

State of New Hampshire

GENERAL COURT

LEGISLATIVE ETHICS COMMITTEE

State House - Room 112
Concord, NH 03301-4951

October 18, 2019

Representative Douglas A. Ley
28 School Street
Jaffrey, NH 03452-6164

**Re: Complaint 2019-2
Informal Resolution**

Dear Representative Ley:

The Legislative Ethics Committee has completed its Preliminary Investigation of Complaint 2019-2. That Complaint alleges that you have acted improperly in carrying out your duties as a State Representative. It asserts that your independent judgment as a legislator is compromised as a result of your employment as President of AFT-NH. More specifically, the Complaint alleges that your failure to recuse yourself from advocating for and from voting on union-related legislation constitutes a violation of Section 3, Prohibited Activities, Paragraph II, Subparagraphs (c), (d) and (f) of the Legislative Ethics Guidelines. The Complaint provides four "examples" of alleged misconduct and suggests that you are effectively operating as a lobbyist for your employer.

You have informed the Committee, in writing and in person, that you do not agree with the allegations set forth in the Complaint. You have addressed each of the examples cited by the Complainant. You contend that the union-related legislation for which you have advocated or on which you have voted impacts all unions and not just AFT-New Hampshire. You assert that if legislation was specific to AFT-New Hampshire you would recuse yourself. You have likened your situation to someone who owns an insurance agency, as long as the legislation applies to all agencies, an individual owner is not expected to recuse him or herself from participation, only to disclose the apparent conflict.

Before addressing the Complaint, the Committee first expresses its concern over the breach of confidentiality involving this Complaint. Unless the person against whom the Complaint is filed requests that proceedings be made public, until formal charges are brought by the Committee, pursuant to RSA 14-B:4, III, all communications or materials received by the Committee, including the Complaint, are confidential. While the Committee believes that you have kept these matters private, the Committee has received evidence that other persons have provided a blogger

and at least one radio reporter with information about the Complaint. Furthermore, the Complainant and one State Representative have been quoted commenting on the Complaint in the press.

It appears that the Legislature enacted the confidentiality provision to avoid causing harm to the reputations of persons based solely on allegations which could be made for political or other purposes. Based upon the breach of confidentiality, you have asked the Committee to dismiss the Complaint. After considering your request, the Committee has decided that dismissal is not the appropriate remedy. Given the issue raised, the Committee felt it was important enough to require consideration on the merits. The Committee notes that while it lacks statutory authority to take action directly against an offending party, RSA 14-B:4-a does make it a misdemeanor for anyone to knowingly or willfully make unauthorized disclosure of these confidential matters.

In evaluating a Complaint, it is the Committee's duty to evaluate compliance with the provisions of RSA Chapter 14-C. The purpose of that chapter is set forth in RSA 14-C:1; "to ensure that persons charged with carrying out the duties and activities of the legislative branch of state government do so in an atmosphere that supports the independent judgment of such persons and minimizes the opportunity for inappropriate influence by persons or organizations subject to or likely to become subject to or interested in any matter or action pending in the legislative branch."

The Committee appreciates your cooperation in this matter and your willingness to provide information regarding your duties as president of AFT-NH. You acknowledge that you keep the members of the organization informed as to legislative matters through an organizational newsletter. The president of the AFT-NH is a paid position and the Committee has no doubt that it would be expected that the president would be an advocate for the organization. In fact, the Articles of Organization for AFT-NH provide that the president of that organization shall be "the only official spokesperson of AFT-NH, or designate a person in his/her place." The person who served as the president of AFT-NH before you registered as a lobbyist.

Certainly, when you advocate for or vote on union-related matters, your position as President of AFT-NH creates an apparent conflict of interest. But, as you correctly pointed out to the committee, it is not uncommon for legislators to have associations with particular industries, businesses or organizations. We encourage people with special knowledge to participate in our citizen legislature. In adopting the Ethics Guidelines, the Legislature has placed an emphasis on disclosure, not on disqualification.

There is no bright line stating when a legislator must refrain from participation in legislative matters. However, the Committee has found in the past that, under certain circumstances, recusal is the required course of action. To quote former United States Supreme Court Justice Potter Stewart; "Ethics is knowing the difference between what you have a right to do and what is right to do." The question for the Committee to answer in this Complaint is whether the apparent conflict between your role as AFT-President and as a legislator can be satisfactorily addressed through disclosure or is recusal required.

On August 15, 2018, the Legislative Ethics Committee provided Representative Gregory Hill with Advisory Opinion 2018-1 regarding his possible employment. He sought guidance from the Committee on whether he would be able to participate in legislative activities impacting his potential employer. As you have noted, his case is somewhat distinguishable because the employment involved a legislatively created program, however, the Committee determined that he would be required to recuse himself in "matters directly related to the interests of (his employer)." The Committee recognized the distinction between being a paid advocate for an organization and simply being a member or an employee of an organization. The Committee found by clear and convincing evidence that his participation in legislative matters which would directly impact his employer would violate Section 3, Paragraph II, Subparagraphs (c), (d) and (f) of the Ethics Guidelines.

A similar situation previously arose involving former Senator Peter Bragdon. He obtained employment as Executive Director of an organization which often lobbies on matters before the legislature. An Informal Resolution of Complaint 2013-5 was reached with Senator Bragdon whereby he agreed that he would "not take part in any official activity that concerns, involves or would have any effect on (his) employer."

You have likened your circumstances to legislators who might be insurance business owners, brokers or agents who, after disclosure, participate in matters involving the insurance industry. While we appreciate that analysis, the Committee finds that holding a paid position in an organization with the expectation that one will advocate for that organization can put that legislator in a position contrary to the purpose of the Ethics Guidelines. It is inconsistent with the precept of independent objective judgment and may result in inappropriate influence by an organization subject to actions taken by the legislature. Certainly, paid lobbyists serving as legislators should not participate in matters favoring their clients or employers. Accordingly, we should not allow a compensated employee who is paid to advocate for his or her employer to participate in matters directly related to his or her employer.

At the same time, recusal is required only when matters directly affect your employer. In your case, as union president, you are precluded from participating in union related legislation such as matters involving union fees, dues or membership. Because your union largely consists of teachers, you would be precluded from participating in issues which directly benefit them. On the other hand, you would not be precluded from participating in general matters involving education. For example, you could participate in education funding legislation as long as it does not directly address the compensation of your union members. However, you are reminded that in certain circumstances, a legislator must file a Declaration of Intent Form when participating in legislative proceedings. And the Ethics Guidelines require a legislator to make verbal disclosure of conflicts of interest prior to engaging in verbal advocacy on any legislative matter affecting his or her interest. With this analysis in mind, the Committee has considered each of the examples provided by the Complainant.

Example #1: 2017 bill *relative to* Right to Work. In this case, it is alleged that you disclosed you had an interest in the legislation but announced that you would participate and vote. The Committee has determined that this matter had a direct effect on your employer and recusal

was the appropriate action to be taken. This would be a violation of the Ethics Guidelines, Prohibited Activities, Section 3, Paragraph II, Subparagraphs (c) and (d).

Example #2: For HB 438 (2018) Hearing House Labor: Eliminating Automatic Union Dues for State Employees. It is alleged that you voted on this legislation which directly affected the interests of your employer. The Committee has determined that this matter had a direct effect on your employer and recusal was the appropriate action to be taken. This would be a violation of the Ethics Guidelines, Prohibited Activities, Section 3, Paragraph II, Subparagraphs (c) and (d).

Example #3: HB 1405 (2018) Heard in House Labor. Requiring school district personnel to be eligible for Family and Medical Leave Act. It is alleged that you did not vote on this legislation on the House floor but participated in committee. If this legislation was about the Family and Medical Leave Act in general, it would not be a problem. But, being directed at school district personnel, it would provide a specific benefit for your union members. The Committee has determined that this matter had a direct effect upon your employer and recusal was the appropriate action to be taken. This would be a violation of the Ethics Guidelines, Prohibited Activities, Section 3, Paragraph II, Subparagraphs (c) and (d).

Example #4: SB 193 (2018) Education Savings Accounts. It is alleged that you “lobbied” for this legislation. While your union’s membership undoubtedly has an interest in promoting education, the Committee does not find that the union will receive any direct benefit from Education Savings Accounts. The Committee does not find a violation of the Ethics Guidelines.

In addition to the four examples, the Complainant also alleged that you registered in favor of or in opposition to legislation by signing committee “Blue Sheets” in your capacity as AFT-NH President. At this point, the Committee has not verified this allegation. However, if it is true, this could result in a violation of the Ethics Guidelines, Prohibited Activities. When acting in your capacity as a legislator, you may have to disclose a conflict due to your employment, but you could participate in legislative activities which do not directly impact your employer. But, when you take a position on legislation on behalf of your employer, you should not be participating in any legislative action or activities involving that legislation. The Complaint does not specify whether you heard or voted on the legislation after signing in on behalf of AFT-NH.


The Committee recognizes that the Ethics Guidelines are not always easily understood and are subject to interpretation. As stated previously, there is no bright line set out in the Ethics Guidelines establishing when recusal is required. Perhaps that is a matter for the Legislature to address in the future. In addition, the Committee notes that the seminal Advisory Opinion on this subject given to Representative Hill was issued on August 15, 2018, and most, if not all, of the examples provided by the Complainant occurred prior to the issuance of that Advisory Opinion. The Committee will also accept your representation that you did not intentionally violate any principle or rule.

Therefore, the Committee proposes to resolve this Complaint through informal resolution, provided that you agree that, as long as you are employed as president of or as an advocate for AFT-NH, you will properly recuse yourself from participating in any legislative activities which

may have a direct benefit to your employer or to the union membership. A failure to comply with that agreement would result in an ethical violation and the imposition of sanctions.


Please advise us as to whether you accept the informal resolution of this matter on the terms described. You may do so by signing in the space provided below and returning the signed letter to the Committee. If you are in agreement, this letter will become a public document. Copies will be provided to the presiding officers of the House and Senate and it will be submitted for inclusion in the legislative calendars.

For the Committee,


Edward M. Gordon
Chairperson

I hereby agree to the Committee's proposal for informal resolution.

10/30/19
Date


Representative Douglas A. Ley