

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

February 12, 2008

The Rhode Island Ethics Commission held its 4th meeting of 2008 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, February 12, 2008, 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 V. Murray
Barbara R. Binder, Vice Chair Frederick K. Butler
Ross Cheit., Secretary Deborah M. Cerullo SSND
Richard E. Kirby* J. William W. Harsch**

Also present were William J. Conley, Jr., Alternate 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 and Peter J. Mancini.

At approximately 9:04 a.m., the Chair opened the meeting. Chair Lynch introduced newly appointed Commission members Deborah M.

Cerullo SSND and J. William W. Harsch and administered the oath of office to them. The first order of business was a motion to approve minutes of the Open Session held on January 29, 2008. Upon motion made by Commissioner Binder and duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve the minutes of the Open Session held on January 29, 2008.

ABSTENTIONS: Frederick K. Butler, Deborah M. Cerullo SSND and J. William W. Harsch.

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 the Town of Smithfield Zoning Board of Review. Town Solicitor Joseph A. Abbate was present. Staff Attorney Gramitt presented the Commission Staff recommendation.

***Commissioner Kirby arrived at 9:08 a.m.**

Staff Attorney Gramitt explained the background to the instant request, namely the recent issuance of two advisory opinions requiring the recusal of two Zoning Board members and the Commission's rejection of a draft opinion provided to a third member.

He advised that the procedure set forth in the draft for applying the

Rule of Necessity is drawn from and consistent with that set forth by the Rhode Island Supreme Court in Poirier v. Martineau. He stated that, while George McKinnon must remain disqualified as a party, the other two members who do not have any personal financial interest would have their names drawn to determine who will participate. The participating member would then complete option B on the recusal form.

Commissioner Kirby commented that the Poirier decision was prior to the establishment of the Commission and that the Attorney General's opinion applying the Rule of Necessity to the Commission was based upon an assumption that the Commission should not determine who shall participate among its own members. He suggested that the Commission should determine who has the least conflict among the members of the Zoning Board, rather than abdicate its authority. Staff Attorney Gramitt replied that he does not believe anything in Poirier or the Attorney General's opinion specifically prohibits the Commission from doing so. He explained that he crafted a procedure to mirror what the courts have previously approved.

Commissioner Cheit noted that at the time of the Poirier decision there would have been no box B to check off on a recusal form and stated that he finds such a declaration to be puzzling. He inquired what would happen if the official whose name is drawn were to state that he or she is biased and cannot complete box B. Commissioner Cheit expressed that if the Commission were to designate who has

the lesser conflict, the selected official could state that the Commission made that determination. Staff Attorney Gramitt indicated that requiring the participating official to complete box B on the recusal form is something the Commission has always required in past opinions applying the Rule of Necessity.

Commissioner Cheit stated that two of the members had conflicts that were more technical than the member who is a party. Commissioner Butler inquired if the Commission could obtain statements from those whose names would be drawn, prior to the drawing, indicating that they would be able to fairly participate if they were chosen. He also questioned whether the statute requiring the participation of all five members had its own Rule of Necessity provision, but he then noted that Legal Counsel was indicating to the contrary. He stated that he would not have a problem proceeding in the manner set forth in the draft if the Commission could ascertain beforehand that the two members would be able to check box B.

Commissioner Harsch noted a recent situation in Cranston which required application to the legislature and asked if the Town had considered such action. Solicitor Abbate replied that it was being considered but involves a long process. He advised that there needs to be a change in legislation to allow the municipality to appoint another alternate. In response to Commissioner Harsch, Staff Attorney Gramitt noted that application to the legislature would be preferable, but it would not be an option that could be effectuated

within the necessary time frame. Commissioner Binder agreed with Commissioner Kirby that the Commission should not set precedent and abdicate its responsibility. Commissioner Cheit commented that he believed Mr. Kovolski was less conflicted. Commissioner Kirby stated that Mr. Kovolski's relationship to the applicant was rather tenuous. He agreed with Commissioner Harsch's point regarding application to the legislature.

Chair Lynch voiced his agreement with Commissioners Kirby, Binder and Cheit. He expressed that it is the Commission's responsibility to determine who may participate, but he also stated that he agreed with the Staff recommendation based on these facts. He suggested that perhaps the Commission should take regulatory action to spell out the procedure for applying the Rule of Necessity. Staff Attorney Gramitt indicated that the Commission could select the individual it believes has the lesser conflict or it could consider the Kovolski opinion again. Commissioner Cerullo stated that it is the Commission's responsibility to determine who shall participate.

Commissioner Cheit suggested that the Commission go forward with the procedure outlined in the draft, with an amendment to state that it has made a factual determination that both members whose names would be subject to a drawing are similarly situated and have technical conflicts. Staff Attorney Gramitt advised that he could prepare a paragraph finding that both situations are similar, with no direct financial benefit to either petitioner, therefore justifying the

following procedure. Commissioner Cheit stated that it would allow the chosen individual to check box B and state that the Commission had made a factual determination. Commissioner Cerullo requested clarification as to whether the opinion would apply the Rule of Necessity. Commissioner Cheit replied that it would, with the statement that the Commission had made a factual determination.

Upon motion made by Commissioner Kirby and duly seconded by Commissioner Binder to adopt the draft opinion as amended, there was discussion. Commissioner Cerullo expressed that she is uncomfortable, perhaps because she did not participate with respect to the prior advisory opinions. She stated that her reaction is to want the Commission to note the factual differences. Upon the original motion, it was

VOTED: To issue an advisory opinion, as amended and attached hereto, to the Town of Smithfield Zoning Board of Review.

AYES: James V. Murray, Ross Cheit, Barbara R. Binder, J. William W. Harsch, Frederick K. Butler, Richard E. Kirby and James Lynch, Sr.

NOES: Deborah M. Cerullo SSND.

The next advisory opinion was that of Amy Grzybowski, a Homeland Security Grant Manager for the Rhode Island Emergency Management Agency. Staff Attorney Leyden presented the Commission Staff

recommendation. The petitioner was present. In response to Commissioner Binder, the petitioner informed that she has a supervisor above her and there is a grant auditor. She advised that her agency is told which grants it may seek under the guidelines, which are based on factors such as population and security risks. In response to Commissioner Binder, Staff Attorney Leyden stated that the draft is based upon the petitioner's express representation that she would only be working on grants for which Rhode Island is not eligible and for education grants, which her agency does not handle. The petitioner clarified that she would not apply for any grants for which Rhode Island would be eligible. She further represented that she would notify the appropriate state agency if there were available education grants.

In response to Commissioner Kirby, the petitioner represented that her name is on the grant application as the point of contact, but the grant would be to the Rhode Island EMA. In response to Commissioner Cheit, she stated that she is not related to Jeff Grybowski. Commissioner Harsch inquired if it were the Commission's policy to discuss the situation with the petitioner's superior. Staff Attorney Leyden explained that the Legal Staff relies upon the petitioner's representations and that advisory opinions are not investigative proceedings. She clarified that it is not her practice to talk with a petitioner's supervisor or former employer. Executive Director Willever advised that Commission regulation provides that advisory opinions are not the result of adversary or investigative

proceedings and that the petitioner alone is responsible for the information submitted in the written request.

Commissioner Cheit advised that there have been several matters where members of the public have come to the meeting and hope to present information on advisory opinions. He commented that there is a potential to turn advisory opinions into fact finding matters which could potentially overwhelm the Commission. He stated that the protection of the opinion goes only as far as what the petitioner represented.

Commissioner Butler agreed and reiterated that the safe harbor of the opinion is only as good as the information provided. He also noted that the opinions state that they only opine as to the application of the Code and do not address any agency or employment rules. Commissioner Kirby suggested that if the Commission were to engage in fact finding at the opinion level and activity were discovered that would violate the Code, it could potentially insulate the petitioner later on. Commissioner Murray expressed that advisory opinions are limited to the ethical question presented and contain limiting language with respect to application of workplace rules or, for attorneys, the Code of Professional Responsibility. Staff Attorney Leyden added that if the petitioner's conduct exceeds her express representation, she loses the protection of the opinion. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Amy Grzybowski, a Homeland Security Grant Manager for the Rhode Island Emergency Management Agency.

The next advisory opinion was that of Chief Thomas D. Gordon, Chief of Police for the Town of Warren. Staff Attorney DeVault presented the Commission Staff recommendation. She explained that the matter had been continued to obtain additional information regarding the examination and a letter from the Town Manager regarding the alternate chain of command. Commissioner Cheit stated that the additional information makes him more troubled. He commented that the petitioner recognized the conflict and created a solution for post-hiring, yet had two subordinates administer an oral exam, which mattered and was subjective. He expressed that if Rhode Island has a nepotism problem it has to do with the hiring process. Commissioner Kirby stated that the petitioner advised that he set up the process because he knew his son-in-law would be applying.

Commissioner Binder observed that the procedure still has the petitioner's subordinates dealing with discipline. Chair Lynch expressed that he is more concerned now that he has the Town Manager's letter. He noted that serious disciplinary issues would be dealt with by a lieutenant and then turned over to the Town Manager. He stated that he would not be able to approve the opinion. Commissioner Kirby inquired who would be in violation of the Code if the procedure were to go forward. Commissioner Cheit indicated his

belief that any potential complaint would be against the petitioner. He commented that in the cited past precedents the individuals were either already on the force or seeking part-time seasonal employment.

In response to Commissioner Kirby, Staff Attorney Gramitt stated that in his educational seminars he advises the municipalities that the Commission will look at a proposed alternate chain of command, but he noted that he makes it clear that it also applies to the hiring process. Commissioner Binder stated that she understood why the police department would require an assessment from their point of view. Commissioner Cheit commented that if they do, they should not be hiring their relatives. In response to Commissioner Binder, Staff Attorney DeVault advised that the petitioner provided the spreadsheet detailing the scoring of the examination and the Town Manager provided the letter. In response to Commissioner Harsch, Commissioner Kirby advised that the Commission directed the Staff to obtain this additional information at the last meeting. Chair Lynch clarified that the Town Manager's letter was needed given that the petitioner represented that he would take over the chain of command. Upon motion made by Commissioner Murray and duly seconded by Commissioner Kirby, it was

VOTED: To issue an advisory opinion to Chief Thomas D. Gordon, Chief of Police for the Town of Warren.

AYES: None.

NOES: James V. Murray, Ross Cheit, Barbara R. Binder, Deborah M. Cerullo SSND, Frederick K. Butler, Richard E. Kirby and James Lynch, Sr.

ABSTENTION: J. William W. Harsch.

Commissioner Harsch stated the he abstained because he had not heard the Commission's prior discussions in this matter.

The next advisory opinion was that of Michael Mello, the Building Official for the Town of Little Compton. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Binder, Staff Attorney DeVault informed that the petitioner specifically represented that he would not work for a general contractor who regularly comes before him. Commissioner Cheit suggested that he should not work for a general contractor who ever comes before him. Commissioner Binder expressed that she would be comfortable with the petitioner laying flooring but she has concerns regarding other language in the draft.

In response to Commissioner Cheit, Staff Attorney DeVault informed that the arrangement with other municipal building officials is not statutory. Commissioner Kirby noted that a town charter may provide

for such an arrangement if the local official has a conflict. Commissioner Cheit stated that he has no problem with the petitioner laying flooring but he stated that the language regarding the petitioner working for a general contractor troubles him. He expressed that the petitioner should not get into that situation. Staff Attorney DeVault noted that the draft could be amended. Commissioner Kirby stated that the petitioner should not handle anything requiring a permit. Chair Lynch suggested that the petitioner should be present. Commissioner Kirby indicated that they could approve an amended opinion that makes it clear he can perform work that would not require a permit and he could return for further guidance if he wished to do more.

Commissioner Cerullo inquired regarding the potential for the petitioner to approve or disapprove work involving his competition. She suggested that the petitioner should be present to answer questions. Commissioner Butler agreed that he would not want him to be in a position to disapprove his competitors' work. Commissioner Binder commented that she is not comfortable with the language in the first paragraph on page three. Chair Lynch indicated that the Commission could approve his work on matters not requiring a permit. Commissioner Cheit stated that it would not address their concerns. Upon motion made by Commissioner Kirby and duly seconded by Commissioner Butler to table the advisory opinion so that the petitioner may be present to answer questions, there was discussion. Commissioners Kirby and Butler amended the

original motion to also withdraw the safe harbor. Upon the amended motion, it was unanimously

VOTED: To withdraw safe harbor and table the advisory opinion so that the petitioner may be present to answer questions.

The next advisory opinion was that of Frederick C. Stachura, a member of the Tiverton Planning Board. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. Commissioner Cheit inquired as to Tiverton's ability to appoint new Board members. Commissioner Kirby advised that Planning Board membership is set by Charter, whereas state statutes control Zoning Board membership. Upon motion made by Commissioner Binder and duly seconded by Commissioner Kirby, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Frederick C. Stachura, a member of the Tiverton Planning Board.

At 10:41 a.m., upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

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

a.) Motion to approve minutes of Executive Session held on January

29, 2008.

b.) Motion to return to Open Session.

The Commission reconvened in Open Session at approximately 10:55 a.m. Chair Lynch reported that the Commission approved the minutes of the Executive Session held on January 29, 2008. * Commissioner Kirby left the meeting at 10:55 a.m. Chair Lynch stated that the Commission would take a few moments to review correspondence just received via email from Representative Douglas W. Gablinske.

The next order of business was Discussion of 2008 Legislation. Staff Attorney Gramitt reported that he has identified two bills that relate to the Commission. He advised that the Government Integrity and Public Accountability Act of 2008, H-7139, would make it a felony for a public servant to engage in or attempt to engage in conduct depriving the public of the right to his or her honest services. He also noted that S-2195 apparently intends to clarify what must be disclosed as income on general officers' financial statements. He stated that the Staff has generally advised that if you declare it as income for tax purposes, it is income for financial disclosure. However, he pointed out that although Legislative Council's explanation is clear, the actual language of the amendment is not. *Commissioner Kirby returned to the meeting at 11:02 a.m. Staff Attorney Gramitt advised that he would offer his assistance to help draft the amendment more clearly,

if the Commission wishes. In response to Chair Lynch, no objections were voiced. Staff Attorney Gramitt stated that if the bill moves forward he will contact the sponsor to clarify its intent and offer his assistance.

The next order of business was Discussion and public comment concerning a proposed regulation regarding Officers of Public Agencies. Staff Attorney Gramitt noted that the members had received a letter from Chuck Barton of Operation Clean Government (OCG) regarding the proposal, as well as an email communication from Representative Gablinske. Staff Attorney Gramitt advised that Representative Gablinske had raised the same issues when he provided ethics training to the House a week and a half ago and indicated his belief that he had answered the Representative's questions at that time. Commissioner Cheit expressed his surprise that the Representative believes that the Commission should ignore the law as it is currently written.

As to OCG's letter, Staff Attorney Gramitt stated that he received it after he tinkered with the last version of the proposal and noted that state and municipal agency are defined terms in the Code. Chair Lynch stated his belief that the proposal addresses the concerns of those who came before the Commission. Commissioner Cheit inquired whether such a vote could only happen in Open Session. Staff Attorney Gramitt replied that he thinks that is true. He suggested that the Commission balance the exception and require

that the vote occur in Open Session. In response to Commissioner Kirby, he advised that the Commission has always said that a public body can take a vote to increase a stipend, but the stipend cannot take effect until after the next election.

Commissioner Butler asked what would happen if the votes were separated, with the vote for the Chair's stipend occurring first, followed by the vote for the Chair. Staff Attorney Gramitt suggested that it would be a cleansing event since there would be no guarantee that the person who voted would receive the stipend. Chair Lynch asked if any member of the public wished to comment. Beverly Clay of OCG addressed the Commission and expressed her belief that the wording does not require the vote to be held in Open Session. Commissioners Kirby and Cheit replied that such a vote would have to take place in Open Session pursuant to the Open Meetings Act.

Commissioner Cheit expressed his extreme disappointment with Representative Gablinske's communication given that the legislator is aware that the Commission is about to change the rule to make it clear that a public official may vote for him or herself as Chair. Staff Attorney Gramitt advised that the Staff will begin the APA process and advertise the proposals for public hearing on March 25th. He also noted that the public will be able to provide comment via email. He clarified which four proposals would be posted for public hearing. Commissioner Cheit inquired if the proposals adequately address the concerns previously raised by the Rhode Island League of Cities and

Towns. Staff Attorney Gramitt replied that he believes that they do and advised that the Staff has not received any comments against adoption. Commissioner Cheit inquired if there were any reason why a Commissioner should not reply to Representative Gablinske's communication. Chair Lynch expressed that it would be appropriate to do so.

The next order of business was the Election of the Secretary. Chair Lynch asked for nominations. Commissioners Kirby and Binder nominated Commissioner Cheit. Upon motion made by Commissioner Binder and duly seconded by Commissioner Butler, nominations were closed and it was unanimously

VOTED: To elect Ross Cheit as Secretary.

ABSTENTION: Ross Cheit.

The next order of business was the Director's Report. Executive Director Willever welcomed Commissioners Cerullo and Harsch to the Commission and thanked former Commissioners Segovis and Weavill for their service. He reported that there are six complaints and six advisory opinions pending. He informed that there have been no formal APRA requests since the last meeting. In response to Commissioner Cheit, he noted that Legal Counsel's contract expires on June 30th. Commissioner Cheit suggested that the Commission could advertise in May and conducts its interviews in June. Director

Willever noted that the process is at the Commission's discretion and the Staff is available to provide administrative assistance.

The next order of business was New Business. There being none, at 11:29a.m., upon motion made by Commissioner Kirby and duly seconded by Commissioner Binder, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

Ross Cheit
Secretary