

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

July 29, 2008

The Rhode Island Ethics Commission held its 14th 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, July 29, 2008, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair James V. Murray

Ross Cheit, Vice Chair Frederick K. Butler*

J. William W. Harsch, Secretary Deborah M. Cerullo SSND

Richard E. Kirby**

Also present were William J. Conley, Jr., 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 9:08 a.m., the Chair opened the meeting. The first order of business was recognition of former Chairperson James Lynch, Sr.

Chair Binder thanked Mr. Lynch for his dedicated service on the Commission from 1997 to 2008 and presented him with a commemorative plaque. Former Commission members George E. Weavill, Jr. and James C. Segovis, Ph.D. were present for the presentation. Mr. Lynch expressed his appreciation to the Commission membership, past and present, as well as Staff.

***Commissioner Butler arrived at 9:11 a.m.**

The next order of business was a motion to approve minutes of the Personnel Subcommittee Open Session held on June 16, 2008. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To approve minutes of the Personnel Subcommittee Open Session held on June 16, 2008.

ABSTENTIONS: Frederick K. Butler, James V. Murray and Ross Cheit.

The next order of business was a motion to approve minutes of the Open Session held on June 17, 2008. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To approve minutes of the Open Session held on June 17, 2008.

ABSTENTION: James V. Murray.

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 Richard A. Yacino, a former Program Manager for Assisted Living Residences in Rhode Island, and former Chief of Compliance, both for the Rhode Island Department of Health. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present. In response to Commissioner Cheit, the petitioner advised that he is a quality assurance pharmacist for Lifespan. He stated that he does not anticipate having to appear before the Department of Health after the one year revolving door period expires, nor is he holding back on doing any aspect of his job until that time. Upon motion made by Commissioner Murray and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Richard A. Yacino, a former Program Manager for Assisted Living Residences in Rhode Island, and former Chief of Compliance, both for the Rhode Island Department of Health.

The next advisory opinion was that of Amy Grzybowski, a Homeland

Security Grant Manager for the Rhode Island Emergency Management Agency. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was present. Staff Attorney Gramitt advised that the petitioner is making the same representations that she did with respect to the issuance of Advisory Opinion No. 2008-10, only here she would be going into business for herself, rather than working for a particular company. In response to Commissioner Cerullo, the petitioner acknowledged that she is seeking an opinion that addresses her ability to work as an independent contractor and engage her own clients. She stated that she anticipates getting her clients through word-of-mouth referrals. She noted that the Chicago firm, with which her prospective employment had been addressed in the prior opinion, is putting her name out.

In response to Commissioner Cerullo, the petitioner stated that she does not market herself when she attends a conference by way of her state employ. Commissioner Harsch inquired about the petitioner's relationship with the Chicago firm. The petitioner replied that the relationship is over, but the firm still advises her of opportunities.

***Commissioner Kirby arrived at 9:26 a.m.**

Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, 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.

ABSTENTIONS: Deborah M. Cerullo SSND and J. William W. Harsch.

Commissioner Harsch expressed that, although it has no reflection upon the petitioner, he has a general issue that he would like to raise with respect to state employees working a second job directly in the field of their state employ. Commissioner Cheit noted that if there were any implication that this would involve Rhode Island there might be a different response. Chair Binder echoed that the opinion is based upon the petitioner's express representation that she will not be involved with any grants impacting Rhode Island.

The next advisory opinion was that of Roderick A. J. Cavanagh, a Special Education Due Process Hearing Officer. Commissioner Murray disclosed that he and the petitioner were business associates approximately twenty years ago, and he stated his belief that he could fairly participate in this matter. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was present. Staff Attorney DeVault noted a correction to be made to the draft, reflecting that the petitioner and other due process officers collectively perform a total of fifty hearings per year. In response to Commissioner Cheit, the petitioner stated that the hearing did not take place on June 18th and will not occur until the Commission issues its opinion. He indicated that he sought an opinion because

the attorney for the school committee filed an objection to his participation. In response to Commissioner Cheit's inquiry as to the petitioner's status, Staff Attorney DeVault stated that the petitioner is an independent contractor. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Roderick A. J. Cavanagh, a Special Education Due Process Hearing Officer.

The next advisory opinion was that of G. Richard Fossa, the Chief of Staff to the Mayor of the Town of North Providence. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was present. The petitioner advised that, although he cannot recall a time since 1973 when every applicant has not been hired, he cannot state with certainty that every applicant was hired. In response to Commissioner Murray, he stated that his granddaughter is currently working. Commissioner Murray inquired whether the opinion seeks to ratify past conduct. Staff Attorney Gramitt explained that at the time the petitioner sought the opinion his granddaughter had not yet begun her employ. Commissioner Kirby noted that the petitioner's granddaughter is not subject to the Code and any potential complaint would be against the petitioner.

In response to Commissioner Cheit, the petitioner stated that he is uncertain when his granddaughter applied for the job. He

represented that the Personnel Director asked him if she were going to apply. In further response, he stated his belief that she began her employ the first week of July. In response to Commissioner Cerullo, the petitioner indicated that his granddaughter did not begin her employ until after he received the draft opinion. He reiterated that while he believes that everyone who applied was hired, he cannot state it with certainty. Commissioner Cerullo inquired whether it would be possible to obtain that information. In response to Commissioner Kirby, the petitioner stated that none of his other grandchildren work in the program. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler to adopt the draft opinion, there was discussion.

Chair Binder expressed that she would be more comfortable if the Commission obtained information as to whether everyone who applied was accepted into the program. Commission Cheit stated that he had a similar concern and noted that the petitioner represented that someone approached him regarding his granddaughter applying to the program, which would not have happened if the petitioner were not in the mayor's office. Commissioner Cheit distinguished prior opinions, where the employment was initiated by the teenager. He suggested that the Commission approve the draft dependent upon a certification that all those who applied were hired. Commissioner Murray clarified that the question would be whether everyone who applied was offered a position, as some may decline for various reasons. The petitioner

advised that he would obtain that statement from the Personnel Director.

Upon reframing of the original motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To approve the draft opinion, conditioned upon the petitioner being able to provide a representation from the Personnel Director that everyone who applied was offered a position.

Commissioner Cerullo clarified that the opinion would not be approved if the petitioner could not provide such representation. Chair Binder agreed. Commissioner Cerullo noted that the safe harbor would remain in place until such time.

The next advisory opinion was that of Lance Mantia, a custodian in the North Providence School Department. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. Upon motion made by Commissioner Kirby and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Lance Mantia, a custodian in the North Providence School Department.

The next advisory opinion was that of Lise J. Gescheidt, a member of the Tiverton Zoning Board of Review. Staff Attorney Gramitt

presented the Commission Staff recommendation and noted that there are three requests based upon the same facts. The petitioner was not present. In response to Commissioner Cheit, Staff Attorney Gramitt stated that he is not aware of any controversy regarding the farmers' market. Commissioner Cheit expressed agreement that the petitioners are not business associates with the Land Trust but suggested that there is an appearance issue with three members of the Zoning Board contributing to the cause. Staff Attorney Gramitt stated that he always advises public officials that they can simply recuse; however, here, recusals would leave the Board without a quorum, due to a vacancy in the alternate position. Commissioner Kirby indicated that a slighted party could proceed to superior court to obtain a restraining order. In response to Commissioner Kirby, Staff Attorney Gramitt stated his belief that the Land Trust is a local organization.

Commissioner Butler related his experience with similar groups and stated that he would not consider himself a business associate. He expressed that he is not troubled by the fact that three Board members are members of the Land Trust. Commissioner Cerullo stated her agreement that there is no direct conflict under the Code, but she voiced her belief that there is an appearance issue. In response to Commissioner Cerullo, Staff Attorney Gramitt indicated that he did not inquire of the individual petitioners regarding their ability to be objective. Commissioner Cheit noted that Mr. Taylor completed the second option on the recusal form and attached it to

his opinion request.

Commissioner Butler expressed that the fact that three members of the Board are members of the Land Trust does not necessarily mean that they all have the same point of view. Commissioner Kirby questioned whether the analysis would be more about how active each member is. Staff Attorney Gramitt replied that each petitioner said that they receive a newsletter in exchange for a small annual contribution. In response to Commissioner Harsch's inquiry regarding the impetus for these requests, Staff Attorney Gramitt stated that it appears that the affected individuals raised the issue themselves. Commissioner Cheit reiterated his belief that the situation presents an appearance issue but is not prohibited by the Code. Commissioner Murray concurred. Upon motion made by Commissioner Kirby and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Lise J. Gescheidt, a member of the Tiverton Zoning Board of Review.

Upon motion made by Commissioner Harsch and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Susan T. Krumholz, J.D., Ph. D., a member of the Tiverton Zoning Board of Review.

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

VOTED: To issue an advisory opinion, attached hereto, to Richard Taylor, a member of the Tiverton Zoning Board of Review.

The next order of business was a motion to go into Executive Session. At approximately 10:17 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Kirby, 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 Personnel Subcommittee Executive Session held on June 16, 2008.

b.) Motion to approve minutes of Executive Session held on June 17, 2008.

c.) Motion to approve minutes of Executive Session held on June 24, 2008.

d.) In re: Susan D. Menard,

Complaint No. 2008-1

**e.) In re: T. Joseph Almond,
Complaint No. 2008-4**

**f.) Notification of Initiation of Preliminary Investigation: P.I. No.
2008-2.**

g.) Status Update:

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

h.) Motion to return to Open Session.

The Commission reconvened in Open Session at 11:19 a.m., at which time Commissioner Murray left the meeting. The next order of business was a motion to seal minutes of the Executive Session held on July 29, 2008. Upon motion made by Commissioner Butler and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To seal minutes of the Executive Session held on June 29, 2008.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Personnel

Subcommittee Open Session held on June 16, 2008; 2) approved minutes of the Open Session held on June 17, 2008; 3) approved minutes of the Open Session held on June 24, 2008; 4) granted a sixty-day extension of time in Complaint No. 2008-1, In re: Susan D. Menard; 5) dismissed Complaint No. 2008-4, In re: T. Joseph Almond; 6) received notification of initiation of a preliminary investigation; and 7) received a status update on William V. Irons v. Rhode Island Ethics Commission, Superior Court C.A. No. 07-6666.

The next order of business was a discussion regarding the Initial Determination Policy & Notice of Dismissal for Insufficient Allegations. Senior Staff Attorney D'Arezzo advised that, pursuant to the Commission's request at the May 20, 2008 meeting, she drafted a proposed amendment to the 1993 Policy Regarding Initial Determinations, as well as an updated Notice of Dismissal for Insufficient Allegations. She informed that, in addition to addressing some citation and typographical errors, the proposed amendment deleted reference to the fact that dismissals at initial determination shall be without prejudice, reflecting the Commission's discretion to act on a case-by-case basis. She stated that the updated Notice includes language reflecting that the Commission may have reviewed the Respondent's Answer and conducted a threshold, factual inquiry.

Chair Binder noted that there should be an "and/or" before the listing of c) in the proposed policy. In response to Chair Binder, Senior Staff

Attorney D'Arezzo stated that it is for the Commission to determine whether it wants to specifically state that dismissal may be either with or without prejudice, at its discretion. Commissioner Cerullo expressed concern regarding the language in the updated Notice, specifically with reference to a failure to state a violation. Senior Staff Attorney D'Arezzo read from the statutory and regulatory language governing initial determination, both of which refer to failure to allege facts sufficient to constitute a knowing and willful violation. Chair Binder stated that the language should mirror the language in the Code. Commissioners Cerullo and Butler concurred. Upon motion made by Commissioner Butler and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To adopt the proposed amendments to the Policy Regarding Initial Determinations and Notice of Dismissal for Insufficient Allegations.

The next order of business was a discussion regarding the Class Exception. Chair Binder complimented Staff Attorney DeVault on her research and memoranda on this issue. Staff Attorney DeVault provided an overview of her first memorandum, which examined other states' statutory provisions regarding the threshold degree of financial impact required to constitute a conflict of interest. She summarized that, after a brief sampling of other states, other jurisdictions seem to fall into the following two categories: 1) those that utilize a bright line with a monetary amount or percentage; and 2)

those that use language allowing a case-by-case analysis, such as “de minimus.”

Staff Attorney DeVault also provided an overview of her second memoranda, which provided a broad historical context of the ways in which the Commission has applied the class exception in advisory opinions and complaints. She informed that, upon reviewing all advisory opinions issued since 1992, seventy-eight applied the class exception and in thirty opinion requests the Commission considered, but ultimately rejected, it. She noted that there have been ten complaints in the last ten years in which the class exception was raised.

Commissioner Kirby thanked Staff Attorney DeVault for her research and suggested that copies of same be provided to former Commissioners who have expressed interest in this topic. Chair Binder stated that she found the California language intriguing and indicated that it might be helpful to get more information, particularly as to whether “lobbyist employer” is a defined term and whether there have been any cases. Commissioner Cheit expressed that the memorandum provides a context to focus on what problem the Commission is trying to solve. He noted that many of the comments at the June 3rd public workshop were not related to the class exception. He asked that proponents of amending the class exception focus on what problems are caused by the class exception that the Commission needs to address, such as situations in which

the Commission allowed someone to proceed when it should not have.

Commissioner Cheit expressed that he also found the California language interesting, but he voiced concern about having a narrower rule which proves to be too narrow. He suggested that the Commission have time to digest the materials presented. Commissioner Harsch urged the Commission to keep the ball rolling on the issue and proposed a workshop for the membership to discuss how to proceed as soon as possible. Commissioner Kirby suggested that a workshop could take place after additional information is obtained regarding the California statute. Chair Binder indicated that the Executive Director will need to evaluate the appropriate time to place such discussion on the agenda, although it should be done as soon as time permits. Executive Director Willever replied that he will give it a higher priority than not. Commissioner Cheit stated that the matter could continue as a recurring item for the Commission's own discussion.

The next order of business was the Director's Report. Executive Director Willever reported that there are five complaints, one preliminary investigation and five advisory opinions pending. He advised that four formal APRA requests were granted since the last meeting. After welcoming Legal Counsel Conley back to the Commission, he reported that administrative staff member Lisa Petrone will be leaving for another position. He stated that he will be

working to post the position and fill the vacancy as soon as possible. Director Willever informed that Staff Attorney Gramitt will be giving an ethics presentation on August 1st as part of the Attorney General's annual Open Government Summit, and he noted that the Commission will host a gathering of public officials from Haiti on August 18th as part of an ongoing program with the U.S. State Department.

The next order of business was New Business. Commissioner Harsch expressed that he has a concern with the situation in which state employees accept outside employment within the same field as their public employment. He inquired whether there is any existing staff research or analysis of the issue. Director Willever replied that the Commission could look at how it has handled the situation through advisory opinions and indicated that he would discuss the issue with staff to determine what material is available.

At approximately 11:56 a.m., upon motion made by Commissioner Kirby and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary