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July 13, 2018

HAND DELIVERED

Michele Lumbert, Clerk
Kennebec County Superior Court
Capital Judicial Center
1 Court Street, Suite 101
Augusta, ME 04101

RE: *Maine Citizens for Clean Elections, et al. v. Honorable Paul LePage, Governor and Alec Porteous, Commissioner, Department of Administrative and Financial Services and Maine Commission on Governmental Ethics and Election Practices, Party-in-Interest*
Docket No. CV-18-112

Dear Ms. Lumbert:

Enclosed for filing in the above-entitled action, in accordance with the Court's procedural order of July 2, 2018, is the Party-In-Interest's (Maine Commission on Governmental Ethics and Election Practices) Memorandum of Law in Response to Plaintiffs' Brief on the Merits and Motion for Injunctive Relief. We are providing copies to counsel for plaintiffs and defendants via email as well as regular mail.

If you have any questions, please let me know. Thank you very much for your attention to this matter.

Sincerely,

Phyllis Gardiner

Phyllis Gardiner
Assistant Attorney General

PG/ajo
Enclosure
cc: John R. Brautigam, Esq.
David M. Kallin, Esq.
Patrick Strawbridge, Esq.

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-18-112

MAINE CITIZENS FOR CLEAN ELECTIONS, SUSAN MACKEY-ANDREWS, BEN CHIPMAN, CRYSTAL CANNEY, GEOFF GRATWICK, LINDA SANBORN, RICH EVANS, WALTER RISEMAN, TOM SAVIELLO, ERIC JOHNSON, ALLISON SMITH, and JOLENE LOVEJOY

Plaintiffs,

v.

HON. PAUL LEPAGE, as GOVERNOR OF MAINE, and
HON. ALEC PORTEOUS, as COMMISSIONER, MAINE DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES

Defendants

and

MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Party-in-Interest

PARTY-IN-INTEREST'S MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFFS' BRIEF ON THE MERITS AND MOTION FOR INJUNCTIVE RELIEF

As a party-in-interest in this proceeding, the Maine Commission on Governmental Ethics and Election Practices ("the Commission"), acting by and through counsel, hereby submits this memorandum of law in response to the plaintiffs' brief on the merits and motion for injunctive relief, pursuant to the Court's procedural order of July 2, 2018. The affidavit of the Commission's Executive Director, Jonathan Wayne ("Wayne Aff."), which was filed with the Court on July 6, 2018, is incorporated by reference in this memorandum.

INTRODUCTION

Before the close of the fiscal year that ended June 30, 2018, the Commission had a statutory obligation to distribute $1,439,075 in public funding to 128 Maine Clean Election Act candidates – 88 candidates for the Maine House of Representatives, 39 for the Maine Senate, and one gubernatorial candidate – all of whom had qualified to receive those funds for the purpose of campaigning for election in the November 2018 general election. The Commission was able to distribute only $374,530, however, or about 26% of the total amount owed to the candidates, due to the Governor's failure or refusal to approve financial orders authorizing an allotment of unspent revenue available in the Maine Clean Election Fund for this purpose. Without an approved financial order, the Controller in the Department of Administrative and Financial Services ("DAFS") would not process the balance of the required payments to candidates. The actions of the defendants have thus put the Commission in the untenable position of being unable to carry out its duties in accordance with Maine law.

BACKGROUND

Maine Clean Election Act

The relevant provisions of the Maine Clean Election Act ("MCEA") and the Commission's role and responsibilities in administering the public funding program authorized by that Act are explained in detail in the Wayne Affidavit. The essential features of the MCEA program that bear directly on this dispute are as follows:

Candidates give up the legal right to raise and spend funds from any private sources – even from themselves or their family members – when they agree to participate in the public funding program and become certified pursuant to 21-A M.R.S.A. § 1125(5). Wayne Aff. ¶¶ 5, 13.

The timing and amount of public funding that each certified MCEA candidate is qualified to receive are specified in statute. 21-A M.R.S.A. § 1125(7-B) – (8-F); Wayne Aff. ¶¶ 14-19. The candidates know how much funding they are eligible to receive when they seek certification, including exactly what amounts they will receive in the form of supplemental payments once they submit a certain minimum number of $5 qualifying contributions ("QCs"), if they choose to put in the extra effort to gather those QCs. Wayne Aff. ¶¶ 14-19.

The Commission has no discretion to deny funding to candidates who meet the statutory requirements to receive either an initial distribution of funds for the primary or general election, or supplemental payments, based on the amount of QCs submitted. *See* Plaintiffs' Brief at 7-9 (quoting relevant provisions of the MCEA).

The Commission may authorize candidates to collect private funds – in effect, excusing them from the legal restrictions of the MCEA program – but only if the Commission determines that the revenues in the Maine Clean Election Fund ("MCE Fund") are insufficient to meet the amount of the distributions required by statute. 21-A M.R.S.A. § 1125(13-A). Here, because there are adequate revenues in the MCE Fund, the Commission has not been able to make such a determination. Thus, the candidates remain unable to collect private funds, yet the defendants are failing or refusing to provide available funds to the Commission for distribution to the candidates, as required by the governing statutes.

Statutes and Budgetary Procedures Governing the Commission's Spending Authority

As explained in the Wayne Affidavit, the MCE Fund is a "special, dedicated, nonlapsing fund," into which revenues flow from various sources, pursuant to 21-A M.R.S.A. § 1124, including an annual $3 million transfer from the General Fund. Wayne Aff. ¶¶ 23-24. Because it is a special revenue account that is automatically funded by statute, the Legislature does not

have to appropriate funds for this program in the biennial budget. The Legislature instead "allocates" revenues in the biennial budget to be spent from the MCE Fund. The allocations are based on the projected revenues and expenditures presented in the Governor's budget bill, which are based, in relevant part, on the Commission's budget submissions. *See* 5 M.R.S.A. §§ 1665, 1666. The Commission had to prepare its budget submissions for fiscal years 2017-18 and 2018-19 in the late summer/early fall of 2016. Wayne Aff. ¶¶ 39, 42.

Revenues that were allocated for the MCEA program in previous fiscal years and remained in the MCE Fund as of June 30, 2017, are not reflected in the biennial budget for 2017-18 and 2018-19. P.L. 2017, c. 284, § A-26 (eff. July 4, 2017). Wayne Aff. ¶¶ 40-42. Such funds are considered unused or unspent allocations – sometimes referred to as the "unencumbered balance" of allocation. *Id.* The Commission has been instructed by DAFS not to include these anticipated available funds, or proposed expenditures of those funds, in its biennial budget submission.[1] *Id.*

The Commission also has been instructed by DAFS not to include any unused or unspent allocations from the previous fiscal year in the work program that it must submit to the State Bureau of the Budget showing the allotments of spending for each quarter of the fiscal year, based on the biennial budget. *Id.* ¶¶ 28-29, 40-42.[2]

In order to obtain authority to spend any of the unspent or unused balance of allocations from the previous fiscal year, the Commission must submit to the State Budget Officer (an official within DAFS) a proposed financial order indicating the amount of funds that it seeks to

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[1] To do so would require making a prediction in August or early September of 2016 (when the Commission must prepare its budget proposals for submission to the Governor) regarding what funds would remain in the MCE Fund as of June 30, 2017. *See* Wayne Aff. ¶¶ 39, 42.

[2] There is a typographical error in paragraph 29 of the Wayne Affidavit; the statutory citation in that paragraph should be to 5 M.R.S.A. § 1667-B(2) instead of "5 M.R.S.A. § 1667(2)".

have allotted to a particular quarter of the current fiscal year, and the purpose(s) for which those funds would be spent. *Id.* ¶¶ 29, 37; Ex. E; 5 M.R.S.A. §§ 1667 & 1667-B(2). The financial order requires the Governor's approval. 5 M.R.S.A. § 1667-B(2). If the Governor approves the order, then it constitutes an allotment increase in the annual work program, pursuant to 5 M.R.S.A. § 1667-B(2). The State Controller enters the increased amount into the accounting system, and payments may be deducted from it. Wayne Aff. ¶ 28. If the Governor fails or refuses to approve the financial order, then no such entry is made and no payments for those amounts may be processed. *See* 5 M.R.S.A. § 1667 (State Controller shall authorize all expenditures on basis of allotments "and not otherwise").

Undisputed Facts

Since the defendants have not yet answered the complaint or responded to the plaintiffs' brief on the merits or motion for injunctive relief, their position on the facts is not yet known. However, the Commission believes that the following facts are undisputed:

One hundred and twenty-eight (128) certified MCEA candidates submitted a sufficient number of QCs to qualify for supplemental payments totaling $1,439,075 before the close of fiscal year 2018, on June 30, 2018. Wayne Aff. ¶ 33.

During fiscal year 2017-18, the MCE Fund contained sufficient revenue to make supplemental payments of $1,439,075 as well as to make initial distributions to all certified candidates who won nomination at the June 12, 2018 primary election or otherwise qualified (as unenrolled candidates) to appear on the general election ballot. *Id.* ¶¶ 25, 33.

The allotments in the Commission's work program for the fourth quarter of FY 2017-18 were insufficient to meet the Commission's statutory obligations to these 128 candidates. *Id.* ¶¶ 25, 33.

The Commission proposed three separate financial orders for approval during the period from March through May of 2018. Wayne Aff. Ex. D (last three pages). The first sought to shift $550,000 in spending from the fourth quarter to the third quarter allotment. The second sought to "increase allotment" in the MCE Fund "by $1,935,444 in the All Other line category for the purpose of making payments to candidates." The third requested an increase in allotment in the MCE account by $986,014 "to match budgeted revenue." Wayne Aff. ¶¶ 46-48; Ex. D (last three pages).

None of these financial orders was approved by the Governor. Neither the Governor nor the State Budget Officer, nor anyone else at DAFS, communicated to the Commission any reason for failing or refusing to approve the financial orders. Wayne Aff. ¶¶ 46-48.

As a result, the Commission had enough allotment in the fourth quarter to distribute, on a pro rata basis, only 26% of what the 128 candidates were owed by statute. Wayne Aff. ¶ 33.

On at least five occasions during his two terms in office, Governor LePage has approved financial orders authorizing the Commission to spend the "unencumbered balance forward" in the MCE Fund for the express purpose of making payments to MCEA candidates in past election cycles. Wayne Aff. Ex. D, Financial Orders # 00645F12 (approved Nov. 21, 2011), #01350F13 (approved Nov. 29, 2012), #02003F14 (approved Dec. 4, 2103),#03647F16 (approved April 8, 2016), and #03667F16 (approved April 21, 2016). His predecessor, Governor Baldacci, routinely approved similar financial orders for these purposes.[3]

[3] *See* orders in Exhibit D to Wayne Affidavit stamped as "approved by Governor" on August 7, 2008, Sept. 2, 2009, December 22, 2009, and September 2, 2010.

ARGUMENT

I. Plaintiffs are Entitled to a Declaratory Judgment that the State is Obligated to Pay Certified Candidates the Full Amount of Supplemental Payments for Which They Have Qualified Under the MCEA.

The Commission agrees with the plaintiffs that the MCEA imposes a mandatory duty to distribute to certified candidates the full amount of supplemental payments for which they have qualified in accordance with the MCEA, as long as sufficient revenues exist in the MCE Fund to cover those payments. Pl. Br. at 7-9. Since it is undisputed that sufficient revenues do exist in the MCE Fund, the State has an obligation to pay. The amounts due to each candidate are set by statute, and no other legal basis exists to warrant delaying or refusing payment.[4]

The MCEA does not exempt the Commission or the public funding program from the procedural requirements of Title 5 with regard to budgeting, allocations, allotments, or financial orders. These are budgeting and financial statutes of general applicability, however, and they must be read in conjunction with the more specific provisions of the MCEA. The two statutes must be harmonized if at all possible, and interpreted to give effect to the intent of the Legislature. *See Arsenault v. Sec'y of State*, 2006 ME 111, ¶ 11, 905 A.2d 285.[5] Another familiar principle of statutory construction is that the more specific statute prevails to the extent the two statutes are inconsistent. *Houlton Water Co. v. Pub. Utilities Comm'n*, 2016 ME 168, ¶ 21, 150 A.3d 1284.

Title 5, section 1667-B requires all agencies to obtain approval of the Governor on the recommendation of the State Budget Officer in order to spend the "unused balance of

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[4] The specific amounts owed to each of the 128 certified candidates who has submitted a sufficient number of QCs to qualify for one or more supplemental payments under the MCEA is shown in the last column of Exhibit C to the Wayne Affidavit.

[5] *See* guidance on the State's Budget Process, published by the Legislature's Office of Fiscal and Program Review (at 10-11), for a discussion of the purpose of financial orders. http://legislature.maine.gov/ofpr/publications/9191

allocations" carried forward from a previous fiscal year in a dedicated special revenue account.[6] From the standpoint of fiscal management, section 1667-B provides a check and balance in the system that could be important in certain circumstances. If, for example, the Commission were proposing to spend the unused balance of MCEA funds carried over from the previous fiscal year for a purpose that was not authorized by the MCEA, then the Governor would have reasonable grounds to refuse to sign the financial order. That is obviously not the case here, however.

Title 5, section 1667-B does not provide unfettered discretion to the Governor to approve or disapprove financial orders. He must review the financial orders in light of the statutory requirements of the particular agency program at issue. And in this instance, the Governor's authority to review and approve the financial orders requested by the Commission is constrained by the MCEA. *See* Me. Const. art. V, § 12 (Governor's constitutional duty to "take care that the laws be faithfully executed"). *Compare Coastal Counties Workforce, Inc. v. LePage*, 284 F.Supp. 3d 32, 51 (D. Me. 2018) (language in federal law that certain job training funds "shall" be made available held mandatory and binding on Governor LePage and Maine's Commissioner of the Department of Labor). Thus, in this instance the Governor lacks the discretion to block the use of dedicated revenues that are required to be distributed to candidates under the MCEA.

The purpose stated in the proposed financial order – "to make required payments to Maine Clean Election Act candidates through June 30, 2018" – is fully consistent with the mandate of the MCEA, and the amount of increased allotment that the Commission requested was for only "a portion of the unencumbered balance forward" in the MCE Fund account. Ex. D to Wayne Aff. (second-to-last-page). No additional information was requested by the State Budget Officer or the Governor, and no questions were raised by either official. The

[6] The Commission recognizes that only one of the three financial orders submitted this spring precisely fits the type of order described in section 1667-B, but it is for the largest amount and is the one necessary at this point to meet the obligations set forth in Exhibit C to the Wayne Affidavit.

Commission's request was entirely consistent with many that had been presented in previous years and approved without delay. Wayne Aff. ¶ 38 & Ex. D.

There appears to be no fiscal reason for the Governor's refusal to sign the Commission's financial orders, and thus no purpose underlying the provisions of Title 5 that could be served by his refusal. However, his failure or refusal to do so directly frustrates the purposes of the Maine Clean Election program and is preventing the Commission from fulfilling its statutory obligations to the candidates under the MCEA. The grounds for issuance of a declaratory judgment are clear.

II. Issuance of a Declaratory Judgment that the Governor has a Duty to Approve the Financial Order Requested by the Commission Should Be Sufficient to Provide the Relief Sought by Plaintiffs.

Because Title 5, section 1667-B expressly provides that a financial order to approve spending of the unspent balance carried forward from the previous fiscal year, as requested by the Commission, must be "approved by the Governor" rather than a lower level state official or agency, the injunction requested by the plaintiffs would have to be directed toward the Governor to order him to approve the Commission's financial order. Approval of the proposed financial order under these circumstances should be construed as a ministerial act, which in a number of other states would support issuance of a mandatory injunction or mandamus order.[7] However, the Law Court has determined on two prior occasions that to order the Governor to take a

[7] *See, e.g., Willits v. Askew,* 279 So. 2d 1 (Fla. 1973) (Governor may be required by writ of mandamus to perform ministerial act of issuing a state warrant necessary to draw funds from the State Treasury to pay a tort judgment duly recovered in court by injured plaintiff); *Jenkins v. Knight,* 46 Cal. 2d 222, 293 P.2d 6 (1956) ("Mandamus will issue to compel Governor to perform ministerial acts required by law, either statutory or constitutional"); *Blalock v. Johnston,* 180 S.C. 40, 185 S.E. 51, 56 (1936) ("mandamus will lie against the Governor to compel the performance of such ministerial act . . . ."); *Winsor v. Hunt,* 243 P. 407 (Ariz. 1926) (mandamus issued to Governor to perform ministerial act of signing warrants for compensation of state employee).

specific action in his official capacity would violate the separation of powers clause of the Maine Constitution, Me. Const. art. III. *Kelly v. Curtis*, 287 A.2d 426, 429 (Me. 1972); and *In re Dennett,* 32 Me. 508 (1851).

