

TESTIMONY OF DAVE THIELE
EXECUTIVE DIRECTOR, NORTH DAKOTA ETHICS COMMISSION
BEFORE THE
SENATE JUDICIARY COMMITTEE
Engrossed HB 1043 March 10, 2021

Mr. Chairman and Members of the Judiciary Committee, my name is Dave Thiele, Executive Director of the North Dakota Ethics Commission. The Ethics Commission in HB 1043 is attempting to fill gaps regarding its constitutional mandate and harmonize conflicts with NDCC 54-66. The Commission is committed to properly addressing citizen concerns in a manner that educates and corrects. The Commission has worked to create an environment that is not a “gotcha” entity, but instead focuses on identifying the problem, fixing the problem and then educate so others don’t make the same mistake. We believe our proposed changes to NDCC 54-66 will promote that goal.

Section 1 simply reflects that a “complainant” under NDCC 54-66 must be a North Dakota resident.

Section 2 The original bill provided that if a complainant is anonymous or a non-resident the Commission would review and upon determination that there is a reasonable belief that a violation has occurred and if approved by a majority vote, the Commission would proceed as the Complainant. If a complainant wished to remain confidential, the Commission would not release their name to the respondent. If, however, the complainant is a witness, they must consent to release of their name to the respondent or their statement may not be considered as evidence of a violation. This ensures that a respondent would receive all evidence being considered to adequately defend themselves. The House eliminated the Commissions ability to consider either non-resident or anonymous complaints. Current law allows non-resident complaints but does not allow the Commission to act on anonymous complaints regardless the evidence or violation. The Commission believes that it is very important to be able to act in the unlikely event that physical evidence of a violation is provided. The Commission believes that the proposed review process will eliminate frivolous complaints or those politically motivated. It needs to be emphasized that an anonymous complaint can only be

acted on if there is actual evidence of a crime. A “statement” by an anonymous complainant is not evidence and could not be used. In any instance a witness must authorize release of their name and address to the respondent or the statement may not be used as evidence. We would respectfully request that the Senate reinstate original changes to **Section 2**. **Section 2** also authorizes the Commission to dismiss or decline to proceed with a complaint if it does not meet certain criteria.

Section 3 eliminates the requirement for registered mail notice and eliminates the requirement that the identity of the complainant be provided to an accused individual. Article XIV of the North Dakota Constitution clearly mandates that a “confidential” complaint process be created. Mandating release of the complainant’s name is in clear conflict with the constitution. We do make clear that the respondent will receive **all** information being used as evidence of a possible violation. We would request that the House removal of language allowing the Commission to proceed as a Complainant be reinstated for the reasons outlined above.

Section 4 is a minor change to language regarding informal resolution.

Section 5 allows for a rapid resolution of a possible criminal violation and provides for Commission subpoena power. The Commission believes that it will be exceptionally rare that a case will rise to a level warranting criminal prosecution and rather than sending a case to the appropriate law enforcement agency where it may languish, the amendment would allow for a quick coordination and then allow for resolution of the matter. Paras 3-5 in the original bill provide the Commission with subpoena power which is routine for ethics commissions and is necessary to ensure we can access documents or records necessary to investigate and resolve a complaint. Review of National Conference of State Legislators data on ethics commissions powers and duties ([NCSL ethics powers and duties](#)) verifies that every state ethics commission in the country has some form of subpoena power. The House eliminated much of the subpoena power language over concerns expressed by a Representative about too much power being vested with the Commission. Subpoena power is an investigative tool necessary for proper investigation and resolution of a complaint. It should be noted that if the Commission is required to go to the District Court to get a subpoena the complaint will no longer be confidential. We believe maintaining confidentiality is a positive aspect of the program and supports informal resolution of

complaints. It should also be noted that the Legislature and committees all have subpoena power.

Section 6 and Section 7 reinforce that the accused individual will receive all the evidence being considered and makes clear such evidence is not confidential.

Section 8 simply authorizes the Commission to delegate duties to staff as appropriate. It also allows the Commission to change or reverse actions of delegated staff.

Finally, in **Section 9**, the Commission proposes the adoption of advisory opinion authority. The ability to issue advisory opinions that can be relied on by public officials and then to publish opinions for education is an important aspect of an effective ethics program. This language provides authority to the Commission to issue written advisory opinions in response to written requests from public officials, candidates for elected office, and lobbyists. Opinions can be based on actual or hypothetical facts, but not on past conduct. The issuance of an advisory opinion is discretionary with the Ethics Commission. Within 14 days after the receipt of a request for an opinion, the Ethics Commission must notify the requester whether an opinion will be provided and then has 90 days to issue the opinion. The bill provides that criminal and civil penalties may not be imposed upon an individual who acts, in good faith, in accordance with an ethics advisory opinion. The opinions are required to be made available to the public on the website of the Ethics Commission or on another readily available medium which will serve to educate other public officials. This language fills a gap concerning the scope of Article XIV, the statutes, and the rules of the Ethics Commission relating to transparency, corruption, elections, and lobbying, and provides a means for written interpretations of that scope that the public can rely on. The Commission worked with Representative Klemin on this section and the language proposed is identical to SB 2034.

Mr. Chairman, Members of the Judiciary Committee, I would be happy to answer any questions.