



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the October 20, 2016, Special 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.; Hon. Richard A. Nass;
Bradford A. Pattershall, Esq.; Meri N. Lowry, Esq. participated via telephone.

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

Commissioner Matheson convened the meeting at 11:01 a.m.

The Commission considered the following items:

1. Request by Maine Republican Party to Investigate State Senate Candidate Jonathan Fulford and Progressive Maine PAC

Mr. Wayne stated the Maine Republican Party filed a request for an investigation into the activities of Jonathan Fulford, candidate for Senate District 11, and the Progressive Maine PAC (the PAC), which had indicated on its PAC registration that it would be supporting Mr. Fulford's election. Some of the concerns raised in the complaint were whether the candidate had received an in-kind contribution from the PAC because there was consultation/coordination between the candidate and the PAC and whether the PAC should have filed independent expenditure reports for their communications in the district.

Joshua Tardy, Esq., representing the Maine Republican Party, appeared before the Commission. Mr. Tardy stated that it was clear from the PAC's advertisement for paid staff that it intended to spend money on field canvassers and communications to influence the election. He referenced several recently filed independent expenditure reports filed by other PACs that reported paid field canvassers. He stated it is clear there is \$50,000 being used to influence a Senate race and several ballot questions. Mr. Tardy noted that, at the suggestion of Mr. Wayne, the PAC had recently amended its registration to include support of the two ballot questions, which should have been on the registration when it was originally filed.

Mr. Tardy stated he accepted Mr. Fulford's counsel's statement that Mr. Fulford has not been coordinating activities with the PAC. He said he did question the credibility of Mr. Fulford's statement about lack of knowledge about the PAC's efforts considering Mr. Fulford had liked the

PAC's Facebook posts advertising for paid staff in Belfast and Winterport to support a progressive candidate in the district.

Ms. Matheson asked if Mr. Tardy knew if any type of printed material had been distributed. Mr. Tardy stated he did not know.

Mr. Nass raised the issue of several recent cases that had come before them that seemed to push the envelope and asked if Mr. Tardy thought this case was similar. Mr. Tardy said there are reporting requirements that have to be followed and he does not believe this PAC is meeting those requirements.

Mr. Nass referenced the talking points document created by the PAC and asked whether Mr. Tardy believed this document was being distributed by the people hired by the PAC. Mr. Tardy said he found it hard to believe that, if people were knocking on doors, they were not distributing literature.

Mr. Nass asked whether the PAC's registration had to be so explicit in stating its support of Mr. Fulford. Mr. Tardy said they did not, but he believed it was important for the public and Mr. Fulford's opponent to know about the \$50,000 being spent to influence this race and the two ballot questions.

Mr. Pattershall noted that the statute lacked a definition for what is a communication. Mr. Tardy stated that, historically, communication has been interpreted very broadly. Any direct communication from a paid consultant on behalf of a candidate or in favor of a candidate is direct advocacy. He said training volunteers to go door-to-door is indirect advocacy, which in the past would have triggered matching funds in the past.

Mr. Lee asked what evidence was there that any sort of communication, cooperation, or consultation happened between Mr. Fulford and the PAC. Mr. Tardy stated there was none except what was expressed in the request to investigate. Mr. Lee said they needed a minimal set of facts before they could order an investigation. Mr. Tardy agreed that, with regard to Mr. Fulford, there was not enough evidence to order an investigation but he believed it was fair to ask the question.

Mr. Lee asked what evidence was there that the PAC made expenditures to distribute materials in support of Mr. Fulford. Mr. Tardy pointed out that the PAC advertised for staff for communication

purposes, which he believed was canvassing. Mr. Pattershall asked how prevalent it was for PACs to report these activities and if Mr. Tardy advised his clients to report canvassing activities. Mr. Tardy stated he did not know how common this reporting was, but he errs on the side of caution and advises his clients to report canvassing activities.

Ms. Matheson said she believed Mr. Tardy was asking them to go beyond the traditional parameters of what has been considered a communication. Mr. Tardy stated paying people to knock on doors is a communication. Mr. Wayne stated that if people are knocking on doors and distributing literature, that activity should be reported in an independent expenditure report. Just knocking on doors and not distributing printed materials would not be an independent expenditure. Mr. Nass said they do not know if people were knocking on doors and distributing the talking points. If they were, that would be a valid reason to initiate an investigation. Mr. Tardy pointed out that at the bottom of the talking points page it directs people to contact Joshua Grossman for more information. Ms. Matheson said they could not be sure for whom that direction is intended.

