

MINUTES
LEGISLATIVE ETHICS COMMITTEE
MAY 13, 2024, MEETING
{Approved: June 24, 2024}

The Legislative Ethics Committee (RSA 14-B:2) met on Monday, May 13, 2024, at 2:00 P.M. in Room 212 of the Legislative Office Building.

The following committee members were present: the Honorable Edward M. Gordon, Chairman, the Honorable Donna Sytek, Vice Chairman, Representative Janet G. Wall, Representative Bob Lynn, and the Honorable David H. Hess. Senator Cindy Rosenwald and Senator Ruth Ward were unable to attend. Also participating was Richard M. Lambert, Executive Administrator.

The Committee's meeting consisted of the following agenda items:

ITEM #1

Discussion of pending legislation relating to recusal (HB1388 and SB605).

Chairman Gordon: "I'll call this special meeting of the Legislative Ethics Committee to order. And we just have 1 item on our agenda today and that is the pending legislation with regard to recusal of legislators. And just following the emails, I understand that there, perhaps, is a difference in thought with regard to the requirement for recusal, as it's spelled out in the legislation, and some concern that it might be too broad and catch too many people. And other people feel that, perhaps, it's adequate. So, I guess I would welcome your thoughts. I know, Representative Hess, you specifically requested that we get together. So, I'll start with you today."

Mr. Hess: "Well, I don't have an answer, Mr. Chairman, but it occurred to me, the language that I had recollected which we had followed historically in defining a conflict of interest, where one is a member of a particular group, say a real estate agent, I think, was the example I used, and it's quoted here in RSA 14-B:8, V, 'if such activity could reasonably have a greater benefit or detriment to you or a household member than other members of a group identified in the form.' That's the phrase that I recollected that we had issued some opinions on in the past and I believe, if I remember correctly, in doing so, and this language recognizes the fact that we are a citizen legislature and consequently we have broad representation from across the general public, including all manner of organizational memberships, all professions, all employers and employees, and that if we were to say if you're part of this group that might generally benefit from the legislation, you basically could encounter the situation where you have to recuse so many members that you jeopardize the fair representation of the public in the legislative process. And also, if it's so broadly interpreted, you deprive the legislative bodies of the expertise that people who are employed in that profession, say in real estate, could bring to the discussion (inaudible). That was the basis for my concern. I tried to phrase it diplomatically in my email to Rich that I didn't necessarily disagree with his testimony which, to me, encompassed a broader recusal role than what this rule might require. And so, I just wanted to throw that out and I thought that all of us would benefit from an exchange of information, an exchange of viewpoints, an exchange of thoughts, rather than sending out single emails expressing a half-baked thought, as mine may very well be."

Chairman Gordon: "Not to mention there might be some (RSA) 91-A concerns with regard to us having a meeting by email."

Representative Lynn: “So, can I just make sure that I’m understanding correctly the current law before we get to any proposed amendments? But, as I understand the current law, there are 2 levels of interests. In other words, if you have an interest in some area that’s greater than the general public, that’s something that you are supposed to disclose on the general form that you fill out every year. Right? So that, for example, I always put down that I have an interest in the New Hampshire Retirement System because it doesn’t have a specific listing for the Judicial Retirement System, but I figure it’s close enough. So, I put that down and I put down the practice of law. So, as I understand it, that protects me and doesn’t require my recusal if the legislature is voting on something that deals with the practice of law where I might be affected just like any lawyer would be affected. But then there’s a second level that talks about what you just read, Representative Hess, that if there’s some legislation that would affect me as a lawyer differently than the bar generally, then I have an obligation that, at least right now, I have an obligation to file a notice of intent and either vote or not vote but have a notice of intent. Am I understanding that correctly?”

Mr. Lambert: “Yes.”

Representative Lynn: “Okay. So, Rich, unfortunately when this bill had its hearing before the Senate, I had to leave right after I testified so I didn’t get a chance to hear your testimony, but it sounds like you raised very significant issues. I’m just wondering if you would go over that for us.”

Mr. Lambert: “Well, the language is ambiguous. So, what is defined as a ‘financial interest,’ including in RSA 14-B:8, which is the language that goes on the (Financial Disclosure) form, it says, ‘you have a conflict of interest’ in all of these categories that are listed, and when you would have a ‘financial interest’ is when a change in the law would have potentially a greater financial effect on you or a household member which is ‘distinct from and greater than the interests of the public at large.’ So, the question is what is the public at large here? It has always been my thought that in understanding it, which I could be wrong obviously, but that each of these categories (on the Financial Disclosure Form) is ‘distinct from and greater than’ the public interest, potentially. So, if you are a real estate agent you have a more specific economic interest than the public at large, potentially. You have what used to be called a ‘special interest.’ So, it’s not a question of greater than your group, it’s a question of your category versus the public at large. And the Committee has in the past ruled that membership in the retirement system or having land in current use is a conflict of interest that has to be disclosed. And when we list taxes on the form, it lists the BPT, the BET and, up to this point, the interests and dividends tax because those are not taxes that the public as a whole pays. They do pay the property tax so that’s never been listed on the form as a financial interest or been considered a financial interest. So, my concern was, the way that this bill is drafted, that it could be interpreted, and that’s what I really tried to say, was I had a concern about the interpretation of the language. That it could be construed to require recusal if legislation came along that affected any of these categories on the form, not necessarily you more than other members of your group because that is a separate level, as you said, where it affects you more than other members of the group.”

Chairman Gordon: “And I have to say I share his concern. And if you all have this amendment (1669h) to (SB)605 in front of you ... If you have that in front of you, and you go down to line 23 on the first page, ‘Recusal and Disclosure for Conflicts of Interest,’ it’s really divided into 2 parts. There’s Roman numeral I, dealing with an individual legislator. That’s like the Harry Bean-type issue. And there’s Roman numeral II, which generally has to do with your employment. And I really don’t have any problem with Roman numeral II. But Roman numeral I, if you look at it, it says, ‘a legislator shall recuse himself or herself from voting during any official legislative activity when, a) the legislator has a conflict of interest as defined in (RSA) 14-B:1, I and that is basically any financial interest.’”

Vice Chairman Sytek: “Distinct from the interests of the public at large.”

Chairman Gordon: “Right. And so, I think that’s the concern that I have and is that the same concern you have?”

Vice Chairman Sytek: “Yes.”

Chairman Gordon: “Because it needs to be something more than the public at large. And then it goes on to say, ‘or the legislator or a member of the legislator’s household could reasonably be expected to incur a direct and substantial financial benefit or detriment as a result of the outcome.’ And it seems to me the intention there is not an ‘or’, it should be an ‘and’ those 2 things.”

Representative Wall: “I think you have a good point, Ned, because if you put in ‘and’ it compounds it and makes it the total, it causes you to be in that situation not just one or the other. Is that correct?”

Chairman Gordon: “Right. Because you could have a financial interest and shouldn’t have to recuse yourself if you just own current use property, but you should disclose it. But you don’t have to recuse yourself, or at least we haven’t said that in the past. But if your interest is greater than the public, or if you have a substantial interest, then perhaps you should.”

Representative Lynn: “I think I agree with what you’re saying, Ned, but I’m wondering if that’s still, if a conflict of interest means that you have more of an interest than the general public. So, that would mean that, for example, the Realtor, if legislation affects Realtors and you’re a Realtor, then you would have some financial interest, then you fit the definition of ‘special interest,’ right, because it’s more than the public. And then, if you were going to get a substantial benefit or suffer a substantial detriment, you would have to recuse yourself even though all other Realtors might be in the same position. I guess the question is, ‘Is that what we want to do? Do we want to say if there’s some bill, let’s say, dealing with Realtors that would affect all Realtors the same as it would affect you, but it’s going to be a substantial affect, all Realtors are going to make a lot of money, or lose a lot of money, then you have to recuse yourself?’”

Mr. Hess: “Can I raise another point? I just happened to notice that in this proposed section (RSA 14-C) 4-a, Roman I, it’s only recusal from voting. In Roman II, it’s recusal from all, any legislative activities.”

Mr. Lambert: “I think there’s an amendment that’s going to change that, but I couldn’t get a copy of that because it’s confidential.”

Mr. Hess: “In what way?”

Vice Chairman Sytek: “To recuse from everything...they talked about that during the hearing.”

Mr. Hess: “So, they’re talking about folding both of these criteria into the recusal from everything in the paragraphs?”

Vice Chairman Sytek: “Yeah.”

Chairman Gordon: “What do you think, Donna?”

Vice Chairman Sytek: “I think there ought to be standard language. One place it says, ‘direct and substantial financial benefit,’ other places it’s ‘something of material value.’ What is ‘direct and substantial’? And what is ‘material value’?”

Chairman Gordon: “That’s a good question. What standard do you apply? How do you know what’s substantial? It’s discretionary and not objective.”

Vice Chairman Sytek: “So if you change the ‘or’ to an ‘and’. So, you have a conflict under (RSA) 14-B:1 and that’s where it says, ‘distinct and greater than the interests of the public at large’ and it’s ‘direct and substantial’ ... I’m thinking of something easy like the bail commissioner bill. There’s a bill that would increase the bail commissioner fee from \$40 to \$60, and my husband is a bail commissioner, and he was going to fill out declaration until we read it. It says on the checklist, if you’ve identified it on the checklist, you only have to declare a conflict if you would benefit more than other members of the group. This is all the bail commissioners, so he didn’t have to file anything. But under this with the language that’s ‘distinct from and greater than the interests of the public at large’ he would have to recuse himself from voting because it’s direct and substantial going from \$40 to \$60.”

Representative Lynn: “One possible way to change that would be to change the definition of ‘special interest’ to say, ‘direct from and greater than the interests of any other member of the group’ to make it narrower. The only problem is if you do that then does that mean that the form that we fill out every year, there would be no purpose in having that form because you wouldn’t have to disclose your general areas where you earn income or might earn income ...”

Representative Wall: “Where would this leave a landlord then, as opposed to a regular person, in discussing legislation regarding landlords and tenants because on Judiciary over the years there’s been so much regarding that. At what point would a landlord recuse as opposed to disclosing?”

Representative Lynn: “I would say it would seem to me that recusal ought to be required if the legislation would affect you as a landlord more than landlords generally. If it’s just going to affect landlords generally, and your example of bail commissioners (Vice Chairman Sytek), if it would affect bail commissioners generally, I would think that’s there no need for your husband to have to recuse himself.”

Vice Chairman Sytek: “Do you think that the average person, you know, Joe Blow on the street, would think it’s a conflict for him to be voting on something that he directly benefits from?”

Representative Lynn: “Maybe Joe Blow on the street would think that, but I think that Joe Blow would be wrong. In other words, I don’t think that we would want everybody who is in that situation, should everybody recuse? Suppose it’s the retirement system. Should everybody that’s in the legislature that’s getting some state pension have to recuse themselves if they’re not getting any particular benefit different than anybody else? I just raise the question.”

Vice Chairman Sytek: “Distinct from and greater than the interests of the public at large.”

Representative Lynn: “Don’t get me wrong. I agree. If that language stays in there, then I agree with you. I’m just saying that maybe that language is too broad. Because remember, right now the way that language is used, and correct me if I’m wrong, Rich, but right now the way that language is used, it is only a disclosure. You have to disclose. But you don’t have to do anything else. In fact, you don’t even have to file a notice of intent unless it applies to you in some way differently than other bail commissioners.”

Mr. Lambert: “Would it be too awkward to instead of in small ‘(a) ... the legislator has a conflict of interest as defined in’ the statute, have some sort of language there about the language we have on the (Financial Disclosure) Form, an interest that is greater than your group ... ‘if you have a financial interest that is greater than others similarly situated’?”

Chairman Gordon: “How would you know whether or not your interest is greater than others in your group?”

Mr. Hess: “That strikes me as a policy issue that we haven’t discussed as a group yet and the legislature up until this legislation hasn’t attempted to address. There’s a difference between disclosure and recusal. In the past we have talked about on this Committee and otherwise we should draw a distinction between the 2 because of the potential impairment in the legislative process and representation. So, I hear what everybody seems to be saying and I think I agree with you that if we adopt the current language in the bill and apply it based upon the current language defining ‘special interest’ that would make recusal synonymous with declaration.”

Representative Lynn: “Right.”

Vice Chairman Sytek: “It’s a dramatic change from the policy which has been disclosure to disqualification. When I was on the Special Committee that looked at all this stuff, that was the first decision we made. Do we want to require people to disqualify? And we talked about the application to so many occupations and situations of members, and we said, ‘No, we ought to encourage people to disclose and give them the opportunity to refrain from voting. And many representatives do.’”

Representative Lynn: “The disclosure that we’re talking about here is the general disclosure that we fill out in this form every year.”

Vice Chairman Sytek: “The checklist.”

Representative Lynn: “The checklist. And I agree completely that shouldn’t be the basis for recusal. But are we really saying that what we want to change is if you, we want to now say that the law should be that if your interest is more than your group, where now as long as you file a notice of intent you can still vote if you want to even if your interest is greater than the group, we want to change that basically to say, ‘No, from now on if your interest is greater than the group, you can’t exercise the choice to still vote, you have to recuse.’ And it goes beyond voting. If your interest is greater than the group, you can’t participate. That’s what we’re talking about changing. And I would agree. That’s fine with me. I don’t have any problem with that.”

Representative Wall: “But it goes back to what Ned asked, ‘How do you know if your interest is greater than?’ And there are occasions, I’m sure, when it’s pretty obvious. But I’m sure there’s a gray area. How would anybody be able to know if they’re not communicating with others? They are not disclosing.”

Chairman Gordon: “And I think the issue, for me, is: Are we talking about being greater than a group or are we talking about an individual getting a substantial benefit? Because, just using the Harry Bean incident, that sort of precipitated a lot of things. (Representative) Harry Bean all of a sudden is getting a few hundred thousand dollars as a result of special legislation that was put in. But there were lots of people that got that benefit. It wasn’t just Harry Bean... it wasn’t just a limited group. It was a fairly large group of people that with the FRM {Financial Resources Mortgage} got taken. And so, he puts in the legislation and then they applied to determine how much money that they would get {from the Financial Resources Mortgage Victims’ Contribution Recovery Fund established in RSA 359-P}. And he did that. So, people would look at that and say, ‘Well geez, how can he vote on that?’ But so, it’s not just a question of being a member of a group, it’s him individually, or any legislator, getting a substantial benefit out of legislation that they voted for, I think, or they participated in.”

Representative Wall: “And there was a lot of talk among legislators at that point in terms of how is he benefiting?”

Chairman Gordon: “We could suggest because all of the advisory opinions that we’ve done, all relate to peoples’ employment at this point. Recusal related to your employer and, frankly, I don’t really have much of a problem at all with the second section here dealing with that. It’s only this one section under Roman numeral I which deals with how do you hold an individual accountable.”

Mr. Hess: “Ned, going back to your point, we are already asking members to decide whether or not they have a greater benefit or detriment than other members of heir group under Roman v of (RSA) 14-B:8.”

Vice Chairman Sytek: “That’s when you have to file your declaration.”

Mr. Hess: “Right. But, I mean, if that’s such a gray area that’s suspectable to (inaudible) standards then that some argue it would apply to this section, although with a lot less serious consequence.”

Chairman Gordon: “In any event, with regard to the current language that part ‘(a)’, I think, captures, probably, too many people for recusal, and part ‘(b)’ probably is ambiguous and unenforceable in terms of its language, I think, and if I was a legislator I’d say, ‘When is it that I could reasonably be expected to incur a direct and substantial benefit or detriment? What does that mean?’”

Vice Chairman Sytek: “I’m thinking about the bill they’re considering having to do with some kind of cancer screening for firefighters. We have a lot of retired firefighters in the legislature. Is there a direct and substantial financial benefit? Because they don’t have to pay for the testing. Because right now, if they’ve put on their form that they are in the retirement system, so they would have checked that off, but this is only for firefighters...so is that direct and substantial? Probably is.”

Chairman Gordon: “What do you want to do?”

Vice Chairman Sytek: “Interim Study. (SB) 605 has already passed. Interim Study (HB) 1388.”

Mr. Hess: Let me just say that as the result of this discussion and more thoroughly (inaudible), I agree with Rich’s testimony based upon the language of the bill, as he has testified.”

Representative Lynn: “As do I. I agree, too. That’s a very valid point.”

{After further discussion}

Representative Wall: “I think Interim Study is kicking the can down the road. I think we need to make some kind of decision. People who’ve worked on this for so long just are looking for an answer, even if it’s not perfect. They’re looking for something that can get us a step forward and I’m hearing from (Representative) Greg Hill, who’s been talking heavily probably with you, Ned, and Senator (Howard) Pearl that they think they’re pretty well at the point where we should be doing something. We have to do something. Interim Study in the second year is not going to get us anywhere.”

Chairman Gordon: “I’ll go back to adding in the ‘and’ because that at least takes it a step above just being a financial interest.”

Representative Lynn: “Yes.”

Representative Wall: “And I can go with that.”

Chairman Gordon: “And then if then someone lodges a complaint, it’s certainly something that we can deal with.”

Representative Lynn: “That is a big improvement, I agree. Remember, the definition of ‘special interest’ is any financial interest or non-financial interest that’s greater than the public. If you put in the ‘and,’ that would mean that’s not enough. You have to be reasonably expected to obtain a direct and substantial financial benefit.”

Chairman Gordon: “And I think that makes it personal... and I think that raises the standard, takes it away from current use, and if you’re just a real estate agent all you need to do is disclose. But if you have some personal interest, then you’ve got to recuse yourself. And it’s not just being part of a group, but it’s a personal interest.”

Mr. Hess: “To incur a direct and substantial personal financial interest?”

Chairman Gordon: “I was thinking of taking out ‘direct, ’incur a personal and substantial financial benefit.’

{Following further discussion.}

Vice Chairman Sytek: “So, it’s still ‘greater than the public at large’?”

Chairman Gordon “Yup.”

Vice Chairman Sytek: “So, that’s what we start with. Is this going to affect me greater than everybody else?”

Chairman Gordon: “Yup.”

Vice Chairman Sytek: “So, that’s the first step. And will there be personal and substantial?”

Representative Lynn: “You can argue ‘personal and substantial,’ but that same kind of language is used, for example, in the judicial recusal kind of thing. There’s always some room for interpretation, but I think that’s inherent in the subject matter.”

Vice Chairman Sytek: "This would cover the bail commissioners. How about the firefighters' cancer testing?"

Chairman Gordon: "I think it covers them."

Vice Chairman Sytek: "Do you think that they would have to recuse?"

Chairman Gordon: "No. I don't think so. Is it a substantial benefit?"

Vice Chairman Sytek: "Yeah. You bet."

Mr. Hess: "As long as we're reading the language of the special interest greater than the benefit of the public at large, are we opening it up to expanding the recusal? Does this language narrow that issue?"

Chairman Gordon: "I think it narrows it from what they proposed here."

Mr. Hess: "There's no question about that ... If I were doing something and it's my decision alone, I would, number 1, state that in our opinion, this draft is defective for the reasons you stated and that that would constitute, based upon our knowledge of the legislative history, a tremendous expansion of the requirement for recusal from what currently exists and a greater expansion than what, perhaps, people realize, and consequently, while the rest of the amendment is fairly clear and distinct, (RSA) 14-C:4-a, I has problems because it could be construed to do that and consequently needs to work. The one possible way to do it would be what we just said. But that is not the only remedy."

Representative Lynn: "Yeah. I agree with that."

Chairman Gordon: "Is everybody happy with that?"

Representative Wall: "It's worth a try and see where it goes."

Vice Chairman Sytek: "What about current use? If they decided to do away with current use?"

Chairman Gordon: "Well, current use, I don't think, is anybody getting a substantial benefit?"

Vice Chairman Sytek: "Sure. Absolutely. And if they raise the retirement benefit, don't they increase it by a certain percentage every year?"

{After further discussion}

Chairman Gordon: "Maybe 'direct' is a better way of expressing it than 'personal' in that what you're really concerned about is somebody getting a direct financial benefit, money paid directly to them as opposed to a current use program or some taxation program."

{The Committee members indicated their agreement.}

Mr. Lambert: "Mr. Chairman, speaking of FRM, that was in the budget, right? And that would be exempt in the bill."

Vice Chairman Sytek: “And that was my next question ... The exceptions, ‘state budget’ or ‘general revenue bills.’ What is a general revenue bill? Is it just House Bill 1? House Bill 2? Because they put everything in it, the ‘Christmas Tree’ ... and ‘general revenue bill’ ... is it capital gains? Property tax? That’s as broad based as you can get.”

Chairman Gordon: “Well, at least this will be an improvement, I think. I don’t know about the general revenue bills.”

Representative Lynn: “I completely agree that it’s an improvement and if the consensus is this is what we should recommend, I can go with that. I’m just wondering, though, if we still have enough questions would it be better to just leave the Senate Bill (605) as passed, to just suggest that this needs further thought. I know what you’re saying, Representative Wall, it’s a lot. I hear you.”

{After further discussion}

Chairman Gordon: “I can live with it. And I can live with it because we don’t have a history of causing people to do stupid things. We don’t exercise our authority to go out of our way to discipline people, but what we try to do is educate people, I think, for the most part. And I’m confident that if we pass this that we’re not going to be hurting people along the way. That’s my sense.”

Representative Lynn: “I think that’s right. And if it means we get a few more requests for advisory opinions, or something else, fine, that’s probably not a bad thing.”

Chairman Gordon: “Okay, so what do you want to do with this?”

Representative Lynn: “I would move to suggest that we recommend to the appropriate committees the changes. So, the changes would be to take out the ‘voting’ so that it applies to everything just like it does in paragraph II, and in (RSA) 14-C:4-a, then in I after a) make it ‘and’ as opposed to ‘or’.”

Mr. Hess: “Yeah. I think it’s an improvement over the existing status quo and it’s not perfect.”

Chairman Gordon: “Donna, can you live with that?”

Vice Chairman Sytek: “This improves it, but I still don’t think it’s ready to become law.”

Chairman Gordon: “We can certainly let them know that we continue to have concerns.”

Vice Chairman Sytek: “I think they ought to let SB 605, that’s already passed the House and the Senate, I think they ought to keep it separate and put this new stuff in HB 1388 because (SB) 605 is a pretty good bill.”

Chairman Gordon: “So, would you like me to talk to Representative Hill? Or Senator Pearl? ... I’ll do my best to talk to them if you want. Do we need a motion?”

Representative Lynn: “I think I made the motion, didn’t I, to do what you said.”

Chairman Gordon: “So, the motion is to express our concerns with regard to the language and its potential effects and the fact that it may not be perfect in the way it’s spelled out, but if they are going to go forward with the bill, currently, it would be problematic because it would cause more legislators than are certainly required to recuse themselves. So, if they did nothing else, they ought to change the ‘or’ to an ‘and’ to preclude it. Does that make sense?”

Representative Lynn: “Right. And did you second that, Dave?”

Mr. Hess: “Yes, I did second that.”

The Committee then voted 5 to 0 in favor of the motion.

ITEM #2

New/Other Business.

There was no new or other business.

ITEM #3

Scheduling of the next meeting.

The Committee’s next meeting will be at the call of the chair.

The Committee’s meeting adjourned at approximately 3:10 P.M.

{Prepared by Richard M. Lambert, Executive Administrator}