

MINUTES OF THE OPEN SESSION

OF THE RHODE ISLAND ETHICS COMMISSION

May 18, 2010

The Rhode Island Ethics Commission held its 10th 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 18, 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 Mark B. Heffner*

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; 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 a motion to approve minutes of the Open Session held on May 4, 2010. Upon motion made by Commissioner Harsch and

duly seconded by Commissioner Butler, it was unanimously

VOTED: To approve minutes of the Open Session held on May 4, 2010.

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 Michael St. Jean, Director of Technology for the Pawtucket School Department. The Petitioner was present. Staff Attorney DeVault presented the Staff recommendation. The Petitioner stated that he understands the issues presented and, further, that he is recognized in the school district as an expert in this area and has the support of the Superintendent of Schools in his desire to be on the HP Client Services Advisory Council.

***Commissioner Heffner arrived at 9:06 a.m.**

The Petitioner further stated that every purchasing decision he makes is subject to School District purchasing policies and is reviewed by the Superintendent and the Finance Manager. He stated that there are checks and balances in place and that it is a good opportunity for the school district.

Commissioner Butler stated that he thought it would come as a

surprise to HP that its Advisory Council is considered a business associate of the Petitioner, as membership on the Council isn't really a leadership position. He further expressed that he thought there were some conflicts that may arise and perhaps the draft recommendation could have focused on those, rather than the leadership position. Chair Binder stated that she thought the draft seemed off and she didn't find the Westerly Land Trust advisory opinion to be parallel. She further stated that what the Petitioner would receive was not compensation, but rather reimbursement for out-of-pocket expenses. Staff Attorney DeVault stated that, in the Westerly Land Trust advisory opinion, the Petitioner was also on an advisory committee and was providing professional and technical advice which created a business association requiring recusal and, thus, was highly analogous to this Petitioner's set of facts.

The Petitioner clarified that HP provides very good value to the school district with its purchases. Staff Attorney DeVault responded that there is no dispute as to the products and services HP provides, but rather a question of whether the Petitioner would be in a business association with HP and making decisions that have a financial impact upon that business associate. Commissioner Cheit stated that he thought the monetary impact on HP would be a general one akin to having a small amount of stock, but that the confidentiality agreement included in the membership agreement is at odds with the Petitioner's membership being a benefit to the school district.

In response to Commissioner Harsch, the Petitioner stated that the impact resulting from his decision-making regarding procurement is usually long-term and impacts purchasing for years out. He further stated that while decisions are departmental, his name appears on the order or contract and that it is not possible for him to remove himself from the decision-making process. Commissioner Butler reiterated his opinion that membership on an advisory council like this does not create a business association. In response to Commissioner Cheit, Commissioner Butler stated that while the feedback provided by council members to HP may be invaluable, membership on the council itself should not be viewed as a “leadership” position. He further stated that there may, however, be other issues present in such membership such as gift, conflict of interest, and attendance at receptions.

In response to Commissioner Heffner, the Petitioner stated that the process for procurement begins with testing a product, then budgeting for it for the next fiscal year. Then a decision is made to choose the best product based on price and quality, which is made by the Technology Department and its staff. The Petitioner stated that if a company is on the state’s master price agreement, he can purchase the product directly from the vendor. Finally, the business director reviews the request and the Superintendent signs off on it. In response to Commissioner Heffner, the Petitioner stated that none of his decisions regarding purchasing have been overruled in his sixteen year tenure. In response to Commissioner Cheit,

Commissioner Butler stated that the possibility of this being a leadership position seems tenuous. Commissioner Cheit stated that the problem may be that this activity does violate the Code, but perhaps these particular facts should not.

Commissioner Cerullo stated that she has other issues with these facts and asked the Petitioner whether his close association with HP will impair his independence of judgment as to his official duties. She further stated that she was concerned about the possibility of breaching confidentiality. The Petitioner stated that he had very little fear of using school department confidential information in these circumstances, but that his judgment could be influenced by HP's confidential information. He stated that, for example, he may wait to purchase something if he knew that HP had a great product that is coming out in a couple of years. The Petitioner stated that he is most concerned with the perception in this instance, and not the reality.

In response to Commissioner Lynch, the Petitioner stated that it may be true that HP will be getting most of the benefit from this relationship and not the school department, given that the school department is a recognized expert in the area and has a lot to offer. Commissioner Heffner noted that there is some valuable information that the school department may get from the Petitioner's interactions with other experts on the Advisory Council.

In response to Commissioner Harsch, Staff Attorney DeVault stated

that the compensation element does factor into the business associate analysis. In further response to Commissioner Harsch, Staff Attorney DeVault stated that these facts are different from the recent complaint against the Attorney General in that there was not a question in that analysis as to a business association between the Attorney General and the trade organization from which he had received airfare.

Commissioner Cheit stated that, in his opinion, the decisive factor is that the Petitioner is required to sign a confidentiality agreement and that provision is evidence of a business association. Chair Binder stated that in her opinion the independence of judgment issue is more important. Commissioner Heffner stated that he is reluctant to go along with the Staff's draft recommendation as he feels that the Ethics Commission needs to have its own independence of judgment and should not just mechanically apply these provisions. He further stated that it would be nice for Pawtucket to be nationally recognized for something positive like this.

Commissioner Butler reiterated his view that advisory councils are not really entities that have the ability to affect the financial objectives of a company. He stated that such groups are more about customer relations and are also a type of focus group. Yet, he stated that the confidentiality agreement is something of an issue.

Upon motion made by Commissioner Cerullo and duly seconded by

Commissioner Harsch, it was

VOTED: To issue an advisory opinion, attached hereto, to Michael St. Jean, the Director of Technology for the Pawtucket School Department.

AYES: Barbara R. Binder; Ross Cheit; J. William W. Harsch; Deborah M. Cerullo SSND; James V. Murray.

NOES: Frederick K. Butler; John D. Lynch, Jr.; Mark B. Heffner.

The next advisory opinion was that of Donald Bollin, a member of the Tiverton Town Council. Staff Attorney DeVault presented the Commission Staff recommendation. Attorney Andrew M. Teitz, AICP, Solicitor for the Town of Tiverton, was present. The Petitioner was not present.

Attorney Teitz stated that the Petitioner had no strong feeling or desire for a particular outcome and will happily abide by whatever decision the Commission issues. In response to Commissioner Cheit, Attorney Teitz stated that he was unsure how the Petitioner came to start the practice of voluntarily emptying the Yacht Club toilet trailer in the summer months. Attorney DeVault stated that the Petitioner represented to her that the Yacht Club just asked him to do it. In response to Commissioner Cheit, Attorney Teitz stated that the Petitioner provides a similar service to some municipal buildings in

Tiverton. In response to Commissioner Cheit, Staff Attorney DeVault stated that the Petitioner estimated the value of the service at \$100.00 a week, during the summer months. In response to Commissioner Lynch, Staff Attorney DeVault stated that it was her understanding that the Petitioner was not reimbursed for dumping fees paid out-of-pocket and that he considers it a public service. Attorney Teitz noted that the swimming lessons provided by the Yacht Club are available to anyone, not just Yacht Club members.

In response to comment provided by a member of the public, Chair Binder asked that he refrain from providing further interjections. Upon motion made by Commissioner Heffner and seconded by Commissioner Lynch to adopt the draft opinion, there was further discussion. Commissioner Cheit stated that he has questions as to why this Petitioner is donating his services and inquired what his possible motive might be. Commissioner Heffner commented that he didn't believe that the Petitioner's motive would alter the analysis. Chair Binder speculated as to why the Petitioner might have chosen this particular entity to which to donate his services. In response to Commissioner Heffner, Chair Binder stated that she doesn't presuppose any nefarious purpose but, rather, merely wishes that the Petitioner were here to answer these questions. Attorney Teitz stated that he can't answer for the Petitioner's motives, but he has spoken with the Petitioner, who said he would do whatever the Commission advises. He further clarified that the proposed zoning amendment the Town Council will be considering will have a major impact upon the

Yacht Club, but that if it passes, the Petitioner will not get any additional business from the Yacht Club. On the original motion, it was

VOTED: To issue an advisory opinion, attached hereto, to Donald Bollin, a member of the Tiverton Town Council.

AYES: James V. Murray; Frederick K. Butler; John D. Lynch, Jr.; Mark B. Heffner.

NOES: Barbara R. Binder; Ross Cheit.

RECUSAL: J. William W. Harsch.

ABSTENTION: Deborah M. Cerullo, SSND.

