

[Draft]

Legislative Ethics Committee

Complaint #2009-1

Report of Preliminary Investigation

Pursuant to its Decision Following Initial Review in this matter dated November 19, 2009, the Committee requested and received the Response of Representative Peter Leishman submitted in accordance with Legislative Ethics Committee Procedural Rule 5. Thereafter the Committee proceeded with a preliminary investigation in accordance with RSA 14-B:4, V and Ethics Committee Procedural Rule 6.

As stated in the Decision Following Initial Review, the purpose of the preliminary investigation was to determine whether there was sufficient cause to warrant further proceedings with regard to:

A. The Respondent's alleged activities relative to 2009 HB 613 and

(1) whether such activities may have violated Section 1, Principles of Public Service, Paragraph I, or Section 4, Prohibited Activities, Paragraph II, Subparagraph (c), or Section 4, Prohibited Activities, Paragraph III of the Ethics Guidelines; and

(2) whether such activities may have violated Section 4, Prohibited Activities, Paragraph V of the Ethics Guidelines; and

B. The Respondent's alleged activities in connection with renewal of the Milford-Bennington Railroad operating agreement with the State of New Hampshire and whether such activities may have violated Section 4, Prohibited Activities, Paragraph II, Subparagraph (d) of the Ethics Guidelines.

In accordance with Ethics Committee Procedural Rule 6, Paragraph I, the Chairman requested the assistance of the Committee's Executive Administrator Richard Lambert, and Committee member Richard Russman Esq., to conduct the preliminary investigation. Mr. Lambert obtained and reviewed legislative records pertaining to 2009 House Bill 613. Mr. Gross and Mr. Lambert conducted an extensive interview with officials of the New Hampshire Department of Justice who, at the request of the Governor and Council, had performed an investigation into the circumstances surrounding renewal of the Milford-Bennington Railroad operating agreement. Attorney Russman conducted interviews with Commissioner George Campbell of the New Hampshire Department of Transportation, and Hon. Peter Burling, Chairman of the New Hampshire Rail Transit Authority, both of whom had previously been interviewed in the course of the Department of Justice's investigation. Mr. Gross once again reviewed the Complaint and its supporting materials, and the Response and its supporting materials, all of which had been submitted to the Committee under oath.

A. As to the Respondent's alleged activities relative to 2009 HB 613, preliminary investigation has disclosed the following:

1) The Respondent was the prime sponsor of the Bill, which would have established a committee to study the advantages and disadvantages of state acquisition of the remaining rail corridors.

Commissioner Campbell would testify that in the latter part of April 2009, following the Commissioner's submittal to the Senate Transportation Committee of a letter opposing the Bill, he received a telephone call from the Respondent who wished to discuss the Commissioner's position on the Bill. The Commissioner would testify that in the course of the conversation, the Respondent said, among other things, that the Bill "would go away" if Pan Am Railway would convey to him certain trackage adjoining the line of track leased from the State by the Respondent.

The Respondent would deny making this statement and has denounced it as a "complete fabrication" in a letter he submitted in connection with the Department of Justice's investigation.

Commissioner Campbell would further testify that he transmitted the statement to David Fink of Pan Am Railways, who declined any interest in it.

David Fink would testify that at the end of April 2009, in a private session following a meeting at NH Department of Transportation, Commissioner Campbell informed Mr. Fink that if Pan Am were to convey the adjoining trackage, the rail study bill would go away. Mr. Fink would testify that Peter Burling was also present at the private meeting.

Peter Burling would testify that he learned of the statement in a telephone conversation, but does not recall hearing of it at a meeting.

If the Respondent had actually made the 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. However, RSA 14-B:4, VIII (d) would require that such a finding be based on "clear and convincing evidence." While the Commissioner's prospective testimony would be credible and would provide substantial evidence of a violation, in light of the Respondent's categorical denial and the lack of clarity in potentially corroborating testimony, it is questionable whether, following formal proceedings, such a finding could be made to the degree of certainty required by the statute.

Nevertheless, the state of the evidence would justify resolution of this issue by informal methods following preliminary investigation, as authorized by RSA 14-B:4, VII (b) and Committee Procedural Rule 6, Paragraph VI. In this case, the Committee proposes to issue a letter of caution to the Respondent, reminding him that his contractual relationship with the State as operator of a rail line, combined with his prominent position as chairman of a Division of the House Finance Committee and his longstanding unfriendly commercial relationship with Pan Am Railways, require that he be continually mindful of, and make special efforts to avoid, any conduct that could be perceived as use of his official position to advance his personal interests in violation of the Ethics

Guidelines. Such a resolution requires consent of the Respondent. Committee Procedural Rule 6, Paragraph VI.

2) In Section II of his Financial Disclosure Form for the 2009 Session filed in accordance with Section 3 of the Ethics Guidelines, the Respondent inserted the word "railroad" as a personal financial interest in a group on which official action by the General Court would potentially have a greater financial effect than it would on the general public. However, no Declaration of Intent Form (Ethics Guidelines, Section 5) is on file with the House Clerk on behalf of the Respondent in connection with his sponsorship of HB 613. Section 5, Paragraph I of the Ethics Guidelines states:

No declaration shall be required if no benefit or detriment could reasonably be expected to accrue to the legislator...as a member of a business, profession, occupation, or other group, to any greater extent than to any other member of such business, profession, occupation, or other group, provided that disclosure of the legislator's...membership is made in the Financial Disclosure Form pursuant to section 3 of the Ethics Guidelines. For purposes of these guidelines, groups shall be limited to ones generally recognized and of a substantial size.

It is a close question whether any benefit would have accrued to the Respondent from HB 613 to any greater extent than to others with personal financial interests in a "railroad." It is also unclear whether such persons would qualify as a group that is "generally recognized and of a substantial size." Again, these issues indicate a question whether in this case, a violation of Section 4, Paragraph V could be determined by the requisite "clear and convincing" evidence. However, in light of the Respondent's legislative position and his private business interests, the better practice would be to avoid concerns by filing a Declaration of Intent Form whenever a bill involves railroad interests. This issue should also be resolved informally, through reference in a letter of caution, if the Respondent consents.

B. As to the Respondent's alleged activities in connection with renewal of the Milford-Bennington Railroad operating agreement with the State of New Hampshire, preliminary investigation has disclosed the following:

The investigation conducted by officials of the New Hampshire Department of Justice at the request of the Governor and Council intensively inquired into the facts and circumstances surrounding renewal of the operating agreement by the New Hampshire Department of Transportation. In that process, every person in NH DOT who had a part in the process was interviewed. The Committee's investigators closely reviewed the notes of that investigation with the individuals who conducted it. Many, if not all of the NH DOT interviewees were known to the NH DOJ interviewers in a longstanding professional capacity, and there is no reason to think that NH DOT personnel provided anything other than their best recollection, or that their testimony to the Committee in a formal proceeding would vary from what they told NH DOJ's investigators.

Based on that review, there appears to be no substantial evidence to support a finding of misconduct on the part of the Respondent in connection with his activities relating to renewal of the operating agreement. However, once again, best ethical practices should indicate to the Respondent that because of his position as an influential legislator, he should conduct his private business relationship with NH DOT with utmost probity and circumspection, in precise compliance with NH DOT's rules and the terms of the operating agreement. This would avoid provoking concerns about use of his official position to gain preferred treatment in the relationship.

Conclusion

In accordance with RSA 14-B:4, VII and Ethics Committee Procedural Rule 6, Paragraph VI, upon the completion of preliminary investigation, the Committee will informally resolve this matter on the terms set forth in the preceding report, if the Respondent consents.