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September 21, 2020

Robert P. Sullivan, Esquire
City Attorney
City of Portsmouth
One Junkins Avenue
Portsmouth, New Hampshire 03801

Re: Ethics Complaint Against Esther Kennedy

Dear Bob:

This will constitute my formal complaint against Nancy Pearson for her misconduct in connection with the Wednesday, September 16, 2020 hearing in the above-reference matter; and, in conjunction therewith, I also renew my complaint that the format of the hearing should have been a live, in-person cross-examination of Ms. Pearson, rather than conducting the hearing by Zoom.

I ask that Ms. Pearson's complaint be dismissed as sanctions for her misconduct; and, if the Committee overrules me on that point and decides that the hearing must go forward, I ask that the remainder of the hearing be conducted live and in-person, and that I be permitted to conduct my cross-examination of Ms. Pearson all over again, starting from scratch. The basis of my request is as follows.

When you're a lawyer cross-examining a hostile witness, you're frequently focusing your attention so intently on the witness that you don't notice details that are readily apparent to detached, outside observers. Almost immediately after Wednesday night's hearing, I was contacted by several of Esther Kennedy's friends and supporters, who pointed out the following details which, frankly, had completely escaped my notice:

At several points during my cross-examination of Ms. Pearson, at times when I appeared to be cornering her with some uncomfortable questions, she could be seen suddenly lowering her head and looking down at her lap, and then looking back up and answering the question. What she was doing, these observers insist, is that she was looking at her cellphone and getting text messages, advising her how to respond to the questions. She was surreptitiously being coached

during cross-examination, a practice which in a court of law would be absolutely verboten and would likely subject the lawyer to an admonition from the court or even sanctions if he were caught doing it (not with a cellphone, which in a courtroom would be too obvious, but with prearranged hand signals or the like). It is equally improper in an Ethics Committee hearing such as this one. A witness is not permitted to use a cellphone as his or her "lifeline," to quote the expression from that popular television show whose name escapes me at the moment.

In this instance, we strongly suspect that Ms. Pearson's "coach" was Josh Denton. I have cross-examined quite a few witnesses in my time, and I do not remember ever previously having had a nonlawyer witness respond to one of my questions with the lawyerly phrase, "Asked and answered," yet Ms. Pearson did it several times. ("Beyond the scope" is another example.) It is the type of objection that I might expect from a lawyer, but not a lay witness like Ms. Pearson. In hindsight, it is clear to me that she was being coached.

Several people who watched the proceeding on YouTube or Channel 22 have informed me that they could see that there was another person in the room besides Andrew Bagley and Ms. Pearson, and in the preface to his testimony Mr. Bagley was candid enough to disclose that Denton had just arrived at the premises. As you looked at the computer screen, you could see that there was a mirror on the wall behind Ms. Pearson, which was clearly visible behind her face, and if you watch the video replay carefully you can see persons entering the room and making other bodily movements in the reflection of the mirror. Ms. Kennedy herself informs me that she has received numerous calls and/or e-mail messages "asking about the guy in the mirror." One informant says that he was clearly able to identify the other individual in the mirror as Denton. I will be separately forwarding you two of the many e-mail messages that I received in which this development was reported to me.

Ms Pearson herself, of course, was far less candid than Mr. Bagley, and there was considerably less than full disclosure on her part. By the time that Mr. Bagley testified, Denton had been in the room for about fifteen minutes. One of the e-mail messages that I am forwarding you includes a screenshot which confirms that he (Denton) walked into the room at about 13:02 on the YouTube video timer, and if you watch the active portion of the video leading up to that point you see that Ms. Pearson was plainly aware of it, as she glances up, just as Denton walks in the door. As of the time that Mr. Bagley began testifying, which was at about 29:30 on the timer, Ms. Pearson had not disclosed that Denton was present, nor had she previously announced that he would be coming or that he would be testifying. Nor did she present him as witness during the presentation of her case, nor did she ever ask that he be sworn in.

