

APPROVED: June 8, 2010

**BOARD OF ETHICS
PUBLIC MEETING MINUTES
May 11, 2010**

Chairman Barbara Hunter called a Board of Ethics meeting to order at 6:30 PM in the downstairs meeting room of the New Durham Town Hall off Main Street.

Present:

Barbara Hunter, Chairman Marcia Clark
Skip Fadden Mike Gelinas Absent with apologies: Jan Bell

Also Present:

Cathy Orlowicz, Steve Orlowicz, Kristyn Bernier, Selectman David Bickford, Peter Rhoades, Debra Jelley, Acting Recording Clerk

INTRODUCTION:

Board members introduced themselves to the public in attendance. Members were polled on the meeting's agenda, all were in agreement. Attending public was offered an opportunity for input on topics off the agenda, none were presented.

APPROVAL OF MINUTES:

Motion Fadden, second Hunter to approve the Minutes of April 13, 2010 as written, three in favor, one abstention. Motion Gelinas, second Fadden to accept the Minutes of April 27, 2010 as written. All in favor.

OLD BUSINESS:

Complaint # 1 of March 12, 2010

The Board received a letter of complaint citing Section 1:8 of the New Durham Code of Ethics regarding a no confidence vote that no public servant misuse position or authority to influence the outcome of an election, based on a letter to the editor of the Baysider publication on March 12, 2010. Since Mike Gelinas wasn't on the Board when the complaint was reviewed, Chairman Hunter queried him as to any possible bias or conflict on his part regarding this complaint. Gelinas disclosed that he knows many of the people listed in the complaint, but feels he can retain impartiality.

Prior to April 27th meeting with Town Counsel, the Board had accepted the complaint for consideration. A proposed decision prepared by Town Counsel was up for discussion. Clark expressed concern that the proposal is offered in its original form, with Hunter admitting that there has been one addition, that will be addressed. Gelinas requested that RSA's that are pertinent be referenced, in particular that which protects an employee's right to freedom of expression.

Chair Hunter explained that in Paragraph 5 of the proposed decision, second to last sentence, especially in the aggregate was added. Also in Paragraph 4 she requested a example from Town Counsel to clarify "to interfere, the Town would require a compelling interest. Such is not present here." None was offered. Gelinas asked that RSA 98-E:2 be read "no person shall interfere with an individuals right to freedom of speech by any public employee."

Clark responded to Paragraph 2 by stating that the accused employees did not individually identify themselves in their official capacities and were expressing their right to free speech, therefore there was no misuse of authority or influence. Fadden disagreed that there was no misuse, with an offer to hold the discussion until the proposed decision was read in completion.

Chair Hunter continued with Paragraph 3, referencing RSA 659:44-a Electioneering by Public Employees

which provides guidance: no public employee shall electioneer while performing in his or her official duties or use government property . . . Chair Hunter queried her Board as to any other changes.

In Paragraph 4, the 1st Amendment right to Free Speech supercedes the town's regulations written in the Code of Ethics. Fadden explained that his interpretation is that this refers to citizens speaking as individuals, not as employees and volunteers, as appears to be the case in the letter to the editor in question. Clark stated that the respondents were writing as individuals and collectively. Fadden disagreed and stated that this is in violation of the New Durham Code of Ethics. Clark countered that this is only true when employees and volunteers are specifically in their official positions. Fadden stated that this applies to other situations as well. Clark responded that they are individuals when away from their jobs. Fadden asserted that they used their positions as employees and volunteers to influence the public, which is a misuse of influence and position. Gelinas retorted that there is no misuse since there is no force or coercion asserted, and that state statutes support freedom of speech for public employees. Fadden added that the state statutes also allow for towns to create their own code of ethics that can go beyond the scope of the state's requirements such as Section 1:8 of the New Durham Code of Ethics.

Chair Hunter referred to Paragraph 3, Gelinas made a motion that was unanimously accepted, to amend the second sentence to say a majority felt in place of "several members felt" and add, A minority felt it was appropriate to identify and express themselves under RSA 659:44-a as it provided the necessary guidance. So long as there was no electioneering while an employee or volunteer was performing his or her official duties, and did not use government property, he or she should feel free to fully participate in the election process. Therefore, the town's regulations must be balanced with the right of free speech.

Fadden adamantly stated that this proposed decision and change of decision to accept the complaint is not the way to go as a Board, as the employees and volunteers had unequivocally stated that they were writing as employees and volunteers in order to muster more influence and support than they would have had as ordinary citizens. Clark remarked that an individuals' right to free speech must prevail. Fadden rebutted that since the state allows towns to create ethics policies this is a violation, and he offered that he has researched other towns' ethics policies which concur with that of the town. Chair Hunter restated that while some Board members clearly see this as inappropriate behavior on the part of town employees and volunteers, she is hesitant to go against state regulations. In defining a misuse of influence, Chair Hunter alleges that first, it must be intended to influence the outcome of the election and second, must adhere to that which is legally correct and aligned with applicable law. Gelinas reminded the Board that there should not be public input since this is a meeting and not a hearing, whereas Chair Hunter stated that comments could be accepted after the Board's decision.

Motion Fadden to take a vote to reconsider their original decision to accept or not accept the complaint before we can act on the proposed decision as amended.

Motion Gelinas to reconsider complaint # 1 of March 12, 2010 in light of the information gained at the meeting with Town Counsel of April 17th. Second Fadden. Fadden requested that the Board not reconsider their original decision to accept the complaint as valid, as it was made by the full Board. Chair Hunter reminded the Board that the majority of 3 was to accept, with 1 not to accept. Gelinas called for vote. Vote to reconsider the original acceptance of complaint vote; 3 in favor, 1 opposed. Chair Hunter revealed that she changed her original position due to information from meeting with Town Counsel.

Continuing with Paragraph 5, Gelinas made a suggestion to hold public hearings and have a discussion so that employees will know where the line is drawn, based on the town's ethics policy. Chair Hunter asked for clarification, Gelinas responded to perhaps rewrite the ordinance. Chair Hunter suggested that the Board first make a decision on the complaint at hand, and then reconsider the ordinance for further clarification.

Motion Gelinas to use the proposed decision as amended for the Board's decision to dismiss the complaint. Fadden requested more time to consider the proposed decision as it is the first time that the Board has seen it. Second Clark on Gelinas motion. Chair Hunter read Paragraph 3 as amended. Called

for a vote, 3 in favor and 1 opposed. The complaint is dismissed. The adopted decision is as follows:

DECISION WITH RESPECT TO COMPLAINT NO.1 – MARCH 12, 2010

The Board of Ethics is in receipt of a complaint letter, alleging a violation of Section 1(viii) of the Town of New Durham Code of Ethics, when twenty-one employees and volunteers signed a letter to the editor, appearing in the "Baysider," which conveyed a collective no-confidence vote in a Board of Selectmen candidate. This section provides that: "No public servant shall misuse his or her official authority or influence for the purpose of interfering with or affecting the result of an election." Initially, the Board accepted the complaint, but also decided to consult with the Town's attorney.

It is clear to Board members that the letter was intended to affect the outcome of the election. However, this fact alone is not enough. There must be "misuse" of "official authority" or "influence." No misuse of official authority exists. For example, there was no *quid pro quo*, as would be the case if a building permit were to be denied if an applicant did not vote in a certain way. Rather, the complaint focuses on the misuse of influence by virtue of the employees and volunteers identifying themselves as such in the letter.

This resulted in a variety of views by Board members. A majority felt that it was inappropriate for the individuals to identify themselves as employees or volunteers in order to gain influence with their letter. A minority felt it was appropriate to identify and express themselves under RSA 659:44-a as it provided the necessary guidance: So long as there was no electioneering while an employee or volunteer was performing his or her official duties, and did not use government property, he or she should feel free to fully participate in the election process.

All Board members agreed that the complaint involved issues of free speech. For example, RSA 98-E guarantees the right of every public officer or employee to freely express themselves on matters of public concern, as does the First Amendment to the United States Constitution. The Town's regulations must be balanced with the right to free speech. Where the balance tips in favor of free speech, a town's regulation must give way. Since this complaint involves the expression of opinions regarding an election, to interfere, the Town would require a compelling interest. Such is not present here. Moreover, an overly broad interpretation of our regulations could have unintended negative consequences. Elections are not limited to candidates, but also involve issues, such as zoning amendments and the town budget. The interpretation of the regulation should not discourage a planning board member from commenting about a zoning amendment, or a conservation commission member from commenting on a wetlands ordinance.

Participation in the election process is to be encouraged. All Board members felt an employee or volunteer is free to express his or her opinion. Some felt it was not appropriate to use one's status as a Town employee, especially in the aggregate, but all agreed that the balance was in favor of free speech.

Participation in the election process is to be encouraged. All Board members felt an employee or volunteer is free to express his or her opinion. Some felt it was not appropriate to use one's status as a Town employee, especially in the aggregate, but all agreed that the balance was in favor of free speech. After considering the law brought to the attention of the Board, the Board decides to dismiss the complaint. In summary, Chair Hunter stated that the decision tips in favor of free speech of employees as in RSA 98-E, but cautions town employees and volunteers to be circumspect when identifying themselves as such when they are offering political opinions dealing with such personal issues. She offered that the process has been responsive and responsibly handled. Gelinas reiterated that there needs to be clarification of and reconsideration of the ordinance.

Kristyn Bernier stated that she feels that the policy can be used to pinpoint one faction of individuals who speak their minds, but not necessarily others, and that the policies need to be applied uniformly. Also, whether the ordinance surpasses state laws needs to be addressed.

Peter Rhoades identified himself as the complainant, and asserted that while understanding the position of the Board because of advice from Town Counsel, he is disappointed in the Board. He revealed that he has sought outside legal advice with a municipal attorney, whose opinion disagrees with that of Town

Counsel, and that it is clear that the parties in question used their positions in town to attempt to influence the public, and that these positions should not afford undue influence. He suggested that the ethics ordinance be eliminated based on its inherent weakness as demonstrated in this case, and he stated that once again the employees are running the town.

Cathy Orlowicz gave her appreciation to the Board and concurred that a review of the ordinance would be beneficial.

Chair Hunter admitted that exactly what is appropriate creates the difficulty, in particular due to confusion with terminology, and that the Board of Ethics is still relatively new and will possibly change over time. A letter with the Board's decision to be sent to Peter Rhoades and the Board of Selectmen, and that minutes of the meeting will be available in 5 business days. Chair Hunter gave thanks to the public in attendance.

Selectman Bickford asked if Rhoades' name will appear in the minutes since he publicly identified himself as the writer of the complaint, consent by Debra Jelley, Acting Recording Clerk. Chair Hunter said there will be no identification of the respondents listed in the complaint in the minutes.

Kristyn Bernier stated that 2 weeks ago she requested a copy of the complaint letter. Hunter said Selectman Jarvis has asked Town Counsel to provide advice as to making copies of the complaint letter available. She questioned when Town Counsel will make do that, Hunter hoped within 5 business days.

Clark questioned whether the letter to Hunter from Town Counsel will be included in the minutes. Motion Gelinis to include such in the minutes (see Appendix A below).

Peter Rhoades expressed concern with the procedure of notifying the respondents. He stated that prior to meeting with the attorney, the Board had accepted the complaint and that Fadden had unconditionally reassured him that Town Counsel was not being consulted to decide if the complaint had merit, as it had already been voted and approved by the Board with a vote of 3-1 and that, in fact, the 3 members were strongly in favor of accepting the complaint. Rhoades had therefore anticipated that the letters had been sent in a timely manner as provided by the BOE's Procedural Rules.

Peter Rhoades inquired as to the process of informing respondents to a complaint in terms of the Board's Rules of Procedure. Chair Hunter replied that this occurs after acceptance of the complaint after the date of the hearing is set. However regarding the complexity of this present complaint, it was decided to seek Town Counsel before proceeding but to send letters informing the complainant and respondents of the complaint and that Town Counsel was being sought. When Hunter met with the Board of Selectmen on April 19 to request that the BOE meet with Town Counsel, as well as, ask for funds for certified mailings, Selectman Jarvis offered to have counsel contact Hunter and inquire as to the wisdom of sending out certified letters to the 15 individuals named in the complaint before the BOE meets with Town Counsel. The advice given, given the following day was to wait before sending the letters. Hunter confirmed that the purpose of meeting with Town Counsel was to ask questions about the complexity of the proceeding with this complaint to hearing regarding public and non-public meetings not to decide to accept the complaint as it already was accepted. Information regarding RSA's relating to this complaint was included in the meeting with Town Counsel.

Selectman Bickford inquired whether the Board was looking to the attorney to decide to accept the complaint, as Chairman Hunter had voted differently in tonight's meeting, specifically citing the attorney's additional information regarding RSA 98-E. Addressing Rhoades, Bickford offered that "everything's a draft, and therefore not permanent."

Peter Rhoades asserted that the members of the Board are not the same tonight as on the meeting of April 13th that first approved the complaint, as Jan Bell in particular is not in attendance, and Mike Gelinis had not yet become a member. Previously, the members overwhelmingly approved accepting the complaint, with only Clark opposed, and those votes should hold. Chair Hunter responded that while Bell agreed that the behavior of town personnel was inappropriate, had she been in attendance at tonight's meeting, and

still voted in favor of accepting the complaint, the tally would be 3:2, and therefore not enough to swing the vote. Peter Rhoades countered that is true unless she was very persuasive. Gelinas chimed in that his new position on the Board brought a different view, as he feels the Board must uphold the right to free speech above and beyond the ordinance.

Chair Hunter stated support of discussion of the ordinance in future meetings, as many items are very debatable; stating that the citizens of the town may need to be reminded that the Board exists for them, and that requests for clarification are welcome, and she asked for further comments on the Board's decision.

The question of change in attorney was brought up, since the attorney who first assisted the town in drafting the ethics ordinance is no longer the same attorney. Kristyn Bernier stated that the attorney's both work for the same firm. Selectman Bickford agreed that it is the same firm, and that after the adoption of our Code of Ethics Ordinance, the state increased the legislation requiring tolerance of RSA 98-E protecting free speech of employees, and a court may now award damages from an employer. He suggested that the Board seek to read "Knowing the Territory" from NH Local Government Center. Bickford mentioned the availability of the newest edition later this month and that the town clerk may be able to provide copies.

Vice-Chair Vacancy:

Position of Vice-Chair to be filled. Motion Gelinas, second Clark to table election until July when Bell will be back. Vote unanimous.

Code of Ethics Presentation:

Chair Hunter raised how should we now proceed with the Code of Ethics presentation that was tabled to deal with Complaint No.1. Fadden replied that he is not prepared to cover the work he has completed at tonight's meeting due to the heavy agenda already covered. Hunter said that was understood as we just should decide when to return to the process. All agreed to continue at the next meeting.

Gelinas suggested a sign-off form for all employees once they are presented with an explanation of the ordinance.

NEXT MEETING:

Tuesday June 8, 2010 to continue work on presentation, discussion of letter from Town Counsel, on-going discussion of Code of Ethics Ordinance that will now be a constant agenda item.

Selectman Bickford suggested a time limit for the Board when reviewing materials and completing investigation of inquiries and complaints. Cathy Orlowicz provided that such a time limit of 30 days from the time a complaint is accepted, to the time a decision must be rendered and delivered to the complainant and the BOS currently exists. Chair Hunter questioned if that should be reexamined, as it may not be enough time in light of the issue that the Board had just dealt with.

Fadden wished to clarify whether the Board had received all of the documents that were referred to in the April 28th letter sent to Chair Hunter from Town Counsel, pointing out that all relevant materials requiring that decisions be made should have been sent to Board members prior to the meeting. Chair Hunter stated that upon advice of Town Counsel she was not able to distribute the proposed decision for complaint no.1. She voiced her frustration that the Board members could not review it prior to this meeting. Fadden stated that adequate time to review documents is necessary for the Board. Selectman Bickford commented perhaps because it was a legal document. Hunter said it wasn't a legal decision but a proposed decision capturing all that the Board said during the meeting with counsel. Bickford said that he has never heard that a board could not receive relevant documents prior to a meeting. Cathy Orlowicz suggested the Board take a vote to accept distribution of such materials prior to meetings, as the Planning Board did when she was a member. She commented that it takes the burden off the chair and establishes a procedure for distributing materials in the future.

At the next meeting, the Board will decide how to deal with legal documents received prior to meetings.

Fadden again inquired as to the receipt of two items from Town Counsel as alluded to in his email letter to Hunter. Chair Hunter responded that the attorney's letter stated that the following items were attached, the proposed decision for the Board's consideration and a draft transmittal letter to Peter Rhoades should it be decided to dismiss the complaint. Chair Hunter read the draft letter in question aloud to Board members (See Appendix B below). Fadden reiterated that the letter should have been a part of the discussion to begin with and not withheld until after a decision was rendered. Chair Hunter asserted that she felt it was only a draft cover letter should the decision go in that direction.

ADJOURNMENT:

Motion Clark to adjourn the meeting, second Gelinas, vote unanimous. Meeting adjourned 8:50 PM

Respectfully submitted,

Deborah Jelley and Barbara Hunter

Appendix A - Town Counsel letter to Chairman, Hunter

April 28, 2010

Barbara Hunter, Chair

Board of Ethics Town of New Durham

P.O. Box 207

New Durham, NH 03855

Dear Barbara:

At the outset, allow me to express my appreciation for the patience the Board members showed at our meeting on April 27, 2010. It was clear that every Board member had considered carefully what was presented, and was prepared to engage in vigorous debate.

Attached are a proposed decision for the Board's consideration, and a transmittal letter to Mr. Rhoades. I take no great pride in authorship, and therefore encourage the Board members to modify the proposal as they deem prudent and necessary.

Allow me to take this opportunity to address some issues involving conflicts of interest. Certainly, a town has the authority to adopt a conflict of interest ordinance in accordance with RSA 31:39-a. The voters of the Town of New Durham have included features which are not commonly addressed in the law, such as a prohibition against the "appearance" of a conflict. Since there is not a great deal of law on this subject, and it is a very broad concept, there is little guidance that I can provide. However, I offer the following on the general principles governing conflicts of interest.

It needs to be understood that there is a distinction between the roles public officials may assume. For example, boards may act in both a legislative and quasi-judicial capacity. An example of the former would be the adoption of a road regulation or subdivision regulation. An example of the latter would be consideration of a petition for the layout of a public highway by the board of selectmen or consideration of a site plan or subdivision by the planning board. A legislator is disqualified when he has a direct, personal and pecuniary interest different from that of a member of the general public. The mere fact that a public official has spoken out on one side of an issue in advance of voting upon a proposed legislative act does not disqualify that individual from participating.

In contrast, the standard for a conflict of interest involving a public official engaged in a quasi-judicial role is much higher. Part I, Article 35 of the New Hampshire Constitution states that "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." Thus, RSA Chapter

43, governing hearings before town officials, provides that “no selectman or other officer shall act, in the decision of any such case, who shall be disqualified to sit as a juror for any cause...in the trial of a civil action in which any of the parties interested in such case was a party.” Similarly, RSA 673:14 provides that no member of a local land use board “shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.” Of course, knowledge of the facts involved gained in the performance of the member’s official duties does not constitute a basis for disqualification.

No clear and unequivocal rule has been established regarding conflicts of interest when an official is serving in a quasi-judicial capacity, but rather a broad principle exists, which requires an analysis of the factual situation in each case. “It is a general rule of law, and the law in New Hampshire, that ‘there is a conflict of interest when a public officer votes on a matter in which he has a direct personal and pecuniary interest.’” *Atherton v. Concord*, 109 N.H. 164 (1968). “However, the rule is also well established that, to disqualify, the personal pecuniary interest of the official must be immediate, definite, and capable of demonstration; not remote, uncertain, contingent, and speculative, that is, such that ‘men of ordinary capacity and intelligence would not be influenced by it.’” *Id.* at 165. The simplest application of the forgoing would be the example of an employee sitting on a board to consider the application of his or her employer. Obviously, this individual would have a direct interest in the matter, and could be influenced by that interest.

The Supreme Court has observed that, “if every possibility of conflict, no matter how remote, uncertain, contingent, insubstantial or speculative, were cause for disqualification, many persons who are peculiarly suited for public office by the very reason of their commercial or professional experience would be prevented from contributing their services to the community.” *Id.* The juror standard contained in RSA 673:14 and 43:6 is a subtle one. “It is not any and every business relation that disqualifies a juror, and if it did the newspaper subscriber, the telephone user, the electric and water consumer and those who engage in a host of other common and everyday habits of ordinary commercial and domestic life would be eliminated from the average jury panel.” *McLaughlin v. Union Leader Corp.*, 99 N.H. 492 (1955). Thus, a person who regularly ran an ad in the Union Leader was not disqualified from sitting on a jury. In a case involving a slip and fall on a sidewalk, the Court refused to disqualify three people as jurors: (a) one was employed by the company which had sanded the defendant’s parking lot and drive (which was not, however, a party to the case); (b) a second was related to an employee of the defendant; and (c) a third had been a client of the defendant’s attorney at some prior time. The Supreme Court said that the trial judge had the authority using the juror questioning procedure, to take these facts into account, and still find these people were impartial. In other words, none of these relationships was disqualifying *per se*. *Matthews v. Jean’s Pastry Shop, Inc.*, 113 N.H. 546 (1973).

Experience will dictate how the Town’s ethics ordinance should be applied or where modifications are required. If you have any questions or wish to discuss these matters further, please do not hesitate to contact me.

Very truly yours,

Barton L. Mayer
bmayer@upton-hatfield.com
BLM/bgb

Appendix B - Draft Transmittal letter to Rhoades

Peter C. Rhoades
73 Jenkins Rd.
New Durham, NH 03855

Dear Peter:

The Town of New Durham Board of Ethics considered your complaint carefully, and appreciates your bringing your concerns to its attention. It certainly provoked a good deal of thought and discussion. In the end, however, we were of the opinion that the right of free speech was controlling. Therefore, your complaint was dismissed, and the Board will not move forward to a hearing.

Attached is a copy of the Board's decision. As you can see, the Board felt that your complaint did provide an opportunity to caution town officials and volunteers that they must be circumspect when identifying themselves as such when they are offering political opinions dealing with such personal issues. Nevertheless, the scale tipped in favor of protecting free speech.

Once again, thank you.

Sincerely,

Barbara Hunter, Chair
New Durham Board of Ethics