

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

**The New Hampshire Civil Liberties Union, Peter Hutchins,
Jack Crisp, and John MacIntosh**

v.

**Gene Chandler, Chairman of the Joint Committee on Legislative Facilities, Henry
Mock, Chairman of the House Judiciary Committee, Robert K. Boyce, Chairman of
the Senate Internal Affairs Committee, and William Gardner, Secretary of State**

No. 04-E-393

ORDER

The New Hampshire Civil Liberties Union ("NHCLU") and New Hampshire citizens Peter Hutchins, Jack Crisp and John Macintosh ("Petitioners"), request that copies of the Voters' Guide as it pertains to a proposed amendment to the New Hampshire Constitution ("CACR5") which, if adopted, would repeal and amend Part II, Article 73-a of current constitution, not be distributed. Gene Chandler, Chairman of the Joint Committee on Legislative Facilities, Henry Mock, Chairman of the House Judiciary Committee, Robert K. Boyce, Chairman of the Senate Internal Affairs Committee, and William Gardner, Secretary of State ("Respondents") object. After hearing and for reasons stated below, this request **GRANTED**.

I. BACKGROUND

The Respondents do not dispute any of the facts presented. The pertinent facts of this case are as follows.

During the 2004 legislative session, the House and the Senate approved CACR5. Following the approval, sometime in August 2004, Representative Mock sent a written memo containing proposed language for the Voters' Guide to CACR5, to members of the

House Judiciary Committee requesting that each member of the committee indicate his or her approval and make any suggested changes. Senator Boyce, sent a similar memo to members of the Senate Internal Affairs Committee.

In August or September, Representative Mock conducted a telephone poll of members of the House Judiciary Committee to determine their support for the Voters' Guide. Once Representative Mock obtained a majority of support for the guide from members of the committee, he made no further calls to the remaining committee members. Representative Mock did not give notice in the House Calendar of the time and place of a meeting to formally review and approve the Voters' Guide.

During this same time period, Senator Boyce circulated a draft of the proposed Voters' Guide to members of the Senate Internal Affairs Committee, asking them to sign off on the same. Senator Boyce also conducted a telephone poll, although he did contact all members of the committee. Senator Boyce did not provide public notice of the time and place and matters to be considered in connection with the Internal Affairs Committee's purported review and approval of the Voters' Guide.

House Speaker Chandler, Chair of the Joint Committee on Legislative Facilities, which has the statutory authority under RSA 636:3-a to authorize the printing of the Voters' Guide, did not give notice of a public meeting, schedule a public meeting or conduct a public vote of the Joint Committee on Legislative Facilities with regard to the Voters' Guide.

On October 2, 2004, William Gardner, by and through his role as Secretary of State, distributed the Voters' Guide to town clerks and election officials throughout the State of New Hampshire.

On October 14, 2004, the Petitioners filed this petition. On October 19, 2004, the House Judiciary Committee and the Senate Internal Affairs Committee scheduled meetings in direct response to the instant petition with the intention of curing the alleged procedural defects. Because only eight members of the House Judiciary Committee attended the meeting, no quorum was present and therefore, no motion, votes or other formal action took place. All members attended the Senate Internal Affairs Committee meeting and voted to authorize, by a vote of four to one, the distribution of the Voters' Guide.

II. DISCUSSION

After consideration of the relevant law and the parties' arguments, the Court concludes that the Voters' Guide relating to CACR5 was distributed in violation of RSA 663:3-a. That statute provides:

If the general court proposes the constitutional amendment, the joint committee on legislative facilities may authorize the printing of the voter's [sic] guide. Distribution of the voter's [sic] guide shall not take place until its text has been reviewed and approved by the house and senate policy committees which considered the proposed constitutional amendment.

RSA 663:3-a.

Respondents do not dispute that neither the House Judiciary Committee nor the Senate Internal Affairs Committee, the appropriate committees under RSA 663:3-a, met to review and approve the language in the Voters' Guide. Rather, the chairs of both committees sent copies of the proposed Voters' Guide, which had been drafted by Representative Mock, Representative Phyllis Woods, Attorney Eugene Van Loan and Superior Court Chief Justice Robert Lynn, to each member of their committees. Senator Royce telephoned members of his committee and requested that each indicate whether he/she approved the language of the guide. Representative Mock called only as many

members as necessary to obtain a majority approval. Respondents argue that this procedure satisfies RSA 663:3-a's review and approval requirements. The Court disagrees.

Although the statute does not specify how the proposed text of a voters' guide is to be "reviewed and approved", the legislature passed the statute and presumably the legislature intended to follow its own procedural rules in carrying out the statutory requirements. New Hampshire House Rules 100-111 (Rules of Committee Procedure) set out the process and procedure for carrying out committee responsibilities and the duties of committee chairs. Rule 106 requires "approval of a majority of the quorum present. . . for a committee to decide a question to take official action on any matter. . . ." Respondents concede that approving a voters' guide constitutes "official action." By its terms, "majority of a quorum present", means a meeting of a committee. The procedure employed by the chairs of the House and Senate committees in this case, obviously did not meet Rule 106's requirement of a meeting to review and approve the voters' guide.

Other House rules were also violated. Rule 107 provides for a role call vote at each legislative committee meeting. Rules 103 and 104 require public notice in the House Calendar at least two days prior to a committee meeting and/or notification by the chair of the meeting on the floor of the House and that the meeting notice contain, among other things, the time and place of the meeting and the matters proposed for consideration. Because the dictates of RSA 663:3-a of review and approval were not met, distribution of the Voters' Guide violates the statute.

While not conceding that RSA 663:3-a was violated, Respondents argue that the Senate Internal Affairs Committee has remedied any arguable statutory and/or rule violations by approving the Voters' Guide at a subsequent meeting. After the filing of the present case in this court on October 14, 2004, the Senate committee met on October 19, 2004, at which time the majority of the quorum approved the language of the Voters' Guide. Representative Mock schedule a meeting of the House Judiciary Committee at the same time. However, a quorum was not present at the meeting and a vote was not taken. The House Judiciary Committee is scheduled to meet again on October 26, 2004 for the purpose of reviewing and approving the Voters' Guide and Respondents request that the Court delay its ruling on this matter so that any arguments regarding statutory and/or rule violations will be moot. However, even if a quorum of the House Judiciary Committee meets on October 26 and a majority approves the text of the Voters' Guide, this would not remedy the statutory violation. RSA 663:3-a states that "[d]istribution of the voter's [sic] guide shall not take place until its text has been reviewed and approved by the house and senate policy committees which considered the proposed constitutional amendment." (Emphasis added). All Voters' Guides were distributed by the Secretary of State to local election officials as of October 2, 2004 in violation of the statute. The statute mandates review and approval by appropriate committees prior to distribution because the review and approval process itself is important. As respondents concede, the purpose of a voters' guide is to offer voters an objective explanation of a proposed constitutional amendment. A voters' guide is published by the Secretary of State's office at taxpayer expense. It is an official document. Bednar v. King, 110 N.H. 475, 478 (1970). It is not intended to be an advocacy piece. A voters' guide is much more likely


to contain an objective explanation of a proposed constitutional amendment when its language is subject to scrutiny and discussion. This is particularly so in this case where the Voters' Guide was written by four long-time and vocal proponents of the amendment. Amending the State constitution is an extraordinary measure which is not done lightly or easily. See N.H. CONST. part II, art. 100. All procedures attendant its amendment, including publication of a voters' guide, should be followed carefully. "It is well established law that. . . a constitutional provision prescribing an exact method for the proposal of a constitutional amendment by the legislature is mandatory and must be complied with." Bednar, 110 N.H. at 476. A voters' guide is intended to ensure that voters are presented a balanced explanation of proposed changes and the results of those changes to enable voters to make informed decisions. A voters' guide continues to be important after passage of a constitutional amendment because its language is relied on in interpreting the intent of voters in passing the amendments. Concrete Co. v. Rheaume Builders, 101 N.H. 59, 60 (1957). For all these reasons, an attempted ratification of the language in the Voters' Guide subsequent to its distribution, at least on the facts of this case, does not cure the statutory violation. The only remedy for this violation of RSA 663:3-a is to recall the Voters' Guides. This will not affect the constitutional amendment remaining on the November 2 ballot since RSA 663:3-a does not require a voters' guide. ("[T]he joint committee on legislative facilities may authorize the printing of the voters' guide.") (Emphasis added).

In sum, petitioners' requests for an injunction and declaratory judgments are **GRANTED** to the extent that the Court finds that the Voters' Guide was distributed in violation of RSA 663:3-a. The Secretary of State's office shall immediately recall all

Voters' Guides. The Secretary of State's office shall instruct local election officials to collect Voters' Guides from locations where they have been made available to the public and return them to the Secretary of State's office.

So Ordered.

Dated: 10/25/04


Kathleen A. McGuire,
Presiding Justice