

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

May 4, 2010

The Rhode Island Ethics Commission held its 9th meeting of 2010 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, May 4, 2010, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair Frederick K. Butler

Ross Cheit, Vice Chair Edward A. Magro

J. William W. Harsch, Secretary* Deborah M. Cerullo SSND

James V. Murray John D. Lynch, Jr.

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; 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 9:04 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held on April 20, 2010. Upon motion made by Commissioner Cheit and

duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve minutes of the Open Session held on April 20, 2010.

ABSTENTIONS: Deborah M. Cerullo SSND and John D. Lynch, Jr.

Staff Attorney DeVault introduced Anthony DeFillipo, a student from the Met School who will be observing the Commission meeting.

The next order of business was 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 Col. Brendan P. Doherty, the Superintendent of the Rhode Island State Police. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was present with Lisa Holley, Esq., Legal Counsel to the State Police. In response to Commissioner Cheit, Staff Attorney Gramitt stated that the language relating to state “policy” and “custom” was his language, not the Petitioner’s.

***Commissioner Harsch arrived at 9:13 a.m.**

In response to Commissioner Cheit, Attorney Holley indicated that negotiations do involve health care to a degree, but it does not apply

to the Petitioner because he has a stand alone contract. In response to Commissioner Cheit, Staff Attorney Gramitt agreed that the word “virtually” could be removed from the third line of the last full paragraph on page three of the draft. Commissioner Butler inquired if there were any other contractual terms that would impact the ability to qualify for the bonus. The Petitioner replied that he is not aware of CALEA status being attached to any other contracts terms. Upon motion made by Commissioner Murray and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To approve the draft opinion, with the elimination of the word “virtually” from the last full paragraph of page three.

Commissioner Harsch noted that he believes that he is able to vote given that he has read all of the material and was present for the last part of the discussion.

The next advisory opinion was that of Robert S. Crausman, MD MMS, former Chief Administrative Officer of the Rhode Island Board of Medical Licensure and Discipline for the Department of Health (DOH). Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. Commissioner Cerullo requested an example of what would constitute a question of physician or facility licensure. The Petitioner replied that if Landmark wanted to expand to a facility across the street he would need to ask whether it would need an extension of its existing license or a

separate license. Commissioner Harsch inquired how much of the Petitioner's job would involve asking these questions of the DOH. The Petitioner advised that tests performed on the incorrect patient must be reported to the DOH if harm is done. He stated that an ultrasound would typically cause no harm, but if a patient were complaining of pain after receiving an ultrasound in error he would need to ask if that is a reportable event.

Commissioner Harsch asked what percentage of time the Petitioner spends doing these things. The Petitioner replied that it could be two or three times a month, or about one percent of his time. Commissioner Cheit suggested adding the word "informational" before item two on page two of the draft. Staff Attorney Leyden and the Petitioner concurred. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Lynch to adopt the draft, as amended, there was discussion.

Commissioner Harsch proposed an amendment to make it clear that a determination has been made that in this case the Petitioner's involvement would be de minimis. Chair Binder questioned what would happen if the Petitioner had to contact the DOH a lot, but all of the inquiries were informational. Commissioner Harsch indicated that he would have a problem with it. In response to Chair Binder, Commissioner Harsch stated that he does not see a distinction in that the questions being posed are informational. Commissioner Cheit expressed his belief that the amendment would change the nature of

the opinion, which he does not want to do.

Upon motion made by Commissioner Harsch and duly seconded by Commissioner Cerullo to further amend the draft, there was discussion. Commissioner Harsch voiced concern regarding use of the term “de minimis” because he does not believe it provides enough guidance. Commissioner Magro noted that the nature of the contact is at issue, not the quantity. Commissioner Harsch asked what would happen if seventy percent of the Petitioner’s new job relates to asking questions of his former employer. Commissioner Cerullo commented that she is uncomfortable because, despite the Petitioner’s representation that that he is not contacting his former employer for the purpose of influencing, the ability to shift in a conversation from asking information and being influential can be a close call. She expressed her concern that the Petitioner might not even be attuned to it happening and stated that she would be more comfortable with the de minimis language. She noted that it would not be a concern to her if the Petitioner were asking such questions one percent of the time, but she would find it problematic if it occurred seventy or seventy-five percent of the time.

Commissioner Harsch recalled that when he was Director of the DEM, an employee went to work for a landscape architect firm and was always on the phone with his former office asking for information and was in touch with his former associates. He noted that a former employee can get some advantage out of that type of running

contact. In response to Commissioner Cheit, Commissioner Harsch indicated that he believes it arguably comes under the rubric of asking informational questions. However, he noted that he is prepared to withdraw his amendment. In response to Commissioner Cheit, Commissioner Harsch stated that he has no problem with the situation presented, but he does have concern about the advisory opinion being applied to other situations. Commissioner Cheit noted that it is clear that the Petitioner's contact with the DOH is exclusively for obtaining information and reporting.

