

# **MINUTES OF THE OPEN SESSION**

## **OF THE RHODE ISLAND ETHICS COMMISSION**

**July 21, 2009**

**The Rhode Island Ethics Commission held its 11th 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, July 21, 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 Deborah M. Cerullo SSND**

**Ross Cheit, Vice Chair Edward A. Magro\***

**James V. Murray Mark B. Heffner**

**John D. Lynch, Jr.**

**Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.**

**At 9:02 a.m., the Chair opened the meeting. The first order of business was approval of minutes of the Open Session held on June 30, 2009. Upon motion made by Commissioner Cerullo and duly**

**seconded by Commissioner Murray, it was unanimously**

**VOTED: To approve minutes of the Open Session held on June 30, 2009.**

**ABSTENTION: John D. Lynch, Jr.**

**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 James T. Conway, Jr., Deputy Chief of the Valley Falls Fire Department. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. Also present was James Scullen, Chair of the Valley Falls Board of Fire Wardens.**

**\*Commissioner Magro arrived at approximately 9:05 a.m.**

**In response to Commissioner Cerullo, Chair Scullen described his background and credentials in regard to the proposed alternate chain of command. In response to Commissioner Cerullo, Chair Scullen stated that he had been on the Board of Fire wardens for thirteen years and would likely only be filling in for the Chief when he goes on vacation or is otherwise absent. In response to Commissioner Cerullo, Chair Scullen stated that he was never a firefighter himself.**

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

**VOTED: To issue an advisory opinion, attached hereto, to James T. Conway, Jr., Deputy Chief of the Valley Falls Fire Department.**

**The next advisory opinion was that of Matthew W. Robinson, member of the East Providence Planning Board, East Providence Historic District Commission, and an East Providence Police Officer. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Heffner and duly seconded by Commissioner Lynch, it was unanimously**

**VOTED: To issue an advisory opinion, attached hereto, to Matthew W. Robinson, a member of the East Providence Planning Board, East Providence Historic District Commission, and an East Providence Police Officer.**

**The next advisory opinion was that of Edward A. Giroux, a member of the West Warwick Town Council. Staff Attorney Leyden indicated that the Petitioner was planning on attending. Chair Binder suggested moving on to the next advisory opinion in the interim.**

**The next advisory opinion was that of Philip C. Marks, a member of the Tiverton Planning Board. Staff Attorney DeVault presented the**

**Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, it was unanimously**

**VOTED: To issue an advisory opinion, attached hereto, to Philip C. Marks, a member of the Tiverton Planning Board.**

**The next advisory opinion was that of N. David Bouley, a member of the Woonsocket Planning Board. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Lynch, it was unanimously**

**VOTED: To issue an advisory opinion, attached hereto, to N. David Bouley, a member of the Woonsocket Planning Board.**

**The next advisory opinion was that of Edward A. Giroux, a member of the West Warwick Town Council. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. Staff Attorney Leyden stated that it was her current understanding, based on an article in the Providence Journal, that the second question contained in the Staff recommendation is now moot. The Petitioner stated that that was correct and that the Town Council, Town Manager and members of the School Committee had come to a confidential arrangement. However, he indicated his belief that other situations may arise in the future that require him to vote on matters**

**involving the school district. Staff Attorney Leyden noted that she had previously advised the Petitioner that advisory opinions are based on a matter-by-matter analysis and do not provide a “carte blanche” or blanket safe-harbor for individuals subject to the Code. The Petitioner acknowledged that Staff had told him exactly that in their phone conversation.**

**In response to Commissioner Cerullo, Chair Binder stated that because the second question is now moot, the Commission will vote to approve an amended advisory that just addresses the first question contained in the Staff recommendation. The Petitioner then stated that he understood that the Commission doesn’t address hypothetical situations and that he has every intention of recusing in any matter coming before the Council concerning his wife specifically, or a smaller group of teachers, but stated his understanding that he need not recuse if a matter concerning the larger group of all West Warwick teachers comes before the Town Council. Chair Binder stated that the prudent thing to do would always be to ask for further guidance. Upon motion made by Commissioner Magro and duly seconded by Commissioner Heffner, it was unanimously**

**VOTED: To issue an advisory opinion, as amended and attached hereto, to Edward A. Giroux, a member of the West Warwick Town Council.**

**Upon motion made by Commissioner Murray and duly seconded by Commissioner Heffner, 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 30, 2009.**

**b.) Motion to return to Open Session.**

**The Commission returned to Open Session. Chair Binder reported that the Commission voted to approve minutes of the Executive Session held on June 30, 2009.**

**The next order of business was a consideration of General Commission Advisories (GCAs). Staff Attorney Gramitt recommended that the Commission take a second and final vote to withdraw GCA No. 10 (Regarding RISDIC) and GCA No. 11 (Activities of a State or Municipal Official in Connection with Decisions Concerning His or Her Property, or the Property of Certain Relatives). Upon motion made by Commissioner Murray and duly seconded by Commissioner Heffner, it was unanimously**

**VOTED: To withdraw (2nd vote) GCA No. 10.**

**ABSTENTION: John D. Lynch, Jr.**

**Upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, it was unanimously**

**VOTED: To withdraw (2nd vote) GCA No. 11.**

**ABSTENTION: John D. Lynch, Jr.**

**Staff Attorney DeVault recommended the withdrawal of GCA No. 1 (Nepotism). Upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, it was unanimously**

**VOTED: To withdraw (2nd vote) GCA No. 1.**

**ABSTENTION: John D. Lynch, Jr.**

**The next order of business was discussion of comment received regarding the proposed GCA 2009-1: Nepotism. Staff Attorney DeVault noted that the Commission had received written comment from Common Cause and the American Civil Liberties Union (ACLU) Rhode Island Affiliate. She stated that the Staff is always appreciative of thoughtful comment. She noted that Common Cause's comment focused on Advisory Opinion 2007-47 and Regulation 5004(b)(4)(b). She further noted that the ACLU comment essentially addressed two different things: a specific example given on page 3 of the draft GCA**

**2009-1 and the application of the “class exception” found at R.I. Gen. Laws § 36-14-7(b) to Regulation 5004. She offered a substitute example for the Commission’s consideration.**

**In response to Commissioner Cerullo, Staff Attorney DeVault stated that while the Commission has not had many opportunities to interpret the “party or participant” clause of Regulation 5004(b)(1), at a minimum, it was meant to include parties with standing, those representing parties with standing and, most likely, witnesses in such proceedings. Chair Binder stated that she thought that the ACLU’s comment in regard to the example cited was valid. In response to Commissioner Magro, Legal Counsel Conley affirmed that if the GCA is amended to include a new example, the Commission will need to provide notice for comment again and take a second vote to approve at the next meeting. In response to Commissioner Lynch, Staff Attorney DeVault stated that the GCAs are intended to provide lay people with black and white examples of applications of the Code, and that if a person was faced with a more uncertain situation, she would hope that they would request an advisory opinion. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously**

**VOTED: To approve the amended GCA 2009-1: Nepotism (1st vote).**

**The next order of business was the consideration of the Staff research memo regarding persons subject to the Code who are union**

members and their participation in official transactions involving their umbrella labor union. Staff Attorney DeVault noted that she had located an additional Ohio Ethics Commission Advisory Opinion that was on point and had it available for review.

Chair Binder stated that after having reviewed the memo, she realized that there was more of a financial nexus than she had originally thought. Commissioner Magro agreed. Chair Binder asked if perhaps crafting a GCA on this issue might be the next step. Commissioner Cerullo agreed. Staff Attorney DeVault noted that another option would be for the Commission to wait for the next request for a factually specific advisory opinion to come in and to address a potential change of policy then. Chair Binder stated that she thought people are likely relying on past advisory opinions and that if a shift in policy is going to occur, perhaps a new GCA is the best way to go. Commissioner Cerullo agreed, stating that, given the value of precedent, she would be more comfortable with a GCA. Staff Attorney DeVault noted that if the Commission does eventually issue a GCA on this issue, the Commission will then have to decide how to deal with petitioners who have already received advisory opinions, and noted that the issue will be whether they will be provided notice of the new GCA or whether the safe-harbor they received with their advisory opinions will continue.

Commissioner Heffner asked what the next procedural step in issuing a GCA would be. Chair Binder stated that the staff would draft an

initial GCA, which the Commission would edit and Staff would redraft until it was in a finalized form. In response to Commissioner Heffner, Staff Attorney DeVault stated that one of the Commissioners at a prior meeting had requested that the research memo distributed at this meeting be publically available. In response to Staff, Chair Binder suggested that as most prior advisory opinions regarding this issue had utilized a business associate analysis, the proposed GCA should reflect that. In response to Staff, Chair Binder further suggested the possibility of utilizing a straight conflict analysis. In response to Staff, Chair Binder stated her recollection that most prior advisory opinions dealt with school committee contract negotiations.

Staff Attorney Gramitt informed that he had provided the Commission with a memo regarding “core legislative functions,” which he had not placed on the agenda for discussion in order to allow the Commission to determine if it wanted it to be a future agenda item. Commissioner Cheit asked that it be on the agenda for the next scheduled meeting.

The next order of business was the Director’s Report. Executive Director Willever advised that there are four advisory opinions and one complaint pending. He also reported that two new APRA requests had been received. Director Willever reported that the Staff had hosted a diplomatic group from Indonesia at the behest of the State Department. Finally, he stated that the Staff is currently working on collections and on the budget.

**The next order of business was New Business. Chair Binder stated that she would like to return to an examination of the Complainant's role in Commission proceedings and asked that materials be included in the next packet and that it be placed on the agenda for the next meeting. She also asked that the Commission take another look at the "class exception" at an upcoming meeting.**

**Upon motion made by Commissioner Magro, it was unanimously**

**VOTED: To adjourn.**

**Respectfully submitted,**

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**J. William W. Harsch**

**Secretary**