pay the penalty. Ms. Lowry said the Commission generally reduces penalties by a percentage that is more than 50% but because this was such a low penalty amount, she was very comfortable with a 50% reduction. Mr. Nass said he supported the staff recommendation.

Mr. Lee made a motion to reduce the penalty from \$100 to \$50. Ms. Lowry seconded the motion. Motion passed 3-0.

5. Findings of Violation and Penalties against Unregistered Candidates

Mr. Wayne said there had been seven unregistered candidates, but with a concerted effort by the Commission staff in the past week, there was now only one unregistered candidate. Mr. Wayne said the Commission staff was not certain whether the candidate, Edward Cohen, had received the letters or telephone calls and it might be better to wait another month before finding a possible violation. Mr. Lee asked if the staff had checked the voter registration lists. Mr. Wayne said the Commission staff was using the address Mr. Cohen provided to the Secretary of State's office to get on the ballot. Mr. Lee said three letters had been sent to Mr. Cohen and the staff had made attempts to contact him by telephone, with no response from Mr. Cohen. He said that was a lot of staff time and effort put into this matter. Mr. Wayne said the letters were not returned to the Commission, so he believed the address was probably a valid address for Mr. Cohen. He said it would be fine to go forward with this matter at this meeting rather than postpone it. Mr. Nass said he agreed with the

Chair. He said there was another factor in this situation that had not been discussed. He said these individuals are recruited by the parties to run as candidates and there should be an expectation that the recruiter would follow-up with the people they recruit. Ms. Lowry said she was neutral in the matter.

Mr. Lee made a motion to assess a penalty of \$100 against Mr. Edward Cohen for failing to register as required by State law. Ms. Lowry seconded the motion. Motion passed 3-0.

Other Business

Stop the Corridor's Municipal Activities

Mr. Nass said in the minutes of the March 10th meeting, there was a reference to Stop the Corridor's efforts to influence municipal referenda and asked whether that activity came under the Commission's jurisdiction. Mr. Wayne said it was important, in the context of the investigation, to know what Stop the Corridor was doing at the municipal level, but he did not believe there was a compliance issue to investigate in this matter for two reasons. Campaign finance laws only apply to actual elections and most of the actions taken at the municipal level involved votes by town councils or at town meetings and were not elections as defined in Title 21-A. In addition, campaign finance laws only apply to towns and cities with population of 15,000 or more.

Use of MCEA Fund to Pay for Face Masks

Mr. Wayne said the Commission had received questions regarding the use of MCEA funds to purchase and distribute face masks and/or other personal protective equipment which may have campaign information printed on the masks or on the package they came in. He said the Commission did provide guidance on what items may be purchased with MCEA funds, but the staff was seeking the Commissioners' guidance on this kind of pandemic-related purchase.

Ms. Lowry said the MCEA expenditure guidelines allow candidates to spend funds on inexpensive promotional items, such as campaign t-shirts. She said she was comfortable with candidates using MCEA funds to buy masks and distribute them in individual bags with a campaign slogan on it or if the mask itself had the candidate's name on it, but she was not comfortable with the idea of a large box of masks with a campaign sticker on the outside of the box. Mr. Nass agreed and said that he did not see any difference between masks with campaign slogans or T-shirts with campaign slogans as long as they were distributed individually. He also viewed giving a large quantity of masks to a

hospital or other organization as a charitable contribution, even if the box had a campaign sticker on it. Mr. Lee questioned how this could be monitored and expressed concern that this could easily become an abuse of taxpayer funds. Ms. Lowry clarified that she did not have a problem with the bulk purchase of masks in order to save money, but the masks should be individually distributed. Mr. Nass said the Commission has guidance on the costs associated with different campaign-related items and said masks could be added to that guidance. Mr. Lee said his concerns could be addressed by setting a price limit on these items in the same way as t-shirts, caps and other campaign-related items.

The Commissioners agreed that masks qualify as an article of clothing. The masks may be used by the campaign and volunteers to the campaign. The masks must be distributed individually, not in bulk, and should have identifiable campaign information on either the mask or the bag containing the mask.

Adjournment

Mr. Nass made a motion, seconded by Ms. Lowry, to adjourn. The motion passed. The meeting adjourned at 11:25 a.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director