Commissioner Cheit asked for clarification as to item four, coordination of required treatment with the Physician's Health Committee. The Petitioner explained that he would be required to report back to the Medical Board if there were an impaired physician under his care. Commissioner Cheit indicated that it seems like coordination really involves reporting and he asked that this be made clear within the draft opinion. He stated that he does not want the Code to prevent people from reporting as required. On the original motion made by Commissioner Cheit and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Robert S. Crausman, MD MMS, former Chief Administrative Officer of the Rhode Island Board of Medical Licensure and Discipline for the Department of Health, with the two language amendments noted.

The next advisory opinion was that of Kevin D. McGee, a Coventry Housing Authority Commissioner. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was present. Staff Attorney Gramitt noted that Regulation 5006 prohibits the acceptance of any appointment or election that requires the approval of the body of which one is a member. He indicated that one could argue that the Petitioner's acceptance of the position would not be prohibited, given that the Executive Director does the hiring, not the Housing Authority. He stated that the Commission amended Regulation 5006 in 2006 to address a loophole presented in a particular case, but he suggested that further review is warranted.

The Petitioner advised that he disagrees with the draft opinion, and he stated that he is not part of the decision-making process per HUD regulations. He urged application of the law as presently written, noting that the Housing Authority does not approve the position. In response to Commissioner Cheit, he informed that the Executive Director was hired in 1999 and that he has been a member for two years. He confirmed that the Executive Director serves at the pleasure of the Board. Commissioner Cheit commented that this is the underlying issue. In response to Commissioner Harsch, the Petitioner advised that the Board is precluded by HUD regulations from getting involved with Staff. Chair Binder noted that the Board does hire the Executive Director, who controls the position for which the Petitioner is applying.

Commissioner Cheit expressed that the revolving door provision is over-inclusive and does prohibit some conduct which might not present a clear conflict. He indicated that it is not a statement regarding the Petitioner himself or his intent, but he believes the Petitioner must wait a year. In response to Commissioner Cerullo, the Petitioner stated that the position will be available later this year and even if he were to resign now he would still be within the one year period. Commissioner Harsch inquired whether the Petitioner could resign now, apply and make it clear that he cannot begin the job for one year. The Petitioner informed that the position is not yet available. Staff Attorney Gramitt clarified that, while the regulation only relates to the acceptance of employment, the Commission has issued advisory opinions not approving situations in which individuals represented that they would accept no pay for the first year.

In response to Commissioner Cerullo, Staff Attorney Gramitt indicated that these facts do not cause him to rethink the analysis. He noted that the situation would be akin to a member of the Ethics Commission resigning and applying to the Executive Director for a staff position. In response to Commissioner Cerullo, Staff Attorney Gramitt stated that the hardship exception would only apply if there is a hardship to the public body, not to the Petitioner. Commissioner Lynch inquired as to the plain language of Regulation 5006. Staff Attorney Gramitt referenced the draft opinion's footnote, which sets forth the regulatory language in its entirety. Commissioner Cerullo

commented that the Staff is interpreting the body of which the Petitioner is a member to include not just the Board, but the whole Housing Authority organization. Staff Attorney Gramitt replied that he looked at the intent of the regulation and the fact that the Board delegates its authority to its Executive Director.

Commissioner Lynch expressed his concern that the Executive Director would fear for her job if she did not hire the Petitioner. He questioned whether the Commission should interpret the body as the whole organization, including the Director. Staff Attorney Gramitt noted that the Commission had interpreted the regulation in that way prior to its amendment in 2006. He indicated that the Commission could issue an opinion based upon the regulatory language and the Petitioner's express representation that he would resign. He informed that, either way, there is a need to look at Regulation 5006 anew.

In response to Commissioner Cerullo, Legal Counsel Alves advised that, if the Commission were leaning toward not accepting the draft opinion, he would suggest looking at the HUD regulations. He indicated that his reading of the regulation would be limited to the Board itself as the body approving the appointment. Chair Binder voiced her concern regarding pressure being exerted on the Executive Director. Commissioner Magro commented that there could be pressure from existing members to hire the Petitioner. He also expressed concern as to the public impression as to what is

going on. Commissioner Lynch stated that he is comfortable with interpreting the body to include those beneath the Board members; otherwise, every board would just appoint an Executive Director and delegate its authority. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Kevin D. McGee, a Coventry Housing Authority Commissioner.

The next advisory opinion was that of Douglas Axelson, Chair of the Board of Fire Commissioners of the East Greenwich Fire District. Staff Attorney DeVault presented the Commission Staff recommendation. Deputy Fire Chief Peter F. Henrikson was present. Staff Attorney DeVault clarified that Deputy Chief Henrikson is not the Petitioner, but he is the subject of the opinion. Legal Counsel Alves disclosed that his firm represents the Fire District and recused himself. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Douglas Axelson, Chair of the Board of Fire Commissioners of the East Greenwich Fire District.