It is plain that his only purpose in being there was to improperly coach Ms. Pearson during my cross-examination of her. It is equally plain that she did not want us to know that he

was there: she never disclosed that he was present, and she never disclosed that he was coming. Were it not for the fact that Andrew Bagley was honest enough to reveal his presence, we would never even have known about it until after the meeting, when a television or YouTube viewer recognized Denton as the figure in the mirror and contacted us.

I have personally tried to contact Mr. Bagley to confirm that Denton was sending text messages to Ms. Pearson, as I consider that I am substantially more likely to be able to get the truth from him than from Ms. Pearson, but I have been unsuccessful in reaching him. I took the trouble to walk down to the Pop Up Portsmouth venue on the Bridge Street lot on Thursday night in order to talk to him, but I was informed that he had not been seen there that evening. On Friday and Saturday night I was unable to do so because I already had other plans.

As you know, I had previously complained rather pointedly that conducting an evidentiary hearing via Zoom, Webex, or other video conferencing medium is vastly inferior to live, in-person testimony and cross-examination, for in the Zoom format you cannot observe anything below the witness's neckline and therefore cannot fully evaluate the witness's demeanor. I was remiss in failing to also point out, as I should have, that another disadvantage is that you cannot readily detect skulduggery and misconduct on the part of the witness and his or her confederates, such as the passing of notes to the witness, hand signaling, or, as in this case, coaching the witness via text messaging. It would certainly be interesting to know how Ms. Pearson would have answered my questions if she had not been secretly receiving advice and suggestions from Mr. Denton and/or others.

I also have other complaints concerning Ms. Pearson's cross-examination testimony, such as the fact that she was deliberately trying to eat up the thirty minutes of time that had been allotted to me by intentionally giving me evasive, nonresponsive, and unnecessarily lengthy answers, but I will spare you the agony, at least for now.

Collectively, we all have already spent many hours on this ethics complaint, which, in the view of Ms. Kennedy and her supporters, is a frivolous complaint that is merely being used as a weapon against a political opponent. I myself have spent voluminous hours meeting with Ms. Kennedy, reviewing and studying the relevant source documents, drafting the time line, and otherwise preparing for the hearing. As far as I am concerned, my cross-examination of Ms. Pearson was all for naught, due to her shenanigans. For that reason you will forgive me, I hope, if I seem a bit resentful of the fact that my time has been wasted via sabotage on the part of Ms. Pearson and Mr. Denton. I find it rather ironic that an ethics complaint has been filed against Ms. Kennedy, but not against Ms. Pearson.

Because of the foregoing facts and circumstances, I ask that Ms. Pearson's ethics complaint against Councilor Kennedy be dismissed as sanctions against her for her misconduct.

In the alternative, I ask that the hearing be switched from the Zoom format to a live, in-person hearing, just as I had requested in the beginning, and that I be permitted to conduct my cross-examination of Ms. Pearson anew, live and face-to-face, in a setting wherein everyone will be able to see what she is doing with her hands and see who else is in the room.

All that Ms. Kennedy has ever asked for is a fair hearing and an open process so that she can tell her side of the story and be given a chance to expose Ms. Pearson's complaint for what it is: a mere vendetta against a political opponent. It is plain that Ms. Kennedy is not going to get that fair hearing as long as it is conducted via Zoom. Ms. Pearson has already made it impossible, for she has already been given a dry run of my cross-examination while being coached by Mr. Denton.

For all of these reasons, I respectfully ask that the Ethics Committee grant us one or the other of the two remedies that I have proposed: dismissal, or a de novo cross-examination (preferably the former).

Very truly yours,

Duncan J. MacCallum

DJM/eap

cc. John Tabor, Committee Chairman
Ann Walker
Richard Gamester
Tom Hart
Esther Kennedy
Nancy Pearson

VIA E-MAIL ONLY