

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

**December 1, 2009**

**The Rhode Island Ethics Commission held its 18th 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, December 1, 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 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 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**

**November 17, 2009. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Murray, it was unanimously**

**VOTED: To approve minutes of the Open Session held on November 17, 2009.**

**ABSTENTION: Mark B. Heffner**

**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 John J. Tassoni, Jr., a legislator serving in the Rhode Island Senate. The Petitioner was present. Staff Attorney Gramitt advised that this matter was continued from the last meeting for amendment as to the Petitioner's representation that he would only be on the list for the provision of mediation services to municipalities and third parties, not any state agencies.**

**\*Commissioner Cerullo arrived at 9:03 a.m.**

**Chair Binder inquired as to the process by which the Petitioner was placed on the state MPA list, and she questioned whether it would be looked at differently if it utilized completely subjective criteria. Staff Attorney Gramitt stated his belief that the criteria utilized by the Division of Purchasing would fall under its own rules and regulations.**

**Commissioner Lynch noted that the Petitioner represents that he will refrain from representing municipalities in his district, but he inquired whether it is required by the Code. Staff Attorney Gramitt indicated his belief that it is not 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 John J. Tassoni, Jr., a legislator serving in the Rhode Island Senate.**

**The next advisory opinion was that of James V. Isherwood, Chairman of the Lime Rock Fire District Commission. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Harsch, the Petitioner informed that the Chief recommends individuals to the Board for promotion to lieutenant or captain and the Board sets the salary and remuneration. The Petitioner confirmed that the Board does not initiate promotion or advancement, but votes on a recommendation by the Chief. In response to Commissioner Harsch, the Petitioner stated that he does not know why remuneration issues begin with the Board rather than the Chief under the Charter.**

**The Petitioner noted that the District made changes to the Department's structure in the past three or four years in order to operate each of its two stations on a 24/7 basis. He indicated that it had to increase benefits in order to attract more people for full-time**

staffing. In response to Commissioner Harsch, the Petitioner stated that the Chief makes recommendations to the Board regarding remuneration, which are voted up or down by the Board. In further response to Commissioner Harsch, the Petitioner confirmed that, as a practical matter, the Chief runs the Department in terms of pay and promotions. In response to Commissioner Cerullo, the Petitioner stated that there is a standard pay for certain ranks.

The Petitioner advised that his son was already a firefighter when he joined the Board in 2004. He recalled that he sent a letter to the Commission in which he stated that he would recuse on any matters that might arise. He informed that he is requesting clarification and will step down from his position if necessary. In response to Commissioner Cheit, the Petitioner indicated that a taxpayer has now raised the issue. He represented that other Board members had questioned whether he could participate in matters specific to his son when he first joined the Board. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Murray, it was unanimously

**VOTED:** To issue an advisory opinion, attached hereto, to James V. Isherwood, Chairman of the Lime Rock Fire District Commission.

The next advisory opinion was that of Danielle R. Coulter, a member of the Tiverton School Committee. Staff Attorney DeVault advised that the Petitioner could not be present today and has requested a

continuance. She noted that the Petitioner will be submitting an additional request and that both matters may be heard at the same time. This matter was continued.

The next advisory opinion was that of Joseph R. Ballirano, Esq., a private attorney who performs legal work on an hourly basis for the Town of Johnston Zoning Board of Review. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Chair Binder inquired whether an agency-type relationship exists here, given that if the City Solicitor were providing those services they would be impacted under the Code. Staff Attorney DeVault informed that the Commission has drawn a distinction in past advisory opinions that such attorneys are no different than other independent contractors, who are not subject to the Code. Commissioner Cerullo questioned whether the Petitioner would be considered a business associate of the Zoning Board if he appears before it.

Staff Attorney DeVault stated that the Commission has consistently found that no such business association exists with municipalities. In response to Commissioner Harsch, Staff Attorney DeVault explained that the Commission has found that municipalities are not “businesses” and, therefore, cannot be in a business associate relationship. Commissioner Harsch noted that the benefit is to the Petitioner. Staff Attorney DeVault stated that there needs to be two parties to form a business association. Commissioner Harsch

**expressed his discomfort with that distinction. Commissioner Harsch stated that he has sat in such capacity in the past and you do act effectively as a member of the body, providing not only legal advice but guidance and direction.**

**In response to Commissioner Harsch, Staff Attorney DeVault informed that the Petitioner represents that he was neither elected nor appointed, but that he was hired. In response to Chair Binder, Legal Counsel Conley disclosed that he is appointed as the Johnston Town Solicitor. He advised that in 2007 he was appointed by the Mayor as an Assistant Solicitor. He stated that the Petitioner was hired by then Solicitor Chris Colardo. Legal Counsel Conley explained that the Town stopped the practice of using the Petitioner as counsel to the Zoning Board when he replaced Solicitor Colardo. Commissioner Harsch inquired as to the distinction between being hired and being appointed. Legal Counsel Conley advised that the Petitioner is not appointed under the Charter. He stated that either he, as the then Assistant Solicitor, or then Solicitor Colardo would have had to represent the Zoning Board. He stated that Solicitor Colardo hired the Petitioner.**

**In response to Commissioner Harsch, Legal Counsel Conley indicated that he would consider himself appointed if he represented the Zoning Board. Staff Attorney DeVault pointed out that the Petitioner was not appointed. Commissioner Cheit commented that government functions are privatized and hired out and it does not**

seem inconsistent to him that the Commission previously has made that distinction. He suggested that if the Commission were inclined to change it, it should consider all of the implications and conduct a workshop. He stated that when you contract out you create a different type of relationship. Commissioner Harsch indicated that he believes a lawyer's role is different because the lawyer performs a unique public function. He expressed that he would like at some point to examine the issue in a workshop or be provided with a brief staff analysis. Commissioner Cheit stated his belief that government is filled with such examples, such as the Wyatt Detention Center. Chair Binder advised that the Commission would proceed with the opinion, but suggested placing the issue on the regulatory agenda list. Upon motion made by Commissioner Magro and duly seconded by Commissioner Cheit, it was unanimously

**VOTED:** To issue an advisory opinion, attached hereto, to Joseph R. Ballirano, Esq., a private attorney who performs legal work on an hourly basis for the Town of Johnston Zoning Board of Review.

The next advisory opinion was that of Denise L. Stetson, the Richmond Town Planner. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Chair Binder suggested that the initial response paragraph be amended to clarify that the Petitioner is asking about work to be done for her personally, and not for the municipality. Upon motion made by Commissioner Harsch and duly seconded by Commissioner

**Cerullo, it was unanimously**

**VOTED: To issue an advisory opinion, as amended and attached hereto, to Denise L. Stetson, the Richmond Town Planner.**

**The next advisory opinion was that of Judith Hetherman, CPA, a member of the Coventry School-Related Personnel Pension Committee. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Harsch, it was unanimously**

**VOTED: To issue an advisory opinion, attached hereto, to Judith Hetherman, CPA, a member of the Coventry School-Related Personnel Pension Committee.**

**At 9:40 a.m., upon motion made by Commissioner Cerullo 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)(4), to wit:**

**a.) Motion to approve minutes of Executive Session held on November 17, 2009.**

**b.) Preliminary Investigation No. 2009-2.**

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

**The Commission returned to Open Session at 9:44 a.m. The next order of business was a motion to seal minutes of the Executive Session held on December 1, 2009. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously**

**VOTED: To seal minutes of the Executive Session held on December 1, 2009.**

**Chair Binder reported that the Commission took the following actions in Executive Session: 1) unanimously approved minutes of the Executive Session held on November 17, 2009; and 2) unanimously approved a motion to extend time for filing the preliminary investigative report in Preliminary Investigation 2009-2.**

**The next order of business was discussion regarding the Commission's receipt of a request for amendment of Regulation 5009.**

**Senior Staff Attorney D'Arezzo advised that, pursuant to Regulation 1026 and the APA, Giovanni Cicione submitted a request for amendment of Regulation 5009. She noted that he first raised the issue in the context of the Complaint he filed against Attorney General Lynch, which was recently dismissed at initial determination. She informed that the Executive Director has acknowledged receipt of**

the request and advised that he may submit supporting data. She stated that the Commission must either deny the request in writing, setting forth the reasons for the denial, or initiate rule-making within thirty days of receipt of the request. She advised that the Commission must notify the Petitioner of the date it intends to consider his request and may, at its discretion, invite him or other interested parties to make oral or written presentation.

Senior Staff Attorney D'Arezzo noted that at the November 17, 2009 meeting Commissioner Cheit asked the Staff to look at other states' efforts to regulate entities, including trade associations, outside of an interested person construct. Given that the Staff is performing research to be presented during the January timeframe, Senior Staff Attorney D'Arezzo suggested that the Commission may wish to deny the request, without prejudice, and invite the Petitioner to participate when the Commission addresses the issue in the near future. Chair Binder commented that she would be uncomfortable denying the request. Commissioner Heffner expressed that the thirty-day time period is unrealistic. He commended the Petitioner for bringing the issue forward and indicated that he would like to get the Staff's input.

Chair Binder questioned whether obtaining Staff research on the issue is part of initiating rule-making. Legal Counsel Conley opined that it can be, given that the research would be a prelude to a decision on whether or not to proceed. He stated that initiating

rule-making does not necessarily mean that you will adopt a rule. Legal Counsel Conley advised that the Commission should determine whether it wishes to invite the Petitioner to the December 15th meeting, which is two days away from the thirty-day deadline. In response to Commissioner Cerullo, Senior Staff Attorney D'Arezzo stated that the Staff would not be able to present the research requested for consideration at the next meeting. Commissioner Cerullo indicated that it would be valuable to remove partisanship from the process and it would be beneficial to have Staff present the information.

Commissioner Cheit stated that the Commission could deny the petition and go ahead with what it is already going to do. In response to Commissioner Cheit, Senior Staff Attorney D'Arezzo advised that the Staff review will be broader than what the Petitioner has requested. Commissioner Cheit commented that the Commission is doing something different, which is another reason to deny the request. He expressed that he believes it is too preliminary for other parties to be invited to participate, but that he is indifferent as to whether the Petitioner should be invited in. He added that he is concerned about addressing trade organizations only, because other entities, such as unions and educational foundations, do the same thing. He suggested that the petition is too narrowly targeted and cautioned against unintended consequences.

Commissioner Heffner agreed with Commissioner Cheit's points and

questioned whether the Commission is bound by the specific language proposed by the Petitioner. He stated his inclination to view the petition as relating to that specific proposal. Commissioner Cheit concurred. Commissioner Heffner suggested that if the Commission is not comfortable with every word of the proposal it should deny the petition and put on the record that it is seeking additional information. He also questioned whether there would be a distinction between trade organizations formed for commercial versus charitable purposes. Commissioner Murray expressed his agreement. He noted that he is uncomfortable with the thirty-day deadline and has no difficulty with denying the petition without prejudice and inviting the Petitioner back to participate when the Commission takes up the issue.

Commissioner Cheit commented that the Commission could state that the issue is now moot because it has already initiated something in this area. Commissioner Magro stated that he would not be hesitant to deny the petition. Commissioner Cheit expressed support for Commissioner Murray's suggestion to invite him to be part of the process going forward. Commissioner Heffner inquired whether the vote on December 15th would be an up or down vote on whether to go forward on the Petitioner's proposed amendment to Regulation 5009, along with any comments. Commissioner Magro questioned whether the vote would be on the specific language presented by the Petitioner or on going forward on the issue more generally.

**Commissioner Heffner stated that reasonable minds can differ on the issue. He noted that the petition is to amend the regulation in a certain way. In response to Commissioner Cerullo, Commissioner Heffner stated that he would have the Petitioner invited to come in. Senior Staff Attorney D'Arezzo clarified that the Commission, by regulation and statute, must notify the Petitioner of the date that it will consider the request, but it may invite him to make a presentation at its discretion pursuant to the regulation. Chair Binder indicated that the Staff should draft language for review in the event that the Commission decides to deny the petition and must set forth its specific reasons in writing. Commissioner Cerullo stated that the public would want to know the reasons for any denial. In response to Senior Staff Attorney D'Arezzo, Chair Binder advised that the Petitioner should be advised that the Commission will consider his petition on December 15th, but she clarified that he would not be invited to speak.**

**The next order of business was a report from Legal Counsel regarding due process issues relative to: 1) the Complainant's role in the complaint process; 2) the right to a jury trial in administrative proceedings; 3) initial determinations; and 4) preliminary investigations. Legal Counsel Conley informed that he is reviewing these issues due to dicta contained in the Irons decision. He apologized for not having a written report available today, as he has been on trial. He stated that he has reviewed the issues thoroughly and will present a memorandum on December 15th. In response to**

**Commissioner Cheit, he indicated that the matter is noticed for Open Session because the topics do not relate to individual pieces of litigation, nor do they fall within any exemption to the Open Meetings Act. In further response, he stated that general legal analysis does not fall within any of the exemptions.**

**The next order of business was the Director's Report. Executive Director Willever reported that there are six complaints, four advisory opinions and one preliminary investigation pending. He stated that one formal APRA request has been granted since the last meeting.**

**The next order of business was New Business proposed for future Commission agendas. Chair Binder advised that the Commission received an updated list of proposed regulatory actions from Staff. She stated that she is also curious as to why a public official's spouse would be prohibited from speaking at public meeting before the official's board when there would be no financial impact involved, an issue recently presented in an advisory opinion request. She suggested that after the next meeting the Commission would be able to prioritize its work on regulatory matters for the next year.**

**Commissioner Harsch expressed that he is impressed by the extent that local government officials are coming before the Commission for guidance and are aware of the process. Chair Binder commended the Staff for its educational programs. Commissioners Heffner inquired whether the Commission by regulation may extend the 30-day**

**deadline for responding to petitions for regulatory action. Legal Counsel Conley advised that the deadline is established by statute. In response to Commissioner Lynch, Senior Staff Attorney D'Arezzo informed that the notice provided under the regulation is broader than that required by statute.**

**At 10:15 a.m., upon motion made by Commissioner Harsch and duly seconded by Commissioner Cerullo, it was unanimously**

**VOTED: To adjourn.**

**Respectfully submitted,**

---

**J. William W. Harsch**

**Secretary**