



Minutes of the August 30, 2017, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: Margaret E. Matheson, Esq., Chair; William A. Lee III, Esq., Meri N. Lowry, Esq.,
Hon. Richard A. Nass, and Bradford A. Pattershall, Esq.

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

Commissioner Matheson convened the meeting at 9:05 a.m.

The Commission considered the following items:

1. Ratification of May 24, 2017, July 14, 2017 and August 10, 2017 Meetings

Mr. Lee made a motion to adopt the May 24, 2017 and July 14, 2017 minutes as written. Ms. Lowry seconded the motion. Motion passed (5-0).

Mr. Lee made a motion to table approval of the August 10, 2017 minutes to the September 28th meeting. Ms. Lowry seconded the motion. Motion passed (5-0).

2. Late-Filing Penalties – Respect Maine PAC and the Honorable Andre Cushing

Mr. Wayne said Laura McIntyre, Senator Cushing's sister, filed a request for investigation due to her concerns regarding certain financial transactions related to the Cushing Family Corporation and Senator Cushing's candidate committee and political action committee. The Commission authorized the staff to investigate on October 26, 2016. He said the Commission staff had reviewed three years of financial records for Senator Cushing's Senate campaign account and his political action committee, Respect Maine. He said the Commission staff found 10 PAC reports to be substantially non-conforming due to unreported expenditures, transfers of PAC funds to a private business, and a general lack of detail about the reported transactions as required by law. Mr. Wayne said Senator Cushing has been very cooperative throughout this process. He said the preliminary penalties are quite high and the Commission staff was recommending a reduction in the penalty to something in the range of \$11,000 - \$16,000.

Mr. Lee asked about the Commission staff's reasoning for the penalty reduction. Mr. Wayne said the overall amount reflects the seriousness of the violations. He said even the reduced

penalty is a significant penalty amount for the Commission to impose. He said the majority of Sen. Cushing's candidate campaign reports were substantially conforming.

Joshua Tardy, Esq., and Senator Cushing appeared before the Commission. In response to a question from Mr. Lee about the sources of the PAC's contributions, Mr. Tardy said it is the nature of PAC contributions to be a mix of individual and corporate donations. Mr. Nass noted that the issue in this case was not with contributions but only with expenditures. Mr. Tardy agreed.

Ms. Matheson said there were a large number of unreported transactions that were unrelated to campaign activity, which helped her understand the staff's recommendation on a penalty. Mr. Tardy said none of the unreported activity affected any campaign and did not deprive the public of information related to an election. Mr. Tardy said Respect Maine is a very active PAC and it will be a lengthy process to correct the errors. Mr. Tardy said he appreciated the Commission staff's recommendation and felt the staff had done a good job with its report, but he disagreed with the proposed penalty. He suggested that a \$5,000 penalty would have send a significant message without having as serious a personal impact on Senator Cushing and his family.

Mr. Lee asked why Senator Cushing had not amended his reports when the Commission staff pointed out the errors. Senator Cushing said that his counsel in the civil matter had advised him not to amend the reports at that time and to wait until the Commission's investigation was complete.

Mr. Lee observed that \$40,080 was given to New England Forest Products (NEFP) but only \$38,600 was returned to the PAC. Mr. Lee asked why all the money given to NEFP had not been returned. Mr. Tardy said the intent was for all the money to be returned. Mr. Lee asked if the non-return of funds was because of a bookkeeping error. Senator Cushing said difficulties with his bookkeeping services had resulted in a lack of access to financial records. Mr. Lee asked if there are any loan documents related to the transfer of funds from the PAC to NEFP. Senator Cushing and Mr. Tardy said there are not.

Mr. Lee asked about a check from Andre Cushing IV to Senator Cushing. Senator Cushing said that was a short-term loan from his son to NEFP. Mr. Lee asked if it had been repaid. Senator

Cushing said it had. Senator Cushing said he was a 50% owner in NEFP, which was a subsidiary business of the Cushing Family Corporation.

Mr. Pattershall asked if Senator Cushing had filed all reports this year. Mr. Wayne said he has. Mr. Pattershall asked if there are any problems with the reports. Mr. Wayne said that, as far as he knows, there are not. Mr. Pattershall asked if there were more loans to NEFP. Senator Cushing said he sold NEFP in 2015.

Senator Cushing said the primary focus of this investigation has been on the PAC's financial activity. He said many PACs are dormant in the off-election years, but because he is involved in a variety of national organizations, his PAC is more active.

Ms. Lowry said many of Senator Cushing's transaction descriptions were so vague they bordered on being meaningless. Ms. Matheson said the deficiencies are significant enough to consider the reports late. She said she would be comfortable with a \$13,500 penalty. Mr. Lee suggested separating the PAC penalties from the candidate penalties. Ms. Gardiner recommended that it would be better procedurally to have a separate motion for each entity.

Mr. Lee made a motion to reduce the statutorily calculated penalty for the 10 violations by the Respect Maine PAC to \$750 per violation and, for the Cushing for Senate campaign, to reduce the statutorily calculated penalty of \$5,000 to \$2,500, which reduces the total statutory penalty of \$105,000 to \$10,000. Ms. Lowry seconded the motion. Mr. Lee subsequently withdrew his motion to deal with the two reporting entities separately.

Ms. Gardiner pointed out that it would be better if the Commissioners split this into two motions because there are two entities with separate reporting obligations involved in this case.

Mr. Pattershall made a motion to reduce the statutory penalty of \$100,000 for Respect Maine PAC to \$5,000, which is \$500 per report. Mr. Nass seconded the motion. Motion failed (2-3; Ms. Matheson, Mr. Lee, and Ms. Lowry opposed).

Ms. Matheson made a motion, with respect to the late-filed PAC reports, to reduce the statutory penalty of \$100,000 to \$7,500, which is \$750 per report. Mr. Lee seconded the motion. Motion passed (3-2; Mr. Nass and Mr. Pattershall opposed).

Mr. Lee made a motion that the statutorily calculated penalty of \$5,000 for the 2016 late-filing violation of Cushing for Senate campaign be reduced to \$1,500. Ms. Matheson seconded the motion. Motion passed (3-2; Mr. Nass and Mr. Pattershall opposed).

3. Objections to Investigative Subpoenas by Bridge Capital, LLC and Capital Seven, LLC

Mr. Wayne said the Commissioners approved the initiation of the investigation on June 9th and on June 15th, the Commission staff mailed subpoenas to Bridge Capital, LLC and Capital Seven, LLC. He said the Commission staff and counsel had negotiated with representatives for Bridge Capital, LLC and Capital Seven, LLC on the timeframe for filing their objections to the subpoenas.

Thimi Mina, Esq., the attorney for Bridge Capital, LLC, and Andrew Ketterer, Esq., attorney for Capital Seven, LLC, appeared before the Commission.

Ms. Matheson said it is her understanding that the parties are agreeable to the objections being considered together. Mr. Mina and Mr. Ketterer agreed that it would be good to consider their objections together.

Mr. Mina said he had accepted service of the Bridge Capital, LLC subpoena on July 28th and had agreed to a September 15th deadline for the production of records. Mr. Mina said Bridge Capital is currently gathering the documents, but he has not had an opportunity to review them. With respect to the staff's responses to the objections, he believes it is not within the Commission's jurisdiction to request all Bridge Capital communications about the York County Casino because all communications may not be relevant and thus, such a request is over-broad. Mr. Mina is aware of the Commission's confidentiality statute, but that statute does not authorize the Commission to get any documents it wants. If that were the case, the assurance of confidentiality would overwhelm any objection or privilege, even those established by statute. Regarding the staff's response that the documents could shed light on the purposes of the entities providing the funding for the initiative, Mr. Mina said that the Commission should take care in examining the motivations and reasons of those who contribute to a political campaign. Though he did not anticipate it, Mr. Mina said he is preserving his objection that the subpoena is unduly burdensome in the event that it becomes necessary to seek relief in the Superior Court. Responding to subpoenas takes a lot of time and resources to collect and review the documents with an attorney. He noted that the staff did not comment on his objections based on the

attorney-client and trade secrets privileges. He said he does not know if there will be any documents in these categories but if there are, a privilege log would be created and reviewed with the Commission's counsel. He said he could not be sure what objections may be necessary, but he wants to preserve them all until he has an opportunity to review the documents.

Mr. Mina said Bridge Capital, LLC is a licensed financial institution in the Commonwealth of the Northern Mariana Islands. Ms. Matheson asked for clarification. Mr. Mina said Bridge Capital, LLC is a financial institution as defined in Northern Marianas code. In response to a question from Ms. Matheson, Mr. Mina said he does not know if Bridge Capital's sole business function is to operate as a financial institution. Ms. Matheson asked if Bridge Capital, LLC has any subsidiaries. Mr. Mina said he does not know. Ms. Matheson asked if Capital Seven, LLC was a financial institution. Mr. Ketterer said it is not.

Mr. Ketterer said he had signed the acceptance of the subpoena for Capital Seven, LLC on August 10th with the agreement of his client. He said that he would rely on his written objections and stated that his client's objections mirror, in large part, the objections of Bridge Capital. However, Capital Seven did not raise undue burden as an objection. He said that some document requests in the subpoena specifically reference the York County casino, while others are open-ended and overbroad. Mr. Ketterer said he believes the request for all communications among the various parties listed in the subpoena infringes upon Capital Seven, LLC's First Amendment rights of speech and association under the U.S. and Maine Constitutions. Mr. Ketterer said the trade secrets privilege may be applicable to certain documents unrelated to the York casino initiative and added that any such documents would be listed in the privilege log. He said he knows the Commission staff does an excellent job protecting confidentiality; however, some requests are overbroad and may involve many documents that are unrelated to the casino initiative.

Ms. Matheson said the request may appear to be overbroad but without the documents the Commission cannot determine whether the committees involved in the casino initiative are in full compliance. She said there is also the question about whether Bridge Capital, LLC and/or Capital Seven, LLC should have registered with the Commission as ballot question committees.

Ms. Lowry asked about the relationship between Bridge Capital, LLC, Capital Seven, LLC and Regent Able Associate Company. Mr. Wayne said it is still unclear what the relationships among these entities are. Mr. Wayne said that Regent Able is located in Asia and a subpoena has not been served on Regent Able. The staff has contact information for someone who is connected to Regent Able and the staff will follow up with that person. Mr. Mina said Bridge Capital, LLC has two members: Shawn Scott and John Baldwin. Mr. Ketterer said Shawn Scott is a member of Capital Seven, LLC, which is registered in Nevada. Ms. Lowry asked about any relationship to Lisa Scott, International Development Concepts, LLC (IDC) and Miami Development Concepts, LLC (MDC). Mr. Ketterer said he did not have any documents on which to base an answer to that question.

In response to a comment by Mr. Lee regarding the scope of the request for bank records, Ms. Gardiner said that a modification could be written in such a way to specify that the request pertains to bank records which are related to transactions involving the York County casino initiative. Mr. Wayne noted that the request was already limited to an eight-month period in which Capital Seven was purportedly making loans to Lisa Scott and, to a lesser extent, to MDC and IDC and added that the Commission staff has no interest in documents unrelated to the York County casino initiative. Mr. Nass asked if unrelated bank records would be listed in a privilege log. Ms. Matheson said they would not be listed in the privilege log based on a relevance argument. Mr. Mina said transactions unrelated to the York County casino initiative might fall within the category of sensitive trade secrets and, as such, considered privileged.

Mr. Lee said he understands Capital Seven's argument regarding the mix of other business interests, but noted that Capital Seven made the choice to become involved in a political activity and to fund those activities through its business account. That created the possibility of a document request from the Commission. Ms. Gardiner said Maine law recognizes a trade secret privilege, but whether it is applicable factually is something that cannot be determined without seeing the documents or a privilege log. She said a privilege log would include both attorney-client and trade secrets privileged documents. Ms. Gardiner said an authorization to withhold privileged documents is implicit and does not have to be spelled out in the subpoena.

Mr. Nass said he does not see any reason to treat these objections any differently than the objections by Lisa Scott and Cheryl Timberlake regarding their subpoenas. Mr. Pattershall said

he is sympathetic to the arguments made by Mr. Mina and Mr. Ketterer, but he agrees with Mr. Nass. Mr. Mina assured the Commission that neither he nor Mr. Ketterer would play any games regarding this document production and the clients understand that. He said he intends to produce the documents and a privilege log, if appropriate, and would continue to produce records as they became available.

Ms. Matheson made a motion to modify the subpoenas to Bridge Capital, LLC and Capital Seven, LLC only to allow any information covered by an evidentiary privilege, such as lawyer-client, spousal, for example, to be withheld but for any such documents which are being withheld because of the claim of privilege, a privilege log will be provided with the documents requested by September 15th. Mr. Lee seconded the motion. Motion passed (5-0).

4. Request for Waiver of Late-Filing Penalty – Patrick Eisenhart

Mr. Wayne said Patrick Eisenhart is a 2018 MCEA gubernatorial candidate. He said gubernatorial candidates who raise or spend more than \$1,000 are required to file a July Semiannual Report. Mr. Eisenhart raised \$1,200 in seed money but believed he was below the threshold for filing the July Semimanual Report because the credit card processing fees reduced the amount he received in his campaign account. Mr. Wayne said that Mr. Eisenhart is a first-time candidate and was not aware that he had to report the entire amount of the contribution, not just the net amount. He said the Commission staff is still working on the guidance materials for 2018. He said the statutorily calculated preliminary penalty is \$168 and staff is not recommending any waiver.

Patrick Eisenhart appeared before the Commission. Mr. Eisenhart said he had not thought the credit card processing fees were counted as part of his overall contributions. Mr. Eisenhart said the Commission staff has been very helpful and a great resource. He said his request for a waiver is not about the penalty but about the damage the finding of a violation would have to his reputation.

Mr. Lee asked if Mr. Eisenhart had ever been a candidate for State office. Mr. Eisenhart said he had not.

Mr. Nass said he is comfortable waiving the penalty but not the late-filing violation. Mr. Lee said he understands that the late-filing was not intentional but the Commission needs to enforce

compliance. He said he would support reducing the penalty to \$100. Mr. Eisenhart said he has no objection to paying the full penalty if the Commissioners are going to find a violation.

Mr. Lee made a motion to find that Mr. Eisenhart inadvertently failed to make a timely filing as described by the Commission staff and that the preliminary penalty be reduced from \$168 to \$100 to reflect that this was an inadvertent violation by a first-time candidate for State office. Mr. Pattershall seconded the motion. Motion passed (5-0).

5. Update on Audits of MCEA Candidates

Jennifer Connors and Casey Leonard appeared before the Commission to provide an update on the status of the 2016 MCEA candidate audits. Ms. Connors said they have now completed 41 audits, with eight candidates remaining. Mr. Leonard said they may need the Commission staff's assistance with the candidates in order to complete the remaining eight audits.

Ms. Connors said of the 31 reports before the Commission today, there are 13 reports with no findings or exceptions, 15 reports with exceptions, and three reports with findings and exceptions. She said the exceptions are mainly reporting transactions with the wrong date and on the wrong report, missing documentation, incorrect vendors, and unreported transactions. Ms. Connors said all the findings were for reimbursements for mileage that occurred during the qualifying period but were paid with MCEA funds instead of seed money.

Mr. Nass asked for clarification regarding how debts are reported. Mr. Wayne said the definition of an expenditure includes entering into an agreement to make a payment. He said the Commission also has a rule about incurring and reporting debts; however, the Commission staff could do a better job providing guidance on this topic. He said the Commission staff is aware of this problem but had not realized how widespread the problem was. Mr. Lee said that 40% of the audited candidates making this mistake is a high percentage, and it indicates to him that reasonable people could miss this reporting requirement.

Mr. Wayne said the Commissioners had found a violation and imposed a penalty on Rep. Maureen Terry for failing to report a debt in the proper report. That case is similar to the three audit candidate findings before the Commission today. He said the Commission staff is looking for direction on whether to bring the three audited candidates before the Commission or rescind the violation and penalty for Rep. Terry. Mr. Lee said he would need more information before making a decision on this matter. Mr. Wayne said he believes 2016 is the first time the

Commission staff had considered a report late due to the failure to report a debt. Ms. Gardiner said that in these three cases, the unreported debts were for campaign mailings to influence the election, but the transactions were not reported until after the election. The question for the Commission is whether to forgive the misreporting in these cases because the problem is more widespread than was previously known. Mr. Pattershall and Mr. Lee said they are not inclined to dismiss these cases on that basis. Ms. Gardiner said if the Commissioners decide to pursue these cases, the candidates would have the opportunity to request a waiver and appear before the Commission and explain the circumstances regarding the misreporting and the Commission could decide whether there were mitigating circumstances to waive or reduce the penalty. Mr. Lee said the candidates should be treated the same and that the Commission should either pursue action against the three audited candidates or rescind the violation and penalty against Rep. Terry. Mr. Wayne said the Commission staff would send notice to the three audit candidates.

Mr. Wayne said the issue of candidates using MCEA funds to reimburse themselves for travel expenses incurred during the qualifying period is more widespread than the Commission staff thought. He said a decision would have to be made about whether to request the return of funds or to pursue a penalty. It was agreed this issue would be discussed again at the next meeting.

Ms. Matheson made a motion to enter into executive session pursuant to Title 1, section 405(6)(E) and Chapter 1, section 5(2) of the Commission rules to consult with Commission's counsel concerning the legal rights and duties of the Commission. Motion passed (5-0).

Ms. Matheson made a motion to come out of executive session.

Mr. Nass made a motion, seconded by Mr. Lee, to adjourn. The motion passed. The meeting adjourned at 12:47 p.m.

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