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September 11, 2020

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Re: Ethics Complaint Against Esther Kennedy

Dear Bob:

There were several issues that I wanted to raise at last night's meeting, but I feared that it would be a departure from protocol if I tried to interrupt the discussion among the committee members in order to do so. My impression was that the meeting was being run very similarly to the running of a City Council meeting or a land use board meeting, where those who are not members of the tribunal speak only when spoken-to and where it would be inappropriate for a member of the public to simply "jump in" and voice his or her comments. If we had been in a courtroom with a judge, I would have been considerably less reticent about interjecting during the proceedings.

In any event, I have several things on my mind:

First, I wanted to make clear that it is Esther Kennedy's desire that the hearing be both public and live, to as great an extent as possible, though we acknowledge that the Ethics Code confers upon the Ethics Committee the right to conduct it in private, in the committee's discretion. She wants a full airing of her rejoinder to Ms. Pearson's various accusations, and she believes that transparency should be the order of the day (as she almost always does).

Secondly, for the reasons which follow, I strongly object to conducting the further hearings by Zoom, Webex, or any other "virtual" meeting format. As the courts have slowly begun reopening after their closure as a result of the pandemic, courts in both Massachusetts and New Hampshire have begun experimenting with "virtual trials," and the early reviews have been almost universally negative.

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In particular, conducting a “virtual” trial or hearing any time that exhibits are involved is an administrative nightmare, especially for the cross-examiner, and of course this case is going to be document-heavy. I have participated in telephone depositions before, in which the lawyers were in, say, New Hampshire and the witness was in, say, Florida, testifying via speakerphone, and as long as the deposition consisted only of oral testimony it went just fine. However, whenever it became necessary to question the witness concerning exhibits, it was an unmitigated disaster--particularly when the need to question the witness concerning a particular document was not anticipated, and no one had thought to send the witness a copy of that document in advance.

If these sorts of problems attend a simple telephonic deposition, you can imagine how much worse they are going to be in a “virtual” evidentiary hearing, where witness testimony is going to be taken and documents are going to be reviewed while the witness is examined. I am a member of the New Hampshire Association of Criminal Defense Lawyers and I subscribe to its listserv, and one of the comments made by one of the lawyers who had recently been involved in one of these experimental, virtual trials was that she was going to have to double her fees any time that she participated in a virtual trial in the future, for just the jury selection alone took twice as long as usual.

A second reason that I oppose a Zoom hearing is that almost all of the drama of confrontation between the accuser and the accused is sapped from the proceeding if Zoom is used. There is a reason why the accused in a criminal case enjoys a 6th Amendment right to the confrontation of witnesses and why, with only a very small and narrow handful of exceptions, live confrontation is required in our courts. The ability of the jury--which in this case consists the four members of the Ethics Committee--to observe the demeanor of the witness and to assess his or her credibility is greatly diminished if cross-examination is not live and in person. In the case of Zoom cross-examinations, it is more easy for the witness to evade the questions and to hide his or her body language. In this case Ms. Pearson’s credibility is going to be sharply in issue, and she should be exposed to full and fair cross-examination so that the members of the committee can judge for themselves whether her testimony is to be believed and whether her various accusations have any merit. I trust it has not escaped the members of the Ethics Committee that it is possible that she is simply be using her ethics complaint as a weapon to remove a political opponent.

In any event, the unwieldiness of attempting to conduct a Zoom cross-examination while using documents or other exhibits should in itself be reason enough for dispensing with that format. I was perfectly satisfied with the thirty-minute time limit which the committee imposed on cross-examination, but that was when I supposed that the cross-examination was to be live. If

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the Zoom format is to be used, then I would ask that that limit be tripled because of the logistical problems that I have mentioned, and I object to the thirty-minute limit.

Finally, I must turn to a more sensitive subject, which is that I must ask for the recusal of one of the committee members, Joe Onosko, from sitting on this case. It has come to my attention that there is clear evidence by which any reasonable, detached, objective observer would be led to question whether Mr. Onosko is capable of being fair and impartial in this matter, and such an observer would be well justified in concluding that the latter has prejudged the case.

