



LEBANON FAIR & IMPARTIAL POLICING TASK FORCE
OCTOBER 20, 2020 - 7:00 PM
REMOTE VIA MICROSOFT TEAMS
LEBANONNH.GOV/LIVE

1. Call to Order

The October 20, 2020 Fair & Impartial Policing Task Force Meeting is hereby called to order.

2. Acceptance of Minutes

- A. August 4, 2020
- B. September 1, 2020
- C. September 15, 2020
- D. September 29, 2020
- E. October 6, 2020
- F. October 13, 2020

3. New Business

- A. Discuss and Finalize Provision #9
- B. Fair & Impartial Policing Task Force Report and Vote on Recommended Changes to Lebanon Welcoming Ordinance

4. Open to the Public

5. Other Business

6. Adjournment

Due to the current situation with the COVID-19 Pandemic, the City of Lebanon is offering its meetings via Microsoft Teams. Members of the public are encouraged to attend by going to LebanonNH.gov/Live where you will find instructions on how to enter the meeting. Members of the public will be able to participate and ask questions through the Microsoft Teams software or by phone. Please visit LebanonNH.gov/Live for full details.

THE AGENDA, IN ITS ENTIRETY IS AVAILABLE ON THE CITY'S WEBSITE AT [LEBANONNH.GOV](https://LebanonNH.gov)

Provision 9: Enforcement

Initiation.

Any person who learns of a violation of this Ordinance may initiate a complaint. The complaint may, but does not need to, use a complaint form developed by the City, and may be made verbally or in writing to the City Manager, the City Council, or the Human Resources department. The recipient of this complaint, or an appointee of that recipient, shall make diligent inquiries into determining the facts of the situation, and shall impose the appropriate penalty. Appropriate penalties are as follows:

First Offense: A warning. The recipient of the complaint, or an appointee of that recipient, should review the Ordinance with the violator, discuss why the conduct was in violation of the Ordinance, and require the violator to sign a statement indicating that the violator understands the content of the Ordinance and nature of the violation and that the violator will comply with the Ordinance in the future. A copy of the complaint and the warning issued shall be kept on file with the City of Lebanon.

Second Offense: The violator will be notified that any further violations will result in automatic dismissal. The City Council will be sent a copy of the first and second complaints. At the discretion of the City Council, the violator may be: fined not more than \$250; required to perform community service; and/or given mandatory further education on the purpose of the Ordinance and impact of Ordinance violations.

Third Offense: Any person violating the Ordinance for a third time shall be dismissed from their position as an Agent of the City, and the City shall be prohibited from enlisting this person's services as an Agent in any position for any purpose.

Notwithstanding the tiered penalties above, any Agent of the City who knowingly shares information with Immigration & Customs authorities in violation of this Ordinance shall be automatically dismissed regardless of whether this is a first offense.

Failure to Report: Any Agent of the City who learns of a violation of the Ordinance and fails to report such a violation shall also be deemed to have violated this Ordinance.

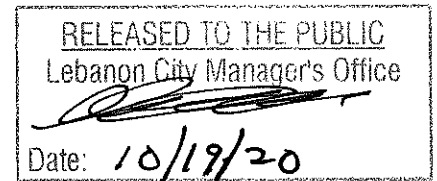
This Ordinance shall not be construed to create any private cause of action, or to form any basis of civil liability on the part of the City or its agents.

Potential add-ons, to discuss as a task force:

"If the complaint is made or referred to the City Council, the Council may in its discretion decide to proceed in executive session."

"Reasonable inquiries of the facts of the situation may, if facts are unclear, include a hearing before the City Council."

At very end: "Nothing herein shall be deemed to pre-condition or restrict subsequent or parallel proceedings in the Circuit Courts of New Hampshire, or to supplant any alternative remedies as may be available under existing state or federal laws."



Waugh Comments on the Enforcement
Section Draft Distributed 10-17-20

(Draft from Devin Wilkie, on behalf of Petitioners' Committee).

It is clear a lot of time and effort was spent on this proposal for Provision 9. Unfortunately I perceive a number of serious legal problems and concerns with this draft (the following items overlap somewhat with each other):

1. ***Non-differentiation between City employees and other "agents."*** The proposal fails to distinguish between violations by City employees and violations of non-employee agents of the City. (In fact, the draft appears – incorrectly – to assume that the City has the same authority in both realms).
 - a) ***Inconsistencies with Existing Personnel Policies.*** As applied to City employees, the proposal creates serious legal issues and concerns about any inconsistencies or overlap between the procedures set forth in this draft and existing procedures under existing personnel and disciplinary policies. Which would take precedence?
 - b) ***Potential Impact On Collective Bargaining Agreements.*** To any extent existing disciplinary procedures are covered by a collective bargaining agreement (an issue I have not checked on for Lebanon, but most CBA's do cover such issues somewhat), it could violate such an Agreement for the City to unilaterally alter those procedures.
 - c) ***State Law Removal Provisions.*** As applied to *non*-employee City agents such as elected or appointed officials, state law often prescribes both the procedure and criteria for removal, and many such laws vary substantially from the provisions of this proposal.
 - d) ***Other Agents.*** As applied to persons whose "agency" relationship to the City is created by a third-party contract (such as a supplier or paving company), it is highly questionable whether the City would have authority to dismiss such persons from their third-party employment (or, for example, to mandate a signed acknowledgement of the violation, as provided under "First Offense"). The City's relationship with such persons would be governed and limited by the applicable contractual relationship.
2. ***Questionable mixture of City authority with judicial authority.*** The proposal appears to presume that the City has authority to impose remedies which in reality can only be imposed by courts. For example, the draft calls for a fine of \$250 and/or community service for a "Second Offense." There is no legal authority in New Hampshire for a municipality to impose fines or community service as penalties. These can only be imposed by the court system, and only if the violation constitutes an "offense" under the

criminal code (and jurisdiction to impose uncompensated community service is itself limited, *see Chatman v. Brady*, 162 N.H. 362 (2011)). [Note: It is true that statutes such as RSA 31:39-c and 39-d (as cross-referenced in RSA 47:17-b) allow for municipal “administrative enforcement” of local ordinance including pleas-by-mail. But, even under those statutes, unless a person agrees to plead guilty, the ultimate trial and sentence is always under the jurisdiction of the court system, not the City itself. This proposal blurs that important distinction.]

3. ***Lack of clarity on who administers.*** To the extent the intent appears to be for the enforcement system to be administered by the City, it is unclear *who* within the City is to be responsible for that administration. Under this proposal a complaint may be filed in several different places, including directly with the City Council. Then the remainder of the administration appears to be up to “the recipient of the complaint, or an appointee of that recipient.” Other parts of the proposal are couched in the passive voice – for example saying that a violator “shall be dismissed” for a third offense, but without designating *who* makes that decision, or what the procedure is. In addition to the issues already raised, such lack of procedural clarity could lead to legal problems by allowing for inconsistent treatment by different complaint “recipients,” leading to possible claims of Equal Protection violations.
4. ***Potential Violations of City Charter.*** To any extent that the proposal appears to allow the Council itself to hold hearings concerning individual violations by City employees, it would violate the Lebanon City Charter, Sections C419:29, :30, :31 and :32. Those sections – among other things (and without going into full detail) – grant authority over appointments and removals to the City Manager, and prohibit the Council from interfering in such decisions.
5. ***“Progressive” penalties in general.*** I question the workability of a strict system of penalties based solely on whether the offense is first, second or third. In the related area of personnel policies, most governmental employers who insert “progressive discipline” procedures also make sure the employer has discretionary authority to bypass such procedures – for example, where a first offense is serious enough to warrant dismissal, or conversely where a later offense is significantly less serious. Legal problems arise where it turns out the type of discipline deemed appropriate by the employer turn out not to be permitted for a first offense (etc.)

Comments Concerning the “Potential add-ons”

- I am quite certain the first one (re: “executive session”) would be unlawful. The question of when and whether a governmental body can have a non-public session (“executive session”) is 100% governed by RSA Ch. 91-A, the “Right-to-Know Law.” Any attempt to locally modify the provisions of that law would be preempted.

- To any extent the first two “add-on” proposals contemplate the City Council becoming involved in hearings decisions pertaining to the employment status of particular City employees, in my opinion that would, as stated above, be a violation of the City Charter.
- The third “add-on” speaks of “parallel proceedings in the Circuit Courts....” Such language serves to bolster my concern under Comment #2 above, about the lack of clarity in this proposal on the issue of whether the ordinance is going to be enforceable internally by the City, versus also creating a violations offense resolvable through the Court system.

IN SUMMARY:

With due respect, I must conclude that in my view, from a purely legal standpoint, this new proposal raises *more* legal issues and problems than the version included with the 10/9/20 “Working Draft.”

In any event, however, the final version:

- A. Should be 100% clear about whether or not a violation offense is being created. If so, there needs to be a provision allowing internal discipline to be potentially put “on hold” pending the outcome of a court proceeding. If not, then the Welcoming Lebanon Ordinance should cross-reference existing personnel and disciplinary policies, rather than attempting to create parallel (and possibly inconsistent) procedures, or to impose remedies that only a court can lawfully impose.
- B. Should make a clear distinction between violations by employees versus violations by non-employee agents, and about what can happen in each case.
- C. Should keep the Council out of personnel hearings/decisions.

I hope the Task Force finds the above comments useful.
Sincerely,

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