

MARILYN K. KIRKPATRICK
ASSEMBLYWOMAN
District No. 1



DISTRICT OFFICE:
4747 Showdown Drive
North Las Vegas, Nevada 89031-2133
(702) 655-0332
Cell: (702) 767-1315

SPEAKER OF THE ASSEMBLY

COMMITTEES:
Vice Chair
Commerce and Labor
Member
Taxation
Ways and Means

LEGISLATIVE BUILDING:
401 South Carson Street
Carson City, Nevada 89701-4747
Office: (775) 684-8509
Fax No.: (775) 684-8533
Email: Marilyn.Kirkpatrick@asm.state.nv.us
www.leg.state.nv.us

State of Nevada Assembly

Seventy-Seventh Session

November 7, 2013

Mr. Kelly Kite
PO Box 2251
Minden, NV 89423-2251

Dear Mr. Kite:

As Chair of the Assembly Select Committee on Ethics, I received the complaint you submitted asking the Committee to investigate alleged breaches of ethics or conflicts of interest involving Assemblyman Jim Wheeler. Pursuant to the past practice established for the Committee, your complaint was also forwarded to the Legal Division of the Legislative Counsel Bureau for a determination of whether the Committee has the authority and jurisdiction to hear the complaint. Based upon the attached opinion of the Legislative Counsel, the Committee must refrain from investigating your allegations at this time.

Sincerely,

A handwritten signature in cursive script that reads "Marilyn K Kirkpatrick".

Assemblywoman Marilyn Kirkpatrick
Speaker of the Assembly
Chair, Assembly Select Committee on Ethics

cc: Assemblyman William Horne
Assemblyman Pat Hickey
Marcus Conklin
Bonnie Parnell
Patty Cafferata
Assemblyman Jim Wheeler

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU

LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600



LEGISLATIVE COMMISSION (775) 684-6800
MARILYN K. KIRKPATRICK, *Assemblywoman, Chairman*
Rick Combs, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
DEBBIE SMITH, *Senator, Chairman*
Mark Krmpotic, *Fiscal Analyst*
Cindy Jones, *Fiscal Analyst*

RICK COMBS, *Director*
(775) 684-6800

BRENDA J. ERDOES, *Legislative Counsel* (775) 684-6830
PAUL V. TOWNSEND, *Legislative Auditor* (775) 684-6815
DONALD O. WILLIAMS, *Research Director* (775) 684-6825

November 2, 2013

Assemblywoman Marilyn Kirkpatrick
4747 Showdown Drive
North Las Vegas, NV 89031-2133

Dear Speaker Kirkpatrick:

As the Chair of the Assembly Select Committee on Ethics (Select Committee), you have asked this office whether the Select Committee has the authority and jurisdiction under Assembly Standing Rule No. 23 (2013 Nev. Stat., File No. 5, at 3900-03) to investigate certain alleged breaches of ethics or conflicts of interest involving Assemblyman Jim Wheeler which were alleged in a complaint filed by Mr. Kelly Kite on September 30, 2013. In the complaint, Mr. Kite alleges that Assemblyman Wheeler filed with the Secretary of State one or more statements of financial disclosure that do not comply with the provisions of NRS 281.558 to 281.581, inclusive. In addition, Mr. Kite alleges that Assemblyman Wheeler does not reside in Assembly District No. 39 from which he was elected in 2012, as required by the Constitution and laws of Nevada.

To answer your question, we have carefully reviewed the Select Committee's authority and jurisdiction under Assembly Standing Rule No. 23 in light of several well-established principles of constitutional, statutory, parliamentary and common law. As explained in the discussion below, it is the opinion of this office that the Select Committee should refrain from investigating the allegations in Mr. Kite's complaint for the following reasons.

First, because the Secretary of State is charged by law with administering and enforcing the financial disclosure statutes, the Legislature has expressly invested the Secretary of State with primary jurisdiction to administer and enforce those statutes. Based on the well-established doctrine of primary jurisdiction, it is the opinion of this office that the Select Committee should refrain from investigating the allegations regarding Assemblyman Wheeler's compliance with the financial disclosure statutes so that the Secretary of State's office may exercise its primary jurisdiction to administer and enforce those statutes.

Second, before a legislative committee may investigate the qualifications of a member, the committee must be given express and special authority by the House to undertake such an investigation. Because the Assembly has not given the Select Committee express and special authority in Assembly Standing Rule No. 23 to investigate whether a member meets the qualifications for legislative office, it is the opinion of this office that the Select Committee should refrain from investigating the allegations that Assemblyman Wheeler does not reside in his legislative district because such an investigation would involve whether Assemblyman Wheeler meets the qualifications for legislative office and therefore would fall outside the scope of the authority and jurisdiction of the Select Committee.

DISCUSSION

I. General rules governing investigations by legislative committees.

Under Article 4, Section 6 of the Nevada Constitution, each House of the Legislature has the authority to judge the qualifications of its members, to determine the rules of its legislative proceedings and to punish its members for disorderly conduct. Specifically, Article 4, Section 6 provides:

Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.

Thus, based on the plain language of Article 4, Section 6, the powers conferred by that section rest with each House. See Heller v. Legislature, 120 Nev. 456, 462 (2004). Because the powers conferred by Article 4, Section 6 rest with each House, there are certain limitations on the delegation of those powers by each House.

First, before a legislative committee may investigate the qualifications of a member, the committee must be given express and special authority by the House to undertake such an investigation. See Luther S. Cushing, Elements of the Law & Practice of Legislative Assemblies §§ 1893, 1894 & 1905-07 (1856) (hereafter "Cushing's Legislative Assemblies"). As explained in one of the leading treatises on legislative practice and procedure, "[a] committee is not at liberty to entertain any proposition, or go into any inquiry, which does not come within the direct purposes for which the committee is appointed, as expressed or clearly implied in the authority conferred upon it." Cushing's Legislative Assemblies § 1906.

Second, when a legislative committee is given express and special authority by the House to investigate the qualifications of a member, the committee may be given only the power to investigate, advise and recommend to the full legislative body. See Mason's Manual of Legislative Procedure §§ 560(15) & 615(2)-(3) (2010) (hereafter "Mason's Manual"). The

committee may not be given the power to disqualify the member because “the fact of disqualification can only be inquired into and decided upon by the assembly itself.” Cushing’s Legislative Assemblies § 477.

Finally, because the powers conferred by Article 4, Section 6 rest with each House, the general rule is that the Legislature may not enact statutes which delegate the power to judge the qualifications or elections of Legislators to another body. See Heller, 120 Nev. at 466-72. As a result, “[t]he exclusive power to judge the qualifications and elections of its members is fixed in each house and cannot by its own consent or by legislative action be vested in any other tribunal or office.” Mason’s Manual § 560(11).

Similarly under Article 4, Section 6, each House has the exclusive power to discipline or punish its members for misconduct involving the performance of core legislative functions, such as the act of voting on legislation. See Comm’n on Ethics v. Hardy, 125 Nev. 285, 293-96 (2009). However, the Legislature may enact statutes which delegate the power to discipline or punish Legislators, but not to expel Legislators, to another branch of government so long as the Legislator is being disciplined or punished for misconduct that does not involve the performance of core legislative functions. Id. at 296-97. When the Legislature enacts such a statute, it may give an administrative agency in another branch of government primary jurisdiction to administer and enforce the statute. Id. at 296-97 & n.9.

II. Statements of Financial Disclosure.

Under Nevada’s financial disclosure statutes, each person who is a candidate for the office of Legislator and each person who is elected to the office of Legislator is required to file with the Secretary of State statements of financial disclosure at certain times prescribed by the statutes. NRS 281.561. Each statement of financial disclosure must include certain information regarding: (1) the person’s length of residence in Nevada; (2) the district in which the person is registered to vote; (3) each source of income for the person and certain members of the person’s household; (4) the specific location and particular use of certain real estate; (5) the names of certain creditors; (6) the names of certain donors and the value of certain gifts; (7) the names of certain business entities in which the person or a member of the person’s household has certain interests; and (8) all public offices held by the person for which the statement of financial disclosure is required. NRS 281.571.

The Secretary of State is charged with administering and enforcing the financial disclosure statutes. NRS 281.558 to 281.581, inclusive. If the Secretary of State receives information that a person has willfully failed to file a statement of financial disclosure or willfully failed to file a statement of financial disclosure in a timely manner as required by the statutes, the Secretary of State may cause the appropriate enforcement proceedings to be instituted in the First Judicial District Court. NRS 281.581. In such enforcement proceedings, a person who violates the financial disclosure statutes is subject to a civil penalty and the payment of court costs and attorney’s fees. Id. However, for good cause shown, the

Secretary of State may waive a civil penalty that would otherwise be imposed under the statutes. Id.

Based on the plain language of the financial disclosure statutes, the Legislature has given the Secretary of State primary jurisdiction to administer and enforce the statutes. Under the doctrine of primary jurisdiction, when an administrative agency has been given primary jurisdiction to administer and enforce a regulatory scheme, other tribunals should generally refrain from exercising their jurisdiction “whenever enforcement of the claim requires the resolution of issues which, under [the] regulatory scheme, have been placed within the special competence of an administrative body.” Nev. Power Co. v. Dist. Court, 120 Nev. 948, 962 (2004) (quoting United States v. W. Pac. R. Co., 352 U.S. 59, 63-64 (1956)). The doctrine of primary jurisdiction advances two important policies: “(1) the desire for uniformity of regulation and, (2) the need for an initial consideration by a tribunal with specialized knowledge.” Sports Form, Inc. v. Leroy’s Horse & Sports Place, 108 Nev. 37, 41 (1992) (quoting Kappelmann v. Delta Air Lines, 539 F.2d 165, 169 (1st Cir. 1976)). Thus, when the Legislature has invested an administrative agency with the authority to administer and enforce a regulatory scheme, other tribunals should ordinarily “refrain from exercising jurisdiction so that technical issues can first be determined by [the] administrative agency.” Sports Form, 108 Nev. at 41.

In the complaint Mr. Kite submitted to the Select Committee, he alleges that Assemblyman Wheeler filed with the Secretary of State one or more statements of financial disclosure that do not comply with the provisions of NRS 281.558 to 281.581, inclusive. Because the Legislature has expressly invested the Secretary of State with primary jurisdiction to administer and enforce the financial disclosure statutes, it is our opinion that any allegations involving a Legislator’s compliance with the financial disclosure statutes should be investigated first by the Secretary of State’s office to ensure uniformity of regulation and to allow the Secretary of State’s office to utilize its specialized knowledge in administering and enforcing the financial disclosure statutes.

Therefore, based on the well-established doctrine of primary jurisdiction, it is the opinion of this office that the Select Committee should refrain from investigating the allegations regarding Assemblyman Wheeler’s compliance with the financial disclosure statutes so that the Secretary of State’s office may exercise its primary jurisdiction to administer and enforce those statutes.

III. Qualifications for legislative office.

To be eligible to be a candidate for a legislative office, a person must satisfy the qualifications for being elected to the legislative office. See Mengelkamp v. List, 88 Nev. 542, 544-45 (1972). When it is alleged that a person does not satisfy the qualifications for being elected to a legislative office, the person’s candidacy may be challenged in a judicial

action to remove the person's name from the ballot. See Child v. Lomax, 124 Nev. 600, 603-05 (2008).

By contrast, once a person is elected to a legislative office, each House "has the sole and exclusive power to judge the election and qualifications of its own members." Mason's Manual § 560(4). This is because Article 4, Section 6 "expressly reserves to the Senate and Assembly the rights to extend, withhold and withdraw membership status." Heller v. Legislature, 120 Nev. 456, 466 (2004).

Furthermore, the power of each House "to pass upon its membership is a continuing power." Mason's Manual § 560(17). Consequently, "the question of the election and qualification of members is never finally decided, in the sense that a decision is conclusive upon the house, *until final adjournment*." Id. (emphasis added). If a member has not been disqualified by the member's House before final adjournment, the question of whether the member continues to meet the qualifications for his or her legislative office is not ripe for a decision by the House until the next regular or special session of the Legislature. See Heller, 120 Nev. at 463.

In the complaint Mr. Kite submitted to the Select Committee, he alleges that Assemblyman Wheeler does not reside in Assembly District No. 39 from which he was elected in 2012, as required by the Constitution and laws of Nevada. In effect, the complaint alleges that Assemblyman Wheeler does not meet the qualifications for his legislative office because he does not satisfy the residency requirements for that office.

As a general rule governing eligibility to public office, "in the absence of a constitutional or statutory provision, residence within the district over which the jurisdiction of the office extends is unnecessary to eligibility." State ex rel. Schur v. Payne, 57 Nev. 286, 291 (1937). Thus, in order for a member of the Assembly to be subject to a residency requirement, the residency requirement must be prescribed by the State Constitution or statute.

To be eligible to any public office under the State Constitution, a person must be a "qualified elector." Nev. Const. art. 15, § 3(1). Additionally, with regard to the members of the Assembly, the State Constitution further provides that "[t]he members of the Assembly shall be chosen biennially by the qualified electors of their respective districts," and that "[t]he members of the Assembly shall be duly qualified electors in the respective . . . districts which they represent." Nev. Const. art. 4, §§ 3 & 5. Finally, to be a duly qualified elector in a district, the State Constitution provides that a person must have "actually, and not constructively, resided . . . in the district . . . thirty days next preceding any election." Nev. Const. art. 2, § 1. Thus, with regard to the members of the Assembly, the State Constitution requires that each member of the Assembly must have been an actual, as opposed to a constructive, resident of the district from which the member was elected for at least thirty days next preceding the member's election.

In addition to the requirements of the State Constitution, Nevada law contains other residency requirements for a person seeking legislative office. A person is not eligible to be elected or appointed to legislative office unless the person has been an actual, as opposed to a constructive, citizen resident of this State for 1 year next preceding the person's election or appointment. NRS 218A.200. And a person may not become a candidate for legislative office unless the person has actually, as opposed to constructively, resided in the particular legislative district for at least the 30 days immediately preceding the date of the close of filing of declarations of candidacy or acceptances of candidacy for the legislative office. NRS 293.1755.

If it is alleged that a candidate does not meet any of these constitutional or statutory residency requirements, the person's candidacy may be challenged in a judicial action to remove the person's name from the ballot. See NRS 281.050 & 293.182; see also Williams v. Clark County Dist. Att'y, 118 Nev. 473 (2002); Chachas v. Miller, 120 Nev. 51 (2004); DeStefano v. Berkus, 121 Nev. 627 (2005).

After a person is elected to legislative office, Nevada law provides that the person must continue throughout the person's term of office to be an actual, as opposed to a constructive, resident of the district from which the person was elected. NRS 283.040(1); see also Op. Nev. Att'y Gen. No. 1959-70 (July 16, 1959) (concluding that a member of the Assembly must continue to be a resident of his or her legislative district for the period of time the member holds office). In particular, NRS 283.040(1)(f) provides that a public office becomes vacant upon:

the ceasing of the incumbent to be an actual, as opposed to constructive, resident of the State, district, county, city, ward or other unit prescribed by law in which the duties of the incumbent's office are to be exercised, or from which the incumbent was elected or appointed, or in which the incumbent was required to reside to be a candidate for office or appointed to office.

However, under the express statutory exception set forth in NRS 283.040(3), the provisions of the statute do not apply to a State Legislator to the extent that the provisions conflict or are otherwise inconsistent with the exclusive power of each House under Article 4, Section 6 to judge the election and qualifications of its own members. Specifically, NRS 283.040(3) provides that:

The provisions of this section do not apply to the extent that they conflict or are otherwise inconsistent with any provision of the Constitution of the State of Nevada regarding the power to judge of the qualifications, elections and returns of or to punish, impeach, expel or remove from office the Governor, other state and judicial officers or State Legislators.

Thus, under the Constitution and laws of Nevada, because each House is given the exclusive power to judge the qualifications of its members, it is within the sole province of each House to determine whether a sitting Legislator meets the qualifications for legislative office, including any residency requirements. Furthermore, each House may make such a determination only when it is convened in a regular or special session. Finally, even though each House may authorize a committee to investigate, advise and make recommendations regarding whether a member meets the qualifications for legislative office, no committee may undertake such actions unless it has been given express and special authority by the House.

Under Assembly Standing Rule No. 23, the Select Committee has been given the express authority to "hear complaints brought by members of the Assembly and others on specific questions of alleged breaches of ethics and conflicts of interest." 2013 Nev. Stat., File No. 5, at 3901. Based on the plain language of Assembly Standing Rule No. 23, the Assembly did not use any express language authorizing the Select Committee to hear complaints on specific questions regarding "qualifications for legislative office" or other words to that effect. In the absence of such express language, it must be presumed that the Select Committee was not given express and special authority by the Assembly to investigate, advise and make recommendations regarding whether a member meets the qualifications for legislative office.

In addition, it cannot be clearly implied from the Select Committee's authority to investigate alleged "breaches of ethics and conflicts of interest" that the Select Committee may also investigate a member's qualifications for legislative office. The qualifications that a member must have to be eligible for legislative office is a subject matter that is separate and distinct from the ethical rules that should guide a member's conduct when performing the duties of legislative office. If the Assembly had intended for the Select Committee to have the authority to investigate whether a member meets the qualifications for legislative office, it could have easily granted that authority in clear and express language in Assembly Standing Rule No. 23. Given that the Assembly did not utilize such clear and express language, it is the opinion of this office that the Select Committee should refrain from investigating whether a member meets the qualifications for legislative office because such an investigation "does not come within the direct purposes for which the committee [was] appointed, as expressed or clearly implied in the authority conferred upon it." Cushing's Legislative Assemblies § 1906.

Therefore, because the Assembly has not given the Select Committee express and special authority in Assembly Standing Rule No. 23 to investigate whether a member meets the qualifications for legislative office, it is the opinion of this office that the Select Committee should refrain from investigating the allegations that Assemblyman Wheeler does not reside in his legislative district because such an investigation would involve whether Assemblyman Wheeler meets the qualifications for legislative office and therefore would fall outside the scope of the authority and jurisdiction of the Select Committee.

CONCLUSION


Because the Secretary of State is charged by law with administering and enforcing the financial disclosure statutes, the Legislature has expressly invested the Secretary of State with primary jurisdiction to administer and enforce those statutes. Based on the well-established doctrine of primary jurisdiction, it is the opinion of this office that the Select Committee should refrain from investigating the allegations regarding Assemblyman Wheeler's compliance with the financial disclosure statutes so that the Secretary of State's office may exercise its primary jurisdiction to administer and enforce those statutes.

Furthermore, because the Assembly has not given the Select Committee express and special authority in Assembly Standing Rule No. 23 to investigate whether a member meets the qualifications for legislative office, it is the opinion of this office that the Select Committee should refrain from investigating the allegations that Assemblyman Wheeler does not reside in his legislative district because such an investigation would involve whether Assemblyman Wheeler meets the qualifications for legislative office and therefore would fall outside the scope of the authority and jurisdiction of the Select Committee.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By 
Kevin C. Powers
Chief Litigation Counsel