

HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
JANUARY 31, 2025

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1360

Chairman Schauer and members of the Committee:

For the record, my name is Claire Ness. I am the Chief Deputy Attorney General, and I am here on behalf of the Attorney General's Office in opposition to House Bill 1360. The Attorney General's Office supports the need for an effective Ethics Commission that has support from experienced professionals. Our office appreciates the goals set forth by the Ethics Commission during its testimony today and supports the many efforts by stakeholders to achieve a more efficient, fair, and open process for all parties involved in Ethics Commission matters. Our office has been engaged in these conversations with the Ethics Commission, legislative leadership, other legislators, our clients, and many others over the years and especially leading up to this session. However, the Office opposes this bill because it raises legal and constitutional concerns for our clients, private citizens, and the state.

Removal of Legislative Authority

HB 1360 would remove any legislative parameters on the Ethics Commission rules, even those that stem from the delegation of legislative authority rather than the Constitution. The process that was presented in testimony by the Commission's staff is not found in the bill and would not be found in statutes. Instead, it would be subject to Ethics Commission rulemaking, which is exempt from the Administrative Rules Committee. Some of the rules exceed the Commission's constitutional powers and would require a delegation of legislative power (which

is discussed later in my testimony). The Legislative Assembly should consider requiring such rules to follow the administrative rules process found in N.D.C.C. Ch. 28-32 that applies to all administrative rules stemming from such delegations of authority from the legislature.

Repeals of Protections for Individuals Brought Before the Commission

HB 1360 repeals multiple statutes that protect the legal interests of individuals in Ethics Commission proceedings, protect the integrity of administrative proceedings, and protect our democratic processes.

These statutes are especially important considering the Commission can decide that an individual violated an ethics law and can refer an individual for civil or criminal penalties. For example, the bill eliminates statutes that:

- Require the Commission to notify individuals of complaints filed against them;
- Require the Commission to allow individuals to respond to complaints filed against them;
- Protect individuals' right to have an attorney with them at Commission proceedings;
- Protect voters from having duly-elected or duly-appointed public office holders removed from office by the Ethics Commission (rather than through a recall vote or other democratic process);
- Protect administrative hearing officer determinations – that provide regulatory consistency to the state and to the energy, agriculture, and other industries – from being overturned by the Ethics Commission.

Some of these protections overlap to some extent with constitutional Due Process. However, those are not fully protected by Due Process alone. Also, there is still a question why the statutes would

be repealed. If the Ethics Commission wishes to changes its internal procedures consistent with these protections, the statutes could simply be amended to leave these important protections in place.

Additionally, any new rules that conflict with some of these protections raise concerns under the separation of powers doctrine. We often hear from one of the Commission's staff members during their training sessions that the Commission is "above the other 3 branches of government," but that is not legally accurate. The constitutional and legal authority of the branches of government remain intact.

New Enforcement Authority and Constitutional Questions

Sections 1 through 3 of HB 1360 raise questions regarding the scope of authority the Legislative Assembly would grant under this bill. Although the language of HB 1360 does not specifically state that enforcement authority would be delegated from the Legislative Assembly to the Ethics Commission, it is clear from today's testimony that that would be the basis for the Ethics Commission's planned sanctions and fines.

The Commission is seeking to change several definitions and revise its procedures. Within those changes, the phrase "enforcement action" appears several times as a replacement for the word "investigation." The replacement of the word "investigation" with "enforcement action" throughout N.D.C.C. chapter 54-66 raises the question: what is the difference between the two terms?

The bill defines the phrase "enforcement action," in part, as "an investigation and proceeding before the commission under section 3 of article XIV of the Constitution of North Dakota . . ." (emphasis added). The term "proceeding" is not defined in the bill, and, by its nature,

could mean any action of the Commission. As a result, the bill seems to give the Commission broad, new authority to carry out actions that presumably relate to “enforcement.” As noted, the testimony today – and the draft rules offered by the Commission – show the Commission plans to establish and impose their own fines and penalties.

The Constitution gives the Commission the authority to make rules and investigate alleged violations of Article XIV of the Constitution and certain, specified rules and laws. It does not give the Commission enforcement authority, most likely because enforcement authority lies with several other entities throughout state and local governments. Any enforcement authority (except the minor exception noted in footnote 1 - which does not include the power to establish civil and criminal penalties),¹ for the Commission would have to come from the Legislative Assembly, and HB 1360 uses language that may do that or may be an attempt to do that.

The draft rules from the Ethics Commission – and the testimony from the Commission’s Executive Director – refer to sanctions and financial penalties they would establish and impose. Again, this authority must be affirmatively delegated by the Legislative Assembly because it is not granted to the Commission under the Constitution. As currently written, any delegation of enforcement authority in HB 1360 has no limits, is not explicit, and does not have any detail. It could be challenged on Due Process grounds for providing insufficient notice, or on other grounds.

Additionally, the definition of the term “enforcement action” also arguably conflicts with the Constitution. As mentioned, the definition refers to “an investigation and proceeding before the Commission under section 3 of article XIV of the Constitution of North Dakota . . .” (emphasis

¹ The Commission has co-existing authority (with the legislature) under Section 2(5) of Article XIV to adopt rules to enforce the prohibition on certain officials disqualifying themselves from quasi-judicial proceedings. However, this provision does not give the Commission authority to set civil and criminal sanctions. Everywhere Article XIV provides authority to set those sanctions is explicitly stated.

added). Since Article XIV of the Constitution does not authorize any enforcement actions, it is unclear what enforcement actions would be “under” that article.

Perhaps most importantly, the Constitution does not allow the Legislative Assembly to delegate this type of enforcement authority. For example, Section 2 of Article XIV of the Constitution requires the Legislative Assembly to establish any civil and criminal sanctions for violating the many ethics provisions in that section. The power to establish sanctions and penalties for specific violations is one of the most significant powers the Legislative Assembly has. Attempts to delegate that authority to an unelected body, particularly without reserving any ability to review those penalties and sanctions through the administrative rules process, would raise significant Constitutional questions.

If the Legislative Assembly makes the policy decision to delegate enforcement authority to the Ethics Commission, a thorough analysis of the legal, drafting, and Constitutional issues should be undertaken, as the state likely would end up engaged in litigation over this matter.

If the Legislative Assembly does not wish to expand the Ethics Commission’s authority beyond the Constitution, it is recommended that the committee change the term “enforcement action” to something else and provide more clarity in the definition.

Confidentiality Concerns

The confidentiality provisions in HB 1360 are helpful but do not address some of the concerns regarding confidentiality of Ethics Commission matters.

While the ability of respondents to disclose information under the bill is a helpful step in the right direction, there are other individuals who still would be hamstrung from obtaining or

disclosing information necessary to protect their legal interests in Commission proceedings. HB 1505 provides a better solution to the problems in this area.

For example, HB 1360 allows the commission, respondents, and “individuals who provide relevant information” to the Commission to disclose some confidential information during the course of an investigation – but only if the respondent consents. (“Relevant information” is defined narrowly as “an assertion provided to the commission that a regulated individual engaged in an ethical violation.”) The bill does not address individuals summoned to appear before the Commission’s staff to provide answers and information that do not constitute “relevant information.” State employees have been summoned to appear and answer questions before a 3-attorney panel comprised of the Ethics Commission’s staff attorney, outside contracted attorney, and executive director (also an attorney). The summoned state employees likely did not have any “relevant information” as defined in the bill, so they would not be allowed to discuss the Commission’s demands with anyone under HB 1360, regardless of whether the respondent consented. As you can imagine, these individuals wanted to consult with an attorney and gather information to protect their legal interests when faced with 3 attorneys who could refer them for civil or criminal penalties. HB 1360 would not address this problem.

The testimony on House Bill 1505 from the Office of the Attorney General contains more detailed information regarding confidentiality and the Ethics Commission that the committee may wish to reference as it works on HB 1360.

I’ve been an attorney for 25 years, and I’ve spent much of that time working in areas of the law that focus heavily on legal compliance and ethics. Providing testimony in opposition to an Ethics Commission bill is not something the Attorney General or I or our office colleagues take

lightly. I think it's safe to say it can open someone up to reprisals or accusations of all sorts. But it's because ethics, our constitution, our balance of powers, and our individual rights are so important that we wanted to provide this testimony to make sure you, the elected representatives of our state, have as much information about this bill as possible before making your policy decisions.

Thank you for your time, and I will stand for questions.