

MINUTES OF THE OPEN SESSION

OF THE RHODE ISLAND ETHICS COMMISSION

June 16, 2009

The Rhode Island Ethics Commission held its 9th meeting of 2009 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 16, 2009, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair Edward A. Magro

J. William W. Harsch, Secretary Mark B. Heffner

James V. Murray John D. Lynch, Jr.

Deborah M. Cerullo SSND

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:00 a.m., the Chair opened the meeting. The first order of business was approval of minutes of the Open Session held on June

2, 2009. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve minutes of the Open Session held on June 2, 2009.

ABSTENTIONS: Deborah M. Cerullo SSND.

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 Michael P. Jolin, former Deputy Chief of Legal Services at the Rhode Island Department of Business Regulation. The Petitioner was present. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner informed that he sought the opinion out of an abundance of caution. In response to Chair Binder, the Petitioner advised that one person at the Real Estate Commission performs a review to determine if an individual is qualified to be an instructor, specifically whether they are a licensed broker and, if not, whether they possess other qualifications. He stated that the review is ministerial because any person who meets the qualifications can teach the class.

In response to Commissioner Murray, the Petitioner represented that the qualification of any individual is not to the exclusion of other

candidates. Commissioner Cerullo inquired how the Petitioner came to be offered the position. The Petitioner informed that he worked closely with the Rhode Island Association of Realtors regarding regulations and through such work developed a good relationship with the Director of Education. He stated that the Director had inquired whether he would be interested in teaching the course. The Petitioner indicated that he does not know how often the teaching slots open up, and he assumes the relationship would be that of an at-will independent contractor.

Commissioner Cerullo asked for more information about Regulation 5006, which is referenced in the second paragraph on page four of the draft, specifically why it only applies to appointed and elected officials. Senior Staff Attorney D'Arezzo advised that Regulation 5006 was never intended to apply to employees; rather, it was intended to prevent a member of a public body from appearing before that body, whether directly or through an advice and consent process, while serving and for one year thereafter. She noted that the regulation was recently amended to clarify that the prohibition extends to appointments requiring the body's approval.

In response to Commissioner Heffner, Staff Attorney DeVault stated that, while the prior advisory opinion cited in the draft supports allowing the Petitioner to accept the position, the Commission has been scrutinizing whether an act really is ministerial in nature. In further response, she explained that the Staff does not frequently

present differing options for consideration, but it has done so when it may be a close call. Legal Counsel Conley advised that this situation is appropriate for a long track opinion due to the question of whether the approval is ministerial. Based upon the information presented, that there are more teachers available than perhaps courses to teach, he suggested that this situation would not seem to be a discretionary exercise.

Chair Binder indicated that it seems remote that the Petitioner would be using his influence to impact his future, given that anyone possessing minimum qualifications will be approved. Commissioner Cerullo noted that the Petitioner disclosed that he was offered the job due to a relationship he had while holding his prior position. Chair Binder stated that individuals in the private sector develop a level of expertise which they then use in future pathways. She expressed that, under these circumstances, she is not sure that a person should be prevented from using expertise developed in a public sector career. Commissioner Harsch commended the Petitioner for his candor in disclosing that the job offer grew out of a personal relationship. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray to approve Option A, there was discussion.

In response to Commissioner Heffner, Staff Attorney DeVault clarified that Option A refers to both the summary response and conclusion. Chair Binder noted that the opinion is limited to the unique factual

situation presented and does not establish precedent. Commissioner Cerullo expressed that she is not inclined to favor Option A, yet she is more uncomfortable with the first sentence regarding Advisory Opinion 1998-11, which she believes should be rethought. Upon the original motion to approve Option A, it was

VOTED: To issue an advisory opinion, attached hereto, to Michael P. Jolin, former Deputy Chief of Legal Services at the Rhode Island Department of Business Regulation.

AYES: J. William W. Harsch, Mark B. Heffner, James V. Murray, Edward A. Magro, John D. Lynch, Jr., and Barbara R. Binder.

NOES: Deborah M. Cerullo SSND.

Commissioner Harsch informed that a matter noticed for the Open Session agenda, review of Legal Counsel's contract, should be properly noticed and heard in Executive Session as a personnel matter. Legal Counsel Conley stated for the record that he does not require it to be heard in Open Session and that he waives any statutory notice, as he has actual notice. He advised that the Commission may discuss the matter in Executive Session and thereafter vote upon it in Open Session, as it had been noticed on the Open Session agenda. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Murray, it was unanimously

VOTED: To amend the Executive Session agenda to add review of Legal Counsel's contract for discussion purposes.

At approximately 9:30 a.m., upon motion made by Commissioner Harsch 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) and (4), to wit:

a.)Motion to approve minutes of Executive Session held on June 2, 2009.

b.)Status Update: William V. Irons v. The Rhode Island Ethics Commission, No. 2008-335-M.P. and 2009-01-M.P.

c.)Review of Legal Counsel's contract.

d.)Motion to return to Open Session.

The Commission returned to Open Session at approximately 9:45 a.m.

The next order of business was a motion to seal minutes of the Executive Session held on June 16, 2009. Upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it

was unanimously

VOTED: To seal minutes of the Executive Session held on June 16, 2009.

The next order of business was a motion to seal minutes of the Executive Session held on June 2, 2009. Upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To seal minutes of the Executive Session held on June 2, 2009.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on June 2, 2009; 2) received a status update on Irons v. The Rhode Island Ethics Commission; and 3) discussed Legal Counsel's contract.

The next order of business was a Commission Workshop regarding the participation of public officials who are union members in actions involving a different bargaining unit of the same umbrella labor union.

Chair Binder noted that the Commission received a lot of input, which shall be part of the record. She asked those who had signed up to speak to limit themselves to two minutes and address only the salient points of any written comment submitted. Staff Attorney DeVault explained that this issue frequently arises in the context of

school committee members who are teachers in another district. She stated that the Commission has allowed such officials to participate in matters involving another local when the official is not a business associate of the umbrella organization. She clarified that, despite what has been suggested in some of the public comments received, the Commission has applied a business associate analysis, not a class exception analysis, to this situation. She noted that the Commission could address the issue through issuance of a General Commission Advisory or via the regulatory process.

The first speaker was Al Benson, First Vice President of Operation Clean Government. He noted that most advisory opinions on the issue opine that there is no conflict because the official does not have a leadership position, and therefore no business association, with the union. He referenced the Code's definition of "business associate" and stated that such an official does have a business association with the other members of the union, even if they are not members of the same local.

The next speaker was John Marion, Executive Director of Common Cause Rhode Island. He stated that Common Cause is not trying to single out unions because such conflicts exist among all professions. He suggested adding new definitions to the Code, which he states is presently silent regarding what constitutes a labor organization, a local union affiliate and regional organizations, like the CHARIHO regional school district. He expressed that there is no better example

of a 5(f) violation than the relationship between a public official and the individual negotiating for the union on his behalf. He noted that different locals with the same parent are used as evidence in binding labor arbitration when making decisions regarding wages and benefits. He indicated that when the negotiating official's contract is up in another district it could affect that individual's salary and benefits.

The next speaker was Harry Staley, Chairperson of the Rhode Island Statewide Coalition. He represented that application of the business associate analysis to the situation makes a distinction without a difference. He noted that the school committee member is either directly a member of the statewide union or is involved in negotiating with a person assigned by the state union to negotiate the contract. He stated his belief that, in practice, the state organization provides the negotiator for the local entity. He suggested that the committee member is then effectively negotiating with himself and or his interests. He also indicated that there may be situations where other committee members have self-interests, such as where the committee's health insurance benefits are tied to those in the contract. He represented that the entire situation is fraught with actual or potential conflicts, and he referenced the constitutional goal of avoiding appearances of impropriety.

The next speaker was George Nee, Secretary-Treasurer of the Rhode Island AFL-CIO. He distributed written comment prepared by Robert

Mann on behalf of Working Rhode Island, a coalition of labor organizations. He represented that prohibiting a public official's ability to participate would fly in the face of long-standing protected rights, including that of legislative immunity. He indicated that it would result in discriminatory application of the class exception with certain persons, union members, prohibited from participating in the political process. He suggested that the voters know who they elect and what their backgrounds are, and he cautioned against denying individuals the right to participate in the democratic process. Commissioner Harsch asked for an explanation as to the application of legislative immunity. Mr. Nee cited from *Maynard v. Beck*, stating that the doctrine of legislative immunity applies as long as the challenged actions are legislative in nature. In further response to Commissioner Harsch, Mr. Nee expressed his view that the collective bargaining process falls under legislative immunity.

