

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

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NOTICE OF DECISION

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Case Name: **Boston & Maine Corp. et al v. Legislative Ethics Committee**
Case Number: **217-2010-EQ-00079**

Enclosed please find a copy of the court's order of September 10, 2010 relative to:

ORDER

September 10, 2010

William S. McGraw
Clerk of Court

(484)

C: David G Sturm, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Boston and Maine Corporation and
Springfield Terminal Railway Company

v.

Legislative Ethics Committee of
the New Hampshire General Court

No. 10-E-079

ORDER

The petitioners, Boston and Maine Corporation and Springfield Terminal Railway Company, seek a declaratory judgment that the respondent, the Legislative Ethics Committee of the New Hampshire General Court (the “committee”), violated RSA 14-B:4 and RSA 14-B:5. Before the court is the respondent’s motion to dismiss. The petitioners object and, also, move to amend. Because the petitioners’ claims are nonjusticiable political questions and the petitioners’ motion to amend does not state a violation of part I, article 8 of the New Hampshire Constitution, the respondent’s motion to dismiss is GRANTED and the petitioners’ motion to amend is DENIED.

Facts

In October 2009, the petitioners filed a complaint with the committee pursuant to RSA 14-B:4, alleging that State Representative Peter Leishman made improper statements and failed to disclose a conflict of interest. Specifically, the complaint alleged that Representative Leishman stated to New Hampshire Department of Transportation Commissioner George Campbell that HB 613 would “go away” if the petitioners transferred certain property to the Milford-Bennington Railroad Company—a company owned by Representative Leishman. The complaint

further alleged that Representative Leishman failed to disclose this conflict of interest and questioned whether Representative Leishman acted improperly in renewing Milford-Bennington Railroad Company's agreement with the state.

The committee conducted an initial review but did not make a statement of formal charges, nor did it hold a formal hearing on the complaint. On the basis of its initial investigation, the committee determined that “[i]f [Representative Leishman] had actually made the [HB 613] statement[,] it would constitute grounds for a finding of improper conduct, in violation of Section 1, Principles of Public Service, Paragraph I, Section 4, Prohibited Activities, Paragraph II, subparagraph (c) and Section 4, Prohibited Activities, Paragraph III of the Ethics Guidelines.” With respect to Representative Leishman's failure to disclose a conflict of interest, the committee determined that “[i]t is a close question whether any benefit would have accrued to [Representative Leishman] from HB 613 to any greater extent than to others with personal financial interests in a ‘railroad.’” The committee elected to resolve the matter informally by issuing Representative Leishman a public letter of caution. RSA 14-B:4, VII (b); Proc. Rules Leg. Ethics Comm. Rule 6, VI. The instant action followed.

Analysis

Motion to Dismiss

Count One of the petition alleges that the committee violated RSA 14-B:4 because it does not confer the authority to resolve the allegations against Representative Leishman informally. Count Two alleges that the respondent violated RSA 14-B:5 by failing to adopt procedural rules in accordance with RSA 541-A—the Administrative Procedure Act (“APA”). In its motion, the committee argues that the petitioners have failed to state justiciable causes of action. The petitioners object. The court agrees that the petitioners' claims are nonjusticiable political questions.

“The nonjusticiability of a political question derives from the principle of separation of powers.” *Hughes v. Speaker, N.H. House of Representatives*, 152 N.H. 276, 283 (2005), citing *In re Petition of Judicial Conduct Comm.*, 151 N.H. 123, 128 (2004). “The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government.” *Id.* The separation of powers clause of the New Hampshire constitution prohibits each branch of government from “encroaching on the powers and functions of another branch,” and is “violated when one branch usurps an essential power of another.” *Petition of Mone*, 143 N.H. 128, 134 (1998), citing *Opinion of the Justices*, 121 N.H. 552, 556 (1981).

“A controversy is nonjusticiable—*i.e.*, involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it...” *In re Judicial Conduct Comm.*, 145 N.H. 108, 111 (2000), citing *Nixon v. United States*, 506 U.S. 224, 228 (1993). The New Hampshire Constitution sets forth “textually demonstrable commitments to the House and Senate to adopt their own ‘rules and proceedings.’” *Hughes*, 152 N.H. at 284, quoting *Baines v. New Hampshire Senate President*, 152 N.H. 124, 130-31 (2005); see N.H. Const. pt. 2, art. 22. Moreover, “[t]he legislature, alone, ‘has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.’” *Id.*, quoting *Des Moines Register v. Dwyer*, 542 N.W.2d 491, 496 (Iowa 1996).

Counts One and Two of the petition assert statutory violations; neither count alleges a constitutional violation. “[C]ourts generally consider that the legislature’s adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution.” *Id.*,

quoting *State ex rel. La Follette v. Stitt*, 338 N.W.2d 684, 687 (Wis. 1983). Thus, the issue of whether the committee violated RSA 14-B is a nonjusticiable political question. RSA chapter 14-B concerns legislative procedures for resolving ethics complaints that are not mandated by the constitution. “[B]ecause the State Constitution grants the legislature the authority to establish such procedures, the question of whether the legislature violated these statutes is nonjusticiable.” *Id.* at 285, quoting *Baines*, 152 N.H. at 130.

Relying on *Powell v. McCormack*, 395 U.S. 486 (1969), the petitioners argue that under federal law a court may examine the propriety of actions taken by the House when it involves the ethical behavior of a legislator. In *Powell*, the court reviewed the House of Representatives’ refusal to seat an elected representative who met constitutional standing requirements. *Id.* at 517. The court concluded that “the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.” *Id.* at 522. The present case is materially different. The United States Constitution permits Congress “to judge only the qualifications expressly set forth in the Constitution.” *Id.* at 548. The New Hampshire Constitution contains no specific requirements for the regulation of a representative’s ethical behavior. More importantly, the petitioners in this case only allege statutory violations. In *Powell*, the plaintiffs alleged constitutional violations, which are justiciable.

The petitioners also argue that the respondent violated RSA 14-B:5 by failing to adopt procedural rules in accordance with the APA. As stated earlier, “the legislature’s adherence to the rules or statutes prescribing procedure is a matter entirely within the legislative control and discretion, [and is] not subject to judicial review unless the legislative procedure is mandated by the constitution.” *Hughes*, 152 N.H. at 284, quoting *La Follette*, 338 N.W.2d at 687.

The petitioners further argue that RSA 14-B:5 and 541-A:24 manifest the intent of the General Court to permit judicial review of the validity or applicability of a legislative procedural rule. The court disagrees.

RSA 14-B:5 provides:

The committee shall adopt, publish, and make available to the public rules governing its procedures, including rules specifically related to sexual harassment complaints, as well as guidelines referred to in RSA 14-B:3, II consistent with procedures set forth in RSA 541-A.

“When construing a statute, [the court] first examines the language found in the statute and where possible, ascribe[s] the plain and ordinary meanings to words used.” *In re Town of Pittsfield*, ___ N.H. ___, ___ (July 23, 2010) (slip op. at 3), citing *Appeal of Garrison Place Real Estate Inv. Trust*, 159 N.H. 539, 542, 986 A.2d 670 (2009). “When a statute’s language is plain and unambiguous, [the court] need not look beyond it for further indications of legislative intent.” *Id.*, citing *Appeal of Garrison Place*, 159 N.H. at 542. RSA 14-B:5 requires that the rules governing legislative procedures be adopted, published and made available to the public. The statute provides that the rules must be “consistent with procedures set forth in RSA 541-A.” *Id.* It does not state that RSA 541-A is applicable to the legislature or its subcommittees. Indeed, the APA specifically exempts the legislature from its definition of “agency.” *See* RSA 541-A:1 (“‘Agency’ means each state board, commission, department, institution, officer, or any other state official or group, **other than the legislature** or the courts, authorized by law to make rules or to determine contested cases.”) (Emphasis added).

Motion to Amend

As indicated above, the petitioners have also filed a motion to amend. The petitioners seek to add a third count alleging that the committee’s process violated part 1, article 8 of the New Hampshire Constitution. The part 1, article 8 violations alleged are a restatement of its sub-

stantive statutory claims—a failure to promulgate and adopt procedural rules in a manner consistent with the APA, a failure to submit proposed procedural rules to the joint legislative committee on legislative rules for review, comment and possible objection (also required by the APA), and a failure to adhere to RSA chapter 14-B in its handling of the petitioners’ complaint. Because the alleged conduct if proved does not violate part 1 article 8 of the New Hampshire Constitution, an order granting the requested amendment is not appropriate.

Part 1, article 8 of the New Hampshire Constitution states:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.

Part 1, article 8 applies to the public’s access to governmental records and proceedings, and is to be read in conjunction with RSA 91-A—New Hampshire’s Right-to-Know Law. *See New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003). It “provides that government ‘should’ be open to the public and that the public’s right of access to governmental proceedings must not be ‘unreasonably restricted.’” *Hughes*, 152 N.H. at 287. Here, the petitioners do not allege that the committee unreasonably restricted the public’s right of access to governmental proceedings or records; rather, they argue that the respondent violated part 1, article 8 by failing to follow the procedures set out in RSA chapter 14-B and the APA. These are not claims under part 1, article 8 of the New Hampshire Constitution. *See Hughes*, 152 N.H. at 289 (finding that part 1, article 8 protects the public’s right of access and/or the right to know).

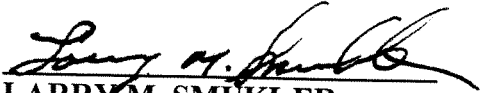
Conclusion

Based on the foregoing, the court concludes that the petitioners’ RSA chapter 14-B claims present nonjusticiable political questions. Furthermore, the petitioners’ amendment is not susceptible to a construction supporting a violation of part 1, article 8 of the New Hampshire

Constitution. Accordingly, the respondent's motion to dismiss is GRANTED and the petitioners' motion to amend is DENIED.

So ORDERED.

Date: September 10, 2010


LARRY M. SMUKLER
PRESIDING JUSTICE