

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

June 17, 2008

The Rhode Island Ethics Commission held its 12th 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, June 17, 2008, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Vice Chair Frederick K. Butler

Ross Cheit, Secretary J. William W. Harsch

Richard E. Kirby* Edward A. Magro

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 Investigator Peter J. Mancini.

At approximately 9:38 a.m., the Chair opened the meeting. Vice Chair Binder thanked James Lynch, Sr. for his years of service on the Commission. She welcomed Edward A. Magro to the Commission

and administered the oath of office to him.

The first order of business was a motion to approve minutes of the Open Session held on June 3, 2008. Vice Chair Binder noted a correction to her comments on page six. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To approve the minutes of the Open Session held on June 3, 2008, as corrected.

ABSTENTION: Edward A. Magro.

The next order of business was that of 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 Theodore J. Przybyla, the Treasurer for the Town of Scituate. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present with the Scituate Town Solicitor, David M. D'Agostino, Esq.

***Commissioner Kirby arrived at 9:45 a.m.**

In response to Commissioner Cheit, the petitioner stated that the cost of the proposed full-time Treasurer position would be about \$6,000

more than the current Treasurer and Deputy Treasurer's combined salaries. Commissioner Cheit wondered how it would constitute a cost savings. In response to Vice Chair Binder, the petitioner stated that the Town Council asked him to assume the additional duties. Attorney D'Agostino explained that the Town does not have a charter, so the Treasurer's role falls under the general laws. He advised that the Treasurer makes a recommendation to the Town Council regarding the appointment of a Deputy Treasurer. He noted that the Council approached the petitioner regarding his assumption of the additional duties because the Deputy position is being eliminated upon the retirement of the person currently serving. He added that the additional tasks are ultimately already within the Treasurer's purview and that he simply would be handling more of the day-to-day administrative functions.

In response to Commissioner Harsch, the petitioner informed that he sought an opinion because a citizen at a Town Council meeting questioned whether it would pose a conflict. In response to Commissioner Cheit, the petitioner advised that he is serving his twelfth year as Treasurer. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Harsch, there was discussion. Commissioner Cheit noted that issuance of the opinion is based upon the representations in the petitioner's request letter. Upon the original motion, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Theodore

Przybyla, the Treasurer for the Town of Scituate.

ABSTENTION: Richard E. Kirby.

The next advisory opinion was that of Robert A. Peretti, the Municipal Court Prosecutor for the Town of North Providence. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was present. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Robert A. Peretti, the Municipal Court Prosecutor for the Town of North Providence.

The next advisory opinion was that of Franklin H. Pond, a member of the Little Compton Zoning Board of Review. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Cheit, Staff Attorney DeVault indicated that the opinion would not be void if the petitioner were to later join the Club, as the opinion pertains to the facts existing when the matter comes before the Zoning Board. Commissioner Butler inquired whether the petitioner would rejoin if the Club if it cannot obtain a variance and, therefore, there is no reason to increase membership fees. Staff Attorney DeVault explained that it is under completely new ownership. Commissioner Butler questioned whether there would be any benefit for the

petitioner not to approve the variance. He noted that the petitioner did not quit, but his membership was terminated.

Staff Attorney DeVault stated that it is speculative what would happen if the variance were not approved. She informed that the petitioner represented that the new owners were undertaking extensive renovations to the Club. Commissioner Cheit inquired whether the change in ownership which terminated the petitioner's membership was a detriment to him. Staff Attorney DeVault indicated that the petitioner may no longer consume alcohol on the premises. Vice Chair Binder stated that the petitioner's intent regarding the new Club is not clear from his letter. Staff Attorney DeVault related that in her conversation with the petitioner he had been very clear that he will not join. She suggested that he may not have understood the new fee structure when he drafted his request letter. She reiterated that the petitioner advised her that the current \$1,500 membership fee was too much and he was not interested in joining the new Club.

Commissioner Harsch inquired whether there would be a difference if the petitioner were interested in joining the new Club. Staff Attorney DeVault replied that the staff analysis would not change, provided that the petitioner was not a member of the new Club at the time of his vote. She noted that if the Commission knew that the petitioner intended to join the new Club at the time of his vote, it might find an appearance of impropriety. In response to Commissioner Harsch, she stated that the old Club, which no longer exists in any form, did

not have an ownership interest in the building itself. In further response, she reiterated that the petitioner informed her that he has no interest in the sale or transfer of the building. Commissioner Kirby questioned whether the title transfer is subject to certain approvals being obtained. Staff Attorney DeVault replied that the petitioner did not make any such representation.

Commissioner Cheit indicated that the petitioner's request letter suggests something more than is addressed in the draft opinion. In response to Commissioner Magro, Staff Attorney DeVault noted that even if the petitioner were to rejoin the Club, it would be after the hearing. She stated her belief that, after he drafted his request letter, the petitioner made further inquiries regarding the proposed fee structure. Commissioner Cheit commented that he wished the petitioner were present. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Harsch, there was discussion. Commissioner Butler stated that he is bothered somewhat by the fact that the petitioner's membership was terminated and now he has the opportunity to rule on the new owner's request. However, he stated he would vote to approve the draft opinion based upon the petitioner's letter. Upon the original motion, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Franklin H. Pond, a member of the Little Compton Zoning Board of Review.

Upon motion made by Commissioner Magro and duly seconded by

Commissioner Cheit, it was unanimously

VOTED: To amend the Executive Session agenda to include, for informational purposes, the Personnel Committee's Report on the Search for Legal Counsel.

At approximately 10: 12 a.m., upon motion made and duly seconded, it was unanimously

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

a.) Motion to approve minutes of Executive Session held on June 3, 2008.

b.) Status Update:

William V. Irons v. Rhode Island Ethics Commission, Superior Court C.A. No. 07-6666

c.) Personnel Subcommittee Report on Search for Legal Counsel.

d.) Motion to return to Open Session.

The Commission reconvened in Open Session at approximately 10:24 a.m. The next order of business was a motion to seal minutes of the

Executive Session held on June 17, 2008. Upon motion made by Commissioner Kirby and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To seal minutes of the Executive Session held on June 17, 2008.

The next order of business was Discussion regarding correspondence from the Honorable Donald L. Carcieri. Kernan F. King, Esq., Executive Legal Counsel, was present. Vice Chair Binder asked Staff Attorney Gramitt to address the procedural issues raised by the Governor's request for an opinion. Staff Attorney Gramitt explained that the Commission generally has not issued individual advisory opinions regarding past conduct. He informed that his memorandum outlined options relating to issuance of a General Commission Advisory or a Declaratory Ruling. He further advised that the Commission could issue informal correspondence. In response to Commissioner Harsch, Staff Attorney Gramitt confirmed that no complaint has been filed. In further response, he stated that the Commission Staff does return correspondence to individuals who request opinions on past conduct by providing references to past opinions on the subject and noting that the Commission cannot opine on past conduct.

Commissioner Cheit wondered whether providing the Governor with a thirteen page memorandum would go beyond what the Staff

normally would do in response to a request for an opinion relating to past conduct. Staff Attorney Gramitt informed that Executive Counsel has already received the memorandum, which cites to past nepotism opinions. Commissioner Butler indicated that he is interested in the idea of a General Commission Advisory, although he does not have a strong preference. He noted that there is no statute of limitations on Code violations; however, he is not sure if it saves the Commission time or leaves the public in limbo to wait for someone to file a complaint. Staff Attorney Gramitt stated that a General Commission Advisory generally would address the current status of the law, not how it previously was.

Commissioner Kirby commented that the Commission took it upon itself to rewrite the nepotism regulation and provide a laundry list of relatives to whom it applies. He questioned whether the Commission could state that it would not entertain any complaints against all those who took action prior to the adoption of the list. Staff Attorney Gramitt replied that the Commission took similar action, following the complaint against Judge Arrigan, and issued a moratorium on accepting complaints alleging violations based solely upon the failure to disclose a position in a not-for-profit organization on the financial statement.