Chair Binder noted that a URI employee, who also was a local school committee member, recently appeared before the Commission for an advisory opinion and represented that she believed there was a conflict given that the local teacher's union was a member of the same parent organization to which her union belonged. Mr. Nee stated that there is no connection between the two unions and he does not know why she would believe there to be a conflict. Staff Attorney Leyden informed that the petitioner was an employee of CCRI and a member of the Narragansett School Committee. She was required to be a member of the union due to her employment and did

not feel comfortable negotiating with the local union because it was under the same umbrella organization as her union. Chair Binder inquired of Mr. Nee regarding the situation where the local union's business agent appears before the school committee, and the school committee member, who is a member of a different local, is represented by the same agent.

Mr. Nee replied that one person works for the union and the other is a member. He stated that the structure varies among the municipalities, but the same agent who works for the parent organization may be assigned to represent various locals. In response to Chair Binder, he indicated that there sometimes may be carry-over in a contract negotiated with one district to another. He noted that binding arbitration does not exist for schools, so the comparability argument does not have legal significance in negotiations.

The next speaker was Sandra Thompson, a member of Operation Clean Government. In response to Mr. Nee's comments, she noted that every opportunity exists for union members to participate as public officials. She stated that the union organizations all have a commonality to provide the best benefits for their members.

She suggested that when an official has to negotiate a contract, even with a different district, there is still a commonality which cannot be absolved and which does not serve the public interest. She

referenced an advisory opinion issued to a Jamestown School Committee member, who also was a teacher in Little Compton. She represented that comparability does exist in the negotiation process and quoted from an East Providence arbitration decision.

Ms. Thompson pointed out that many school board members have family members who are teachers and belong to the union. She noted that some matters, such as the health insurance buy-back, can financially impact the board member. She expressed that, while the Code is very clear regarding what is a conflict, she does not understand the effort made to carve out exceptions to the standards. In response to Chair Binder, Ms. Thompson acknowledged that the situation also applies to other groups who belong to unions, such as members of fire and police departments. She noted that members of police and fire unions came out in support of East Providence teachers before the School Committee, even though they were members of different locals.

The next speaker was Representative Douglas Gablinske, who noted that he previously addressed the Commission regarding the class exception. He indicated that he continues to advocate for a stronger class exception rule, but he recognizes that it cannot be taken away entirely. He represented that there is no validity to the argument that members of different locals support each other just like business people belonging to the Chamber of Commerce. He urged the Commission to “follow the money” in looking for conflicts. He

suggested that there is frequent crossover from union dues collected at the local level to the umbrella organization, or even brother and sister organizations.

Commissioner Harsch inquired how one would “follow the money” in the situation of the Jamestown School Committee member previously referenced. Representative Gablinske indicated that he did not see a tie-in in that situation; there has to be a more specific connection. He noted that many members of the General Assembly regularly recuse on bills affecting their professions, but the union members do not. Commissioner Harsch asked if a person who is a member of one local is also technically a member of the statewide union. Representative Gablinske suggested that Mr. Nee might have that information. Mr. Nee replied that there is no simple answer because each union has a different structure. He explained that, in most cases, the local union is affiliated with the state organization, but most of the dues stay at the local level and only some go toward the state organization. He stated that some local unions have no affiliation with a parent or umbrella entity and all dues remain local.

In response to Commissioner Harsch, Mr. Nee stated that members of a teachers’ union are classroom teachers. He represented that, although they would all be members of a local union, their affiliations with the state would vary. In further response, Mr. Nee indicated that most locals do not have the resources for a full-time staff, so the state organization would bring in people for the local. However,

locals of sufficient size often do not receive assistance from the state.

Representative Gablinske reiterated that the Commission should follow the money and, if local money goes to the umbrella organization, there is a relationship that may present a conflict.

Chair Binder thanked everyone for their comments. Commissioner Harsch requested additional Staff analysis, in the form of a research paper, and also asked for written comment from Legal Counsel.

Chair Binder voiced support for the idea and commented that the financial analysis is important. In response to Staff Attorney DeVault, Chair Binder clarified that the Staff should look at the advisory opinions issued and provide a better understanding of the union financial structure and support provided by the state organization.

She stated that the Commission wants information on whether there is a financial nexus between the local unions and the NEARI and RIFTA, for example. Commissioner Lynch suggested looking at how the national organization would impact the individual teacher.

Commissioner Cerullo stated that she would like more information on comparability and how what happens in one local union impacts another.

Commissioner Heffner expressed his appreciation for the request for research, which he stated will involve talking to individuals like Mr. Nee regarding union structures.

Commissioner Harsch asked that the Staff not limit its research to the teachers' situation alone. He suggested that the Staff look at any union organization negotiating with the public sector and whether there can be cross-membership.

Commissioner Harsch asked that the Staff not limit its research to the teachers' situation alone. He suggested that the Staff look at any union organization negotiating with the public sector and whether there can be cross-membership.

The next order of business was a review and consideration of General Commission Advisory (GCA) No. 1 and the newly proposed GCA on nepotism. Staff Attorney DeVault recommended the withdrawal of GCA 1, Nepotism, primarily due to the adoption of Regulation 5004 in 2007. She provided an overview of the new proposal, which uses a different structure that contains restatement-type examples throughout. She advised that, pursuant to Regulation 1027, the Commission must vote at two separate meetings regarding the adoption of a new GCA, in addition to accepting public comment at some point prior to the second vote. Chair Binder complimented the new structure and use of examples. Upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To withdraw the 1988 GCA No. 1.

Legal Counsel Conley commented that the new structure is a 110% improvement. He stated that the old GCA's rang more in the nature of a regulation, and he expressed his belief that the new format fulfills and implements that GCA's original intent. Upon motion made by Commissioner Lynch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To approve (1st vote) the draft GCA on nepotism.

Chair Binder advised that the Commission will receive public comment on the proposed GCA at the July 21st meeting.

The next order of business was discussion of third-party posting of financial disclosure statements on the internet. Senior Staff Attorney D'Arezzo advised that two individuals recently informed the Commission that their financial statements are posted on www.scribd.com and expressed concerns regarding privacy and identity theft. She stated that in January 2009 an individual posted over 5,400 statements for calendar years 2005 and 2007 on the website, which allows people to post and share documents. She advised that the statements are public records pursuant to the APRA and the Commission cannot control to whom or in what format an individual who obtains the records may subsequently disseminate them. She clarified that the Commission only posts the statements filed by General Officers and members of the General Assembly on the Commission website in PDF format. In response to Commissioner Harsch, Senior Staff Attorney D'Arezzo explained that the statements are posted on www.scribd.com as PDF documents, which are in a read-only format so that no changes can be made to them. She also noted that the APRA's prohibition against commercial use is not implicated here.

The next order of business was consideration of Legal Counsel's contract, which had been discussed in Executive Session. Upon motion made by Commissioner Harsch and duly seconded by

Commissioner Cerullo, it was unanimously

VOTED: To extend Legal Counsel Conley's contract for a period of one year.

The next order of business was the Director's Report. Executive Director Willever advised that Staff Attorney Gramitt is presently meeting with former Justice Flanders and others in preparation for Thursday's panel presentation at the RI Bar Association Annual Meeting. He noted that Commissioners may obtain CLE credit for attending the presentation, as well as for the Attorney General's Open Government Summit which will be held on July 31st. He informed that the Staff intends to review each GCA as time permits and present them to the Commission for review and action. He stated that this includes reviewing existing GCA's and drafting proposals to address new areas. In response to Chair Binder, he indicated that another proposal would not yet be available at the next meeting. Director Willever reported that the Staff recently was subject to one furlough day due to statewide budget constraints. He stated that this is a busy time for Operation Compliance, with the forwarding of reminder letters and tweaking the process to elicit optimal voluntary compliance.

The next order of business was New Business. Commissioner Harsch inquired if the Staff analysis of the workshop would be made available to the public. Director Willever replied that it would be

publicly available, although it would not be ready for the next meeting.

At approximately 10:55 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Murray, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary