



Minutes of the August 29, 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.

1. Ratification of Minutes of June 27, 2018 Meeting

Mr. Pattershall made a motion to accept the minutes as written. Mr. Nass seconded. The motion passed (4-0).

2. Request for Waiver of Late-Filing Penalty – Maine Health Care Association PAC

Mr. Lee noted the staff-recommended penalties are significantly higher than they have been in the past and said it would be helpful if Mr. Wayne could explain the reason for the higher recommendations. Mr. Wayne said that a 2015 citizen initiative made a number of changes to campaign finance law. Among those changes was an increase to the daily accrual rate for penalties for late-filed reports. As a result, there was a perception among the Commissioners that the recommended penalties should be higher to give effect to what the voters approved. In April 2018, the Commissioners discussed increasing recommended penalty amounts and indicated that the recommended penalties should be roughly double what they had been in previous years. Mr. Wayne said the size and sophistication of PACs can vary greatly and it may not be possible to have a single baseline recommended penalty amount appropriate for all PACs. However, the staff is considering setting \$750 as the low end of the recommended penalty for late-filed reports by PACs.

Mr. Wayne said the Maine Health Care Association (MHCA) PAC made three \$1,000 contributions to three other PACs on May 31st. It was required to report these expenditures in a 24-Hour Report by June 1st, but did not do so until July 17th, 46 days late. The preliminary penalty is \$2,760. In making the recommended penalty of \$500, the staff was influenced by the fact that the contributions were made to three other PACs and did not have anything to do with

the primary election and did not result in a high degree of public harm. It was just a matter of poor timing that the contributions were made within the 13 days before an election. The staff recommended a partial waiver, reducing the penalty to \$500. The PAC requested a full waiver due to the minimal harm to the public resulting from the late-filing and the inadvertent timing of the donations.

Richard A. Erb, President and CEO of the MHCA, appeared before the Commission and stated it was an oversight on his part that he did not inform the PAC treasurer about the contributions. Mr. Erb said in the past 17 years the PAC had filed reports on time and assured the Commission this oversight would not happen again.

Ms. Lowry commented the contributions were not associated with the primary election or made for the purpose of influencing the election and that distinguishes this case from other instances of late-filed 24-Hour Reports.

Mr. Erb stated the contributions were to support the members of the parties which support the issues of importance to the PAC during the upcoming legislative session. Mr. Erb said he believed the contributions were made in connection with certain fundraising events that regularly happen at that time of year.

Mr. Lee said the Commission has tried to act with consistency when it imposes penalties in order to give regulated entities some indication of the potential penalties they may be facing. The standard penalty for PACs tended to be \$500 for late-filing violations, \$200 for candidates, and a lesser amount for county committees. With the change to the penalty calculation brought about by the citizen initiative, it seemed that a doubling of the recommended penalties was in order. Mr. Lee said he thought the standard penalty for PAC should be closer to \$1,000, while recognizing that there may be mitigating or aggravating circumstances that would warrant a lower or higher penalty.

Mr. Nass commented that there was a lack of comment or feedback from the public for the Commission to gauge what the public thinks about the Commission's penalties. Mr. Pattershall agreed and said he was comfortable with the staff recommendation in this case.

Ms. Lowry suggested that the Commission may want to give some guidance to the staff regarding a default penalty amount since Mr. Lee has proposed \$1,000 and Mr. Wayne said he

was thinking of \$750 as the low end of the penalty range for PACs. Ms. Lowry said she was comfortable with the staff recommendation in this case.

Mr. Lee made a motion to reduce the statutorily calculated penalty from \$2,760 to \$500 as proposed by the Commission staff, on the basis of the mitigating factors that have been expressed. Ms. Lowry seconded. The motion passed (4-0).

3. Request for Waiver of Late-Filing Penalty – Fecteau for Leadership PAC

Mr. Wayne said the Fecteau for Leadership PAC, established by Representative Ryan Fecteau, made a \$5,000 contribution to another PAC on June 4th. It was required to report this expenditure on June 5th in a 24-Hour Report but did not do so until June 9th. In his waiver request, Rep. Fecteau stated he had thought a report may be required but since there was no 24-Hour Report listed on his filing schedule in the e-filing system, he thought that a report was not required after all. The preliminary penalty is \$400 and the staff did not recommend a waiver of the penalty.

Rep. Ryan Fecteau of Biddeford appeared before the Commission. He said the contribution was not related to the primary election. He made the contribution on June 4th merely as a matter of convenience while he was at a fundraiser with someone connected with the recipient PAC.

Mr. Lee said that when the preliminary penalty is below the standard recommended penalty, it is unusual for the Commission to reduce the preliminary penalty in the absence of extraordinary mitigating circumstances.

Mr. Lee made a motion to impose the statutorily calculated penalty of \$400. Ms. Lowry seconded. The motion passed (4-0).

4. Request for Waiver of Late-Filing Penalty – Caitlin Hills

Mr. Wayne said that Catlin Hills was a Maine Clean Election Act candidate for House District 97. She was in a contested primary election which she lost. She paid \$1,151.71 to a vendor for campaign signs and a mailing and was required to file a 24-Hour Report on June 9th. She filed the report on July 5th, 26 days late. The preliminary penalty is \$829.08. Ms. Hills requested a waiver due to her unawareness of the 24-hour reporting requirements. The staff recommended reducing the penalty to \$300.

Ms. Hills appeared before the Commission as did her campaign treasurer, Charlie Grey. She explained that she had actually wrote and sent the check to the vendor on May 21st, before the 24-hour reporting period started.

Mr. Grey said he was unaware he should have been using the date of the check for the date of the expenditure. In his prior bookkeeping experience, he would use the date the check cleared the bank when he entered the transaction into QuickBooks and reconciled his bank statements. So, when he was entering expenditures into the Commission's e-filing system for the post-primary report, he used June 9th as the date of the \$1,151.71 expenditure, which triggered the 24-Hour Report.

Mr. Wayne said the guidance to candidates is that whenever a payment to a vendor is made, that information should be relayed to the campaign treasurer or the person completing the campaign finance reports. Treasurers should not have to wait until they get a bank statement to learn about payments out of the campaign bank account. The information is needed in a timely fashion to fill out the campaign finance reports accurately. In this case, the payment fell within the reporting period for the report that was due on June 1st, 11 days before the primary election.

Mr. Lee asked Mr. Wayne whether this reporting error actually resulted in a violation involving the 11-Day Pre-Primary Report. Mr. Wayne said the staff would withdraw the late-filing violation for the 24-Hour Report and review whether the 11-Day Pre-Primary Report was substantially non-conforming and therefore late.

Mr. Lee made a motion to find no violation and to request that the Commission staff investigate further into whether there was a June 1st filing violation and report back as needed. Mr. Nass seconded. The motion passed (4-0).

5. Request for Waiver of Late-Filing Penalty – Ian Schwartz

Mr. Wayne said Ian Schwartz was a Maine Clean Election Act candidate in a contested primary for the Democratic nomination in Senate District 7. Mr. Schwartz did not win the primary. He made an expenditure of \$1,011.88 on June 8th and was required to file a 24-Hour Report by June 9th. He filed the report on June 28th, 19 days late. The preliminary penalty is \$384.37. Mr. Wayne said Mr. Schwartz or his treasurer was aware of the 24-hour reporting requirement because the campaign had filed a 24-Hour Report for another expenditure earlier in June. Mr. Schwartz requested a waiver of the penalty because of his inexperience. The Commission staff recommended not waiving the penalty.

Mr. Schwartz appeared before the Commission. He apologized for the late-filing. He said while he was an inexperienced first-time candidate, he was aware of the 24-hour reporting requirement.

He said he was not present at the meeting to make excuses but to show to the Commission he takes this matter seriously.

Mr. Lee asked Mr. Wayne whether the recommended penalty in this case should be \$300. That amount would be consistent the previous case and next case which also involved first-time candidates. Mr. Wayne said he did not think there would be any harm in doing so. The staff did not recommend a reduction from the preliminary penalty in this case because, unlike the other cases, Mr. Schwartz was aware of the 24-hour reporting requirement. However, he said all three candidates were otherwise diligent in fulfilling their reporting responsibilities and he did not see any problems with the reduction.

Mr. Pattershall said he supported a reduction to \$300. Mr. Lee said that a \$300 penalty was consistent with the other cases.

Mr. Lee made a motion to reduce the statutorily calculated penalty of \$384.37 to \$300. Mr. Pattershall seconded.

Ms. Lowry said the Commission is moving towards a more standardized and consistent penalty structure. She suggested that it may be helpful if there was a statement explaining the rationale for making a reduction in this case.

Mr. Lee said this case involved a first-time candidate who had no other violations. He thought the standard for this kind of violation would be in the \$300 range unless there are aggravating circumstances that warranted a higher penalty. In this case, there are no aggravating factors. In addition, the \$300 penalty is in effect a doubling of the standard penalty in use before the 2015 citizen initiative.

The motion passed (4-0).

6. Request for Waiver of Late-Filing Penalty – Danny Costain

Mr. Wayne said Danny Costain was a traditionally financed candidate in a contested primary for the Republican nomination in House District 100. On June 5th, he loaned his campaign \$3,116.26 and made an expenditure of \$2,796.89 for campaign signs and literature. He was required to file a 24-Hour Report on June 6th reporting this financial activity. He filed the report on July 24th, 48 days late. The preliminary penalty is \$2,991.36, which the staff considers disproportionately high. Mr. Wayne outlined for the Commission the various methods used to provide notice and guidance to candidates about the 24-hour reporting requirement. The staff recommended

reducing the penalty to \$300 in light of the fact that Mr. Costain was a first-time candidate and was unaware of the reporting requirement.

Joshua Tardy, Esq., appeared before the Commission on behalf of Mr. Costain. He said that Mr. Costain appreciates the staff recommendation and agrees with it. In response to a question from Ms. Lowry, Mr. Tardy said he was the treasurer of the campaign in name only. He provided advice to the candidate but did not file reports.

Mr. Nass moved that the Commission adopt the staff recommendation and reduce the penalty to \$300. Mr. Lee seconded. The motion passed (4-0).

7. Request for Waiver of Late-Filing Penalty – Jeffrey Slocum

Mr. Wayne said Jeffrey Slocum was a traditionally financed candidate in the 2016 Republican primary election for House District 51. He won the primary election but withdrew shortly thereafter. Because his campaign had over \$100 in surplus cash after the primary election, Mr. Slocum was required to file semiannual reports until he disposed of his campaign balance. He was required to file the 2018 July Semiannual Report by July 16th, but he filed the report 7 days late. This report would have been his final report because he had disposed of his remaining campaign funds by making a contribution to a candidate running in 2018. The preliminary penalty is \$112. He requested a waiver of the penalty because his campaign is now defunct and his contact information was not updated, so he did not receive filing reminders. The staff recommended not reducing the penalty.

Mr. Nass moved that the Commission adopt the staff recommendation and assess a penalty of \$112. Mr. Lee seconded. The motion passed (4-0).

8. Settlement of Litigation and Civil Penalties – York County Casino Initiative

Mr. Lee said this item had been placed on a revised agenda published the day before the meeting.

Phyllis Gardiner said the Commission made its decision in this matter in December 2017 and that decision was appealed to the Superior Court. Normally, she would defend the Commission's decision through the appeal process, and if successful, the decision would become final. Then, the Commission staff would attempt to collect the penalty. If that attempt was not successful, the Commission could refer the matter to the Office of the Attorney General, which would file a new civil action to collect the penalty.

Ms. Gardiner said the settlement proposal would resolve the appeal pending in Superior Court and the issue of collecting the penalty. The appellees – Cheryl Timberlake, Lisa Scott, and Ms. Scott’s LLCs and ballot question committees – would dismiss their appeal voluntarily which would leave the Commission’s decision as the final word on the matter. Ms. Scott and Ms. Timberlake would also pay an agreed-upon amount (\$100,000) as a penalty, which would obviate the need to file a collection action.

Ms. Gardiner said the settlement would be highly efficient and save resources in terms of the litigation involved in defending the decision and filing a collection action in the Superior Court. One of the more significant reasons for recommending the acceptance of the settlement proposal is the reality of trying to collect the penalty from Ms. Scott and her LLCs. Ms. Scott lives outside of the country and does not have assets in Maine and, to Ms. Gardiner’s knowledge, is unlikely to have assets in the country. Trying to collect a judgment against Ms. Scott and her LLCs is unlikely to be successful. The only person liable for a penalty who is in the country and has assets here is Cheryl Timberlake, whom the Commission found jointly and severally liable for a penalty of \$130,000. That amount would be the maximum the Commission could collect against her. In light of these circumstances, it seemed reasonable not to expend a lot of State’s resources in time and effort trying to collect something that was likely uncollectible. The payment of \$100,000 is a significant amount and the Commission’s decision is a significant deterrent. The settlement is a practical acknowledgement of the reality of the difficulty of collecting a penalty under these circumstances.

In response to a question from Mr. Nass, Ms. Gardiner said the penalty payment would be made to the State Treasurer and be deposited into the General Fund.

Mr. Lee asked why this matter was coming to the Commission now and not at the next meeting so that there would be more notice to the Commission and to the public. Ms. Gardiner explained that, at the outset of settlement negotiations, it was anticipated that this matter would be on this meeting’s agenda. However, she had not received the final sign-off from all the parties before the agenda was finalized and the meeting packet sent to the Commissioners. It was not until two days before the meeting that she was able to review the final agreement to determine whether it was acceptable and something she could recommend to the Commission. She said she would not have added it to the agenda this late but for the fact that the consideration of a settlement agreement is not a matter which the Commission would usually open for public comment. Ms.

Gardiner said that if the Commission wanted to take more time to consider the proposal and make a decision at the next meeting, she could request an extension of the briefing deadlines for the appeal in Superior Court.

Mr. Lee clarified for the record that the Commission has held several executive sessions over the past several months at which counsel briefed the Commission on settlement negotiations. This is not the first time the Commission has considered a possible settlement in this matter.

Mr. Nass mentioned that the settlement proposal has been covered quite extensively in the media.

Mr. Pattershall said he thought the settlement agreement was well-drafted. He also pointed out that, in addition to the difficulty in collecting the penalty, there is the risk that the Superior Court will not uphold the Commission's decision.

Mr. Lee agreed with Mr. Pattershall that a successful collection effort was doubtful and there is an unsettled matter of statutory interpretation of the penalty statute before the Superior Court. Even if the Commission ultimately prevailed on the statutory interpretation issue, the chance of collecting the full penalty is practically nil.

The Commissioners thanked Ms. Gardiner for her work in negotiating a successful settlement in this case.

Mr. Pattershall moved that the Commission accept the settlement of this matter for \$100,000 as proposed in the settlement agreement. Mr. Nass seconded. The motion passed (4-0).

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

The meeting adjourned at 10:38 a.m.

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