

**STATE OF NEW HAMPSHIRE
EXECUTIVE BRANCH ETHICS COMMITTEE**



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Advisory Opinion

2007-008

Question Presented

May an elected executive branch official vote on the confirmation of an individual nominated to an executive branch position when the elected official's campaign received a political campaign contribution from the nominee at the most recent election?

Summary Answer

Yes. There having been full, lawful disclosure of the contribution in question, there is no statute, court ruling or ethical rule which would disqualify the executive branch official from voting on the nomination presented for consideration.

Legal Authority

RSA 21-G:21, II. – "Conflict of interest" means a situation, circumstance, or financial interest which has the potential to cause a private interest to interfere with the proper exercise of a public duty.

RSA 21-G:22 – "Executive branch officials shall avoid conflicts of interest. Executive branch officials shall not participate in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties."

RSA 21-G:24 – Acceptance of Campaign Contributions. – An executive branch official who is a candidate for an elective office that is not subject to the reporting requirements of RSA 664 and

who accepts a political contribution from any person or entity which is or is likely to become subject to that executive branch official's duties shall make a disclosure of such contributions to the secretary of state within 5 days of receipt of such contributions. The disclosure shall be in writing and on such form as the secretary of state shall prescribe.

RSA 664:2, VIII. – "Contribution" shall mean a payment, gift, subscription, assessment, contract, payment for services, dues advance, forbearance or loan to a candidate or political committee made for the purpose of influencing the nomination or election of any candidate. "Contributions" shall include the use of any thing of value but shall not include the services of volunteers who receive no pay therefor or the use of personal resources by a candidate on behalf of his candidacy.

RSA 664:2, IX. – "Expenditure" shall mean the disbursement of money or thing of value or the making of a legally binding commitment to make such a disbursement in the future for the purpose of influencing the nomination for election or election of any candidate. It does not include the candidate's filing fee or his expenses for personal travel and subsistence.

RSA 664:4-b Surplus Campaign Contributions. – Surplus campaign contributions may be used after a general or special election for fund raising activities and any other politically related activity sponsored by the candidate, or for donations to charitable organizations. Such surplus campaign contributions, however, shall not be used for personal purposes.

The United States Supreme Court has recognized that political campaign contributions and expenditures are intertwined with political speech and in varying degrees the making of contributions and expenditures are afforded the same First Amendment protection as political speech. The act of making a contribution is also protected, to a degree, by the constitutional right of association. *Buckley v. Valeo*, 424 U.S. 1 (1976).

Courts in other States analyzing conflict of interest statutes similar to, but not identical to, RSA 21-G:22 have concluded that a political contribution, standing alone, does not give rise to a conflict of interest.

A statute requiring covered state officials to submit statement of conflict of interest, if required to take action that could reasonably be expected to directly result in economic benefit, did not apply to governor who had selected as architects for state park renovation project a firm whose principal had contributed \$20,500 to governor's campaign over past four years; campaign contributions, without more, did not count as "economic benefit." *DiPrete v. Morsilli*, 635 A.2d 1155, 1165-67 (R.I., 1994).

The mere receipt of campaign contributions by a council member does not constitute a "direct or indirect substantial financial or familial interest," and does not constitute "substantial pre-hearing contacts with proponents or opponents."

Snohomish County Imp. Alliance v. Snohomish County, 61 Wash.App. 64, 808 P.2d 781, 786 (Wash.App.,1991)

In a 1980 case the California Supreme Court held that city council members were not disqualified from considering and voting on a proposed subdivision by reason of campaign contributions made to council members by the real estate developer, its engineering firm, and its attorneys. While the court relied in part on statutory language that explicitly excluded contributions from the financial interests that give rise to a conflict of interest, the court further concluded that political contributions involve an exercise of a fundamental freedom protected by the First Amendment. "To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms." *Woodland Hills Residents Ass'n, Inc. v. City Council*, 26 Cal.3d 938, 946 (1980).

While disqualifying contribution recipients from voting would not prohibit contributions, it would curtail contributors' constitutional rights. Representative government would be thwarted by depriving certain classes of voters . . . of the constitutional right to participate in the electoral process. Public policy strongly encourages the giving and receiving of campaign contributions. Such contributions do not automatically create an appearance of unfairness.

Id. At 946-47. The California Supreme Court went on to recognize that the campaign finance reporting and criminal laws afforded adequate protection against corruption and bias.

Common Law Conflict of Interest

The Executive Branch Ethics Committee has authority to issue advisory opinions regarding the meaning of the ethics statutes. Its authority does not extend to interpreting the common law on conflicts of interest, however, the Committee relies on decisions by the New Hampshire Supreme Court when analyzing ethics statutes. In the analysis of conflict of interest law the Supreme Court has recognized a distinction between administrative and legislative actions versus judicial or quasi-judicial actions, and has imposed a less restrictive conflict of interest standards on administrative and legislative acts.

"An act is judicial in nature if officials 'are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments, as the parties choose to lay before them.'" *Appeal of Keene*, 141 N.H. 797, 800 (1997) (quoting *Sanborn v. Fellows*, 22 N.H. 473, 489 (1851))

"Legislative and administrative action, by contrast, is marked by 'its high visibility and widely felt impact,' from which an aggrieved person can find an 'appropriate remedy ... at the polls.'" *Appeal of Keene*, 141 N.H. 797, 800 (1997) (quoting *Winslow v. Holderness Planning Board*, 125 N.H. 262, 266, (1984)).

In the context of holding that a city council member is not disqualified from voting on a zoning issue because he or she made prior comments on the issue, the Supreme Court has recognized that conflict of interest analysis properly considers the political realities of elected officials. “To impose so strict a requirement of impartiality on legislators would be to ignore the political realities of the election process and to unnecessarily restrict public dialogue” *Quinlan v. Dover*, 136 N.H. 226, 232 (1992).

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. The reasons for this rule are obvious. A man cannot serve two masters at the same time, and the public interest must not be jeopardized by the acts of a public official who has a personal financial interest which is, or may be, in conflict with the public interest. 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.

Atherton v. Concord, 109 N.H. 164, 165 (1968) (internal quotations and citations omitted).

Analysis

A campaign contribution standing alone is not a private interest sufficient to give rise to a conflict of interest, within the context of the prohibition on participating in matters when one has a conflict of interest. The United States Supreme Court recognizes a campaign contribution as a form of political speech, as an expression of support for the candidate by the contributor. See *Buckley v. Valeo*, 424, U.S. 1 (1976). The funds the candidate receives are for the purposes of expenditures as defined by RSA 664:2, IX. If campaign expenses do not exhaust the contributions, the candidate may not use the funds for personal purposes. RSA 644:4-b. Therefore, while a candidate gains some control over how contributions are used, that control is limited and the character of the use must be publicly disclosed. The character of the financial interest held in a contribution is sufficiently limited, that in our view receipt of a contribution, standing alone, does not constitute a conflict of interest within the meaning of RSA 21-G:22.

Lawful disclosure of a campaign contribution places the transaction in the public record. This record affords the voters the information they need to assess whether undue influence has occurred. State law requires disclosure of campaign contributions, but it does not impose a recusal requirement. RSA 21-G:24; RSA chapter 664.

This conclusion is consistent with the common law standard for conflict of interest. The influence that might arise from the receipt of a lawful campaign contribution would be remote, uncertain, contingent, and speculative, such that men or women of ordinary capacity and intelligence would not be influenced by it. *Atherton v. Concord*, 109 N.H. 164, 165 (1968).

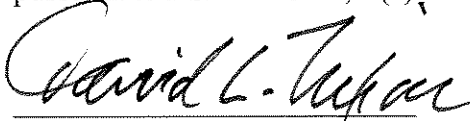
Furthermore, in *Quinlan* the New Hampshire Supreme Court, in holding that a city council member should not be disqualified from voting on an issue because of prior statements on the subject, considered the organizational structure of the city council, the fact that people who were elected into office were also assigned responsibility for making the decision at issue. Similarly here, our Constitution makes the office of Executive Councilor an elected position. New Hampshire Constitution, Part 2, Art. 60. The Legislature has assigned a duty to Executive Councilors to vote whether or not to confirm nominations by the Governor to the post at issue. RSA 176:1. As the Supreme Court did in *Quinlan*, we recognize that this structure reflects a recognition that the members of the Executive Council will engage in the typical activities of candidates for office, including accepting campaign contributions, and subsequently vote on nominations.

New Hampshire law assigns the Executive Council responsibility for voting on a substantial number of nominees and appointments each year. A conflict of interest rule that required recusal by any Executive Councilor who received a campaign contribution from any nominee would result in widespread recusal. Such a rule would therefore chill participation in the democratic process by anyone who might have an interest in any of the hundreds of appointed positions subject to confirmation by the Executive Council. Applying the reasoning set forth by the California Supreme Court in *Woodland Hills* we conclude that construing RSA 21-G:22 to require recusal in these circumstances would raise significant constitutional concerns.

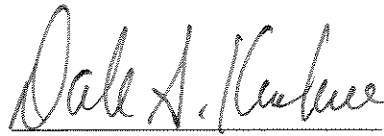
Conclusion

The mere receipt of a lawfully disclosed campaign contribution from a person later nominated to an executive branch position does not create a conflict of interest prohibiting the elected executive branch official from voting on the nomination.

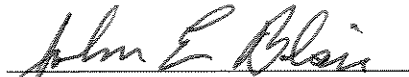
This Advisory Opinion is issued by the Executive Branch Ethics Committee on April 11, 2007, pursuant to RSA 21-G:30, I (c).



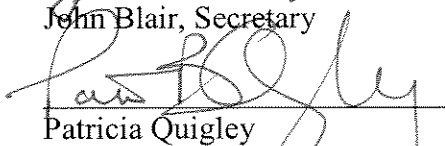
Chairman David L. Nixon



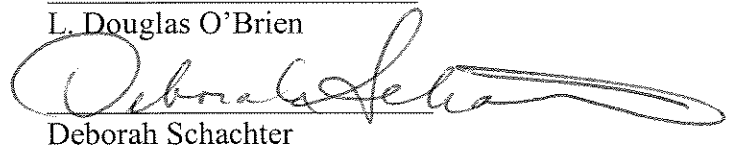
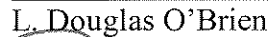
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