Preliminarily, I must report that during last night's meeting it was a bit unsettling to Ms. Kennedy and some of her friends who were present, as well as to myself, that during some of his comments Mr. Onosko referred in passing to "Councilor Kennedy's violation". As of right now, there is no violation. It has yet to be proven. Ms. Pearson has not yet put on her case or been cross-examined by the undersigned, and thus far there is no evidence of any violation beyond Ms. Pearson's naked accusations. Those accusations are being hotly disputed by Ms. Kennedy and her witnesses, and our side has yet to be heard.

For these reasons, it came as a most unhappy surprise to us to hear him refer to "Ms. Kennedy's violation". I remember hearing it once, and some of the attendees in her corner tell me that he said it at least twice. (I was busy scribbling notes, and so I might not have heard it the other times.)

Secondly, since last night I have been contacted by resident Arthur Clough at Councilor Kennedy's request. Both verbally and by e-mail he related to me an incident which, in my judgment, leaves little question but that Joe has already made up his mind concerning the accusation against Ms. Kennedy and strongly suggests that he is not capable of judging this case fairly and impartially.

Specifically, Mr. Clough reports that he had a conversation with Joe a week and a half ago, which began as a conversation about a completely unrelated subject but at some point drifted into the subject of Ms. Kennedy's ethics complaint, and he (Joe) began railing at her for her perceived misconduct. I quote verbatim from the e-mail message that Mr. Clough sent me, which conforms to what he told me verbally:

When I met with Joe Onosko by phone on September 2 about a different issue than the Ethics complaint. During that call Joe spoke about the many things that he has on his plate and he brought up the subject of the Ethics Board complaint against her and his words and tone made it clear that he was disgusted with

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Esther and that he had concluded that the charges were real and wrongful. I don't have the exact wording of what he said, but I'm trying to recall. It was a 32 minute call and we discussed a number of topics. I cut the subject short because I didn't want to argue with Joe and he seemed to be passionately against her whereas I understand that she was trying to expose the legal status of the Pop-up NH group.

If you would like, I can forward you the original e-mail message.

In our view this information, coupled with the casual references to "Councilor Kennedy's violation" at last night's meeting, clearly suggests that Mr. Onosko has prejudged this case and draws into question whether he is capable of judging Ms. Pearson's complaint fairly and impartially and deciding it based on the evidence to be presented.


Giving you a preview of what Councilor Kennedy's defense will consist of, our evidence will be that there is absolutely no question but that the City of Portsmouth and the as-yet-unformed Pop-Up Portsmouth's organizers were in clear and open violation of federal law; that the City was exposed to potentially serious liability as a result; that both she and a few of the other city councilors had attempted to avail themselves of normal and proper channels in an effort to force the organizers to obey the law, but had gotten nowhere; and that Councilor Kennedy took the unorthodox step of purchasing that organization's corporate name and registration only after her efforts to exploit more conventional methods had failed. Also, we consider a number of the members of the Pop-Up Portsmouth organizers to be less than trustworthy, and there was some question as to how the money that they collected was being handled. We cannot have an Ethics Committee member sitting in judgment who has already formed a firm opinion and is incapable of being open-minded when listening to her defense.

I know and like Joe, as well as his wife, Jane Zill, and we have always been on friendly terms with one another. I bump into one or the other or both of them occasionally, and we usually stop and chat for a minute or two when we do so. However, I am serving as Esther Kennedy's attorney in this matter, and it is my duty to ask that he recuse himself from hearing this complaint. From Councilor Kennedy's standpoint, there is quite a bit at stake here, and she is understandably fearful of whether she can get a fair hearing with him as part of the four-member committee. For the same reason that the chicken does not want to have twelve foxes on her jury (or even one), I must ask that he recuse himself.

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If you have any questions or require further information concerning any of the above,
please feel free to call me.

Very truly yours,



Duncan J. MacCallum

DJM/eap
cc. Esther Kennedy

BY FAX

ORIGINAL BY REGULAR MAIL