

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

May 20, 2008

The Rhode Island Ethics Commission held its 10th 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, May 20, 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 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 and Peter J. Mancini.

At approximately 9:03 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open

Session held on May 6, 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 May 6, 2008.

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 Robert La Fazia, a Johnston School Committee member. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present. In response to Commissioner Cheit, the petitioner indicated that the current mayor informed him that, if he were elected, he would put him back on the tow list. Commissioner Cheit expressed that the process seems strange and wrong and questioned whether other towns operate the same way.

The petitioner represented that he had been on the Town's tow list for thirty years, as well as the State Police's tow list. In response to Commissioner Cheit, he stated that there are others in town that are eligible but are not on the list. In response to Commissioner Kirby, the petitioner acknowledged that he could be off the list if he were to cross the mayor. In response to Commissioner Cerullo on the

second issue, the petitioner stated that, as a member of the School Committee, he would not have knowledge of bids submitted by others. The petitioner informed that he would provide an initial repair estimate, but that there would be a supplemental estimate after the vehicle was taken apart and examined. He confirmed that he does not know who the other bidders are or information relative to their bids. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Binder, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Robert La Fazia, a Johnston School Committee member.

The next advisory opinion was that of Samuel C. Paterson, Harbormaster of the Town of Jamestown. Commissioner Harsch recused and left the meeting. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present with Mark Liberati, Esq. Attorney Liberati advised that this is a part-time job and that the petitioner only performs routine maintenance repairs on existing moorings to supplement his income. He suggested that the scope of such work would fall within the line of prior opinions addressing part-time work by building inspectors. He represented that it would not impact the petitioner's discretionary authority, as the Harbormaster is not charged with inspecting moorings. He stated that another harbormaster and/or the Executive Director could handle any matter if a dispute arose.

Chair Lynch observed that § 6(k) of the Harbor Ordinance indicates that the petitioner is responsible for mooring inspections. Attorney Liberati replied that all new moorings shall be inspected, but he noted that the petitioner does not get involved with new moorings in his private capacity. He added that the petitioner does not inspect existing moorings and is not charged with doing so by the ordinance.

In response to Commissioner Kirby, the petitioner explained that he would issue the permit for a new mooring and the owner would obtain contractors for installation. He confirmed that he does not go down and perform an initial inspection. In further response to Commissioner Kirby, the petitioner stated that there is a waiting list for moorings, whereby individuals sign up and are issued moorings in order based upon the list.

***Commissioner Butler arrives at 9:34 a.m.**

The petitioner represented that there is no discretion to deviate from the list. In response to Chair Lynch, the petitioner informed that the other harbormaster is his co-equal and could handle any dispute that arose. Chair Lynch expressed concern that the Commission does not have anything in writing from the other harbormaster indicating his agreement to do so. Commissioner Cheit expressed that Option A seems to be the choice to approve, given that under Option B it is not clear how his independence of judgment might be impaired as to the performance of his duties. Staff Attorney DeVault indicated that the petitioner might be in a position to respond to a situation involving

his ongoing clients if something were happening on the water that needed an immediate response. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

VOTED: To adopt Option A.

***Commissioner Harsch returns to the meeting.**

The next advisory opinion was that of Lynn Ceglie, a potential candidate for the Newport School Committee. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present. Upon motion made by Commissioner Binder and duly seconded by Commissioner Kirby, it was unanimously

VOTED: To issue an advisory opinion, as attached hereto, to Lynn Ceglie, a potential candidate for the Newport School Committee.

The next advisory opinion was that of Representative Joseph A. Trillo, a member of the Rhode Island House of Representatives. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was present. Staff Attorney Gramitt explained that he spoke with the petitioner and discussed the likely draft response, after which the petitioner took official action prior to receiving the draft opinion. He advised that it is within the Commission's discretion whether it wishes to issue the opinion, but the issue is

nonetheless relevant to the upcoming workshop on the class exception. In response to Commissioner Kirby, Staff Attorney Gramitt noted that the reference to a “tax credit” on page two should read “premium credit.”

The petitioner advised that most insurance companies already issue credits for installing fire equipment. He explained that he had already introduced the bill when Providence Business News contacted him about the impact of the legislation and questioned whether he had a conflict. He stated that the legislation was postponed for hearing so that he could seek an opinion. He represented that, after speaking with Staff Attorney Gramitt, he felt comfortable with his participation. He noted that the bill is presently in the Senate but, if necessary, as the sponsor of the bill he can kill it. Commissioner Cheit stated that he hoped the petitioner would come back for the class exception workshop. Chair Lynch expressed his agreement with the draft opinion. Commissioner Cheit indicated that the petitioner has safe harbor with respect to his vote.

In response to Commissioner Kirby, the petitioner explained that the legislation simply mandates the issuance of credits that most insurance companies already provide. He noted that insurance companies testified in favor of it. Commissioners Cheit and Kirby expressed that the Commission should vote on the opinion. In response to Commissioner Kirby, Staff Attorney Gramitt clarified that the petitioner’s vote occurred in between their telephone

conversation and issuance of the safe harbor letter. In response to Legal Counsel Managhan, the petitioner stated that he still wants the opinion. Legal Counsel Managhan questioned whether the issue is now moot. The petitioner advised that the bill can be amended and come back from the Senate. Upon motion made by Commissioner Kirby and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Representative Joseph A. Trillo, a member of the Rhode Island House of Representatives.

The next advisory opinion was that of Margie M. Caranci, the Recording Clerk for the North Providence School Committee. Staff Attorney Leyden presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Harsch, Staff Attorney Leyden informed that this is a part-time position. She stated that the petitioner did not represent how much the position pays or whether it is her sole source of income. She noted that the petitioner was appointed by the School Committee in 1993. Commissioner Harsch expressed that he is troubled by the advantage the petitioner has by having held a job in the field because that is part of the credentials she offers as a candidate. He also stated that he is concerned with the distinction between allowing her to run while holding the job and requiring her to step down if elected.

Commissioner Kirby replied that those concerns would seem to apply to incumbents, also. He noted that the petitioner's experience as clerk could be a two edged sword, as some people may attribute the things they do not like about the School Committee to her. Chair Lynch stated that such concerns would seem to fall under the election laws. Commissioner Cheit suggested that there could be an ethics issue if the petitioner were using inside information from which she could profit. Chair Lynch agreed with Commissioner Harsch that the petitioner's position gives her an advantage, but stated that it is not prohibited by the Code. Commissioner Butler indicated that her extra credentials could be an advantage or a disadvantage.

In response to Commissioner Cheit, Commissioner Harsch stated that he questions why the petitioner would have to resign if her running for the position is not itself prohibited. He also noted that she attends executive sessions and would be privy to confidential information. Commissioner Cheit stated that any incumbent would also have such information. Commissioner Cerullo suggested that it might be helpful to include cautionary language in the opinion regarding the disclosure of confidential information. Chair Lynch indicated that he sees the potential for problems under certain scenarios, but not based upon the facts presented. Upon motion made by Commissioner Butler and duly seconded by Commissioner Binder to approve the draft opinion, there was discussion.

Commissioner Kirby stated that Commissioner Harsch raises good

points, but he would vote to approve the opinion because he does not want there to be a chilling effect of discouraging individuals from running for public office. Commissioner Cerullo indicated that the petitioner's resignation would not solve any problems at this point because she already had access to confidential information. In response to Commissioner Cheit, Staff Attorney Leyden advised that the Code would prohibit the petitioner from holding the clerk's position while serving on the School Committee. Upon the original motion, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Margie M. Caranci, the Recording Clerk for the North Providence School Committee.

ABSTENTION: J. William W. Harsch.

At approximately 10:09 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Cheit, it was unanimously

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

a.) Motion to approve minutes of Executive Session held on May 6, 2008.

b.) Preliminary Investigation No. 2008-1.

c.) Motion to return to Open Session.

The Commission reconvened in Open Session at approximately 11:05 a.m., without the presence of Commissioner Kirby. The next order of business was a Motion to Seal minutes of the Executive Session held on May 20, 2008. Upon motion made by Commissioner Binder and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To seal the minutes of the Executive Session held on May 20, 2008.

Chair Lynch reported that in Executive Session the Commission approved the minutes of the May 6, 2008 Executive Session and also received a report on Preliminary Investigation No. 2008-1.

The next order of business was Discussion regarding the Commission's Policy Regarding Initial Determinations. Senior Staff Attorney D'Arezzo provided an overview of the policy, which was adopted by the Commission in 1993. Commissioner Murray noted that this is a fifteen-year-old policy and expressed his concern that the policy states that dismissals shall be without prejudice. He advised that there is no statute of limitations and that there are cases where the Commission should have the discretion to dismiss with

prejudice. Senior Staff Attorney D'Arezzo explained that, prior to June 2001, all such dismissals were without prejudice. She read from the draft minutes of a June 2001 initial determination in which the Commission members raised the issue of whether dismissal should be with or without prejudice. After discussion among the members, and with Legal Counsel's input, the Commission had noted that the policy needed to be updated, although it took no subsequent action to do so.

Commissioner Murray stated that he would like to see the Commission have discretion regarding dismissals on a case-by-case basis. Commissioner Cerullo expressed her concern that the phrasing of the actual dismissal notice reflect that more than just a four corners review of the allegations was conducted. Senior Staff Attorney D'Arezzo stated that she would prepare language for the Commission to review and approve at a future meeting.

The next order of business was Discussion regarding the Search for Legal Counsel. As Chair of the Personnel Subcommittee, Commissioner Binder informed that notices of the position were placed in The Providence Journal and Rhode Island Lawyers Weekly and that the application period runs through May 27th. She noted that the Personnel Subcommittee would meet immediately following adjournment of the full Commission and any member who wishes to join may do so.

The next order of business was the Director's Report. Executive Director Willever advised that there are three complaints and three advisory opinions pending. He noted that the Staff is busy with financial disclosure and budgetary matters. He reported that the Commission would not be losing any existing employees under the new fiscal constraints, but it should not expect to be able to replace any employees who may leave. He informed that William Irons has filed his reply memorandum in *William V. Irons v. Rhode Island Ethics Commission*, copies of which have been distributed to the members. No date has been set for oral argument yet. Director Willever stated that the Staff continues its work on Operation Cyber Expedition, which is tied into budget and personnel areas, and the education program remains ongoing.

The next order of business was New Business. Commissioner Cheit informed that after the last meeting he contacted Staff regarding Complaint No. 2008-2, which had been initially determined in Executive Session. He noted that the Commission dismissed the Complaint without addressing specific requests made by the Respondent in her Answer. He advised that he does not believe that the prior dismissal precludes a future Executive Session discussion regarding the specific issue of sanctions. Chair Lynch agreed that the issue of the request for sanctions needs more attention.

Legal Counsel Managhan stated that, during her tenure with the Commission, 5(k) sanctions have never emanated. She expressed

her understanding that sanction requests have been considered, historically, upon the Respondent's motion, which is a much easier procedural form. However, she noted that the statute contemplates sanctions emanating from the Commission. She suggested that it could be placed on the next Executive Session agenda as some sort of a show cause hearing to see if the Commission wants to pursue the issue. Commissioner Cheit expressed his support for doing so to examine what alternatives are available. Commissioner Cerullo stated that she would not object to continuing the discussion in Executive Session. Chair Lynch stated his belief that it is not too late to address the issue.

Senior Staff Attorney D'Arezzo expressed her opinion that, under the Open Meetings Act, the Commission would be unable to convene in Executive Session to discuss the Respondent's request given that the Complaint has been dismissed. She explained that all hearings conducted post-probable cause take place in Open Session and further noted that the two prior hearings conducted on the issue of sanctions have taken place in Open Session. She clarified that the Respondent requested that the Commission initiate a 5(k) complaint, as opposed to requesting reimbursement of reasonable legal expenses under the Roney amendment.

Legal Counsel Managhan suggested that the Commission should at least have a discussion in Open Session regarding how to handle the issue when it happens again. Commissioner Murray stated that the

Commission did not address the Respondent's prayer for relief in her Answer, so arguably there is something upon which it may still act. Legal Counsel suggested that if the Commission is inclined to consider the issue, it may be best not to do so in Executive Session. Commissioner Cerullo expressed her view that the appropriate way to deal with it is to address it on a going forwarded basis. In light of the Staff's opinion, Commissioner Harsch suggested that the Commission request a memorandum from Legal Counsel on the issue. Commissioner Cheit stated that if there is too much uncertainty regarding whether it would be allowed in Executive Session, then it should be considered generally in Open Session. However, he expressed his regret that the subject of the complaint did not get consideration of her request for relief. Chair Lynch concurred with Commissioner Cheit and supported the request for a memorandum from Legal Counsel.

At approximately 11:46 a.m., upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

Ross Cheit

Secretary