Katherine Knox, Esq., counsel for Mr. Fulford, appeared before the Commission. Ms. Knox said the Facebook post referenced in the complaint was actually a re-post by Waldo County Democrats, which is a public Facebook group. She pointed out that the advertisement being questioned simply stated it was to support a progressive Senate candidate. Mr. Nass said the advertisement was posted on the Waldo County Democrats page; there is only one Democratic Senate candidate for Waldo County; and Mr. Fulford liked the post. Ms. Knox said it was posted in a variety of places and simply liking a post is not evidence that Mr. Fulford had any interaction with the PAC.

Ms. Knox said Mr. Fulford did not know who Progressive Maine was or who Progressive Kick was and has publicly stated he has no interest in that kind of spending in his race. She said there is no evidence of coordination or that any materials were shared. Ms. Knox said she has advised her clients that face-to-face communications without literature do not need to be reported as an independent expenditure. She cautioned that if the Commission was going to reinterpret the communication rule, they needed to get that information out as soon as possible.

Mr. Lee said he did not see any evidence of cooperation between Mr. Fulford and the PAC. Though there is not a specific definition of communication, it appeared to him that Commission staff has interpreted communication to mean that just talking does not qualify as a communication. Mr.

Wayne agreed and said staff has provided written guidance on this issue. Mr. Lee asked if canvassers were going door-to-door and handing out flyers if that would qualify as a communication. Mr. Wayne said it would.

Mr. Pattershall said that Mr. Tardy had advised his clients to report canvassing activities even if there are no hand-outs and asked if Ms. Knox gave similar advice to her clients. Ms. Knox said she does not because if the canvassing activities do not include hand-outs, it is her understanding that is not a communication.

Neil Reiff, Esq., treasurer for Progressive Maine PAC, and David Mitrani, Esq., counsel for Progressive Maine PAC, participated in the meeting via telephone. Mr. Mitrani stated they were not present to litigate the definition of communication or the scope of what an independent expenditure is under Maine law. He stated the Commission has guidance on these issues and the PAC has followed that guidance. Mr. Mitrani said the PAC hired staff to recruit and train volunteers to communicate with their friends and families about supporting Mr. Fulford and the two ballot questions. He said the PAC spent and reported \$91 to print and copy the talking points, which were only distributed to volunteers to guide their conversations with their peers. Mr. Mitrani stated the PAC was tracking its expenditures on communications and would file independent expenditure reports when it reached that threshold. He said it appeared to him that the questions being asked were beyond the scope of the issues raised in the complaint and that the Maine Republican Party was seeking an expanded definition of communication that is contrary to the guidance given by Commission staff. Mr. Mitrani stated the PAC requests the complaint be dismissed because there is no evidence of wrongdoing.

Mr. Nass said it was hard to believe that the PAC was sending people door-to-door and they were not distributing any type of literatures. He said \$50,000 is a lot of money to influence a State Senate race.

Ms. Lowry asked if any of the paid staff were at the meeting. Ms. Matheson said they were not. Ms. Lowry asked if any literature was being distributed. Joshua Grossman, Principal Officer for Progressive Maine PAC, participated in the meeting via telephone. Mr. Grossman stated this was not a traditional canvassing effort and there were no door-to-door activities happening. The volunteers were recruited and trained to talk to people they already know. He said most of the

volunteers already supported Mr. Fulford and the two ballot questions. The talking points were given to them to answer any questions they might receive from the people they talked to.

Mr. Lee said even if, hypothetically, these volunteers gave a copy of the talking points to friends, he did not see how that would be an independent expenditure that had to be reported. Mr. Wayne said he was correct. He said there is always administrative staff working at headquarters and their work would not have to be reported in an independent expenditure report. Ms. Gardiner clarified that the administrative staff work would have to be reported in a regular campaign finance report but they were talking about independent expenditures.

Mr. Lee asked how the \$50,000 was spent. Mr. Grossman said the PAC has reported the money it has spent so far. Mr. Wayne said the basis for the question was that the report only documents \$10,000 in expenditures. Mr. Grossman said a large amount of the money has not been spent. Mr. Nass asked how much money has been spent since that report. Mr. Mitrani said the PAC would report how it spent the money in its next report.

Mr. Tardy urged the Commissioners to look at the definition of expenditure and the exceptions in section 1012 (3)(B)(10). He stated there is a narrow exception for party committees to exempt out 40 hours of paid staff time for the recruitment and oversight of volunteers. He said it did not make sense that the PAC's expenditure for staff to organize volunteers to directly communicate with voters would not be an expenditure that should be reported in an independent expenditure report. Mr. Tardy said the guidance states that an independent expenditure is any obligation for goods or service. He said if the service is paying a consultant to organize volunteers to influence an election that would meet the broad definition of a communication.

Ms. Knox stated that, as local counsel for the Democratic Party, she often deals with the party committee exception. She said the exception to the definitions for contributions and expenditures means that party committees do not have to report certain activities. She did not think the independent expenditure statute should necessarily mirror the exception. Ms. Knox said there are narrowly defined activities that qualify as an expenditure to be reported under the independent expenditure statute. She said they may want to redefine communication, but that is a different issue than what is being alleged in this case. She said while there is no question there is expenditure, there is no communication that must be reported in an independent expenditure report.

Mr. Mitrani said the PAC takes these matters seriously. They had conducted extensive research, talked with people on the ground, and had followed the guidance of the Commission. He urged the Commission to follow its own guidance and to leave redefining communication to another day.

Mr. Nass said \$50,000 to influence a candidate election is significant. Mr. Mitrani said the amount of money being spent in a race is immaterial to whether the Commission finds a legal reason to initiate an investigation. Ms. Matheson said there needs to be enough groundwork laid to make a determination of whether or not to investigate. She suggested, in an effort to move matters forward, they bifurcate the matters and address the in-kind contribution first.

Mr. Lee made a motion to not conduct an investigation on the first issue because there has been no evidence submitted to suggest some type of collaboration or consultation as described in the statute between Mr. Fulford and the PAC, which has come into the state in an attempt to influence the campaign. Ms. Lowry seconded the motion. Mr. Nass said he agreed with the motion because there does not appear to be any direct connection and he would support it.

Motion passed (5-0).

Mr. Pattershall asked if the Commissioners are bound by prior determinations. Ms. Gardiner stated the Commission is free to reinterpret terms and rules. However, an issue of fairness and proper notice arises if the Commission were to adopt and apply a new interpretation without providing notice to regulated entities. She said that if the Commission were inclined to revisit what is a communication under its rule, it may be beneficial to receive comments from interested parties who would be affected by any such change.

Mr. Lee said that he did not see how oral communications would fit with the other types of communications listed in the Commission's rule. He would not rule out a reinterpretation of the rule, but based on the evidence before the Commission he did not see a basis for initiating an investigation.

Mr. Nass said this is not just about oral communications and contended there was a high likelihood that the talking points had been distributed. Ms. Matheson said there is no allegation of distribution. Mr. Nass said, based on his past experience, there is a high likelihood this was distributed, which is

why they should investigate. Mr. Lee said the complainant could have gone around the neighborhood to ask if the talking points were handed out. Without evidence, the Commission has nothing to go forward on.

Ms. Matheson agreed there was some consternation about what a communication is and, while they are not bound by prior determinations, there is precedential value. She said, in order to go forward with an investigation, facts should be set out with sufficient detail to specify the alleged violation and the source of information for those facts should be identified in the complaint. Ms. Matheson said that is why the first question she asked was if there was any evidence of distribution and there was not. Mr. Lee said the facts, as presented, do not give a basis to go forward with an investigation. Mr. Nass asked if the PAC's statement to spend \$50,000 to support Mr. Fulford, payment to three people on the ground, and production of the talking points provided enough evidence to go forward with an investigation. Mr. Lee said it did not. Mr. Nass stated he supported going forward with an investigation.

Ms. Matheson asked if the Commissioners had any further comments. Mr. Wayne said there was another issue raised in the complaint, which is whether the PAC's registration was complete when filed. He said they did not need to address it today because the parties had not been asked for a response on this issue.

Ms. Matheson asked if, hypothetically, it turned out that the talking points had been distributed, would that change anything. Mr. Lee said if people were paid to distribute the talking points, it would likely be a reportable independent expenditure if the dollar threshold were met. But in this case, there is no evidence of that happening. Mr. Nass said three people were paid and they do not know if any volunteers were recruited. Mr. Lee said they have to have articulable facts as a basis for an investigation. Mr. Nass asked why the PACs statement of intent to spend \$50,000 to influence a state Senate campaign was not enough of a basis to go forward with an investigation. Mr. Lee said the money was not proof of a violation. Mr. Pattershall said the amount of money was irrelevant.

Mr. Nass made a motion to authorize an investigation into whether Progressive Maine PAC made an independent expenditure in the Senate District 11 campaign. Mr. Pattershall seconded the

motion. He said, based on the language in the statute, he believed there were sufficient grounds to believe there may have been a violation.

Motion failed (2-3); Ms. Matheson, Ms. Lowry and Mr. Lee opposed the motion.

The parties agreed to postpone the discussion of the issue regarding the PAC's registration until the next regularly scheduled commission meeting on October 26th.

Mr. Nass made a motion, seconded by Ms. Lowry, to adjourn. The motion passed. The meeting adjourned at 12:46 p.m.

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