

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

September 22, 2009

The Rhode Island Ethics Commission held its 13th 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, September 22, 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
J. William W. Harsch, Secretary John D. Lynch, Jr.
James V. Murray Mark B. Heffner***

Also present were 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 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 August 18, 2009. 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 August 18, 2009.

ABSTENTIONS: Deborah M. Cerullo SSND and James V. Murray.

Pending further arrivals, the next order of business was the Director's Report. Executive Director Willever reported that there are nine complaints, one advisory opinion, and one preliminary investigation pending. He stated that four formal APRA requests have been granted since the last meeting. He informed that Staff Attorney Gramitt and he have been asked to be part of a group organized under former Chief Justice Weisberger to review the Judicial Code of Conduct for conformity with the Code of Ethics. He advised that he recently met with the new House Fiscal budget analyst, as well as John Marion, Executive Director of Common Cause Rhode Island, and Bob Edgar, the national president of Common Cause, to review the Commission's functions.

Director Willever reported that Chair Binder and Staff Attorney Gramitt recently participated in a panel held at Brown University to discuss the Rhode Island Supreme Court's ruling in William V. Irons v. Rhode Island Ethics Commission. He noted that the panel was moderated by Vice Chair Cheit, and the panelists included counsel on the amicus pleadings for both sides. He stated that he was asked to

speak at the annual COGEL conference, but he had to decline due to a lack of funding and constraints on out of state travel. He indicated that the Staff would be meeting with a group of officials from Romania next week as part of a US State Department program. Director Willever informed that the issue regarding potential furlough days has yet to be resolved. He noted that Staff is engaged in ongoing cross-training which will lessen the impact that any flu outbreak will have on personnel and Commission functioning.

***Commissioner Heffner arrived at 9:08 a.m.**

Commissioner Cheit stated that former Senator Roney and John Marion also participated in the panel at Brown University and inquired when it would be televised. John Marion replied that the tape is now being edited, but it is available on youtube.com, and the anchor rising blog.

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 Robert J. Reilly, a firefighter employed by the City of Providence Fire Department, who serves in the Department's Arson Unit as a Fire Investigator. Senior Staff Attorney D'Arezzo presented the Commission Staff recommendation and noted that the Petitioner was not afforded safe harbor in the draft

recommendation. The Petitioner was present.

The Petitioner represented that he very seldom performs inspections.

In response to Commissioner Cheit, the Petitioner stated that the contact from a potential client came as a referral from a friend after he was transferred. In further response to Commissioner Cheit, the Petitioner stated that 60% of his practice focuses on property and the other 40% is general litigation. In response to Commissioner Cheit, Senior Staff Attorney D'Arezzo stated that the "use of position" to solicit clients could be as overt as handing out business cards or soliciting clients while performing his municipal duties, or any other acts that are essentially the equivalent of "drumming up business" while on the job, but that is different from circumstances when potential clients just know of your expertise and then come to you.

In response to Commissioner Cheit, Senior Staff Attorney D'Arezzo stated that the Petitioner's jurisdiction is confined to the City of Providence and that, accordingly, he would be prohibited from going before the City of Providence Fire Marshal or the State Board on Providence matters. Commissioner Lynch stated that he believed it was okay for the Petitioner to use his expertise and knowledge and that alone was not the "use of position." Commissioner Cheit responded that if the Petitioner did not have his current job, he would not be getting this type of client. Commissioner Lynch stated that he did not believe the Commission should limit the Petitioner's practice based on his knowledge alone. Commissioner Cheit stated that he

believed the Commission could limit the Petitioner in this way, but historically it has not done so. Upon motion made by Commissioner Magro and duly seconded by Commissioner Heffner, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Robert J. Reilly, a firefighter employed by the City of Providence Fire Department, who serves in the Department's Arson Unit as a Fire Investigator.

The next advisory opinion was that of Chief Joseph Baris, Jr., Chief of the West Warwick Fire Department. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present, along with Assistant Town Manager Luke Peterson, who was present on behalf of the Town Manager. Commissioner Harsch inquired as to the size of the department. The Petitioner replied that the department includes 73 people, 4 stations, 4 engines, 1 ladder truck, 1 rescue truck and a special hazards unit. He informed that there is a battalion chief on each platoon, a fire alarm division and a fire prevention division. Commissioner Cerullo asked about the Town Manager's background to independently address an issue arising regarding the professional competence of the Petitioner's son-in-law, if he were hired. Mr. Peterson informed that the Town Manager has worked in municipal management for approximately twenty-five years and is currently the city's Personnel Director.

Commissioner Cerullo inquired whether the Town Manager would have to rely upon fire department personnel to understand issues relating to the competency of a fire-fighter. Mr. Peterson replied that the Town Manager would rely upon fire department personnel, in part, but he would also educate himself as to the issue. In response to Commissioner Cheit, the Petitioner stated that his son-in-law's immediate supervisor is his subordinate. Commissioner Cheit wondered why it would not be a problem for a subordinate of the Chief to make initial determinations on disciplinary issues relating to his son-in-law. Staff Attorney Leyden noted that in all cases the first person to become aware of a problem is going to be a subordinate, but the ultimate decision is made by someone above. Commissioner Cheit indicated that the issue might not go that high if the initial decision is not to discipline the individual. He noted that the issue is not personal as to the Petitioner but, in general, subordinates are not going to want to discipline the Chief's son-in-law, so the issue will not go up the chain of command.

Commissioner Cheit stated that the alternate chain of command cannot involve subordinates. Chair Binder asked what the Commission has done in other similar situations, specifically whether a subordinate employee was allowed to handle the initial discipline issue. Staff Attorney Leyden noted that in a similar prior opinion, the alternate chain of command involved the Mayor handling matters involving the Chief of Police's relative once matters rose to the level of being handled by a Major.

Commissioner Cheit expressed that the situation is different when you are dealing with the Chief, to whom everyone is subordinate. The Petitioner explained that a matter like being late to work would be handled at the subordinate level, but something serious, like a DUI, which would normally go to him, would be referred to the Town Manager. Commissioner Cheit stated that things that would not get to the Petitioner would be decided by his subordinates. The Petitioner noted that familial relationships exist in fire services throughout the country. Staff Attorney Leyden indicated that in a prior opinion, issued to Chief McGrath in Cranston, the Major would make the initial determination and then it would go to the Mayor.

Commissioner Cheit indicated that the Commission is trying to strike a balance between the tradition of families working within a fire department and being fair to others. In response to Commissioner Cerullo, the Petitioner advised that he was a Captain in Providence when his son-in-law first applied. In response to Commissioner Murray, the Petitioner explained that assignments are handled, in part, by a bid system within the union. In further response, the Petitioner stated that he is unsure of the union's involvement with disciplinary matters, as not every disciplinary process results in a grievance. The Petitioner stated that new hires are able to bid on vacancies, but they are usually placed in leftover slots. Upon motion made by Chair Binder and duly seconded by Commissioner Magro, there was discussion.

Commissioner Cheit stated that the draft opinion is consistent with past advisory opinions, so he is inclined to approve it, but he has a level of discomfort regarding the discipline issue. He inquired what would happen as a disciplinary matter if, for example, someone came in late chronically. The Petitioner replied that he has not seen the issue in his fourteen months in the department. Commissioner Cerullo expressed her discomfort. She stated that she cannot recall how she voted in the last advisory opinion, but she believes it was a smaller department at issue. She commented that a subordinate would be disciplining the individual and the Town Manager really has no competence to make a potential decision without relying on fire department personnel. Commissioner Cheit inquired if she would feel differently if the Chief of Police were the alternate chain of command. She replied that she is uncertain, as fire fighting is pretty specific.

Mr. Peterson noted that the Town Manager deals with the police, fire and sewer departments every week and comes across a variety of disciplinary areas. The Petitioner represented that in his twenty-nine years he has not come across any disciplinary action that has anything to do with a firefighting aspect. He noted that if someone does something wrong on a rescue, it is referred to the Department of Health. He indicated that an example of a disciplinary issue would be an employee using drugs. Commissioner Cerullo stated her concern that the evaluation of a new employee's job performance would be

done by the Petitioner's subordinate. She stated that if at any point there is a concern regarding that performance and it goes up the alternate chain of command, the person who would eventually evaluate it would not have the expertise needed.

Mr. Peterson stated that all performance issues go before the Town Manager, as he is the Director of Personnel. Chair Binder voiced her concern as to how the Petitioner would be able to make decisions such as who to send into a burning building at a major fire. The Petitioner replied that those decisions are made by the battalion chiefs and captains, generally before he would be at the scene. Upon the original motion made by Chair Binder and duly seconded by Commissioner Magro, it was

VOTED: To issue an advisory opinion, attached hereto, to Chief Joseph Baris, Jr., Chief of the West Warwick Fire Department.

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

NOES: Deborah M. Cerullo SSND.

The next advisory opinion was that of Judge Steven J. Hart, the newly appointed Probate Court Judge for the Town of Coventry.

*Commissioners Lynch and Heffner recused. Commissioner Lynch

also stated his recusal on the next matter on the agenda, the advisory opinion request of Jean A. Boulanger, Esq. Commissioner Lynch left the meeting at 9:50 a.m., at which time Commissioner Heffner sat in the audience.

Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Staff Attorney Gramitt explained that the Petitioner thought there might be confusion among municipal probate court judges and that an advisory opinion would provide clarification. He also noted that the Petitioner indicated that he might need to reappear before the Probate Court as a ministerial function in the future. In response to Commissioner Harsch, Staff Attorney Gramitt stated that he does not know if this situation occurs with other probate court judges; however, he noted that the Commission recently handled a case involving a municipal solicitor who sat as the probate court judge from time to time and then would appear before the same court in his private capacity. Staff Attorney Gramitt indicated that the advisory opinion is an educational opportunity. Upon motion made by Commissioner Murray and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Judge Steven J. Hart, the newly appointed Probate Court Judge for the Town of Coventry.

***Commissioner Heffner returned from the audience at 9:55 a.m.**

The next order of business was that of Jean A. Boulanger, Esq., the former Probate Court Judge for the Town of Coventry. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Commissioner Heffner inquired as to what the Staff would interpret as being a court of public record, given that there is not typically a record in probate court. Staff Attorney DeVault replied that the statute refers to “matters of public record in a court of law” and cited to prior advisory opinions. In further response, she indicated that the purpose of the statute was to address the situation of attorneys representing clients before their former agencies. Commissioner Harsch inquired why the exception would not have applied in the complaint against Joseph Larisa. Senior Staff Attorney D’Arezzo clarified that the Larisa complaint involved the representation of a client in a personnel hearing before the East Providence City Council, not a court. Commissioner Harsch commented that the hearing was open and public. Commissioner Cheit indicated that the advisory opinion might be educational, but he thinks the statute is quite clear. Upon motion made by Commissioner Magro and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Jean A. Boulanger, Esq., the former Probate Court Judge for the Town of Coventry.

***Commissioner Lynch returned to the meeting at 10:03 a.m.**

The next advisory opinion was that of Mayor Susan D. Menard, the Mayor of the City of Woonsocket. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Staff Attorney Gramitt explained that, although the Petitioner first requested the opinion back in July, as is the case with most requests, additional factual information was needed requiring follow-up contacts. In response to Commissioner Cheit, Staff Attorney Gramitt indicated that the Petitioner represents that she is not being offered a price that any other person could not get. In response to Commissioner Heffner, he informed that advisory opinions are not investigative proceedings; however, he stated that, unofficially, the price was within the range of the car's blue book value. In response to Commissioner Cheit, Staff Attorney Gramitt stated that the Petitioner did not provide any paperwork. Upon motion made by Commissioner Cheit and Commissioner Lynch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Mayor Susan D. Menard, the Mayor of the City of Woonsocket.

At 10:10 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, 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 August 18, 2009.

b.) Notification of initiation of Preliminary Investigation pursuant to Commission Regulation 36-14-12001.

**c.) In re: Kevin Carter,
Complaint No. 2009-2**

d.) Motion to return to Open Session.

The Commission returned to Open Session at 10:53 a.m. The next order of business was a motion to seal minutes of the Executive Session held on September 22, 2009. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Murray, it was unanimously

VOTED: To seal minutes of the Executive Session held on September 22, 2009.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on August 18, 2009; 2) received notification of initiation of a

Preliminary Investigation pursuant to Regulation 12001; and 3) initially determined that Complaint No. 2009-2, In re: Kevin Carter, states sufficient facts to allege a knowing and willful violation of the Code of Ethics.

The next order of business was the withdrawal of Amended General Commission Advisory (GCA) 6 (Salary Raises for Public Officials). Staff Attorney DeVault advised that this would be the second and final vote to withdraw GCA 6. Upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it was unanimously

VOTED: To withdraw (2nd vote) GCA 6.

The next order of business was public comment on and the Commission adoption of proposed GCA 2009-2: Public Officials' Actions Involving their own Stipends, Salaries, Compensation or Benefits. Staff Attorney DeVault informed that no public comment had been received. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To adopt (2nd vote) proposed GCA 2009-2: Public Officials' Actions Involving their own Stipends, Salaries, Compensation or Benefits.

The next order of business was review and consideration of proposed

GCA 2009-3: Participation in Union Actions by Public Officials who are Union Members. Staff Attorney DeVault advised that the analysis finds a business association between union members and their local and umbrella organizations. She stated that it also indicates that a public official is not a business associate of other locals with which the official is not affiliated, nor is the official a business associate of every rank and file union member. She noted that the draft is presented for the Commission's discussion and inputs. Chair Binder and Commission Harsch expressed their approval of the analysis.

Commissioner Cheit asked why the Commission would consider adopting a GCA rather than adopting a regulation to address the issue. He noted that individuals have received prior advisory opinions on this issue and the Commission now would be changing its analysis through a GCA. Staff Attorney DeVault noted that the Commission has issued approximately thirty such opinions in the past ten years, and it could notify those who previously received such opinions. Commissioner Cheit voiced his opinion that a policy change should be undertaken by adopting a new rule and that the draft proposal is helpful in the context of thinking about what the rule should say. Chair Binder stated that it would be a big policy shift. Commissioner Harsch indicated that he would like to hear from Legal Counsel on the issue. Chair Binder asked that the matter be placed on the next agenda for Legal Counsel's input. Commissioner Cheit concurred. In response to Commissioner Heffner, Chair Binder clarified that the agenda item for discussion would relate to whether

the Commission should handle the issue through adopting a new rule or a GCA.

The next order of business was discussion regarding the class exception. Staff Attorney DeVault provided an overview of the research materials presented in the staff memorandum. She informed that the Commission had received public comment at a workshop on the class exception in 2008. She noted that the memorandum provides information as to what other states do in this area, as well as abstracts of how the Commission has applied section 7(b) in both advisory opinions and complaint matters. Chair Binder suggested that the Commission take up the issue at a later time.

The next order of business was the election of officers. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To re-elect Barbara R. Binder as Chairperson.

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

VOTED: To re-elect Ross Cheit as Vice Chairperson.

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

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

ABSTENTION: J. William W. Harsch.

The next order of business was New Business proposed for future Commission agendas. Director Willever congratulated the officers on their re-election. In response to Director Willever, Chair Binder requested that the Complainant's role in the complaint process be noticed as an agenda item for discussion at the next meeting.

At 11:08 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary