

MINUTES
LEGISLATIVE ETHICS COMMITTEE
OCTOBER 14, 2024, MEETING
{Approved: October 28, 2024}

The Legislative Ethics Committee (RSA 14-B:2) met on Monday, October 14, 2024, at 1:00 P.M. in Room 210-211 of the Legislative Office Building.

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

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

ITEM #1

Consideration of the draft *Minutes* from the Committee's meeting held on September 16, 2024.

Following review, Senator Ward noted 2 typographical errors. Vice Chairman Sytek then moved to adopt the September 16, 2024, *Minutes* as corrected. Representative Lynn seconded the motion, and the Committee voted 6 to 0, with 1 abstention, in favor of the motion.

ITEM #2

Continuation of the Initial Review of *Complaint 2024-8*. (Nonpublic Session)

Vice Chairman Sytek moved to enter nonpublic session, pursuant to RSA 14-B:3, I(d), to continue the initial review of *Complaint 2024-8*. Representative Lynn seconded the motion, and the Committee voted as follows:

Mr. Hess	Yea
Representative Lynn	Yea
Senator Ward	Yea
Chairman Gordon	Yea
Senator Rosenwald	Yea
Representative Wall	Yea
Vice Chairman Sytek	Yea

{MOTION ADOPTED}

{NONPUBLIC SESSION}

Vice Chairman Sytek moved to exit nonpublic session. Senator Rosenwald seconded the motion, and the Committee voted as follows:

Mr. Hess	Yea
Representative Lynn	Yea
Senator Ward	Yea
Chairman Gordon	Yea
Senator Rosenwald	Yea
Representative Wall	Yea
Vice Chairman Sytek	Yea

{MOTION ADOPTED}

Chairman Gordon stated: “The Legislative Ethics Committee has just come out of nonpublic session having continued its initial review of *Complaint 2024-8*. As a result of our nonpublic session, or during the nonpublic session, the Committee voted to continue the initial review and to invite both the complainant and the respondent to attend our further meeting.”

ITEM #3

Consideration of a request for an Interpretive Ruling from Representative Rebecca J. McWilliams (Merr./30) relating to 2024 HB 1388, “An Act relative to ethical standards for members of the general court.”

Chairman Gordon said that the Committee had invited several people to participate in the meeting so the Committee could get some further understanding of the legislative intent of the bill. He then asked one of the invitees, Senate Legal Counsel Rick Lehmann if he would like to speak first.

Richard J. Lehmann, Esq., Senate Legal Counsel, said that he had reviewed the draft Minutes from the Committee’s last meeting and said it seemed to him that the outstanding question has to do with the reach of the statute. He said he hesitated to speak to the legislative intent, not being a member of the legislature, just staff. But, he said, he did participate in helping to draft the bill, and said, “from my perspective, it never really occurred to me that it could reach into a household where 1 member of the household was a lobbyist, and the other member of the household was a member of the legislature. My intention in helping draft this was to try to come up with a structure that helped explain when a person holds a position within an organization that’s sufficiently important that recusal should be something that is considered or mandated. And in doing that, the guidance that’s in (RSA) 14-C:4 came from an IRS regulation that has to do with when income is taxable to somebody who is an employee of a nonprofit. That’s sort of where the test came from and that is why the reference to the kinds of contractors who might do work for a nonprofit lists the way it does and mostly because the employee of the nonprofit, as distinguished from the contractor, wouldn’t derive any benefit from any kind of lobbying. It’s just not apropos to the context of determining income. So, to the extent that lobbyists aren’t included in the list of contractors which, again, I would indicate that in the text it is not exhaustive, it’s just indicative of the kind of contractors who are exempted from, or suggested, don’t have a substantial influence over an organization. That’s why lobbying isn’t in the list because it wasn’t in the place I ‘stole’ it from, basically the IRS regulations...”

“The second thing is the prudential question of whether this is the right time to issue guidance moving forward. I think this is a difficult subject to issue broad-based guidance in a vacuum on just because there are a lot of fine points and there’s balancing called for in the statute and if you don’t have specific facts in front of you as far as to balance how those facts play out in particular, how substantial the interest is, how large the financial impact would be. I think all of those things will play into a decision about mandatory recusal, but I don’t know if you can do that, necessarily, without having a specific example, a specific piece of legislation, a specific kind of conflict in front of you. And, finally, I would say it’s always possible the next legislature will come in and, following the decisions in the Hughes v. Speaker (152 N.H. 276) case and the Baines v. Senate President (152 N.H. 124) case, say these are statutory and not constitutional requirements and we’re not doing any of this. They certainly have the authority. Now, I have a hard time imagining a world in which the next legislature ... says that that’s the way they’re going to do things, but it’s always possible that that’s going to happen, or that they would alter it in some way. The next House and the next Senate have plenary authority to determine their own rules of proceeding regardless of statutory commands about the way they go about their business, and they may modify this during their rulemaking process at the beginning of the session...”

Mr. Hess asked Attorney Lehmann for clarification on the bill's language excluding from "substantial influence" a person who is a contractor, asking "Do I understand your testimony to be that that litany of definitions of contractors was taken directly from an IRS guideline or statute ... am I correct in that?"

Attorney Lehmann: "That's my recollection. That certainly was the origin of all of this. I don't remember if it was word for word."

Mr. Hess: "In the discussion or in any proceeding dealing with this language, did any thought occur about a lobbyist? Should a lobbyist be included? Should it not? Was the word lobbyist, to your knowledge, ever used in any discussion or in any legislative event in the Senate?"

Attorney Lehmann: "Not to my recollection."

Senator Donna M. Soucy, Senate Democratic Leader, addressed the Committee: "Thank you, Mr. Chairman, members of the Committee. For the record, I'm Donna Soucy, I'm the Senator from Senate District 18, and was cosponsor of the legislation that was in question... I don't want to repeat some of the things that Mr. Lehmann said, but I did work with Attorney Lehmann on the language that we adopted. Be mindful of a few things. One, that there had been proceedings before this Committee that led us to believe there needed to be some clarification within the statute. And, most notably, I think, what was very important and part of our considerations is that, when speaking with Senator Bradley and then when we spoke with Attorney Lehmann, our concern was that we, on one hand, create a bright line, but on the other hand, we recognized that this is a unique legislature. I know there's been mention made of what other legislatures do, other states do, in their statutes. New Hampshire, as all of you know, is a citizen's legislature. We are paid \$100 a year by constitution. That being said, that means that a number of us, myself included, who serve in the legislature, work and have professions that may from time to time have subject matter legislation that pertains to the work we do. It has always been our belief that the statutes should ensure full transparency and, at the same time, should someone be required to recuse, it be in extraordinary circumstances and that it be a personal benefit to that individual. Those were some of the discussions that we had in drafting. We had a situation where there was a concern raised. Three members of the current Senate work in some fashion for the University System. And the discussion that we were having at the time was 'does the mere employment of the individual by the University System preclude them from voting on the budget,' for example, and we concluded that was not the case and shouldn't be the case. It should be disclosed, but it was in no way a benefit to those individual legislators to vote for or against that piece of legislation. So, we were trying to, I think, thread a needle in crafting this legislation with the full expectation, I believe, and this issue actually did come up at our first meeting of the Orientation Committee, that such a change would require a great deal of education of our members and should be a significant component for not only Orientation for new legislators, but for those members that are returning, because it is a change to practice. But fundamentally, we wanted to ensure that, on the one hand, full transparency continued to exist, and on the other, that only those members that would receive a direct personal benefit to themselves, would be implicated, or potentially implicated, by such a law."

Mr. Hess: "Same question, Senator, that I asked of Attorney Lehmann: Did the word lobbyist or the concept of lobbying come up at all in any discussions, drafting, informal discussions, public hearings, regarding either of the 2 bills that we're evaluating?"

Senator Soucy: “I don’t recall there being any discussion about it. I personally did read this Committee’s decision with respect to former Representative Ley, who’s now deceased. And the more recent about Representative Murray. I did not discuss those. I merely read them for my own contextual knowledge. ... The other thing I should mention if I may in response, Mr. Chairman, we were also very mindful of the fact that this law couldn’t be in effect in the midst of a session because, frankly, after November 5th, none of us could be sitting here anymore ...we knew we couldn’t impose something on an entirely new legislature...so we wanted to at least set some clear boundaries to try to ensure that new members coming in, and those members returning, would see a bright line and that there be some extraordinary circumstance by which a member should be compelled to recuse.”

Vice Chairman Sytek: “Can you talk to us about the ‘state budget’ and ‘general revenue bills.’ What bill is a ‘state budget,’ is it only House Bill 1 or does it include the capital budget? What was the thinking behind that?”

Senator Soucy: “With respect to the budget, my personal understanding was that it would refer to House Bill 1 and House Bill 2.”

Vice Chairman Sytek: “How about, what is a ‘general revenue bill’?”

Senator Soucy: “Once again, in crafting this, I can tell you that ‘general revenue’ was a term that was, I believe, if my recollection is correct, not part of what was in the Senate version, but had come back from the House version. My understanding is, and this did not come up in testimony, but it was a bill to impose a new revenue, such as a new tax or fee.”

Vice Chairman Sytek: “Previous versions of the House bill said ‘sales or income tax’ and then it was changed to ‘general revenue bills,’ so it’s broader than that? Does it include capital gains? Does it include the inheritance tax?”

Senator Soucy: “What I can say, Madam Speaker, is that I think that will be subject to interpretation. The initial discussion, as I said, which generated the initial draft, the discussion was solely focused on the actual budget bills. That was added later....”

Representative Gregory G. Hill (Merr./02) and Representative Vanessa L. Sheehan (Hills./43) addressed the Committee jointly. Representative Hill stated that he chairs the House Committee on Legislative Administration and had been working on legislation involving recusal for about 3 years. Representative Sheehan said that during her first term in the House there was an ethics bill that came before her committee (Legislative Administration) and they worked on the issue for the past 3 years with the Ethics Committee crafting the bill’s language. She said she would be pleased to answer any questions.

Chairman Gordon: “The obvious question has to do with legislative intent. As you know, we’ve been asked to provide an interpretive ruling with regard to, more specifically, how this would address someone who might be involved in lobbying or married to someone who might be involved in lobbying. ... In terms of your understanding of the legislative intent, how would it apply?”

Representative Sheehan: “Our intent with this legislation was to promote transparency in government and raise the level of faith that New Hampshire residents have in their elected officials. ... Representative Hill created a tree that you could follow to walk through the bill ... I can say that we never

really talked about lobbyists, however, in thinking about it, yeah, there may be some questions that come up in that situation.”

Representative Hill: “We did our best, recognizing the pitfalls of specific situations. ... with the (Legislative Administration) committee to not deal with specific individuals, specific circumstances that we could think of that were coming along, and we discouraged those kinds of discussions. Within that framework, we tried to truly take that kind of 30,000-foot view ... to our recollection, we never specifically dealt with lobbyists. We never considered the fact that someone either may be a lobbyist or related to a lobbyist. So, I’m not sure how much help we’re going to be in that regard. The 1 thing we tried to focus on was the recognition that when you have ... an occupation, it’s very difficult unless you match it to a specific piece of legislation that is before us. So, you can’t make a blanket statement about all lobbyists on all legislation, or all firemen, or all plumbers. It has to be married to whatever the legislation was or the conflict that came up. So, that’s why it’s not, to us, unusual that we didn’t discuss the specific occupations, like lobbyist.”

Chairman Gordon: “Is it your understanding that if you are a lobbyist and you’re getting paid to advocate for a particular company, and they have a bill and you’re testifying for it you’d be able to participate in the legislature?”

Representative Hill: “I think it would be very difficult to act as a lobbyist if it were the case that an issue came before us within a bill that directly benefited either the legislator or the legislator’s household member. I would have to, obviously, see the specific legislation ... it’s always best if you have a question to recuse.”

Allan Hershlag addressed the Committee and quoted NH Constitution, Part Second, Article 7. He said the intentions of the article are not satisfied by HB 1388. He also said the bill offers conflicting guidance as to when legislators should recuse.

Representative Rebecca McWilliams said: “I’d like to have an opportunity to rebut 2 things that were mentioned in the opposing memo that you received that I also had a chance to review, but hadn’t had a chance to respond to... I do believe that transparency in ethics is meant for the public, and so the public is absolutely in a position where they can require a ruling ... it’s not about elected versus member of the public. And then second, I think that we do need to have some clear guidelines on what recusal means in terms of can an elected official lobby other elected officials about a specific bill if they do have a conflict of interest. I do think we need some guidelines about that because it will happen next legislative session...”

Mr. Hess asked “Attorney Christie has indicated that in his opinion this Committee lacks jurisdiction over this issue at this time because the effective date of the legislation is January 1, 2025, so that we do not have an existing statute or law that we’re being asked to provide an interpretive ruling on. Would you care to respond to that?”

Representative McWilliams: “I think the situation we find ourselves in is one of timing. So, understanding that the effective date is January 1, 2025, and we will be swearing in a brand-new legislature under these new rules and this Committee itself will be re-formed, my understanding is that the timing of that re-forming of this Committee will likely happen in February, possibly March, of next year, and so we find ourselves in a situation where the Committee exists right now, but there will be a gap from January 1 until it is re-formed. And so, for the purposes of fairness and justice and providing

some guidance to a new legislature who has never had to recuse in the past, I think, that we're in the position where this Committee is the only opportunity to provide that guidance to the newly electives or the re-electives under the new rules. And so, therefore, in the interest of fairness and justice, you do need to do something to provide that information. If you don't, we have a gap between January 1, 2025, and when this Committee is re-formed and meets for the first time..."

Attorney William Christie asked to respond to Representative McWilliams's comments. He said "The new Committee is formed in December of this year. It must be formed by no later than December 31st..."

Chairman Gordon: "It's supposed to be."

Attorney Christie: "I think it will be this time."

Aaron Goulette, Chief of Staff of the House, addressed the Committee: "I wanted to convey a request. The House Democratic Leader and the Speaker have had a number of conversations where the point has been made that members of the legislature are very interested in having a better understanding about how this legislation may affect the way that they carry out their legislative duties so they have a shared opinion and they are both hopeful that the Committee could provide guidance sooner rather than later when it comes to updated guidelines. The normal practice ... is for these recommendations to come before the House and be adopted by the body in January. Obviously, there are a lot of processes between Organization Day and Convening Day that could benefit from having a better-informed understanding about how this legislation may affect the way the legislature does its business. So, the request is, with the understanding that there's a high level of interest in this, perhaps the Committee, and I note this is an agenda item you have today, perhaps the Committee could work on updates on the Guidelines for the House to consider as soon as Organization Day. That's about a month sooner than we normally do it, but again, I think we'll better inform a lot of the processes that happen throughout December... Obviously, if that were to be acceptable, consideration would be made to the fact that we like to publish any updates to the Guidelines in the House Calendar as soon as we can, and in this case we don't publish a calendar the week of Thanksgiving, so we'd have to consider 2 weeks prior to that Organization Day date, so generally the week of November 18 is when we hope that we can receive something from you to publish..."

Paul Smith, Clerk of the New Hampshire House of Representatives, addressed the Committee: "Just as a corresponding note, Legislator Orientation will be taking place that week of November 18th, as well. And normally, in historical purposes the Legislative Ethics Committee has usually given about a 45-minute presentation to the new members. We have had attendance of anywhere between about 90 up to 160, depending on the will of the voters, so there's a strong potential here for a mass education. Indeed, it is important that our new members be educated. There's a paragon shift here in the legislature where recusal is going to be a part of our new norm, and these members are going to need to be able to understand, specifically: What is a recusal? What isn't a recusal? ... And so, in terms of coming to you from the Orientation Committee standpoint, we're really looking for some strong involvement from you as well as a potential for a new set of Guidelines for the next legislature ..."

Committee Discussion

Chairman Gordon: “Okay, members of the Committee, what is your privilege?”

Representative Lynn: “I appreciate very much what Mr. Goulette and Mr. Smith have said, and I understand the concerns they’ve expressed, which are well-taken, but I continue to believe that Mr. Christie makes a very valid point that we do not have jurisdiction here. This is legislation that is not in effect now and by the time it is in effect this Committee may be differently constituted. And I think that what we’ve heard from the various witnesses, all of whom, I’m sure, I have no doubt, have testified in good faith and they believe in what they say, and they can’t all be right in their views of what the legislation did mean. But what that says to me is that this is a pretty complicated issue and that for us to be issuing decisions it should be really in the context of some specific situations, and I’m just very concerned about us making kind of very general decisions without having particular contexts.”

Representative Lynn also said he was very concerned about the political impact of issuing a ruling so close to the election. He concluded: “On the jurisdictional issue ...it is not appropriate for us to take cognizance of this matter now.”

Chairman Gordon: “Nothing would please me more than not having to rule on this thing and to put it off and put it into someone else’s hands. I disagree in the sense that I don’t think putting it off makes sense because you have a legislature that’s coming in. They need to have some direction, and I think we’re the only agency right now that can provide that. I don’t think we need to get down into great detail, but I think we need to at least come up with what we understand are some basic guidelines for legislators to follow. I certainly will do that. It’s always been the Committee’s perspective that the one thing that is most important is not recusal, frankly, it’s disclosure, and we want to continue to advocate for disclosure with the Declaration of Intent, it seems to me. But basically, do you want people who are being compensated? It was always my understanding that a lobbyist couldn’t serve in the legislature. And the more I think about it, yes, a lobbyist could serve in the legislature but could a lobbyist then serving in the legislature vote or advocate on bills for which they are lobbying? It just doesn’t make sense to me, and it wouldn’t make sense to the public. And so, I think that there needs to be some direction. But I think the intent should be that the recusal will be in very limited circumstances, narrow circumstances, when it’s obvious and would be obvious to anyone looking at it, that it just wouldn’t be appropriate for that person to be voting on things. ...And I don’t think that necessarily the Committee needs to make a decision before the election, either, if your concern is a political concern. But I think we ought to come out with some kind of direction before we get to Orientation for our new members.”

Vice Chairman Sytek: “I think we shouldn’t answer the specific questions that were presented by Representative McWilliams. We shouldn’t answer those specific questions, but I think we should offer some general guidance, not just for the new members, but as has been said, the existing members because this is, I believe, a drastic departure from our policy of disclosure to one of you’re disqualified. This talks about recusal in the very first sentence, ‘A legislator shall recuse themselves from participation in any official activity...’ when they have a conflict of interest, or a member of their household could be reasonably expected to get a direct and substantial benefit. It’s right there. The plain language of the law requires recusal. This is going to be a new experience for everybody. So, as much guidance that we can provide to the poor members who are coming in and getting information like drinking out of a firehose. This is a real challenge because of the language of this. These were 2 bills brought together. The original bill had to do with your relationship to your employer and so that language got folded into here into a

more general bill regarding recusal in other circumstances. And so, I think the 2 parts don't mesh together as well as would be helpful to anybody reading it to know what they have to do."

Chairman Gordon: "When I look at the bill, and what history I'm familiar with, there's 2 parts. The first part which you just mentioned, the legislator has a conflict of interest with the subject matter and that they're going to receive a direct and substantial financial benefit. My understanding was that dealt with circumstances where somebody had a personal interest in legislation, for example, and the example was used over and over again, was the FRM case, where somebody puts in a piece of legislation in which they are going to receive a direct and substantial financial benefit. I don't think that was intended to apply to (New Hampshire Retirement System) Group II employees...who should file a notice of intent and indicate they have a conflict, but I don't think they have to recuse themselves unless they want to...I think it was only where an individual has a substantial personal benefit that (recusal) was intended to apply, as I understand it."

There was considerable discussion about when members would have to recuse under the new law versus only having to disclose a conflict of interest on the Declaration of Intent Form. The discussion used hypothetical examples, such as when a legislator is a member of the New Hampshire Retirement System.

Senator Ward asked: "How much of a problem is this, really? Are we talking about 1 or 2 isolated instances? Are we talking about a widespread issue with legislators?"

Chairman Gordon responded: "The problem that we have now is that we have people contacting Rich saying 'I'm not sure if I have to recuse myself next year on this or that. And there is a lot of confusion on exactly what the intent is, so if we don't come out with some ruling or there isn't some guidance provided ... then we may have people at the beginning of the next session who are recusing themselves when they don't need to or people who are voting when they shouldn't. So, that's the concern..."

Following the Committee's discussion, Vice Chairman Sytek moved that the Committee decline to issue an interpretive ruling on the specific questions raised by Representative McWilliams based on lack of jurisdiction. Mr. Hess seconded the motion, and the Committee voted 6 to 1 in favor of the motion.

The Committee then discussed whether they should issue a more general ruling and decided not to do so. Chairman Gordon offered to draft an informal analysis that would explain HB 1388. The Committee agreed that he should.

ITEM #4

Discussion of proposed amendments to the *Ethics Guidelines*.

The Committee reviewed a draft amendment which was distributed to them. Discussion focused on changes proposed to the Declaration of Intent Form. House Clerk Paul Smith participated in the discussion and suggested some changes for the Committee to consider. Following the discussion, the Committee agreed to make the suggested changes to the form and to take up the proposed amendments at its next meeting.

ITEM #5

New/Other Business.

There was no new or other business.

ITEM #6

Scheduling of the next meeting.

The Committee scheduled its next meeting on October 28, 2024, at 9:00 A.M.

The Committee's meeting adjourned at approximately 3:50 P.M.

{Prepared by Richard M. Lambert, Executive Administrator}