

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

September 9, 2008

The Rhode Island Ethics Commission held its 16th 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, September 9, 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** Edward A. Magro**

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 9:04 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held

on August 19, 2008. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To approve minutes of the Open Session held on August 19, 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 Ashbel T. Wall, II, Director of the Rhode Island Department of Corrections. Commissioner Cheit disclosed that he teaches a class at the ACI, for which he is not paid, and stated his belief that he can fairly participate in this matter.

***Commissioner Butler arrived at 9:05 a.m. **Commissioner Kirby arrived at 9:06 a.m. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was present along with DOC Chief Legal Counsel, Patricia Coyne-Fague. Upon motion made by Commissioner Murray and duly seconded by Commissioner Kirby, it was unanimously**

VOTED: To issue an advisory opinion, attached hereto, to Ashbel T. Wall, II, Director of the Rhode Island Department of Corrections.

The next advisory opinion was that of Caswell Cooke, Jr., a Westerly Town Council member. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. Upon motion made by Commissioner Butler and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Caswell Cooke, Jr., a Westerly Town Council member.

The next advisory opinion was that of Terri Serra, a CHARIHO Regional School Committee member. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Cheit, Staff Attorney DeVault indicated that the analysis would be different if the negotiations were only relating to future benefits, other than pension and retirement, given that her spouse's cousin would be a retiree. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Terri Serra, a CHARIHO Regional School Committee member.

The next advisory opinion was that of Albert P. Valliere, Jr., a Woonsocket Planning Board member. Staff Attorney Leyden presented the Commission Staff recommendation. The petitioner was not present. Staff Attorney Leyden stated that she spoke with the

petitioner on August 14th and advised him that he is a business associate of CVS and, as such, would not be allowed to participate and vote. She indicated that he still wished to obtain an advisory opinion because there are other similarly situated members and there could be a quorum problem. In response to Commissioner Cheit, she stated that she is not aware of any action taken by the petitioner. Upon motion made by Commissioner Cheit and duly seconded by Commission Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Albert P. Valliere, Jr., a Woonsocket Planning Board member.

The next advisory opinion was that of Paul C. Dolan, Deputy Chief of Urban and Community Forestry within the Department of Forest Environment. Staff Attorney DeVault presented the Commission Staff recommendation. The petitioner was not present. In response to Commissioner Cheit, Staff Attorney DeVault stated that the fact that the entity is a non-profit is irrelevant to the analysis. Upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Paul C. Dolan, Deputy Chief of Urban and Community Forestry within the Department of Forest Environment.

The next advisory opinion was that of Lise Gescheidt, a Tiverton

Zoning Board of Review member. Staff Attorney Gramitt presented the Commission Staff recommendation. The petitioner was not present. Commissioner Kirby suggested that the analysis should involve consideration of the impact of the matter under consideration, a drive-through window, and her \$18,000 in shares, which is a de minimis interest as applied to CVS. Commissioner Kirby indicated that individuals who do outside work with CVS have a personal relationship with the company, which is different from owning stock in a corporation. Staff Attorney Gramitt inquired whether there would be a number that would give the Commission pause with respect to stock ownership and suggested that another draft opinion could be presented to the Commission.

Chair Binder noted that the SEC requires notification when an individual owns more than 5% of an entity's stock. Commissioner Cerullo suggested undertaking a totality test that factors in not just the petitioner's stock ownership, but also includes the de minimis nature of the action before her board. Staff Attorney Gramitt indicated that a totality of the circumstances test makes sense, but that every individual with that level of stock ownership must then come before the Commission on a case-by-case basis. Commissioner Kirby suggested that the test could factor in that the petitioner owns shares of a publicly traded corporation, as opposed to private stock. In response to Commissioner Cheit, Staff Attorney Gramitt confirmed that as long as an individual had more than a \$5,000 interest in a company, the Commission would have to opine

that she could not participate.

Commissioner Cheit reflected that such an application sounds too strict. He stated that the fact that the interest is over \$5,000 does not seem important where the percentage ownership denominator is so enormous. Commissioner Kirby added that the other consideration is whether the action the public official is taking is of de minimis import.

For illustration, Staff Attorney Gramitt provided the examples of approving a drive-through window versus eliminating Pharmacy Freedom of Choice. Commissioner Butler commented that there would be a different analysis if the petitioner owned a mutual fund or an IRA that is not self-directed. He inquired as to the analysis if the petitioner owned stock in a CVS competitor. Staff Attorney Gramitt replied that those issues would likely be decided by the Commission in future clarifying opinions, but he distinguished mutual fund ownership where the individual does not have the same level of control.

In response to Commissioner Cerullo, Staff Attorney Gramitt informed that the petitioner recently received another advisory opinion. He stated that he advised her to recuse on the present matter, given that she would not receive safe harbor. He represented that she wanted the opinion because there had been a potential quorum problem, which has been resolved through the appointment of an alternate. He stated that the petitioner would not participate until she receives solid advice from the Commission. Commissioner

Cheit inquired whether the Commission could ask the Staff for alternatives or options, or perhaps a General Commission Advisory.

Legal Counsel Conley advised that the Commission could send the draft back to the Staff to take into account its comments. He also noted that it could adopt a bright-line standard and set forth additional factors that it would consider separate and apart from the standard. He stated that they were not mutually exclusive. He commented that the issue is capable of replication.

Staff Attorney Gramitt stated that he will ascertain if the petitioner's request is now moot and, if not, he will bring it back for further consideration. He also informed that the Staff has recently reviewed all of the General Commission Advisories and likely will be recommending the withdrawal of most of them in the near future. He added that the Commission may wish to draft a few new ones and stock ownership may be a good topic.

Commissioner Kirby reiterated that part of the Staff's analysis might be how the official can affect the public company in which she owns stock by reason of her official position. He added that there could be a comparison of the percentage ownership of the company and what percentage it comprises of the official's portfolio. Commissioner Cheit questioned whether that would require a greater level of disclosure than is now required. Staff Attorney Gramitt indicated that the request would be brought back as an individual advisory opinion,

if not yet moot, which would take into account the Commission's comments. If the issue is moot, he stated that it could be the subject of a potential General Commission Advisory.

Commissioner Cheit expressed that the Staff recommendation is right based upon the current policy. In response to Commissioner Butler, Staff Attorney Gramitt stated that the petitioner does not have safe harbor. Commissioner Butler inquired as to the status of the 1998 advisory opinion referenced in the draft opinion. Staff Attorney Gramitt clarified that an individual opinion only applies to the person to whom it was issued. Commissioner Butler questioned whether the earlier opinion should be withdrawn if the Commission no longer relies upon it. Staff Attorney Gramitt explained that it is not precedent and only applies to that individual based upon those facts. Commissioners Butler and Kirby discussed whether the Commission should remove such opinions from the website, or perhaps make a notation that the analysis has since changed.

Upon motion made by Commissioner Kirby not to adopt the draft opinion and to table the request to get further information as to whether the issue is moot, there was discussion. Commissioner Magro pointed out that the Commission would be rejecting an opinion on a claim that may be mooted. Commissioner Cerullo noted that the petitioner is not present to provide information. Upon motion made by Commissioner Kirby and duly seconded by Commissioner Magro, it was unanimously

VOTED: To table the advisory opinion request to obtain further information.

Commissioner Cerullo questioned whether individuals have an awareness that their stock ownership relates to their decision-making. Staff Attorney Gramitt replied that they do as to private stock, but not as to public stock. Commissioner Cheit observed that the petitioner did disclose the stock on her financial statement. Commissioner Butler expressed concern that someone would not look at an old advisory opinion and the financial statement and would simply bring a complaint.

The next advisory opinion was that of Matthew Leys, a prospective Assistant City Solicitor for the City of Newport. Staff Attorney Gramitt advised that the request has been withdrawn since the petitioner did not accept the appointment. He added that another associate in the firm accepted the appointment, so the issue will be before the Commission again shortly.

At approximately 9:56 a.m., upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, 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 August 19, 2008.

b.) Status Update: Preliminary Investigation No. 2008-2.

c.) Motion to return to Open Session.

The Commission reconvened in Open Session at 10:11 a.m. The first order of business was a motion to seal the minutes of the Executive Session held on September 9, 2008. Upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it was unanimously

VOTED: To seal the minutes of the Executive Session held on September 9, 2008.

Chair Binder reported that the Commission approved the minutes of the Executive Session held on August 19, 2008 and received a Status Update on Preliminary Investigation No. 2008-2.

The next order of business was a Commission Discussion of Input Received from the June 3, 2008 Public Workshop on the Class Exception. Staff Attorney DeVault advised the Commission that, as set forth in her memorandum, there is no additional information with respect to the California statute, other than the definition of

“Lobbyist-Employer” provided in the memorandum.

***Commissioner Harsch left the meeting at 10:09 a.m.**

The next order of business was the Director’s Report. Executive Director Willever reported that there are five complaints, eight advisory opinions and one preliminary investigation pending. He advised that there have been no formal APRA requests since the last meeting. He reported that the Staff is busy addressing budget and personnel matters.

The next order of business was New Business. Commissioner Cheit inquired whether the Commission would be discussing a letter received from Common Cause. Chair Binder advised that she has requested that Legal Counsel prepare written advice on the issue. Commissioner Cheit asked if it would appear as an agenda item at the next meeting. Chair Binder indicated that Legal Counsel can write a letter to the membership. Chair Binder clarified that the membership will either receive a letter stating that the matter will not be on the agenda or the matter will be on the next agenda.

At approximately 10:11 a.m., upon motion made by Commissioner Kirby and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary