

STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss.

April Term, 2025

State of New Hampshire

No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

MOTION TO DISMISS INDICTMENT FOR
CRIMINAL SOLICITATION OF MISUSE OF POSITION (DUPREY)

The Accused respectfully moves to dismiss the indictment for criminal solicitation of misuse of position regarding Pease Development Authority (PDA) Chairperson Duprey because the statute on which the prosecution relies applies only to “executive branch officials” and “classified employees,” and PDA Chairperson Duprey is neither an executive branch official nor a classified employee. For this reason, which is plain according to the terms of the applicable statutes, the indictment must be dismissed, as further explained below:

1. The prosecution had the grand jury return an indictment, CID 2257397C, which alleges that Justice Hantz Marconi committed criminal solicitation of misuse of position, RSA 21-G:23, “by soliciting Pease Development Authority Chairperson Steve Duprey to secure a governmental privilege and/or advantage for her to which she was not otherwise entitled regarding the employment of Geno Marconi and/or an investigation into Geno Marconi, or words to that effect[.]”

2. The statute on which the indictment is based, RSA 21-G:23 provides that “No executive branch official or classified employee shall use his or her position with the state to secure privileges or advantages for himself or herself, which are not generally available to governmental employees, or to secure governmental privileges or advantages for others to which

they are not otherwise entitled.” RSA 21-G:23, II (underline added). “Any person who knowingly or willfully violates” the section “shall be guilty of a misdemeanor.” RSA 21-G:34.

3. Thus, an alleged violation of the statute depends on the solicitee, the person allegedly being solicited, being either an “executive branch official” or a “classified employee.”

4. The Chairperson of the Pease Development Authority is neither an executive branch official nor a classified employee.

The Chairperson of the Pease Development Authority Is Not an “Executive Branch Official.”

5. RSA 21-G:21, II-a provides the definition of “executive branch official” as “any person, other than a classified employee, who conducts business on behalf of an executive branch agency.” The statute says:

“Executive branch official” means the governor, members of the executive council, every commissioned, unclassified, or nonclassified executive branch employee other than one elected by the legislature, every constitutional official as defined by RSA 15-B:2, II, and any person other than a classified employee who conducts business on behalf of the governor, an executive branch official, or executive branch agency, including a volunteer.

Thus, according to the statute, if a person is not conducting business on behalf of an executive branch agency or member of the executive branch, the person is not an “executive branch official.”

6. The Pease Development Authority is not an executive branch agency.

7. RSA 6:44 expressly recognizes that the PDA is not part of the executive branch of the New Hampshire government. Instead, the PDA is described as a “component part” of state government which is not part of the executive branch. The statute says:

6:44 Component Units of State Government. –

I. All systems, authorities, and organizations established by the state which are not part of the executive, legislative, or judicial branches shall be considered component units of the state government. For the purpose of this section, the following shall be considered component units: ... (i) Pease development authority....

RSA 6:44, I (underline added). This statute is consistent with other statutes and New Hampshire case law.

8. The PDA was established by RSA 12-G.

9. The PDA is a “body politic and corporate of the state” and is “deemed to be a public instrumentality.” RSA 12-G:3, I. *See also Appeal of Geekie*, 157 N.H. 195, 196 (2008).

However, a body “politic and corporate” is not a “department or establishment” of the executive branch. *See State Emples. Ass’n of N.H. v. State*, 161 N.H. 558, 562-65 (2011).

10. In addition, RSA 21-G:6-b lists the “organization of the Executive Branch” and details constitutional offices, executive departments, executive agencies, and executive commissions. The PDA is not included.

11. Lastly, other statutes treat those acting on behalf of the PDA as distinct from executive branch employees. The indemnity statute, RSA 99-D:2, lists PDA’s “directors, officers, and employees of the Pease development authority” as separate from “present or former officer, trustee, official, or employee of the state or any agency thereof.”

12. In short, the PDA is not an executive branch agency and the Chairperson of the PDA is not an “executive branch official.”

13. Rather, the Chairperson of the PDA is required to act, “in all respects for the benefit of the affected communities, the seacoast region, and the state and for the improvement of their welfare and prosperity, including the creation of employment and other business opportunities.”

RSA 12-G:1, III. The Chairperson of the PDA, appointed by the Governor and Executive Council, is but one of a board of seven appointed by various “appointing authorities.” RSA 12-G:2, IV; RSA 12-G:4, I-II. The PDA is required to act “consistent with the public good,” RSA 12-G:7, and reports to “all appointing authorities, to the house finance committee, the senate finance committee, the senate president, the speaker of the house of representatives, the senate

clerk, the house clerk, the governor, and the state library.” RSA 12-G:29. Neither the PDA Board nor its Chairperson should be “conducting business” on behalf of the Governor, alone.

The Chairperson of the Pease Development Authority Is Not a “Classified Employee.”

14. The statute defining a “classified employee” specifically excludes personnel of the PDA, such as the Chairperson. Classified employees are defined in RSA 21-I:49. *See also Appeal of Westwick*, 130 N.H. 618, 623 (1988) (explaining the history and exceptions to the classified system).

15. RSA 21-I:49 exempts “[p]ersonnel of the Pease development authority” from the ranks of classified employees. RSA 21-I:49, VII. And they are further distinguished from “[t]hose appointed and commissioned by the governor or the governor and executive council.” RSA 21-I:49, II.

16. In short, reference to the plain terms of the applicable statutes shows that the Chairperson of the PDA is not a “classified employee.”

The State Does Not Avoid Dismissal By Couching the Offense as “Solicitation.”

17. That this crime is charged as the inchoate crime of criminal solicitation does not change the analysis. The inchoate crime of criminal solicitation “requires no overt act other than the offer itself” and the “statute does not require the State to plead and prove the elements of the solicited crime[.]” *State v. Carr*, 167 N.H. 264, 270 (2015). Nevertheless, the State must still prove the purposeful *mens rea*—“a purpose that another engage in conduct constituting a crime”—and an *actus reus*—“an attempt to persuade another to commit a specific offense,” RSA 629:2, I; *Carr*, 167 N.H. at 269-70.

18. In the context of the solicited crime of Misuse of Position, RSA 21-G:23, II, that means the State must prove that it was Justice Hantz Marconi’s purpose to solicit an “executive branch official or classified employee” to “[u]se his or her position with the state...to secure

governmental privileges or advantages for others to which they are not otherwise entitled.” But, as a matter of law and explained above, Chairperson Duprey is not an executive branch official or classified employee. Justice Hantz Marconi, like every citizen, is presumed to know the law. *Lennartz v. Oak Point Assocs., P.A.*, 167 N.H. 459, 464 (2015) (“every person is presumed to know the law and, therefore, to organize his or her conduct and affairs accordingly”).

19. Thus, since the State has not alleged the necessary mental state—that Justice Hantz Marconi had a purpose to solicit an executive branch official or classified employee—the State has not alleged the crime it purports to charge.

Conclusion.

20. The State alleges a violation of RSA 629:2 and RSA 21-G:23 which by their express terms applies only to “executive branch officials” and “classified employees.” Since the chairperson of the Pease Development Authority is neither an executive branch official nor a classified employee, the indictment fails to state a crime and this court should dismiss the indictment.

WHEREFORE, the defense respectfully asks that the court dismiss the indictment for criminal solicitation of misuse of position regarding Chairperson Duprey, CID 2257397C.

Dated this 4th day of April, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Guerriero, do hereby certify that Senior Assistant Attorney General Dan Jimenez and Assistant Attorney General Joseph Fincham are registered e-filers in the court's electronic filing system and that when filing this motion, I am electing for them to receive a copy of the document through the electronic filing system's system for electronic service.

/s/ Richard Guerriero