

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

October 6, 2009

The Rhode Island Ethics Commission held its 14th 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, October 6, 2009, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

**Ross Cheit, Vice Chair Edward A. Magro
James V. Murray John D. Lynch, Jr.
Frederick K. Butler Mark B. Heffner
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 Jason Gramitt and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:03 a.m., the Vice Chair opened the meeting. The first order of business was approval of minutes of the Open Session held on

September 22, 2009. Upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To approve minutes of the Open Session held on September 22, 2009.

ABSTENTION: Frederick K. Butler.

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. Vice Chair Cheit announced that due to recusals the Commission would postpone consideration of the first two advisory opinions on the agenda pending Commissioner Cerullo's arrival. The first advisory opinion was that of Philip L. Hervey, the Barrington Town Planner. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Staff Attorney Gramitt noted the Petitioner had also requested guidance as to the conduct of third parties. He advised that, while the Commission can only address the conduct of the Petitioner, others may be guided by the language contained in the opinion. Upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Philip L.

Hervey, the Barrington Town Planner.

The next order of business was Commission review and consideration of proposed General Commission Advisory (GCA) No. 2009-3: Participation in Union Actions by Public Officials who are Union Members. Staff Attorney DeVault noted that this matter had been continued from the last meeting in order to obtain Legal Counsel's input as to whether the issue should be addressed by rulemaking or by issuance of a GCA. Vice Chair Cheit stated that he had suggested that it would be more appropriate to handle the issue through rulemaking. Legal Counsel Conley advised that the issue has been a recurring one for the Commission, mostly occurring in the context of police officers and teachers. He stated that the issue is whether the prior analysis is one that the current Commission agrees with.

Legal Counsel Conley advised that the analysis in prior advisory opinions is not as in depth as what the current Commission is looking at regarding the relationship between locals. He stated that, based on the additional research and analysis that has been done, if this Commission were to determine that they are joined together to achieve a common financial objective there is a sufficient basis to reach a different conclusion than that reached in prior advisory opinions. If the Commission were to decide to go in that direction, he advised that it does not necessarily need to engage in either rulemaking or the adoption of a GCA to do so. Legal Counsel Conley

stated that the Commission could adopt that analysis based upon additional information provided.

Vice Chair Cheit agreed that the Commission does not need to engage in rulemaking or the adoption of a GCA, but he suggested that it might be better to do it through rulemaking, which would provide opportunity for public comment. Commissioner Butler commented that if the Commission does not adopt a GCA, it would be prudent to withdraw old advisories if they do not represent the current thinking of the Commission. In response to Vice Chair Cheit, Staff Attorney DeVault indicated that the Commission could notify individuals who previously received advisory opinions on the issue. She stated that there have been approximately thirty such opinions in the past ten years, and the individuals would continue to have safe harbor from the time their opinions issued until the new GCA is adopted. She noted that the Commission has previously changed its interpretation of the Code via issuance of an advisory opinion, such as in a 2003 opinion issued to Brandon Faneuf, a DEM employee. In response to Vice Chair Cheit, Staff Attorney DeVault stated that in such case she does not believe that the Commission went back and notified all persons who had received advisory opinions on the issue.

Legal Counsel Conley stated that once a GCA is issued on this topic, people cannot rely on prior advisory opinions issued. He indicated that he is not as concerned regarding any potential grandfathering issue because once the specific instance addressed in an advisory

opinion has occurred, the person cannot rely on that advisory opinion to protect future conduct. Vice Chair Cheit expressed his opinion that the Commission should either engage in rulemaking or adopt a GCA. Commissioner Magro indicated that the Commission needs to make a public statement regarding its shift in interpretation on this issue. Legal Counsel Conley noted that if the issue were to arise at the next meeting, the Commission would not be required to adhere to the analysis set forth in prior opinions for the sake of consistency.

Commissioner Lynch stated that this seems to be a substantial change, and he indicated his preference to engage in rulemaking to make it clear. Vice Chair Cheit inquired as to the difference between handling the issue through a rule or a GCA in terms of public participation. Legal Counsel Conley explained that rulemaking involves a lengthier and more in-depth process, with more public vetting. He stated that a GCA is like the CFR on the federal level. While he noted that he previously has cautioned the Commission against using GCAs to replace rulemaking, he indicated that in this situation, where the Code is clear, a GCA might be a better approach because the issue relates to application of facts to the Code, rather than a legislative gap. Vice Chair Cheit stated that he sees the issue as more doctrinal than fact based. Commissioner Lynch indicated that the same set of facts previously would have received a different answer, and he reiterated that the Commission should not legislate through opinion but by rule.

Commissioner Magro inquired as to what rule the Commission is looking to change. He expressed his view that the Commission is taking the same test and rule and looking at the information differently now to find that a business associate relationship exists. He inquired whether there would be a business association between two locals if the parent organization stays out of the negotiations.

***Commissioner Cerullo arrives at 9:30 a.m.**

Commissioner Magro noted that the Commission heard public testimony that a local would sometimes base its benefits upon what another local receives. Staff Attorney DeVault replied that such a situation would involve a separate conflict of interest analysis. Vice Chair Cheit commented that he would be wary about having a regulation directed at unions, but the Commission could have a business associate analysis that applies to matters as they arise, including those involving unions. Commissioner Heffner stated that he shares Vice Chair Cheit's concerns. He inquired as to the public notice process if the Commission decides to issue a GCA and what would happen if an individual requests an advisory opinion on the issue in the interim. Legal Counsel Conley replied that the public would be noticed of the proposed GCA and the Commission can reach out to interested parties. He stated that the public would have the opportunity to address the Commission on the proposal. He noted that the Commission would be free to issue an advisory

opinion setting forth the new analysis in the interim, without waiting for adoption of a GCA or a rule.

Commissioner Lynch inquired whether, if the Commission were to issue a GCA, there could be two individuals sitting on a public body, one of whom may participate in such matters and one who may not due to the timing of their advisory opinions. Commissioner Butler noted that issued opinions only address that specific instance of conduct. Commissioner Lynch stated that in some situations the facts remain the same and the only thing that changes is the calendar year for the contract. He asked whether these people have to seek a new opinion each year. In response to Vice Chair Cheit, Staff Attorney DeVault stated that, while some individuals would be advised to return for further guidance, others would operate under the assumption that they had safe harbor.

Commissioner Heffner asked whether the Commission could have a hybrid process to afford individuals additional notice. Staff Attorney DeVault reiterated the requirements of the normal GCA notice process and stated that notice could be provided to those persons who received prior opinions on the issue. Commissioner Magro indicated that there should be a notice statement regarding the fact that those individuals could no longer rely on those issued opinions. Commissioner Cerullo expressed support for specific notice to those individuals that the Commission is considering making a change and they have the opportunity to address the Commission. She asked

whether the Commission would be revoking those individuals' prior opinions. Vice Chair Cheit noted that the Commission has not revoked old opinions based on a new interpretation. Commissioner Butler observed that the Commission considered revoking the opinion previously issued to Senator Irons, but did not due to other issues that arose in that case.

Commissioner Cerullo expressed her concern for what the consequences would be for those individuals who received prior opinions, and whether they would differ depending on whether the Commission issues a GCA or adopts a rule. Vice Chair Cheit and Legal Counsel Conley stated that they would be the same under either scenario. In response to Vice Chair Cheit, Legal Counsel Conley indicated that an individual could take the Commission to court over a new regulation, but would not have the same potential with respect to a GCA, unless the Commission specifically applied it to the individual. Commissioner Heffner pointed out that the APA rulemaking process involves a longer public comment period, but individuals who received prior opinions do not get specific notice. He stated that he is leaning toward issuance of a GCA and concurs with Commissioner Magro that there should be particular notice to individuals who received prior opinions. Commissioner Cerullo also concurred and stated that it is a more appropriate vehicle for a change in interpreting the advice provided in advisory opinions.

Upon motion made by Commissioner Butler and duly seconded by

Commissioner Cerullo to direct Staff to bring the matter back before the Commission for consideration as a draft GCA, there was discussion. Commissioner Lynch voiced his discomfort with deciding to change the definition of business associate without the formality of a rule change. Commissioner Heffner commented that people who received prior opinions will rely on them and, even if the Commission were to engage in APA rulemaking, there would be no additional notice to them. He voiced support for taking the extra step of noticing such individuals. In response to Vice Chair Cheit, Commissioner Lynch indicated that he is concerned with notice, as well as the nature of what the Commission is doing, changing the rule. Commissioner Heffner noted that the Commission issues advisory opinions interpreting the business associate definition section of the statute. Commissioner Lynch inquired why the Commission, under stare decisis, should change its interpretation if section 36-14-2(3) does not change. Vice Chair Cheit replied that stare decisis does not constrain the Commission on advisory opinions.

Commissioner Cerullo referenced the Commission's prior discussions in which it agreed not to change the interpretation through individual advisory opinions issued as people come before it.

She stated that this satisfies her concerns. Commissioner Murray expressed his concern regarding notice to individuals with prior opinions and stated his agreement with Commissioner Heffner regarding the extra steps to be taken regarding notice. He indicated

that individuals do rely on advisory opinions issued to other public officials who are similarly situated, even though they should come to the Commission themselves. He suggested that notice should be provided to legal counsel for every school committee and town council because these individuals may be impacted by past practice. Staff Attorney DeVault stated that such notice could be provided. Upon the original motion, it was

VOTED: To direct Staff to bring the matter back before the Commission for consideration as a draft GCA.

AYES: Deborah M. Cerullo SSND, Frederick K. Butler, Mark B. Heffner, James V. Murray and Edward A. Magro.

NOES: John D. Lynch, Jr. and Ross Cheit.

Vice Chair Cheit stated that he voted in the negative because he believes rulemaking is the better option. Staff Attorney DeVault indicated that the draft proposal would be presented to the Commission for a first vote at the next meeting and would thereafter be noticed for comment, with the additional notice requested.

The next order of business was consideration of proposed GCA No. 2009-4: Secondary Employment. Staff Attorney DeVault advised that the Staff initiated the draft proposal based upon suggestions of the membership, particularly Commissioner Harsch, that this is an area

which might benefit from a GCA. She noted two corrections on pages three and seven of the draft GCA. Upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To adopt (1st vote) proposed GCA No. 2009-4: Secondary Employment, as corrected.

The next order of business was discussion of the Complainant's role in the complaint process. Staff Attorney Gramitt explained that the Staff previously had been asked to draft four proposals for rulemaking relative to the Complainant's role at the settlement hearing and recapped the four options presented. He advised that, in response to soliciting public comment, the Commission received comment from Operation Clean Government (OCG) and Common Cause, which are diametrically opposed. He indicated that OCG would like to make the process more open and allow the public to attend the settlement hearing. Based upon the Irons case, presumably in reference to the jury trial issue, Common Cause would favor a more limited Complainant's role, emphasizing that the Complainant is not a party and has no role beyond the filing of the complaint.

In response to Commissioner Cerullo, Staff Attorney Gramitt stated that OCG's contention is that the settlement hearing is the same as an adjudicative hearing, which by statute is public. He expressed his

disagreement with that analysis. Commissioner Butler wondered why parties would choose to enter into settlement discussions if it were a public hearing. He suggested that it would chill any idea of a settlement, given that the parties could not be free to test the strengths and weaknesses of their positions and compromise. Commissioner Cerullo stated that negotiation between the Staff and the Respondent occurs and then the Commission hears the reasons for such recommendations and asks questions and decides whether to approve the settlement. She noted that the Commission does not necessarily do that with the Staff and Respondent present.

In response to Commissioner Cerullo, Staff Attorney Gramitt advised that there is no policy requiring communication with the Complainant regarding settlement negotiations, and in most instances the Staff would not telegraph to anyone, including the Complainant, that it is in settlement negotiations. He noted that the vast majority of Complainants are not witnesses and have no independent information to provide. He suggested that if a Complainant were a fact witness there might be more communication with the Prosecution, but that would be a very infrequent fact pattern.

Vice Chair Cheit commented that the Commission noticed four options and received comments that raise two new ones. He stated that this suggests that there is a need to figure out a way to more clearly engage both ideas. Staff Attorney Gramitt stated that he would like time to further consider the questions raised by the

Commission and OCG. He noted that it is also important to consider the implications on the jury trial issue. In response to Vice Chair Cheit, Staff Attorney Gramitt stated that the Staff would be in favor of not providing an advance copy of the informal resolution & settlement document. Vice Chair Cheit inquired whether there is concern regarding the Complainant being present for the hearing. Staff Attorney Gramitt replied that there is, but the provision of the advance copy of the settlement is where there has been a problem in the past. He noted that it is hard to explain to Respondent's counsel why the Complainant has a copy of the settlement, particularly given the inclusion of admissions which may need to be withdrawn.

Vice Chair Cheit suggested that the Staff eliminate consideration of Option D and come back to the Commission with a different or longer list for consideration, but it is not expected for the next meeting. Staff Attorney Gramitt stated that he would provide an updated cover memo and some staff commentary on the issues raised by the public comments. Vice Chair Cheit thanked OCG and Common Cause for their comments.

The next order of business was the Director's Report. Executive Director Willever reported that there are eight complaints, five advisory opinions, and one preliminary investigation pending. He advised that there has been one formal APRA request granted since the last meeting. As to the budget, he stated that the Commission has essentially been level funded for this year and next year, with

some minor adjustments to be made in the area of wages and benefits. He indicated that the budget is approximately 1.5 million dollars and provides for all 12 FTE's. He noted that proposed furlough or shutdown days are still uncertain. In response to Vice Chair Cheit, Director Willever acknowledged that the budget for legal counsel might be more constrained. However, he noted that the Commission cannot foresee what matters may arise requiring Legal Counsel's attention. He stated that Legal Counsel Conley's experience allows him to work quickly and efficiently, but he emphasized that the Commission should not be constrained in its communication with its counsel.

Director Willever informed that the Education Program has recently provided education to a US State Department delegation from Moldova, the Towns of Westerly and Portsmouth, and the Rhode Island Association of Assessment Officials, as well as the Ocean State Institute of Internal Auditors, which involved the participation of Commissioner Cerullo.

The next order of business was the advisory opinion request of Judge Steven J. Hart, the Probate Judge of the Town of Coventry Probate Court.

***Commissioners Lynch and Heffner recused and left the meeting at 10:20 a.m.**

Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. He noted that both advisory opinions on the agenda relate to a request for a hardship exception under section 5(e) in order to finish up estate work. Commissioner Murray noted that, unlike the Petitioner's next request on the agenda, the instant request requires him to appear before the Court, part of which involves the approval of fees. In response to Commissioner Murray and Vice Chair Cheit, Staff Attorney Gramitt stated that it is not known if it is a pro forma process or if the fees are established ahead of time by statute. He noted that he had asked the Petitioner to be present to answer any questions.

Legal Counsel Conley advised that, although the probate courts differ among the municipalities, there is certain baseline information that you have to provide to the probate court regarding fees, including an itemized list of all services provided. He noted that the hourly rate differs among the municipalities, but most courts require a retention-fee agreement prior to the start of a case. If a particular court's practice allows for lower fees, he stated that it will decrease them. He indicated that 90% are approved without objection, but a party's heirs can appear to object to the fee, in which case it proceeds to a hearing. In response to Vice Chair Cheit, Legal Counsel Conley stated that, although the Petitioner made a representation that there has been no objection, in theory it could happen here.

Commissioner Cerullo suggested that it could happen regardless of whether the Petitioner or substitute counsel presented it to the court. Staff Attorney Gramitt added that it could happen without the issuance of an advisory opinion if the Petitioner refers it to another attorney and recuses. Commissioner Cerullo stated that is what the Petitioner would have to do anyhow if he does not receive an opinion.

Commissioner Magro observed that the hardship would be to the estate. Vice Chair Cheit noted that the Petitioner would not receive that much less in terms of fees in such a case, but his client will have to prepare more. Staff Attorney Gramitt observed that the hardship is more compelling since it is suffered by the client. He advised that yesterday the Commission received another advisory opinion request from the Petitioner seeking a hardship exception with respect to a third estate matter. He stated that he advised the Petitioner that the more requests he submits, the less likely there is to be a finding of hardship. He suggested that the Commission continue this request until the Petitioner is before it on the most recent request.

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

VOTED: To continue this matter to the next meeting.

The next advisory opinion was that of Judge Steven J. Hart, the Probate Judge of the Town of Coventry Probate Court. Staff Attorney Gramitt informed that the facts are identical, although it involves a

different estate. In response to Vice Chair Cheit, Staff Attorney Gramitt stated that he does not know if an objection can be raised at this stage. Legal Counsel Conley advised that an affidavit of complete administration is a purely ministerial act and no hearing is required. Upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it was unanimously

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

***Commissioners Lynch and Heffner returned to the meeting at 10:35 a.m.**

Upon motion made by Commissioner Cerullo 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) (4), to wit:

- a.) Motion to approve minutes of Executive Session held on September 22, 2009.**

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

The Commission returned to Open Session at 10:36 a.m. Vice Chair Cheit reported that the Commission approved the minutes of the Executive Session held on September 22, 2009.

The next order of business was New Business proposed for future Commission agendas. There being none, at 10: 40 a.m., upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary