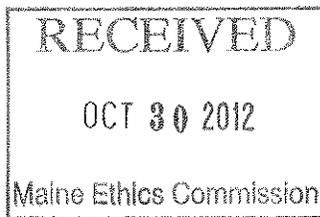


October 31, 2012



October 30, 2012

Commission on Governmental Ethics and Election Practices  
135 State House Station  
Augusta, ME 04333-0135

Re: Agenda Item #2, 10/31/12 Commission Meeting "Request for Investigation of Sen. Nichi Farnham/Coordination on Television Spending"

Dear Commissioners:

We respectfully submit these comments regarding the complaint against Senator Nichi Farnham. Each of us is a former legislator with particular interest in the integrity of our election system. We commend Commission staff for their thorough preliminary work on this matter.

In this case the Commission is asked to address a conflict between the statutorily mandated information on a PAC registration statement and the factual claims contained in Senator Farnham's affidavit.

The registration statement says that Senator Farnham was a decision maker for the Maine Senate Republican Majority PAC. If Senator Farnham in fact played that decision-making role, it logically follows that the PAC activities were coordinated with her own reelection campaign in violation of 21-A M.R.S.A. §1125. This would be true even if she delegated decisions to others.

The Commission has now received an affidavit from Senator Farnham that is inconsistent with the PAC registration statement, indicating her "disassociation" from the PAC and that she "let it be known" that she would not be involved with it.

The record in this case presents substantial factual questions. Senator Farnham's affidavit does not indicate to whom she communicated her "disassociation." The affidavits of Trevor Bragdon and Senator Thomas Saviello do not refer to any specific communication. Senator Farnham, who serves as co-chair of the legislative committee overseeing election laws, also does not explain why she communicated this information to other unnamed persons but not to the Ethics Commission, where it most mattered. What steps did she take, and were they sufficient to relieve her of her status as the PAC's official decision maker? The Commission will need to consider these and other questions.

This case also presents legal issues about the significance of the registration statement. Senator Farnham argues that the Commission should disregard the PAC registration statement naming her in the statutory role as "decision maker" for the PAC. The PAC registration statement is an important regulatory record and should not be ignored. Indeed, based on the registration statement one could conclude that Senator Farnham was legally responsible for the conduct of the PAC and its consultants until she withdrew her name. If so, the PAC's activities were "coordinated" as a matter of law, and a summary decision may be warranted

*in favor of the complainant.*<sup>1</sup> Again, this is an issue for the Commission to decide.

We also call attention to one troubling concept found in the memoranda and affidavits. The term “placeholder” is used repeatedly to imply that Senator Farnham’s agreement to serve as the PAC decision maker was not legally meaningful, real or genuine – that she was “only” a placeholder.

We urge the Commission to squarely debunk the “placeholder” notion. The PAC registration requirement, including the identity of the decision maker, is not a mere administrative technicality created by Commission staff. It was enacted by the legislature precisely to establish a public record of the PAC’s management and independence.<sup>2</sup> The required information goes to the heart of the system of transparency, disclosure and accountability. The statutory responsibility is not subject to the convenience of the person who assumes it, and it should be given its full application in this case.

Finally, we foresee a host of new questions depending on the outcome of this case. Will a candidate now be permitted to serve as a decision maker for a PAC while simultaneously denying any coordination with that PAC? When something goes wrong in the operation of a PAC can the decision maker of record later claim that he or she was merely a “placeholder” and thus not accountable? Would this approach apply equally to other types of reports filed with the Commission or even other agencies? These are significant questions.

We believe that Senator Farnham never set out to violate the law. But the Commission’s files contain many cases where conduct that was merely inadvertent or negligent was reviewed by the Commission and given some degree of sanction.

We urge the Commission to give this case the time and attention required to establish a clear precedent for the public and those subject to your jurisdiction.

Sincerely yours,



Hon. Matthew Dunlap  
143 Middle Street  
Old Town, ME 04468



Hon. John Brautigam  
1 Knight Hill Rd.  
Falmouth, ME 04105

Hon. Marilyn Canavan  
28 May Street  
Waterville, ME 04901

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<sup>1</sup> The legal concept of “regulatory estoppel” provides that a statement may be ignored if it contradicts a document previously authorized by the same person. *See, e.g., Simon Wrecking Company, Inc. v. AIU Insurance Company*, 03-CV-3231 (E.D.PA Mar. 10, 2008) (regulatory estoppel may apply where “(1) A party made a statement to a regulatory agency; and (2) Afterward, the party took a position opposite to the one presented to the regulatory agency.”).

<sup>2</sup> Pursuant to Title 21-A a PAC registration form must include “[t]he names and mailing addresses of . . . all individuals who are the primary fund-raisers and *decision makers for the committee . . .*” 21-A M.R.S.A. §1053 (emphasis added).