

2022 Webinar Series



The Do's and Don'ts of Electioneering

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NEW HAMPSHIRE MUNICIPAL ASSOCIATION

Presented by:

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Today's Speakers



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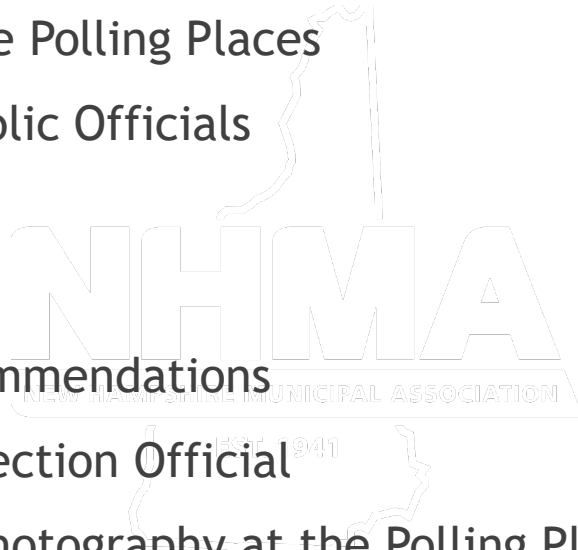


Myles Matteson
*Deputy General Counsel
NH Dept. of Justice*

Agenda



- ▶ What is Electioneering?
- ▶ Regulation of Electioneering at Polling Places
- ▶ Campaign Signs at the Polling Places
- ▶ Electioneering by Public Officials
- ▶ Political Advertising
- ▶ Voter Guides
- ▶ Warrant Article Recommendations
- ▶ Disqualification of Election Official
- ▶ Ballot Security and Photography at the Polling Place



What is Electioneering?



652:16-h Electioneering - Definition

Electioneering means visibly displaying or audibly disseminating information that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure being voted.



Electioneering includes, but is not limited to:

- ▶ I. Wearing clothing or paraphernalia that displays a candidate's name, likeness, or logo, a ballot measure's number, title, subject, or logo, a political party's name or logo, or any communication that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure, **provided that a person eligible to vote or register to vote in the voting district who is unable to remove or cover clothing that explicitly advocates for or against any candidate, political party, or measure, may wear such clothing in the polling place while actively engaged in the process of registering to vote or while actively engaged in the process of voting.**
- ▶ II. Distributing or posting a card, handbill, poster, placard, picture, pin, sticker, circular, or any other form of communication that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure.



Electioneering At Polling Places - RSA 659:43

- ▶ Electioneering shall be prohibited within the polling place building.
- ▶ Establish one or more no-electioneering corridors, no less than 10 feet wide, that extend from all entrances of the polling place
- ▶ Voter must be allowed to enter polling place building without interference from individuals outside the corridor.
- ▶ Moderator shall designate a preferred area for electioneering
- ▶ The distribution or posting of electioneering communications, including but not limited to posters, cards, handbills, placards, pictures, pins, stickers, circulars, or articles of clothing, is prohibited within any no-electioneering corridor established outside the polling place by the moderator.



Campaign Signs at Polling Places



Electioneering signs shall not be affixed to the polling place building or grounds.

Electioneering signs shall not be left unattended.



A vehicle that is parked or has been left unattended on election day for longer than 3 hours in an area designated for voters who are temporarily present for the purpose of voting. RSA 262:32, VIII

First Amendment vs. Regulating Electioneering



- ▶ A state may regulate speech inside the polling place “as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 885 (2018).
- ▶ Speech supporting or opposing a candidate or measure on the ballot at a polling place ***may be prohibited***; speech supporting a point of view not on the ballot at a polling place ***may not be prohibited***.

Attorney General Recommendations on handling electioneering speech*



- ▶ Upon observing a voter enter the polling place to vote wearing electioneering campaign material, it is reasonable to ask the voter to remove or cover up campaign material being worn.
- ▶ It is recommended, that local election officials keep spare shirts or inexpensive rain ponchos on hand to offer voters to cover unlawful attire.
- ▶ However, should the voter refuse, he or she must be allowed to vote.
- ▶ The proper response if the person is unwilling to cease the improper conduct is to refer the voter to the Attorney General's office for investigation.

* *New Hampshire Election Procedure Manual 2020-2021, page 248*

Electioneering by Public Officials



659:44 - Electioneering by Election Officers.



- ▶ RSA 659:44 prohibits electioneering at a polling place by any election officer. The term “election officer” is defined as “any moderator, deputy moderator, assistant moderator, town clerk, deputy town clerk, city clerk, deputy city clerk, ward clerk, selectman, supervisor of the checklist, registrar, or deputy registrar.” RSA 652:14.
- ▶ The Attorney General’s Office has interpreted RSA 659:44 as prohibiting any official action by an election official to endorse a candidate for office.
- ▶ According to the Attorney General’s Office it is a violation of RSA 659:44 for a select board to endorse a candidate for office while acting in their official capacity as an election official. However, an individual select board member could endorse a candidate in her individual capacity.

659:44-a - Electioneering by Public Employees



I. No public employee, as defined in RSA 273-A:1, IX, shall electioneer while in the performance of his or her official duties.

II. No public employee shall use government property or equipment, including, but not limited to, telephones, facsimile machines, vehicles, and computers, for electioneering.

III. For the purposes of this section, "electioneer" means to act in any way specifically designed to influence the vote of a voter on any question or office.

IV. Any person who violates this section shall be guilty of a misdemeanor.

Who is a “public employee”?

- RSA 273-A:1, IX



- ▶ IX. "Public employee" means any person employed by a public employer except:
 - (a) Persons elected by popular vote;
 - (b) Persons appointed to office by the chief executive or legislative body of the public employer;
 - (c) Persons whose duties imply a confidential relationship to the public employer; or
 - (d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.

664:17-a Advertising on Government and Law Enforcement Vehicles. -



- ▶ No printed or written political advertising shall be attached to or displayed on any motor vehicle:

I. Which is used by a police officer authorized to make arrests or serve process; or

II. Which displays government license plates and is registered in the name of the state or of a political subdivision of the state.

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Voter's Guide



- Governing bodies can advocate for the adoption, or defeat of specific warrant articles.
- There have been instances where the NH Attorney General's Office has ordered a municipality to rescind or revise a voter guide claiming the information provided exceeded the permissible boundaries of informing the voters on an issue and straying into impermissible electioneering.
- NHMA would recommend that voter guides educate the voters on the issues presented by any proposed budget or warrant article and state the position of the governing body and budget committee through their respective recommendations.

Warrant Article Recommendations



- ▶ Recommendations by an official budget committee are limited to articles containing an appropriation.
- ▶ May include numerical tally on recommendation vote. RSA 32:5, V-a.
- ▶ Select Board may offer its recommendation on all articles on the warrant, not just articles with appropriations. *Olson v. Town of Grafton*, 168 N.H. 563 (2016)
- ▶ Planning Board recommendations on governing body and petitioned warrant articles should be stated as either “approval or disapproval” of the article. RSA 675:3, VIII; RSA 675:4, III

Local Electioneering Bylaws

RSA 31:41-c



Towns shall have the power to make bylaws regulating the distribution of campaign materials or electioneering or any activity which affects the safety, welfare and rights of voters at any election held for any purpose in such town. **Such power shall not extend to the display of printed or written matter attached to any legally parked motor vehicle, nor shall such power extend to activities conducted wholly on private property so as not to interfere with people approaching or entering a polling place.** Failure to conform to bylaws adopted under this section shall constitute a violation. A copy of the bylaws adopted under this section shall be provided to the town clerk immediately following adoption so that they may be made available to candidates filing for office, and shall be posted at each polling place at least 72 hours in advance of any town election.

Election Officials Who Are on the Ballot - RSA 658:24



- ▶ 658:24 Disqualification of Certain Persons. - Any person, other than a moderator, clerk, selectman, inspector of election, or supervisor of the checklist, whose name appears on a ballot for an elective position, other than a position of an election official, shall be disqualified from performing duties as an election official in that election. A moderator, clerk, selectman, inspector of election, or supervisor of the checklist whose name appears on a ballot for an elective position, other than the position of an election official, shall be disqualified from the handling of marked ballots and the counting of votes.

Disqualification of Officials - RSA 659:58



Disqualification of Officials. - Any election official, other than the moderator, who is also a candidate for office shall not be allowed to remain within the guardrail during the counting of votes for an office for which he is a candidate. Such official shall disqualify himself from election duties relating to the tabulation of votes; and the moderator shall appoint an assistant who shall take the same oath as, serve in the same capacity as, and have all the powers of the election official who is disqualified until such official may properly return.

Ballot Security

- ▶ RSA 658:31, at or prior to the opening of the polls, the seal of the ballot packages delivered to the municipality by the secretary of state is publicly broken by the clerk and the ballots given to the ballot clerks to be examined and counted by the election officers in the presence of the clerk, the moderator, and at least one other legal voter.
- ▶ RSA 658:36, at the opening of the polls, the ballot box must be publicly opened and shown to be empty; and the election officers shall ascertain that fact by a personal examination of the box.
- ▶ Spoiled ballots must be marked cancelled and preserved. RSA 659:22.
- ▶ After the counting of the votes and announcement of the results by the moderator, the moderator must record and sign a ballots cast form prepared by the secretary of state within 48 hours of the closing of the poll. RSA 659:73 (VI).



Photography at the Polling Place



- RSA 659:37 protects a voter from interference by another while the voter is within the guardrail.
- If a voter expressed an objection to being photographed while in the act of voting (such as a religious objection), the moderator could deem such activity to be an interference with a voter and order the offending person to cease or leave the polling station.
- The Third Circuit ruled that Pennsylvania election officials could exclude print and video news reporters from polling stations. *PG Publishing v. Aichele*, 705 F.3d 91 (3d Cir., 2013).

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2022 Right-to-Know Law for Law Enforcement



Right-to-Know for Law Enforcement Hybrid Workshop

9:00 am - 12:00 pm, Thursday, January 27, 2022. Join NHMA's Legal Services team who will share insights and strategies to assist law enforcement agencies in handling government records requests. Cost is \$65 (in person) or \$55 (virtual).

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