Executive Counsel King addressed the Commission and asked it to take seriously the evolution of the nepotism prohibition from a fairly narrow set of relatives to a much broader ambit. He represented that at the time the Governor hired his niece-in-law there was no express

provision prohibiting it and no fair notice to him that it applied. He stated that the Governor would like clarification. In response to Commissioner Kirby, he indicated that he thought the law was unclear at the time of hiring. In response to Commissioner Kirby's inquiry as to why the Governor did not seek an opinion then, he stated that there are many personnel decisions to be made upon becoming Governor. He suggested that it is not entirely obvious that hiring one's niece-in-law is something you would have to be careful about.

Commissioner Kirby commented that the regulation stated "whether by blood, marriage or adoption." He questioned whether Executive Counsel King would agree that the hiring of a niece or nephew by blood was prohibited at the time of the hiring. Executive Counsel King replied that, based upon the Staff memorandum and hindsight, it was prohibited. In response to Commissioner Cheit, Executive Counsel King stated that an opinion was not requested at the time because there was a lack of clarity and notice. Commissioner Cheit inquired whether it did not cross the Governor's mind at the time or that it did, but he did not seek an opinion. Executive Counsel King advised that he was not the Governor's Counsel at the time.

Commissioner Cheit suggested that since the Governor did not take action when he could have or should have, perhaps the Commission should take none at this time. Commissioner Kirby stated that he does not want to break with precedent and write individual policy

decisions. However, he stated that the Commission redefined the terminology and anything it does now should have blanket application to all those who acted prior to the new regulation. Commissioner Cheit indicated that the memorandum explains that the Commission did not expand the definition of family when it adopted the new regulation. He noted that it appears that the Commission would have answered in the negative if the Governor had requested an opinion at the time. Vice Chair Binder observed that the papers filed with the Secretary of State's Office reflect that the Commission adopted the new regulation to "broaden and clarify" the nepotism prohibitions.

Commissioner Harsch inquired whether the individual is now in a position from which she cannot be removed. Staff Attorney Gramitt stated that he did not address the issue of her continued employment. Commissioner Kirby commented that the Code does not apply to her actions. Commissioner Harsch questioned whether she would have tenure if she serves at the Governor's pleasure. Commissioner Kirby observed that, even if the Governor chose to remove her, it would not obviate the problem of action he took six years ago. Vice Chair Binder asked if there is any consensus as to how to handle the request. Legal Counsel Managhan suggested that there should be a motion, even if it is to take no action.

Commissioner Kirby suggested a motion to accept the Staff memorandum on the record but to take no action. Legal Counsel

Managhan suggested that the Commission could move to instruct the Executive Director to acknowledge the request and state that the Commission is not taking it further. Commissioner Cheit stated that the Commission could authorize the Executive Director to include any previously issued opinions addressing the issue. Vice Chair Binder expressed her agreement.

Commissioner Magro made a motion, which was duly seconded by Commissioner Harsch, to provide the Governor with informal correspondence stating that the Commission has received his request and is not inclined to issue an opinion at this time, but prior advisory opinions on nepotism are provided as guidance. Executive Director Willever suggested that the correspondence be addressed to the Governor's Executive Counsel. Upon amended motion made by Commissioner Magro and duly seconded by Commissioner Harsch to provide the Governor's Executive Counsel with informal correspondence from the Executive Director stating that the Commission has received his request and is not inclined to issue an opinion at this time, but prior advisory opinions on nepotism are provided as guidance, there was further discussion.

Commissioner Kirby expressed his concern that the Commission will end up dealing with the definition of "niece," and he stated that he wished the Commission could short-circuit the process. Commissioner Cheit reiterated that the regulation applies whether the person is related "by blood, marriage or adoption." Commissioner

Butler stated that he is not in disagreement with adhering to precedent by not issuing opinions on past conduct; however, he voiced that there is a need for clarification for a whole population, not just an individual. Vice Chair Binder agreed and stated that if a complaint were filed the Commission would likely consider a motion regarding the legal definition of “niece,” at which time the Staff memorandum would be helpful.

Commissioner Cheit stated that even if the Commission’s re-definition created the confusion, it took place after the subject events. Commissioner Butler noted that the Commission took action because it recognized that there was an issue. He suggested that it would not be a bad idea to clarify the situation for all those who acted prior to 2007. Commissioner Cheit replied that the Commission has no information to indicate that there is a general need or problem. Commissioner Butler stated that the Commission took it upon itself to change the language and perhaps it was something that did not need changing. Commissioner Cheit expressed that the Commission wants to encourage people to seek advisory opinions, not bail out those who do not. Commissioner Butler stated that there could be a lot of people affected. Commissioner Magro commented that the Commission is just addressing the procedural issue of handling the request for an opinion and that the resolution of the issue is preserved for a later date.

On the amended motion, it was

VOTED: To provide the Governor's Executive Counsel with informal correspondence from the Executive Director stating that the Commission has received his request and is not inclined to issue an opinion at this time, but prior advisory opinions on nepotism are provided as guidance.

AYES:J. William W. Harsch, Frederick K. Butler, Ross Cheit, Edward A. Magro and Barbara R. Binder.

NOES: Richard E. Kirby.

The next order of business was the advisory opinion request of Stephen Durkee, a Providence City Plan Commission member. Staff Attorney DeVault advised that the petitioner had been present earlier and, upon reviewing the draft, recognized the need to recuse and stated that he would withdraw his request. Commissioner Cheit stated that there is no need to take any action.

The next order of business was the Election of Officers. Upon motion made by Commissioner Butler and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To elect Barbara R. Binder as Chairperson.

ABSTENTION:Barbara R. Binder.

Upon motion made by Commissioner Kirby and duly seconded by Commissioner Butler, it was unanimously

VOTED: To elect Ross Cheit as Vice Chairperson.

ABSTENTION: Ross Cheit.

Upon motion made by Commissioner Kirby and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To elect J. William W. Harsch as Secretary.

ABSTENTION: J. William W. Harsch.

The next order of business was Discussion of Legal Counsel's Memorandum regarding Frivolous Complaint Sanctions. Legal Counsel Managhan provided a brief overview of her memorandum. Commissioner Kirby suggested that discussion be continued to the next agenda. Commissioner Cheit expressed that he is not sure there is a need to carry the discussion further. He advised that the Commission may wish to adopt regulations addressing the procedural issues in the future. Chair Binder stated that it could be placed on the regulatory agenda list. Executive Director Willever suggested that the Commission address it when it has a pending case in which the Respondent raises the issue of Roney amendment

sanctions. Commissioner Cheit noted that the prior matter had dealt with a request that the Commission initiate a section 5(k) complaint, and he added that in the future he would not let the Executive Session end without addressing the issue.

The next order of business was the Director's Report. Executive Director Willever advised that there are three complaints and six advisory opinions pending. He informed that there has been one formal APRA request since the last meeting, which was granted. He welcomed Commissioner Magro to the Commission and congratulated the newly elected Officers. Executive Director Willever expressed the condolences of the Commission and Staff on the recent death of Chief Investigator Steven T. Cross's father.

Senior Staff Attorney D'Arezzo inquired whether the Commission wished to proceed with the adjudication of the Larisa matter on July 22nd, given that some members will not be able to participate on said date. The consensus was to reschedule the adjudication to September.

The next order of business was New Business. Commissioner Cheit suggested that the Commission have its own workshop on the class exception to discuss the input it received on June 3rd. Chair Binder expressed support for such a discussion and asked that it be placed on the July 22nd agenda. Commissioner Kirby asked if the Staff could look at whether other jurisdictions talk about substantial or de

minimus financial benefit in their approaches to the class exception. Commissioner Cheit stated that working the word “substantial” into the language could be a useful solution.

Commissioner Harsch commented that he found the June 3, 2008 Open Session minutes to be instructive as to the discussion of the class exception.

At approximately 11:21 p.m., upon motion made by Commissioner Kirby and duly seconded by Commissioner Magro, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary