

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

November 20, 2007

The Rhode Island Ethics Commission held its 20th meeting of 2007 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, November 20, 2007, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

James Lynch, Sr., Chair James C. Segovis

Barbara R. Binder, Vice Chair Frederick K. Butler*

George E. Weavill, Jr., Secretary Ross Cheit

James V. Murray

Also present were Kathleen Managhan, Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault and Commission Investigators Steven T. Cross, Peter J. Mancini and Steven Branch.

At approximately 9:10 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open

Session held on November 6, 2007. Upon motion made by Commissioner Murray and duly seconded by Commissioner Binder, it was unanimously

VOTED: To approve the minutes of the Open Session held on November 6, 2007.

***Commissioner Butler arrived at approximately 9:12 a.m.**

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Hank Kniskern, Chairperson of the Newport Waterfront Commission. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present. Staff Attorney DeVault noted that the petitioner had provided updated information regarding the number of moorings which, while originally reported as 750, number approximately 930 according to recent local news reports.

The petitioner indicated that he has been the Chairperson for approximately a year and a half and that they try to involve individuals who have knowledge of the harbor. He questioned at what point their expertise and involvement with the harbor would become a conflict, noting that almost all of the members have roughly

the same issues. Commissioner Cheit stated his agreement with the Staff's analysis regarding jurisdiction but suggested that the proposal is really only advisory. Staff Attorney DeVault replied that it is advisory, but such conduct is subject to the Code. Commissioner Cheit stated his belief that it is not reasonably foreseeable that the petitioner's actions would affect him since he is not making the decision. He recalled a prior matter involving the Providence Historic District Commission where the Commission looked at the fact that the public body was just advising, not making decisions.

Staff Attorney DeVault advised that although the City Council makes the final decision it receives significant input from the Waterfront Commission, which carries great weight to the extent that the Commission is effectively engaging in policy-making. Commissioner Cheit disagreed and stated that he is unclear why the Commission has to decide this since in the Providence matter it said that the body was just advisory. In response to Commissioner Weavill, the petitioner explained that a quarter of all moorings are designated as commercial. The largest commercial holder will lease to seasonal and transient mooring holders. He indicated that it is set up so there will be a certain number available to visitors. He noted that Connecticut and Massachusetts have similar constructs.

In further response, the petitioner represented that he does not personally own a commercial mooring, which tend to cost three to five times as much as a private mooring. He rents a mooring from

Old Port Marina. Commissioner Weavill inquired if an increase in the fee would have a significant personal effect on him. The petitioner advised that there is a fee increase every few years and noted that the increase for commercial moorings relates to rising prices for fuel and steel. He explained that the City uses a different multiplier for increases in private mooring fees, using an example of respective increases of ten, fifteen and twenty percent for private, private non-residential and commercial moorings.

In response to Commissioner Weavill, the petitioner estimated that the seasonal costs of \$4,000 for his 45 foot sailboat would be about \$800 if he had a private mooring. Commissioner Weavill stated that the petitioner would be specifically impacted if there were to be a mooring fee increase. Commissioner Binder stated her agreement with Commissioner Cheit that this action of the Waterfront Commission is only advisory.

Staff Attorney Gramitt advised that taking any part in the process is considered decision-making under the Code and provided examples, including legislative committees who are advisory to the full House or Senate. Commissioner Cheit countered that in the prior Providence Historic District complaint the Commission said the body was purely advisory. Commissioner Binder stated that the only component that is not advisory is its function as an appellate body. Staff Attorney Gramitt analogized to the Commission's advisory opinion function. Commissioner Cheit suggested that the Commission should only

decide when people are taking final action, noting that the City Council can do what it wants.

Executive Director Willever expressed that the fact people wait up to twenty years for moorings shows that it is an important issue. He noted that other members of the body have similar issues and suggested that ruling on this matter would provide guidance to others. Commissioner Cheit endorsed the idea of the Waterfront Commission having people with expertise on it and stated that if the Chair has been on a waiting list for five years it shows that they are acting above board. Upon motion made by Commissioner Weavill and duly seconded by Commissioner Butler, it was

VOTED: To issue an advisory opinion, attached hereto, to Hank Kniskern, Chairperson of the Newport Waterfront Commission.

AYES: James Lynch, Sr., Frederick K. Butler, George E. Weavill, Jr., James C. Segovis and James V. Murray.

NOES: Ross Cheit and Barbara R. Binder.

The next advisory opinion was that of Kathleen Magill, a member of the Personnel Board of the City of Pawtucket. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Weavill, Staff Attorney

DeVault advised that the petitioner had represented that there were seven wards, with between eight and twelve members in each. Commissioner Weavill commented that in some jurisdictions those committees would be very small. Commissioner Weavill inquired if Staff had discussed the role of patronage with the petitioner. Staff Attorney DeVault stated that she had general discussions regarding the endorsement of candidates. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Segovis, it was unanimously

**VOTED: To issue an advisory opinion, attached hereto, to
Kathleen Magill, a member of the Personnel Board of the
City of Pawtucket.**

The next order of business was a Motion in Hearing in the matter of In re: William V. Irons, Complaint No. 2004-1. The hearing was stenographically recorded and the transcript is available at the Commission Offices. Commission Prosecutor D'Arezzo advised that by stipulation the parties have waived oral argument and requested that the Commission issue its decision based upon on the submitted memoranda. The Commission considered the Respondent's Motion to Implement Demand for Jury Trial and Motion to Dismiss, and the Prosecution's Objections Thereto.

At Chair Lynch's request, Legal Counsel Managhan advised the Commission regarding the issues before it and whether it has the

ability to make determinations of facial unconstitutionality. She stated that if the Commission can determine issues on non-constitutional grounds it ought to do so. She advised that the Commission should decline to rule on allegations of facial statutory unconstitutionality and should carefully consider whether it wishes to rule on the Speech in Debate issue. She advised the Commission not to address the facial constitutionality issue presented by Speech in Debate and leave it to the courts. In response to Commissioner Cheit's comment that the Superior Court could hear the matter after the Commission decides, she indicated that if the Commission were to dismiss the case on Speech in Debate grounds there would still be the question of whether the Prosecution may appeal such a dismissal on its own.

As to the Respondent's Motion to Dismiss based upon application of the Speech in Debate clause, upon motion made by Commissioner Cheit and duly seconded by Commissioner Segovis there was discussion. Commissioner Cheit stated that he does not believe the case is identical to the Montalbano matter because the actual charges do not reference the votes. Upon the motion, it was unanimously

VOTED: To deny Respondent William V. Irons' Motion to Dismiss.

As to the Respondent's Motion to Implement Demand for Jury Trial, Legal Counsel Managhan advised that granting the motion would divest the Commission of its jurisdiction over the matter. She

indicated that it almost constitutes a facial challenge given that the statutes do not provide for a jury trial. Upon motion made by Commissioner Weavill and duly seconded by Commissioner Binder, it was unanimously

VOTED: To deny Respondent William V. Irons' Motion to Implement Demand for Jury Trial.

John A. Tarantino, Respondent's counsel, addressed the Commission and stated that the Speech in Debate clause provides absolute immunity from prosecution, which would preclude the Commission from going forward. He requested that the Commission stay the proceedings so that he may obtain relief from the courts. Commission Prosecutor D'Arezzo objected to issuance of a stay, noting that the Prosecution would afford the Respondent a reasonable period of time in which to file his appeal. Upon motion made by Commissioner Weavill and duly seconded by Commissioner Segovis, it was unanimously

VOTED: To deny Respondent William V. Irons' Motion to Stay Proceedings.

At approximately 10:21 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Weavill, it was unanimously

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (a)(4), to wit:

a.) Motion to approve minutes of Executive Session held on November 6, 2007.

**b.) Status Update: Schubert, et al. v. Willever,
Superior Court C.A. No. 07-3733**

c.) Motion to return to Open Session.

The Commission reconvened in Open Session at approximately 10:30 a.m. Chair Lynch reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on November 6, 2007; and 2) received a status update on Schubert, et al. v. Willever, Superior Court C.A. No. 07-3733, which has been dismissed with prejudice.

The next order of business was a motion to seal minutes of the Executive Session held on November 20, 2007. Upon motion made by Commissioner Segovis and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To seal minutes of the Executive Session held on November 20, 2007.

The next order of business was approval of the Tentative 2008 Commission Meeting Schedule. Senior Staff Attorney D'Arezzo informed that the schedule could be amended as needed. She noted that Legal Counsel Managhan has informed that she will be unavailable for the February 12th date and inquired whether the Commission wished to obtain former Legal Counsel William Conley as a substitute. There being no objection, the Staff advised that it will contact Mr. Conley.

The next order of business was the Director's Report. Executive Director Willever reported that there are seven complaints and two advisory opinions pending. He informed that all of the non-filing Complaints have been settled and stated that there has been one formal APRA request granted since the last meeting. Director Willever complimented the Legal Staff for their participation in ethics education programs. He noted that Roger Williams Law School recently requested Staff Attorney DeVault to participate in a career night workshop.

In response to Commissioner Cheit's inquiry regarding the budget situation, Director Willever reported that he had recently met with the Governor's Executive Counsel and just yesterday met with the Governor's Budget Officer. He advised that he does not anticipate any cuts and informed that the Governor's prior proposal to add two staff members did not get approved. He stated that the Commission received a cut of approximately \$28,000 from the enacted budget

amount, but would be able to accommodate it by moving resources from one area to another.

Senior Staff Attorney D'Arezzo advised that the Commission did not employ its audio recording device today, given that Staff must attempt to segregate portions of the last meeting's open session to respond to a forthcoming APRA request. She informed that the flash card contained recordings from more than one meeting and she wanted to preserve the record. In response to Commissioner Weavill, she stated that she has infrequently had occasion to review the audio to confirm a member's vote. In response to Chair Lynch, she expressed her belief that the difficulties encountered with its use outweigh the benefits of continuing its use. After discussion among the members, upon motion made by Commissioner Weavill and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To discontinue use of the audio recording device.

Commissioner Weavill inquired if the Commission would be in a position to resume rule-making after January 1st. Director Willever indicated that it would, but he also stated that further proceedings in a case heard today would require the allocation of personnel resources to other areas. He estimated that between \$55,000 and \$75,000 was spent in terms of salaries, stenography and other costs in the Montalbano case, as well as the substantial time of the attorneys involved. He stated that he would have to devote similar

assets, if not more, to the Irons matter as it proceeds. Director Willever advised that he is looking at a mid-January target date to start the regulatory workshops, with the involvement of one designated Staff Attorney. Commissioner Weavill expressed his concern that there are some issues that the Commission is ready to proceed on, or which would not require much work, and he would like to see it completed if there are going to be changes in the membership.

The next order of business was New Business. There being none, at approximately 10:50 a.m., upon motion made by Commissioner Butler and duly seconded by Commissioner Binder, it was unanimously

VOTED: To adjourn the meeting.

Respectfully submitted,

George E. Weavill, Jr.

Secretary