



Minutes of the April 25, 2018, 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, Esq.; Bradford A. Pattershall, Esq.

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

Mr. Lee convened the meeting at 9:02 a.m.

Margaret Matheson, the former Chair of the Commission who had recently resigned, was presented with a plaque from the Commissioners to commemorate her eight years of service, two years beyond the expiration of her second term. Ms. Matheson was the Chair of the Commission for the past two years. Mr. Lee commended Ms. Matheson for exhibiting judgment, probity, and objectivity while serving on the Commission, and for the civility, courtesy, and respect with which she treated all who appeared before the Commission. Ms. Matheson graciously accepted the gift. She said the Commission does important work and she has enjoyed serving with the members of the Commission and staff, both present and past. Ms. Lowry said they have all experienced and benefitted from Ms. Matheson's warmth, humor, inclusivity, and grace.

1. Ratification of Minutes from February 22, and March 28, 2018 Meetings

Mr. Lee, Mr. Nass, and Mr. Pattershall recommended several amendments to the minutes of the February 22nd meeting.

Mr. Lee moved to adopt the February 22, 2018 minutes as amended; Mr. Nass seconded. The motion passed (4-0).

Mr. Lee moved to adopt the March 25, 2018 minutes as drafted; Mr. Nass seconded. The motion passed (4-0).

2. Public Hearing on Rulemaking – Ranked Choice Voting/Contribution Limits/Recounts

No public comments were made at the meeting and Mr. Lee closed the public hearing on this rulemaking.

The Commissioners decided to discuss items 3 & 4 at the end of the meeting.

5. Final Adoption of Rule Amendments – Submission of Qualifying Contributions

Mr. Wayne stated that, in October of last year, the Commission proposed major substantive rule changes regarding the process used by candidates to submit qualifying contributions (QCs) to qualify for MCEA funding. The idea was to increase administrative efficiency by enhancing the Commission's QC website. The primary use of the website is for individuals to make QCs by credit card to support candidates seeking MCEA funding. Candidates can log into the website to track the online QCs they have received and confirm whether the contributors' voter registrations were verified by the system. Under the proposed rule which was provisionally adopted by the Commission at the December meeting, candidates would be able to enter in the names and residential addresses of contributors who made QCs by check or money order and have the system attempt to verify their voter registrations. Mr. Wayne said the Commission received positive comments from the Maine Citizens for Clean Elections; no other comments were received. The Legislature authorized the Commission to finally adopt the rules as proposed. The staff recommendation is to finally adopt the rules as proposed.

Mr. Nass moved to finally adopt the proposed rule. Ms. Lowry seconded. The motion passed (4-0).

6. Discussion of Proposed Policy – Employees of Political Parties

Mr. Lee said this issue arose out of a complaint filed by the Maine Democratic Party in February, regarding an anonymous blog which published articles about the mayoral run-off election in Lewiston. The blog was later determined to have been created and published by Jason Savage, the Executive Director of the Maine Republican Party. The Maine Republican Party paid to boost the blog on Facebook which ultimately gave the blog more exposure than it would otherwise have. At the February meeting, the Commission decided not to pursue further investigation. However, the Commissioners discussed that political campaigning is changing rapidly with technology and considered whether the Commission should try to fashion, through statute or rule, some policies and procedures to handle similar situations in the future.

As requested by the Commissioners in February, Mr. Wayne submitted for the Commissioners' consideration a draft of a proposed rule change regarding campaign-related communications paid for by employees of a political party.

Mr. Nass expressed his concern about the rule's potential for restricting an individual's free speech rights.

Ms. Lowry said she did not think the draft proposed rule discourages or restricts free speech. It would only require communications created and disseminated by an employee of a political party to include a disclosure statement indicating who paid for the communication.

Ms. Lowry suggested a change in the final sentence of the proposed rule that gives the employee or party committee an opportunity to rebut the presumption by submitting evidence that the employee acted without the party's authorization or that the activities are completely unrelated to the employee's work responsibilities. Ms. Lowry said, even if the proposed language had been in effect during the Lewiston mayoral election, the result would have been the same with respect to the Maine Democratic Party's complaint because Mr. Savage did not have authorization from the Maine Republican Party. Ms. Lowry suggested two changes to the last sentence of the proposed rule:

- include a requirement that to rebut the presumption, the employee or the party committee must show that the employee requested authorization from the party committee to publish the communication and was denied such authorization, or
- delete the section of the rule that allows the presumption to be rebutted by evidence that the employee acted without the authorization of the party. Thus, the only way to rebut the presumption would be to demonstrate that the activities are unrelated to the employee's work responsibilities. However, Ms. Lowry said this approach would not be as strong as the first option.

Mr. Pattershall said he was concerned with the possible confusion and lack of clarity about how to calculate the portion of an employee's compensation that would be attributable to the communication. Ms. Lowry said if an employee was acting with the employer's authorization, it would simply be a matter of keeping a record of one's time working on the communication.

Mr. Nass said this change may infringe upon an individual's right to speak anonymously on social media and other digital platforms.

Ms. Lowry said the rule does not prohibit individuals from speaking or using social media. It only requires disclosure if the individual is an employee of a political party.

Mr. Lee said if an individual is an employee of a party and anonymously advocates for or against a candidate, the lack of disclosure to the public poses a problem.

Ms. Gardiner suggested another approach for the Commissioners' consideration. Title 21-A, section 1014, subsection 6(C) excludes from the disclosure requirement "internet and e-mail activities costing less than \$100, as excluded by rule of the commission, paid for by one or more individuals who are not required to register or file campaign finance reports with the commission and who are acting independently of and without authorization by a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee...." Ms. Gardiner suggested adding a provision to create a presumption that an employee of a party committee engaged in these activities is not acting independently of the party committee unless the employee presents evidence to rebut the presumption.

The Commissioners discussed a number of concerns regarding a policy that would apply the disclosure requirement to individuals who are also employees of a political party committee, recognizing that such a policy touches upon an individual's free speech rights and the public's right to be informed about the source of campaign communications. Mr. Lee noted the varying degree of opinions and perspectives of the Commissioners and requested Commission staff and counsel to consider possible changes to the proposed policy in light of the discussion at today's meeting.

Executive Session

Mr. Lee moved that, pursuant to Title 1 of the Maine Revised Statutes, section 405(4), the Commission go into executive session pursuant to Title 1, section 405(6)(E) and Chapter 1, section 5(2) of the Commission rules to consult with the Commission's counsel concerning pending or contemplated litigation. Mr. Nass seconded. The motion passed (4-0).

Ms. Lowry made a motion to come out of executive session; Mr. Nass seconded. The motion passed (4-0).

7. Discussion of Late Filing Penalties

Mr. Wayne said that Mr. Lee had suggested having a discussion now – at the outset of an election year – about whether the Commission's penalties should be higher in light of the 2015 citizen initiative which established higher penalty rates.

Mr. Nass said the staff memoranda outlining how the staff arrives at recommended penalties is helpful and usually includes reference to past penalties in similar matters. He asked Mr. Wayne if the staff intends to increase its recommended penalties in light of the 2015 citizen initiative. He said that the voters were clear that penalties should be higher. However, Mr. Nass said he still had concerns about the capacity for county and local party committees to pay larger penalties because they are unlikely to have any more funds than they have had in the past.

Mr. Lee said it was important to carry out the voters' intent as expressed in the 2015 citizen initiative. However, the Commission still has a high degree of discretion when deciding whether to waive or reduce penalties. He said it was also important for regulated entities to have some degree of predictability regarding the range of penalties imposed for various violations.

In response to a question from Mr. Pattershall, Mr. Wayne confirmed that the citizen initiative increased the rate at which a penalty would accrue each day a report was late. It did not change the ability of the Commission to waive or reduce penalties or change the criteria for doing so.

Mr. Lee said the standard penalty in routine cases should be higher in light of the citizen initiative, but that does not necessarily mean the penalties should double.

Ms. Lowry asked Mr. Wayne if this discussion has provided him with guidance about how to proceed with respect to the staff's recommended penalties. He said he understands the consensus to be that recommended penalties should be higher. However, he thought there was still reason to exercise discretion in recommending penalties for the county and local party committees and small political action committees and ballot question committees.

Mr. Nass and Mr. Lee said they would like to see Mr. Wayne continue to include the history of past penalties in the staff's memoranda.

Mr. Lee said the consensus of the Commissioners is that the staff's recommended penalties for routine violations would likely double but the penalties for county and local party committees and small political action committees and ballot question committees may not be increased as much given their particular circumstances.

3. Request for Waiver of Late-Filing Penalty – Maine United Auto Workers PAC

Mr. Wayne explained that the Maine United Auto Workers PAC was required to submit a campaign finance report on January 16, 2018. The PAC stated the reason for the late filing was

the PAC had changed treasurers. The preliminary penalty is \$400 and the staff did not recommend a change in penalty.

Mr. Nass moved to accept staff recommendation and issue a \$400 penalty. Mr. Lee seconded. The motion passed (4-0).

4. Request for Waiver of Late-Filing Penalty – Lobbyist Timothy Vernon

Mr. Wayne explained that Mr. Vernon is an employee of the MMG Insurance Company in Presque Isle. Because he registered as a lobbyist, he was required to file a report due on March 15, 2018 covering his lobbying activities for the month of February. In his response, Mr. Vernon stated he registers every year regardless of whether he knows he will be lobbying or not. He did not lobby in February or March of this year. Mr. Vernon stated he came down with an illness in December leaving him unable to work full days and he inadvertently missed some emails, including filing notices from the Commission. He missed the March 15th filing deadline. After being notified by the Commission, he filed the report on April 2nd. The preliminary penalty is \$100. The staff recommendation is a full waiver of the penalty based on the facts that Mr. Vernon had no lobbying activity in the month of February and he had fallen ill around the time of the filing deadline. If a full waiver is deemed to be too lenient, the staff recommended a \$50 penalty.

Mr. Nass inquired about the process of terminating as a lobbyist and whether that would have been an option for Mr. Vernon. Mr. Wayne explained that lobbyists could terminate their registration at any time during the year.

Mr. Lee made a motion to reduce the penalty to \$50. Mr. Nass seconded. The motion passed (4-0).

Other Business:

Mr. Wayne alerted the Commissioners that the MCEA certification deadline had passed and if a candidate were to be denied certification, he or she may appeal the staff's decision, in which case the Commission would have to hold a special meeting within 5 days to consider the appeal.

Mr. Wayne also informed the Commissioners of a potential budget issue in the fourth quarter of the current fiscal year ending on June 30th. While the Maine Clean Election Fund has sufficient revenue to make payment to candidates, the Commission will need a change in the budget in order to have the authority to spend those funds to cover the initial and supplemental payments to

MCEA candidates in the general election. Mr. Wayne said he will be communicating with the Governor's Chief of Staff about possible options to resolve this budget issue.

Mr. Wayne told the Commissioners that the Governor had nominated an individual to fill the vacant seat on the Commission. However, the nomination has been withdrawn due to a procedural issue.

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

The meeting adjourned at 10:12 a.m.

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