In reaching this conclusion in *Kelly*, the Court affirmed the principle established in *Dennett* case and in a Massachusetts case, *Rice v. Draper*, 207 Mass. 577, 93 N.E. 821 (1911), that it would also violate separation of powers for the judicial branch to "attempt to evaluate the nature of the official duty [of the Chief Executive] as ministerial or discretionary." 287 A.2d at 430.[8] In *Kelly*, therefore, the Law Court simply declared what the law required, and trusted that the Governor would comply without need of an injunction. *See id.*, quoting *Rice*, 207 Mass. 577 ("for whatever he does officially, the Governor shall answer only to his own conscience, to the people who elected him, and in the case of the possible commission of a crime or misdemeanor, to a court of impeachment").

As the Law Court has noted more recently, however, "[l]ike the federal courts, 'our constitutional structure does not require that the Judicial Branch shrink from a confrontation with the other two coequal branches." *Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 28, __ A. 3d __. And the federal court just recently ordered Governor LePage and his Labor Department Commissioner to distribute funds in accordance with mandatory language in the federal Workforce Investment Opportunity Act. *Coastal Counties Workforce*, 284 F. Supp. 3d at 65 ("Court is exercising its authority to mandate state compliance with a federal statute because in

[8] This distinction is important in that, "generally, mandamus (or its procedural equivalent) lies to compel the performance of strictly ministerial acts imposed by law upon subordinate officers of the government" whereas "[i]f the law clothes the officer with discretion in the performance of his duties, then mandamus will not lie ... except to compel the exercise of the discretionary powers upon complete refusal to act." *Kelly*, 287 A.2d at 429, citations omitted. *See Carroll v. City of Portland*, 1999 ME 131, ¶ 9, 736 A.2d 279 ("A *discretionary* act requires judgment or choice, whereas a *ministerial* act is mandatory and requires no personal judgment or choice.") (emphasis in original).

this case the statute clearly demands it and the required action is confined and readily achievable"); *see also Coastal Counties Workforce, Inc. v. LePage*, 2018 WL 2143094 *1 (D. Me. 2018) (issuance of permanent injunction). Moreover, *Kelly* addresses only a mandatory injunction or mandamus issued to the Governor; it does not suggest any limitation on the judicial branch's ability to issue a prohibitory injunction.[9]

The Commission, the plaintiffs, and the public should expect the Governor to faithfully execute the laws of this State as declared by this Court, consistent with his constitutional obligations and his oath of office. Thus, if this Court declares that the MCEA mandates the distribution of supplemental payments to the 128 candidates who have qualified, then the Commission would expect the Governor to promptly sign a financial order approving the increased allotment of special revenue in the Maine Clean Election Fund, as requested by the Commission, to cover the state's obligations to those candidates. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (court may assume that Chief Executive will abide by an authoritative interpretation of a statute and constitutional provision by the District Court even if not directly bound by such a determination); *Knight First Amendment Inst. At Columbia Univ. v. Trump.*, 302 F. Supp. 3d 541, 579-80 (S.D.N.Y. 2018) (because no government official is above the law and all government officials are presumed to follow the law once the judiciary has said what the law is, court will assume that Chief Executive and other executive officials will "remedy the blocking we have held to be unconstitutional").

[9] The Commission shares the plaintiffs' view that by failing and refusing to sign the financial orders and thereby blocking statutorily required payments to these 128 MCEA candidates, the Governor is violating the First Amendment rights of those candidates and their supporters to engage in core political speech. Pl. Br. at 15-18. Such a finding would support this Court's issuance of a prohibitory injunction without violating the separation of powers principles set forth in *Kelly v. Curtis*.

CONCLUSION

For the foregoing reasons, and those set forth in the plaintiffs' brief, the Commission respectfully requests the Court to issue a declaratory judgment as requested by plaintiffs, enjoin any further violation of First Amendment rights of the MCEA candidates and their supporters, and thereby enable the Commission to comply with its statutory obligations to administer the Maine Clean Election Act.

Dated: July 13, 2018

Respectfully submitted,

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