The next advisory opinion was that of Angel M. DesMarais, District Clerk for the Manville Fire District. Staff Attorney DeVault presented the Commission Staff recommendation. She advised that the

Petitioner was unable to attend the meeting. In response to Commissioner Cerullo, she informed that the Petitioner is seeking an opinion now due to the fact that a complaint has been filed relating to what is going on in the Fire District, some of which is referenced in her request. Commissioner Cerullo asked for clarification of the Commission policy as to issuing advisory opinions on past acts. Chair Binder noted that the Petitioner's employment is ongoing. Staff Attorney DeVault stated that the Commission would not address the request if it solely related to past conduct. Commissioner Lynch indicated that he read the request as relating not to the position itself but the performance of certain acts within said position. Staff Attorney DeVault stated her belief that the request was all encompassing. Upon motion made by Commissioner Butler and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Angel M. DesMarais, District Clerk for the Manville Fire District.

At 10: 11a.m., upon motion made by Commissioner Cheit 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 April 20, 2010.

**b.) In re: Stephen Durkee,
Complaint No. 2009-6**

**c.) Status Update:
Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission,
Superior Court C.A. No. 08-7325.**

**d.) In re: Brenda K. Gaynor,
Complaint No. 2001-32**

**e.) In re: Aisha W. Abdullah-Odiase,
Complaint Nos. 2001-34 & NF2002-1**

**f.) In re: Luis Aponte,
Complaint No. NF2005-3**

g.) Motion to return to Open Session.

At 11:20 a.m., the Commission returned to Open Session. The next order of business was a motion to seal minutes of the Executive Session held on May 4, 2010. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To seal minutes of the Executive Session held on May 4,

2010.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on April 20, 2010 by unanimous vote; 2) found that probable cause does not exist in the matter of In re: Stephen Durkee, Complaint No. 2009-6, which was dismissed by unanimous vote; 3) received a status update on the Larisa litigation; and 4) received collection action updates on the Gaynor, Abdullah-Odiase and Aponte matters.

The next order of business was a Legislative Update. Staff Attorney Gramitt advised that in March he appeared before the House Judiciary Committee regarding House Resolution 7357, which was sponsored by Speaker Fox. He stated that he obtained the video of the hearing and copies are available. In response to Commissioner Heffner's inquiry at the last meeting, he noted that he sent correspondence to the Senate Judiciary Committee regarding Senate Bill 2051. He stated that the correspondence went to all the Committee members and to the sponsor, Senator Ciccone.

The next order of business was review of comments received regarding General Commission Advisory (GCA) Opinion No. 8 - Architect Members of State and Local Historic Preservation Commissions Appearing before their Respective Agencies, and a first vote to withdraw GCA 8. Staff Attorney DeVault recapped the

discussion from the last meeting and advised that she received two comments from historic architects, prior to the Commission specifically inquiring as to the requirements to be an historic architect. She noted that Ted Sanderson previously submitted comment and would likely submit more if the issue is noticed for public comment. She recommended that the Commission take a first vote to withdraw GCA 8. Commissioner Butler stated that it is pretty clear that the current GCA should be withdrawn, particularly where it is built on the premise that there is such a thing as an historic architect. Upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To withdraw (1st vote) GCA 8.

In response to Chair Binder, Staff Attorney DeVault suggested that there be a thirty day period for receiving public comment, prior to the Commission taking its next vote to withdraw.

The next order of business was the Director's Report. In Executive Director Willever's absence, Senior Staff Attorney D'Arezzo reported that there are three advisory opinions, eight complaints, and one appeal under the APA currently pending. She noted that one formal APRA request has been granted since the last meeting. Senior Staff Attorney D'Arezzo provided a budget update and informed that the final enacted FY 2010 Budget is \$1,416,832. She indicated that no bottom line shortfall is projected by the close of the fiscal year. As to

the Governor's recommended FY 2011 Budget of \$1,485,693, she reported that she and Director Willever appeared before the House Finance Committee's Subcommittee on General Government on April 27th. She expressed appreciation to the Budget Office and the Governor for funding the Commission's operations and all twelve FTE's during these difficult fiscal times. She noted that the recommendation does not include funds for the Staff to attend the December 2010 COGEL conference, at which it has been asked to participate on a panel.

The next order of business was New Business proposed for future Commission agendas. Commissioner Harsch stated that he would liken to broaden this item to allow more general comments by the Commissioners. Chair Binder expressed support for the idea. In response to Commissioner Butler, Legal Counsel Alves advised that the Commission can discuss issues, but it might not be able to take action until a subsequent meeting pursuant to the Open Meetings Act.

At 11:31 a.m., upon motion made by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary