

February 17, 1998

Donald S. Hill, Commissioner
Department of Administrative Services
State House Annex
Concord, New Hampshire 03301

Re: RSA 640:5 "Gifts to Public Servants"

Dear Commissioner Hill:

On behalf of the Governor's Task Force on Ethics Guidelines, you have asked for our assistance in interpreting RSA 640:5, which makes it a crime for a public servant to accept pecuniary benefits from persons who are or are likely to be subject to regulation by or interested in a matter before the public servant or the public servant's agency.¹ Specifically, you have asked for our interpretation of the term "pecuniary benefit" as it is used in RSA 640:5. We have reviewed the statute, its legislative history, and legal precedent, and respond as follows.

The statute in question, RSA 640:5, states in relevant part that a person is guilty of a misdemeanor if:

Being a public servant [that person] solicits, accepts or agrees to accept any pecuniary benefit from a person who is or is likely to become subject to or interested in any matter or action pending before or contemplated by [that person] or the governmental body with which [that person] is affiliated [.]

The term "pecuniary benefit" is defined in RSA 640:2,II(c), as follows:

Pecuniary benefit means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.

As a preliminary matter, it should be noted that the word "advantage" as used in the statute is synonymous with "benefit," "gain," and "interest," meaning a "more favorable or improved position or condition." Webster's Third New International Dictionary Unabridged (1968). The phrase "money, property, commercial interest or anything else" as used in the statute is not meant to be limiting, but instead is indicative of the breadth of what is intended to be included ("anything else") as an advantage, benefit, gain, or interest which constitutes pecuniary benefit. Thus, the definition of what constitutes "pecuniary benefit" under this statute is expansive.

Similarly, the term "economic gain" as used in the statutory phrase "the primary significance of which is economic gain" should not be interpreted to limit the statute as applying only to gifts of money. When coupled with the terms "any advantage" and "money, property, commercial interest or anything else," it is clear that the term "economic gain" is meant to include anything of either direct or indirect economic value, worth, profit, or advantage.

In this regard, an important point is that the "economic gain" of which the statute speaks is gain which flows to the public servant. If the pecuniary benefit in fact flows to the State and not to the public servant, RSA 640:5 is not implicated. It is the Governor who may accept gifts to the State. RSA 4:8. All such gifts or other expenditures by third parties in support of State operations, unless

otherwise authorized by statute, e.g. RSA 188-F:4 (Regional Community-Technical College Board may accept gifts up to \$15,000), RSA 162-H:10, IV (costs of Site Evaluation Committee and Public Counsel in evaluating energy facility application to be borne by the applicant) must be placed before the Governor for acceptance.² RSA 4:8.

Accordingly, the response to your question is that RSA 640:5 plainly prohibits gifts to state officials and employees of anything, tangible or intangible, the primary significance of which is any direct or indirect economic advantage to the official or employee, from anyone who has or is likely to have an interest in a matter handled by the official's or employee's agency.

We note that our response is supported by the statute's legislative history. See, e.g., Testimony before the Criminal Codification Commission, at 26 (November 18, 1970); Report of Commission to Recommend Codification of Criminal Laws established under Chapter 451, Laws of 1967, at 86 ("It seems to be a warranted assumption that gifts from persons who have an interest in an official matter before the public servant would be so often made with the hope and intent of influencing him that it is appropriate to prohibit all such gifts generally.").

Further, according to that legislative history, it is not the intent of RSA 640:5 and its predecessor to prohibit all gifts to public officials. Report of Commission to Recommend Codification of Criminal Laws established under Chapter 451, Laws of 1967, at 86. Instead, it is the intent of RSA 640:5 to prohibit such "gifts from certain people," that is, from people who are or are likely to become subject to or interested in a matter pending before or contemplated by the public servant's governmental agency. *Id.* RSA 640:5 sets up a presumption that gifts from people who have an interest in an official matter that is or is likely to be before the public servant or the agency are generally prohibited. *Id.*

A few examples³ may be helpful in understanding the prohibition established in RSA 640:5:

- A lobbyist or contractor whose firm occasionally does business with the public servant's agency pays for the public servant's lunch. This payment constitutes a gift under RSA 640:5 and is prohibited.
- A member of the Site Evaluation Committee travels to Washington, D.C. in connection with a pending application, and the applicant pays the expenses, including airfare and meals. This payment is expressly authorized by statute, RSA 162-H:10,IV and as such neither violates RSA 640:5 nor requires approval under RSA 4:8.
- A public official is invited to an out-of-state conference with transportation, meals and lodging paid for by a professional association that is in turn funded by companies regulated by that official's agency. Assume for purposes of this hypothetical that no statute concerning the agency in question expressly authorizes the acceptance of such payments. If the conference is substantive in content and is directly relevant to the public servant's official duties (it may be convenient in this regard to ask, by analogy, whether in the absence of the offered funding payment by the State for attendance would be justified), then the payment would constitute a gift to the State, and if accepted in accordance with RSA 4:8.
- A public official speaks before a group that the public servant's agency regulates or with which it does business. The next day a small wall plaque thanking the public servant arrives. As the primary significance of such a ceremonial gift or award of insignificant monetary value is not economic gain, acceptance does not violate RSA 640:5.

- A public servant speaks before a group that the public servant's agency regulates or with which it does business. The next day, a watch, engraved with the public servant's name and the name of the group arrives. The economic gain of such a gift is significant, overshadowing any other purpose, and acceptance of the gift would violate RSA 640:5.
- A public servant is invited to attend a luncheon or dinner reception being sponsored by a contractor which does or would like to do business with the public servant's agency, or a business which engages in activities regulated by the public servant's agency. In general, the acceptance at such an event of free drinks or meals constitutes acceptance of gifts in contravention of RSA 640:5; there may, however, be circumstances under which attendance is sufficiently integral to the performance of the public servant's official duties as to warrant a determination that the gifts are actually gifts to the State which may be accepted, if done so in accordance with RSA 4:8.
- During the holiday season, a number of officials or employees of a State agency receive gifts of fruit baskets, liquor, or the like from representatives of companies which occasionally have business coming before the agency. Although it could be argued that the primary significance of such gifts is not economic gain but, for example, an expression of holiday wishes, the conclusion that such gifts are prohibited by RSA 640:5 is consistent with the statute and its intent.

We are mindful that the position set forth in some of these hypothetical examples may seem somewhat harsh. These are, however, the results required by the statute. As the statutory codification commission commented, while RSA 640:5 does not prohibit all gifts to someone just because they are a public servant, it is the intent of the statute to prohibit gifts to public servants from those who have or are likely to have an interest in an official matter before the public servant or the public servant's agency.

Please do not hesitate to contact us if we may be of further assistance, or in the event we may be called upon to provide guidance concerning specific situations as they arise.

Very truly yours,

Philip T. McLaughlin
Attorney General

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¹ RSA Chapter 640 concerns corrupt practices and applies in the context of your inquiry to "public servants." RSA 640 defines "public servant" as "any officer or employee of the state or any political subdivision thereof, including judges, legislators, consultants, jurors, and persons otherwise performing a governmental function." RSA 640:2,II(a).

RSA Chapter 15-B, on the other hand, concerns gifts, testimonials, and honorariums and applies to "elected officials." RSA 15-B defines "elected official" as the governor, members of the executive council, members of the general court, county commissioners, county sheriffs, county treasurers, county attorneys, registers of deeds, and registers of probate. RSA 15-B:1,I.

Thus, while the class of persons to whom RSA 640 applies is quite broad, there is a smaller class, elected officials, to whom both RSA 640 and RSA 15-B applies. For example, all members of the executive branch are covered by RSA 640, while the Governor and Executive Councilors are covered

by both RSA 640 and RSA 15-B. As to those public servants to whom both statutes apply, i.e. elected officials, to the extent there is a conflict between the provisions of these statutes, the later-enacted statute, RSA 15-B, controls. See, Gozzolla v. Clements, 120 N.H. 25, 28 (1980); Perkins v. New Hampshire Power Company, 90 N.H. 534, 540 (1940). Thus, while RSA 640:5 would prohibit gifts of any pecuniary benefit from a certain class of persons to such officials, RSA 15-B allows gifts to such officials to \$50 in value and allows acceptance of gifts in excess of \$50 in value with disclosure in accordance with the statute; RSA 15-B controls.

We attach copies of both statutes so that you may readily compare their provisions.

² Customarily, the authority to accept gifts on behalf of the State pursuant to RSA 4:8 has been delegated by the Governor to the Governor and Executive Council. The Governor has a wide range of procedural options available under the statute. The Governor could, for example, continue the customary delegation of this authority to the Governor and Council; accept gifts on behalf of the State herself; delegate to agency heads or other officials the authority to accept gifts on behalf of the State, perhaps delimited by category, or up to a certain value; or adopt some combination of these options.

³ We do not endeavor here to address every hypothetical situation which may arise, but to focus on only a few hypothetical examples for purposes of illustration. We will, of course, be glad to provide consultation as specific factual situations arise.