



Minutes of the August 16, 2018 Special 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 12:07 p.m.

1. Request by Maine Citizens for Clean Elections Regarding Release of MCEA Funds

Mr. Lee began the meeting by explaining that the Maine Citizens for Clean Elections (MCCE) had requested a special meeting regarding its request for the Commission to release funds under the Maine Clean Election Act (MCEA or the Act) to candidates who are eligible for supplemental payments and to six candidates who have replaced candidates who withdrew after the primary election (replacement candidates). Mr. Lee said the replacement candidates faced a dilemma in that, on the one hand, they had a looming deadline in six days to submit their requests for certification to participate in the MCEA program; while on the other hand, they had no certainty whether the Legislature will correct an error in the current budget bill that would allow the Commission to make payments to them. If the replacement candidates are certified for the MCEA program, they have forfeited the ability to raise funds from private sources and can only use public funds for their campaign. If the Legislature does not fix the budget error, these six candidates will have no money at all for their campaigns and are prohibited from raising traditional private campaign contributions. The candidates who are owed more supplemental funds also deserve to be paid; however, they have at least received the initial payment for the general election and some portion of supplemental funds. Given the time-sensitive nature of this issue, the Chair, in consultation with Commission counsel and staff, agreed to hold a special meeting to consider MCCE's request.

Mr. Wayne said there are 128 candidates (out of approximately 200) in the MCEA program who were eligible for and received supplemental funds in June and August. They and the other

MCEA candidates are still eligible for more supplemental funds and the Commission's decision today will be critical for them.

Mr. Wayne gave a brief overview of the reason why the Commission has a negative allocation in the Maine Clean Election Fund (the Fund) which means that the Commission does not have the legislative authorization to make payments from the Fund. MCCE's argument is that it was not the Legislature's intent to stop payments from being made from the Fund. In light of the Superior Court's decision on August 2, 2018, MCCE argues that the Commission has the ability and is required to make these supplemental payments for the rest of the election year.

John Brautigam, Esq., representing MCCE, appeared before the Commission. He said the Commission is an independent state agency. Moreover, the original citizen initiative enacting the Maine Clean Election Act altered the Commission's structure and gave it a degree of separation from the executive and legislative branches that had not existed before. Most importantly, it gave the Commission the authority to administer the Maine Clean Election Fund. The Superior Court's decision makes it clear that the Commission has the unambiguous statutory authority to administer the Fund. Furthermore, the Court's decision stated that, where there is a conflict between statutory provisions, the provision in the Act establishing a specific mandate requiring the Commission to distribute funds to eligible candidates takes precedence over the provisions regarding general budgetary procedure.

Mr. Brautigam said the error in the budget bill came about during the final hours of budget negotiations in 2017. He said there is no one who contends that the Legislature intended to freeze the Fund in FY2019, even those who are opposed to fixing the error. When the Legislature has decided to reduce MCEA funds available to candidates in past election years, it has done so by enacting legislation that specifies the reduction. For example, the Legislature eliminated MCEA funding for gubernatorial candidates in the 2014 election. The Legislature has not taken any action to reduce or curtail MCEA funding through the budget bill. Mr. Brautigam urged the Commission to act today to restore order and certainty to the Maine Clean Election Act program.

Mr. Pattershall asked Mr. Wayne to explain how payments to candidates are processed. Mr. Wayne said that until recently the procedure was that the Commission staff would create and send payment vouchers to the Department of Administrative and Financial Services (DAFS) which would enter the information into the State's accounting system to generate a check or

transfer the funds electronically. However, because of the Superior Court's decision, on August 6th, the DAFS Commissioner terminated the arrangement the Commission has had with DAFS since 2005 under which DAFS provided financial and personnel support services to the Commission. The Commission staff now is handling the entire payment process and sending checks and initiating electronic funds transfers to the candidates. Mr. Wayne said the Court's decision was clear. With respect to the payments to candidates in FY2018, the Superior Court stated that the specific mandate in the Act requiring the Commission to make payments of a certain amount at a certain time if the required conditions were met took precedence over general budgetary statutes. He said it was reasonable to conclude that the same reasoning would apply to required payments to candidates in FY2019.

Mr. Lee pointed out that the Superior Court's decision was not appealed to the Law Court.

Ms. Gardiner said the budgetary provisions of Title 5 establish the procedure for an agency to request authority to spend more than the current year's allocation and unused allocation allowed to be carried forward, if certain conditions are met. There must be sufficient cash available to the agency and the agency's request must be approved by the State Budget Officer and the Governor. The Superior Court's reasoning, however, is there is no discretion on the Governor's part to decline to sign the financial order, and therefore, there is in effect no need for a financial order to make the distributions to the candidates who qualify as specified by the Act. The specific provisions of the Act control over the general budgetary statutes.

Mr. Lee asked Mr. Wayne whether, if the Commission voted today to direct the staff to make payments to qualified candidates, there was any point in the payment process at which someone could exercise discretion to stop the payments. Mr. Wayne said he is waiting to receive confirmation from the State Controller. However, the preliminary discussions he has had with individuals in the executive branch indicate that the Controller's Office would approve the payments and they would be sent to the candidates.

Joshua Tardy, Esq., appeared before the Commission on behalf of the Senate Republican caucus. Mr. Tardy said the Senate Republican caucus and Senate President Michael Thibodeau agreed with the analysis by Ms. Gardiner and Mr. Wayne as contained in the staff memo. President Thibodeau agreed with the analysis of the legislative history and conclusions of legislative intent. He said the caucus and President Thibodeau urge the Commission to adopt Mr. Wayne's recommendation and authorize the staff to make payments to candidates.

Senator Troy Jackson (Senate District 1), the Senate Democratic Leader, appeared before the Commission. He said legislative intent has a bearing on all laws. During the budget negotiations, the Senate Democrats were very clear that they would not support a budget bill that did not provide funds for the MCEA program. When the budget bill did finally pass, all Legislators knew that MCEA funding was in the budget bill. The argument that an inadvertent error by a legislative staff member overrides legislative intent is not tenable. The entire Senate voted to fix this error as did a large majority of the members of the House. Senator Jackson urged the Commission to take action to ensure that the MCEA program is fully functional for this election.

Mr. Lee said that the Commission should rely on the advice of its counsel and view the Superior Court's decision as providing an avenue for the Commission to direct the staff to make the required payments to qualified candidates in FY2019 rather than engaging in the Commission's own efforts at statutory interpretation. Ms. Lowry and Mr. Pattershall agreed.

Mr. Pattershall said he did not see any need to engage in statutory interpretation regarding legislative intent and the meaning and impact of the parentheses in the budget bill. He said it was unambiguous to him that the placement of the parentheses in the budget bill was a mistake, and in the absence of ambiguity it was not necessary to turn to the principles of statutory construction. He thought the conflict between the Act and the general budget provisions of Title 5 must yield to the specific mandate in the Act. Mr. Pattershall said the Superior Court's decision is persuasive and gives him confidence that if the Commission decides to make payments to candidates, that decision is likely to be upheld if an appeal is filed. Mr. Lee agreed.

Mr. Nass said he was concerned that the Commission was trying to fix a problem that really could only be fixed by the Legislature. There are many other special revenue accounts in the state budget and the Legislature needs to impose some degree of control over the funds in those accounts. Otherwise, he said there would be chaos. There is a legislative process for fixing errors. He agreed there is an error in the budget, but it is not the Commission's role to fix it.

Mr. Lee said the election is less than three months away. There are six replacement candidates who have less than six days to figure out whether they will request certification to participate in the MCEA program, which is entirely dependent on whether the Commission will be able to distribute funds to them. There are other candidates who have qualified for and are entitled to supplemental payments. These candidates have completed the requirements to be eligible for

payments. In the interests of fundamental fairness and in upholding the Commission's contractual obligations, the Commission should take steps to ensure that it performs its duty to pay candidates, if it can do so legally.

Ms. Lowry said Mr. Nass and Mr. Pattershall have carefully distinguished the extent of the Commission's authority. The Superior Court's decision addresses Mr. Nass' concern that the Commission is contributing to chaos in the legislative budgeting process. The Court refers to the Commission's mandate and authority in the Act as being unique among state agencies and commissions. The Court stated specifically that the Commission has an authority that other commissions and agencies do not have.

Mr. Lee moved that the Ethics Commission staff will make general election distributions to any replacement candidates who request certification on or before August 22, 2018 and qualify under the MCEA as well as supplemental payments to any participating MCEA candidates who submit the requisite number of qualifying contributions. Ms. Lowry seconded.

Mr. Pattershall said he supports the motion irrespective of the error in the budget bill. He bases his support on the specific mandate in the Act which controls over the general budgetary provisions in statute.

Mr. Lee said his support for the motion is not based on any statutory interpretation done by the Commission but on the Superior Court's decision which states that the specific takes precedence over the general in this matter because of the Maine Clean Election Act's mandate to the Commission to make payments to qualified candidates.

Mr. Nass said he would vote against the motion which he views as relieving the Legislature of its responsibility to fix errors of its own making.

The motion passed (3-1). Mr. Nass opposed.

Ms. Lowry moved to adjourn. Mr. Pattershall seconded. The motion passed (4-0).

The meeting adjourned at 1:39 p.m.

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