



Board of Ethics
Meeting Minutes
July 11, 2012
City Council Chambers
12:00 p.m.

Present: Tenley Callaghan, Scott Daniels, Daniel Feltes, Brenda Robb, John Sullivan, Deputy City Solicitor Danielle Pacik and Deputy City Clerk Michelle Mulholland.

Ms. Callaghan moved approval of the June 8, 2012 meeting minutes. The motion was duly seconded and passed with no dissenting votes.

Ms. Callaghan nominated John Sullivan as the Chairperson of the Board. The nomination was duly seconded and passed with no dissenting votes.

Chair Sullivan indicated that the board has limited jurisdiction and has the power to make a recommendation to the City Council in which they have the option of not accepting. He added that they don't have jurisdiction that is completely independent of the Council but are just an advisory board. He noted that the board doesn't have the right to overturn decisions of the Council.

Chair Sullivan stated that he would like to first consider the June 19, 2012 complaint filed against Councilor Kretovic. He asked whether any members of the board had any conflict in respect to this case. No member of the board had a conflict with this case. He referenced page 7 of the June 4, 2012 City Finance Committee meeting minutes and pointed out that the minutes reflect that Councilor Kretovic asked for a determination as to whether there was a conflict of interest in her vote on the funding for Intown Concord. He stated that the minutes also reflect that the City Council determined that there was not a conflict. He noted that based on Article III, D, 6(a), Board of Ethics Rules, he feels that the underlying complaint here is really something that the board does not have jurisdiction over. He added that they can alternatively look at it and say that there isn't merit to the complaint. He pointed out that the Councilor asked for a ruling by the City Council and therefore she acted on what the Council told her to do. He feels that since she brought this forth before the vote and received approval by Council, it appears that her act is ethical at that point.

Mr. Feltes questioned whether, by making the conclusion that the board does not have jurisdiction, they are saying that under no circumstances can the Council get the benefit of an Ethics Board review and recommendation. He asked whether they are making a per se rule against any potential future complaint.

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Chair Sullivan stated that the exception that strikes him is that if there was less than full disclosure being made to the Council; the Council is misled into a bad decision. He added that he doesn't feel the board was appointed to second guess all of their decisions.

Ms. Callaghan noted her agreement with the Chair pointing out that the Councilor disclosed the past relationship and received a vote by the Council.

Mr. Feltes indicated that he would be uncomfortable saying, just as a per se matter, that anytime something is flagged that it prevents anybody from complaining to the board. He stated that, in this particular case, there was a disclosure and the Council acted upon it and there is not any indication that she did not disclose. He agreed with the argument that, with this particular case, the board doesn't have jurisdiction but cautioned the board not to make a broad based rule to discourage future ethics complaints.

Chair Sullivan moved to dismiss the Councilor Kretovic complaint due to the lack of merit. The motion was duly seconded.

In discussion on the motion, Mr. Daniels stated that just because the Council takes a vote does not mean that there wasn't an ethical issue.

Ms. Callaghan noted that she feels, in a sense, it does. She indicated that if what the violation is alleged to be is that a person acted in a manner that was unethical when they sought out, with full disclosure, about the potential for an issue. If everyone agreed that there wasn't a conflict there, she feels there is no basis for a complaint.

Mr. Daniels indicated that this complaint is asking the board to second guess the Council. He asked if what they are saying is that they cannot second guess the Council on ethical issues.

Ms. Callaghan responded that it's broader than it is; it's not that they can't second guess the Council on ethical issues but in this particular narrow window of facts in which there was an individual who questioned a conflict to vote and everybody else voted that it wasn't a conflict, regardless of whether the vote was right or wrong, there is no ethical violation.

Chair Sullivan stated that they are an advisory board and there is nothing that states in their documents that they can overrule a direct determination of the Council.

Mr. Daniels indicated that whether it's the Council or someone impacted or thinks they were impacted by a decision all they are asking for is an advisory opinion.

Ms. Robb asked whether it's being indicated that the board can't look at the case as whether there was a conflict because the Council looked at it and said no there is no conflict then the board can't look at it.

Chair Sullivan indicated that he feels that it's very problematic if a Councilor comes forward and does the right thing by asking for a ruling of the Council for a determination as to whether there is a conflict, gets a unanimous vote of the Council, acts and then gets charged with an ethical violation. He stated that what they are being asked to say is that she should have known that the

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Council was wrong and should have still not voted. He reminded the board that his motion was based under the lack of merit rather than under jurisdiction.

The motion to dismiss the Councilor Kretovic complaint due to the lack of merit passed with no dissenting votes.

Chair Sullivan stated that he would like the board to consider the May 25, 2012 complaint against Councilor St. Hilaire. He asked whether any members of the board had any conflict in respect to this case. No member of the board had a conflict with this case. He pointed out that this complaint specifically alleges misconduct with respect to a vote that occurred on May 14, 2012. He explained that the May 14, 2012 vote was reconsidered by the Council on May 31, 2012 in which Councilor St. Hilaire did not vote on the matter at issue. He indicated that it's his belief that the May 31st reconsideration moots this specific complaint because there is not a vote any longer that is the basis for the claim of misconduct. His view on this specific complaint is that it should be dismissed on a mootness basis.

Mr. Feltes moved to dismiss the complaint against Councilor St. Hilaire due to it being moot. The motion was duly seconded and passed with no dissenting votes.

Chair Sullivan stated that he would like the board to consider the May 14, 2012 complaint against Mayor Bouley. He asked whether any members of the board had any conflict in respect to this case. No member of the board had a conflict with this case. He noted that he feels that the allegation here is that it was a conflict for the Mayor to comply with Ordinance 30-3-39 in appointing the three members to the Board of Ethics which he was required to do under the ordinance. He pointed out that the minutes reflect that the three individuals appointed by the Mayor were unanimously confirmed by the Council with the Mayor not voting on this confirmation. He explained that the ordinance doesn't provide an alternate procedure for the Council to empanel this board in the absence of the Mayor or City Manager taking action. He stated that, in the record, he doesn't feel that there is any evidence presented that the members of this Ethics Board are so compromised by their being appointed by the Mayor that they are not able to participate in this decision.

Referencing the allegation, Mr. Daniels stated that there has to be something more presented, for example, there would have to be some nexus of impropriety that would have to be apparent. He indicated that he doesn't see anything in the complaint that gives it substance or underlying support.

Ms. Callaghan moved to dismiss the complaint against Mayor Bouley under Article III-D-6(a),iii. The motion was duly seconded and passed with no dissenting votes.

Chair Sullivan stated that there were two complaints that were filed on March 31, 2012, one against Mayor Bouley and one against Councilor St. Hilaire. He pointed out that each of the complaints have four elements which he would like to break down because he feels that they deserve different consideration. Referencing the complaint against Councilor St. Hilaire, he explained that there is a complaint made in how he conducted the Rules Committee and a

complaint made regarding his decision to not hold a public hearing of the Rules Committee. Referencing the complaint against Mayor Bouley, he explained that there is a complaint made that the Mayor failed to hold a public hearing on the Councilor Patten matter and a complaint made that he failed send the Councilor Patten matter to the Board of Ethics. He noted in taking these four complaints as a group he comes back around with a jurisdictional issue again. He stated that he feels that a Council decision about whether they are going to conduct a public hearing or a Rules Committee decision as to whether the Rules Committee is going to conduct a public hearing takes the board to a place in which they would have to second guess procedural decisions made by two other bodies. He pointed out that Councilor Patten is the real party of interest in these complaints and if the procedure was wrong, Councilor Patten has made no such complaints and confessed to the wrongdoing that was involved and apologized and accepted the Council's punishment. He added that it feels strange to him that procedural issues are being addressed to the board by an individual who is not the party affected by the procedure.

Ms. Callaghan stated that she doesn't feel that choosing one course of action over another is an ethical violation; it was a decision made by the group that was empowered to hear it.

Mr. Feltes noted that there is a good faith disagreement over the subject matter jurisdiction of this Board versus the subject matter jurisdiction of the Council. He added that there is a good faith disagreement about whether or not it should have been a complaint to the Board of Ethics versus handling it through the Rules Committee, but that good faith disagreement doesn't arise to in itself, improper activity or a conflict. In terms of the standing argument, he wouldn't be in favor of dismissing the case just because individuals who want to complain to the board should be able to complain on things that they potentially disagree with or think is an ethical complaint. He stated that he is in favor of dismissing the complaints which raise procedural issues because they are without merit.

Mr. Feltes moved that the March 31, 2012 complaint against Councilor St. Hilaire, with respect to the third bullet point (failing to hold a public hearing) and second bullet point (following the City Charter and ethics ordinances), be dismissed as without merit. The motion was duly seconded and passed with no dissenting votes.

Mr. Feltes moved that the March 31, 2012 complaint against Mayor Bouley, with respect to the third bullet point (failing to hold a public hearing) and first bullet point (fail to appoint a Board of Ethics), be dismissed as without merit. The motion was duly seconded and passed with no dissenting votes.

Chair Sullivan noted that they were left with, in each instance, two complaints. In regards to Mayor Bouley, there is a complaint (bullet point 2) for failing to disclose personal financial or other interests and a complaint (bullet point 4) that his remarks regarding Councilor Patten were inconsistent with previous actions regarding alleged rules violations and shows a personal bias. In regards to Councilor St. Hilaire, there are complaints (bullet points 1 and 4) that follow the same language. He indicated that, at this point, they are more into the substance of what is a

conflict of interest and as to what is the relevant standard here and asked the Deputy City Solicitor to brief the board on her review of NH law.

Danielle Pacik, Deputy City Solicitor, noted that under the city's ethics ordinance a conflict of interest exists when an official makes a decision that affects his or her financial interest. In addition to financial consideration, the ordinance also states that a conflict may exist when it does not impact financial interest but calls into question an individual's objectivity or independence. She explained that the conflicts of interest have been interpreted by the NH Supreme Court; in one case, the Petition of Grimm, the NH Supreme Court explains that public officials are presumed to be capable of reaching a fair and just result and that the burden is on the complainant to present evidence to rebut that presumption. She added that the NH Supreme Court has also explained in another case, Atherton v. Concord, that information presented by the complainant on a conflict of interest cannot be speculative, uncertain and remote. She indicated that to demonstrate that a conflict of interest exists, the conflict must be immediate and definite and there needs to be some sort of either direct financial or personal interest on the part of the official. Ms. Pacik noted that essentially what the board looks at is the juror standard used by trial courts; whether the official has some sort of bias or prejudice that would not allow that individual to look at an issue fairly. She stated that those are the standards that this board should look at in determining whether a conflict exists.

Referencing Councilor St. Hilaire's response, Chairperson Sullivan indicated that there was a reference to a statutory basis that he might not be subject to these ethic codes because of an enactment issue. Ms. Pacik responded that in order for an ordinance to be permitted the legislature has to have a statute allowing the city to enact that ordinance. She explained that there is a statute, RSA 31:39-a which specifically states that municipalities are permitted to enact conflict of interest ordinances and which also states that any such ordinance shall include provisions to exempt affected officers and employees who are in office or employed at the time the ordinance is adopted for a period not to exceed one year from the date of adoption.

Following brief discussion in regards to 31:39-a, Chairperson Sullivan indicated that he is troubled by two words. Referencing the Code of Ethics 1-6-2, he pointed out that the requirement of disclosure is matter specific in which it states that it has to relate to the matter. He noted that it focuses on, in this instance, the discipline of Councilor Patten because that was the matter that was before the Council that these votes and actions relate to. He stated that he is wrestling with the idea of what are they being told is the conflict with respect to Councilor Patten that rises to the level of a conflict. He pointed out that both of the complaints use the word "may" which he feels at best is speculation and added how would it be in a lobbyist's best interest to pick on a sitting legislator. He noted that he feels that this is highly speculative and that there are no facts. He stated that there was a unanimous vote, it wasn't a close vote in which either the Mayor's or Councilor St. Hilaire's vote made a difference and it was a unanimous vote that followed a confession. He indicated that the allegations in the complaint are mere speculation

that these two Council members acted with a conflict; his perspective to the substance is that he doesn't feel that there is merit to the complaints.

Mr. Daniels noted that the speculation fails to provide any evidence or facts that actually provide some sort of mischief going on. He asked how the board can make a decision on anything with mere speculation.

Mr. Feltes moved that the March 31, 2012 complaint against Mayor Bouley, with respect to the second bullet point be dismissed without merit as to too speculative. The motion was duly seconded and passed with no dissenting votes.

Mr. Feltes moved that the March 31, 2012 complaint against Councilor St. Hilaire, with respect to the first bullet point be dismissed without merit as to too speculative. The motion was duly seconded and passed with no dissenting votes.

Chairperson Sullivan pointed out that leaves: bullet point 4 of the March 31, 2012 complaint against Mayor Bouley which states that his remarks regarding Councilor Patten were inconsistent with previous actions regarding alleged rules violations and shows a personal bias against Councilor Patten; and bullet point 4 of the March 31, 2012 complaint against Councilor St. Hilaire which is of identical wording.

Mr. Daniels asked whether it mattered whether people think that their elected officials are inconsistent from an ethics standpoint. He indicated that he is having a hard time that this is even stating a claim from an ethical standpoint.

Ms. Callaghan noted that there are no facts and no allegation other than the statement that it's somehow inconsistent with something that happened in the past.

Mr. Daniels noted that if someone alleges something is inconsistent or alleges a personal bias, the real question is why, which is not stated within the complaint.

Ms. Callaghan indicated that the alleged victim, the alleged actors, and the complainant are all involved in politics and feels that this is just an allegation.

Chairperson Sullivan stated that given the damage done in regards to reputations it doesn't seem that they should be acting on such weakly presented complaints.

Ms. Callaghan noted her agreement stating that its part of why she prefers not to dismiss these jurisdictionally because she would rather make the statement that there's no merit in the allegation before them.

Mr. Feltes stated that had Councilor Patten not issued the apology acknowledging a wrongdoing, this particular accusation is different than the "may have" one. He noted this seems to suggest that the complainant has knowledge of previous actions that are inconsistent or develop a personal bias. In there was an absence of Councilor Patten acknowledging the wrongdoing, he

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would recommend the board to inquire further as to what exactly this meant but since he acknowledged the wrongdoing it doesn't seem that this has merit.

Mr. Feltes moved that the March 31, 2012 complaint against Councilor St. Hilaire, with respect to the fourth bullet point be dismissed as without merit. The motion was duly seconded and passed with no dissenting votes.

Mr. Feltes moved that the March 31, 2012 complaint against Mayor Bouley, with respect to the fourth bullet point be dismissed as without merit. The motion was duly seconded and passed with no dissenting votes.

Ms. Pacik noted that, as a procedural matter, the Council will be notified of the Board's determinations.

The time being 1:11 p.m., Mr. Feltes moved to adjourn the meeting. The motion was duly seconded and passed with no dissenting votes.

A true copy; I attest:

*Michelle Mulholland
Deputy City Clerk*