

**2019 HOUSE ETHICS COMMITTEE**

**HCR 3028**

# 2019 HOUSE STANDING COMMITTEE MINUTES

**Ethics Committee**  
Pioneer Room, State Capitol

HCR 3028  
2/12/2019  
Job #32632

- Subcommittee  
 Conference Committee

Committee Clerk: ReMae Kuehn
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## Explanation or reason for introduction of bill/resolution:

A resolution directing Legislative Management to consider studying Article XIV of the Constitution of North Dakota, relating to transparency of funding sources, lobbyists, conflicts of interest, and the establishment of an ethics commission.

## Minutes:

Attachment #1
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## Speaker Klemin: (Attachment #1)

Some of the questions are answered in HB 1521. HB 1521 provides a roadmap to follow. There needs to be procedures in place for the rule making between the sessions.

**Bruce R. Bale, Mandan:** I support this. Time can be taken to consider all the provisions and comments from the public.

**Chairman Jim Kasper:** Closed the hearing.

# 2019 HOUSE STANDING COMMITTEE MINUTES

## Ethics Committee

Pioneer Room, State Capitol

HCR 3028—Committee Work

2/14/2019

Job #32823

Subcommittee

Conference Committee

Committee Clerk: ReMae Kuehn
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### Explanation or reason for introduction of bill/resolution:

A resolution directing Legislative Management to consider studying Article XIV of the Constitution of North Dakota, relating to transparency of funding sources, lobbyists, conflicts of interest, and the establishment of an ethics commission.

### Minutes:

**Representative Boschee:** Moved Do Pass

**Representative K. Koppelman:** Seconded the motion

**Representative Headland:** What would be the point of a study?

**Representative Steiner:** The public might get frustrated with this process. You are expecting them to come in and give input after the fact that it is in the constitution. You take your input before the measure is passed.

**Representative Ruby:** It is the job of the commission to implement it.

**Vice Chair Scott Louser:** I was a co-sponsor but that was prior to all the work done on HB 1521. I would resist the motion as well.

**A Roll Call vote was taken: Yes 4, No 10, Absent 0.**

**Motion failed.**

**Representative Headland:** Moved Do Not Pass.

**Representative D. Anderson:** Seconded the motion.

**A Roll Call vote was taken: Yes 10, No 4, Absent 0.**

**Do Not Pass** carries.

**Representative Steiner** will carry the bill.

**2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 3028**

House Ethics Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider     \_\_\_\_\_

Motion Made By Rep. Boschee    Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman Kasper		X	Rep. Boschee	X	
V. Chair Louser		X	Rep. Mitskog	X	
Rep. D. Anderson		X	Rep. Mock	X	
Rep. Becker		X			
Rep. Headland		X			
Rep. Heinert		X			
Rep. K. Koppelman	X				
Rep. Lefor		X			
Rep. Rohr		X			
Rep. D. Ruby		X			
Rep. Steiner		X			

Total    (Yes) 4    No 10

Absent \_\_\_\_\_

Floor Assignment MOTION FAILED

If the vote is on an amendment, briefly indicate intent:

**2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 3028**

House Ethics Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider     \_\_\_\_\_

Motion Made By Rep. Headland    Seconded By Rep. D. Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Kasper	X		Rep. Boschee		X
V. Chair Louser	X		Rep. Mitskog		X
Rep. D. Anderson	X		Rep. Mock		X
Rep. Becker	X				
Rep. Headland	X				
Rep. Heinert	X				
Rep. K. Koppelman		X			
Rep. Lefor	X				
Rep. Rohr	X				
Rep. D. Ruby	X				
Rep. Steiner	X				

Total    (Yes) 10    No 4

Absent 0

Floor Assignment Rep. Steiner

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HCR 3028: Ethics Committee (Rep. Kasper, Chairman)** recommends **DO NOT PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HCR 3028 was placed on the Eleventh order on the calendar.

**2019 TESTIMONY**

**HCR 3028**

# NORTH DAKOTA HOUSE OF REPRESENTATIVES



STATE CAPITOL  
600 EAST BOULEVARD  
BISMARCK, ND 58505-0360



## Representative Lawrence R. Klemin

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Speaker of the House

### TESTIMONY OF REP. LAWRENCE R. KLEMIN HOUSE ETHICS COMMITTEE HOUSE CONCURRENT RESOLUTION 3028 FEBRUARY 12, 2019

Mr. Chairman and members of the House Ethics Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here today to testify in support of House Concurrent Resolution No. 3028, relating to a study of Article XIV of the North Dakota Constitution which establishes a North Dakota Ethics Commission.

Article XIV contains requirements for transparency of funding sources used to influence statewide elections, elections for the Legislative Assembly, statewide ballot issue elections and state government action. There are also requirements relating to lobbying and conflicts of interest, as well as the powers and duties of the Legislature and the Ethics Commission. Some of the provisions in Article XIV are internally inconsistent and ambiguous. Many issues in Article XIV are left to the Legislature to implement.

Although there are two bills pending in the Legislature, namely SB 2148 and HB 1521, there are many questions that arise about the meaning of the words and phrases in Article XIV that may not be fully answered by either bill. In addition, there are deferred effective dates in Article XIV, which gives the Legislature time to further analyze its provisions regardless of whether either bill gains legislative approval. Consequently, an interim study is appropriate.

Some of the questions raised by a review of Article XIV include:

#### Section 1. Transparency.

What is the meaning of "timely," "source," and "nature of resources"?

Does the word "transparency" in Section 1, relating to the Legislature, have the same or a different meaning than the word "transparency" as used in Section 3, relating to the Ethics Commission?

What is the extent and meaning of the "right to know" in Article 1, Section 1, and how does that reasonably relate to the rights of free speech, assembly and petition guaranteed by the First Amendment to the United States Constitution?

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Does "petition" in the First Amendment, which is referenced in Article XIV, include "petitions" provided for in the North Dakota Constitution and the laws enacted thereunder, such as a "petition" for the initiative or referendum contained in Article III of the North Dakota Constitution?

How is the "ultimate and true source of funds" to be defined for purposes of implementation of Article XIV?

What are the potential "one or more entities" in Section 1, subsection 2, that the Legislature is authorized to "vest" with the "authority to implement, interpret, and enforce" Section 1? Is that authority limited to campaign finance and lobbyist reporting requirements currently vested in the Secretary of State, or does it encompass other entities and responsibilities since Section 1 is required to be "construed broadly"?

With regards to citizen suits, can those suits be brought against the Legislature or the Ethics Commission if the "laws" (enacted by the Legislature) or the "rules" (adopted by the Ethics Commission) fail to fully "vindicate" the "rights" in Section 1. What does "vindicate" mean? Are the "rights" in a citizen suit limited to the "right to know," since that is the only "right" mentioned in Section 1. What is the meaning of "resident taxpayer"? Does this include anyone who pays income tax, property tax, sales tax, use tax, excise tax, or other taxes?

Are the existing provisions of the law related to campaign finance and lobbyists in compliance with the mandates of Article XIV or is more required?

Do the provisions of Article XIV impair, impede, or violate the rights in the United States Constitution, particularly with respect to the right of freedom of speech in the First Amendment and the right of confrontation guaranteed to accused persons by the Fifth Amendment?

Are there other provisions in the United States Constitution which may invalidate provisions in Article XIV of the North Dakota Constitution?

What are the inconsistencies in Article XIV and can the Legislature implement laws to reconcile those inconsistencies?

## **Section 2. Lobbyists and Conflicts of Interest.**

"Gift" is defined by both inclusion and exclusion in subsection 1 of Section 2. The Legislature is authorized by Section 4, subsection 1, to enact laws as follows: "Laws may be enacted to facilitate, safeguard, or expand, but not to hamper, restrict, or impair, this article." To what extent can the Legislature enact laws to explain or expand upon the definition of "gift"?

There are also terms within the definition of "gift" that may require further definition. Some of those terms include:

"not given in exchange for fair market consideration" -- is this in money or other consideration such as trade, barter, services, property, equipment, and so forth?

"social settings" -- what is included? Is this to be construed broadly or narrowly?

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Does "gift" include items of small or nominal value?

The prohibitions on "gifts" by lobbyists in Article XIV and as further defined by rules of the Ethics Commission don't take effect until January 5, 2021. We already have statutes and constitutional provisions relating to criminal acts, bribery, and corrupt practices. For example: ND Const Art. IV, Sec. 9 -- bribery in legislative assembly; ND Const. Art. IV, Sec. 10, legislator disqualification due to criminal act; ND Const. Art. V, Sec. 10 -- bribery of the Governor; N.D.C.C. Ch. 16.1-10 -- corrupt practices act; to name a few. Do the rules to be adopted by the Ethics Commission supersede these existing laws and constitutional provisions? You may think not, but arguments can be made that they could because of the "supremacy" clause in Article XIV, Section 4, subsection 3.

To what extent, if at all, can "rules" adopted by the Ethics Commission supersede existing laws enacted by the Legislature or laws enacted to implement Article XIV?

The Legislature is to set "appropriate" civil and criminal sanctions for violations of Section 2 of Article XIV. Are the existing sanctions in the law "appropriate"? Are the sanctions in HB 1521 or SB 2148 "appropriate"? Should there be different or additional sanctions? What does "appropriate" mean?

How does the delayed effective date of Ethics Commission rules (2 years) affect or interact with the delayed effective date of Legislative laws enacted under subsection 5 of Section 2 (3 years) with respect to "directors, officers, commissioners, heads, or other executives of agencies"? What is the definition of "bias" in subsection 5? Can duly elected public officials legally accept campaign contributions from any person that potentially may later come before them in a regulatory proceeding? Example: Industrial Commission member, Public Service Commissioner, Tax Commissioner. How about appointed commissioners? What is the definition of "executives" of agencies. How far down the chain of command does it go?

Can the Legislature enact other laws relating to ethics in 2019 or 2021 that take effect before 2022?

Can the Legislature set "appropriate" sanctions for violations by the Commissioners and staff of the Ethics Commission, including for violations of their own their own ethics rules?

### **Section 3. North Dakota Ethics Commission.**

Subsection 1 creates the Ethics Commission and subsection 3 states that the Ethics Commission consists of 5 members. Article XIV does not say anything about the staff, offices, furnishings, equipment, salaries, benefits, or other matters relating to the Ethics Commissioners and staff, other than that the Legislature shall provide "adequate" funds for the Ethics Commission's functions and duties.

What is "adequate" now and during the interim until 2021 without knowing anything more about the composition of the staff and functioning of the Ethics Commission? Is this something that can be determined more appropriately through an interim study as more about the needs of the Ethics Commission become known?

The Ethics Commission is authorized by subsection 2 to adopt "ethics rules". What is included within the meaning of "ethics rules"? Do they have authority to adopt any other rules? What is the rulemaking procedure to be followed by the Ethics Commission? Is it subject to judicial review?

What is the procedure to be followed by the Ethics Commission for the determination of violations to ensure compliance with requirements for procedural due process of law and other rights of accused persons under the United States Constitution and the North Dakota Constitution? Hearings, appeals, right to counsel if an accused person can't afford a lawyer?

Appointment of the commissioners is to be done by "consensus" agreement of the Governor, Majority Leader of the Senate, and Minority Leader of the Senate. What is meant by "consensus"? Do they all have to agree or can 2 of 3 make the decision?

How is the Ethics Commission to be organized? Chairman? Vice Chairman? Staggered terms? When do terms start? Term limits? Meetings? Public, private, notice, frequency, location? Open meetings and open records except for "confidential" whistleblowers?

Commissioners are to be appointed to 4-year terms. Can a commissioner be removed or impeached? What is the procedure?

#### **Section 4. General Provisions.**

Subsection 1 provides that laws may be enacted to "facilitate, safeguard, or expand, but not to hamper, restrict, or impair" Article XIV. How are these terms defined? Who decides what the terms mean? Who decides if there has been a hampering, restriction, or impairment? What is the penalty if there is?

Does the definition of "agency" include licensing boards and their employees? Is there no limit to who is covered as a "public employee"? The definition appears to cover everyone in state government. Can we give tips or monetary "gifts" to the parking lot attendants employed by the Legislature?

Subsection 3 contains a "supremacy clause". Does this supremacy clause conflict with inalienable rights granted under other parts of the North Dakota Constitution? Does Article XIV violate the United States Constitution, and if so, to what extent? Is the "supremacy clause" itself unconstitutional?

As you can see, there are many questions about Article XIV. Some of those questions are answered in HB 1521 (with my proposed amendments), but not all. HB 1521 provides a good starting point. There needs to be procedures in place to address the rulemaking and adjudicatory conduct of the Ethics Commission during the interim between the sessions. A study is needed to determine what else is needed to implement Article XIV in the 2021 Legislative Session and whether the provisions in HB 1521 should be revised.

I urge your support for HCR 3028. Article XIV should be studied in detail.

Rep. Lawrence R. Klemin, Speaker of the House