Attorney Teitz inquired whether the Petitioner may ask for reconsideration, given that no advisory opinion would issue. Staff Attorney DeVault stated that there had been one recent request for reconsideration submitted to the Commission in the case of the Christopher Warfel advisory opinion request.

The next advisory opinion was that of Hannibal Costa, a member of the Tiverton Town Council.* Staff Attorney DeVault presented the Commission Staff recommendation. Attorney Andrew M. Teitz, AICP, Solicitor for the Town of Tiverton, was present. The Petitioner was

not present. Upon motion made by Commissioner Butler and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To issue an advisory opinion to Hannibal Costa, a member of the Tiverton Town Council.

RECUSAL: J. William W. Harsch.

*** Commissioner Harsch left the room at 10:12 a.m.**

The next advisory opinion was that of Thomas C. Riley, a member of the City of East Providence Canvassing Authority. Staff Attorney Gramitt presented the Staff recommendation. The Petitioner was present. The Petitioner stated that the position in question had previously been titled Canvassing Authority Clerk and had been selected by the Canvassing Authority from a list provided by the City Council. He stated that it has been done this way in East Providence for many years. The Petitioner also made reference to an opinion issued by the Attorney General's Office and stated that if he were chosen for the position in question, he would resign from the Canvassing Authority Board.

In response to Commissioner Cheit, Staff Attorney Gramitt stated that this advisory opinion is not moot given that no decision has been made by the Canvassing Authority. The Petitioner stated that he has avoided reviewing any of the resumes. Commissioner Cheit inquired

how the Petitioner can represent that he is the most qualified candidate, to which the Petitioner responded that he is the only candidate with an MBA. In response to Commissioner Cheit, the Petitioner stated that he didn't come before the Ethics Commission when he first applied for the position because the position has since been broadened such that credentials are being more closely examined. In further response to Commissioner Cheit, the Petitioner stated that Attorney Robert Craven had suggested that he request an advisory opinion and that the Petitioner told Staff Attorney Gramitt that he would take a deferral on the salary if needed.

In response to Commissioner Cerullo, Staff Attorney Gramitt stated that he did not receive the opinion drafted by Attorney Bill Conley that the Petitioner referenced and that the Attorney General's opinion addressed the quorum requirement of the Open Meetings Act and not the Code of Ethics. The Petitioner stated that his record keeping is not the best and that he could not locate the Bill Conley opinion, which he said discussed Title 17 regarding election laws, which the Petitioner represented states that an individual can not simultaneously be a federal, state or municipal employee and a member of a canvassing authority. In response to Commissioner Cheit, the Petitioner stated that no, he did not think that the revolving door provisions in the Code of Ethics applied to him. In response to Commissioner Harsch, Staff Attorney Gramitt agreed that this Petitioner alone does not represent the Canvassing Authority, but that another member of the Board had inquired regarding the

advisory opinion request.

Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Heffner, there was discussion. In response to Commissioner Cheit, Staff Attorney Gramitt agreed that the language of the draft should be amended to say “one of the purposes of the revolving door provisions” rather than “the primary purpose of the revolving door provisions,” given that there are multiple purposes behind these provisions. In response to Chair Binder, Commissioner Cerullo stated that she accepted this amendment. It was then unanimously

VOTED: To issue an advisory opinion to Thomas C. Riley, a member of the City of East Providence Canvassing Authority.

At 10:11a.m., upon motion made by Chair Binder and duly seconded by Commissioner Butler, 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 May 4, 2010.

b.) In re: Peter Adam, Complaint No. 2010-5

c.) Motion to return to Open Session.

At 10:42 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 18, 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 18, 2010.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on May 4, 2010 by unanimous vote; 2) initially determined by unanimous vote that Complaint No. 2010-5, In re: Peter Adam, states sufficient facts to allege a knowing and willful violation of the Code of Ethics.

The next order of business was an update on scheduling in the matter of In re: Kevin J. Carter, Complaint Nos. 2009-2 & 2010-1. The Respondent's attorney, Albin Moser, was present. Prosecutor Leyden informed the Commission that the parties had agreed to file the memoranda previously requested by the Commission by October 1, 2010, and then schedule an adjudication for a date thereafter.

The next order of business was a Legislative Update. Staff Attorney

Gramitt stated that he thought that House Resolution 7357 would have been voted out of committee by now, but it hasn't been yet. He further advised that he had an additional DVD copy of the prior hearing, if any of the Commissioners wanted to view it. In response to Commissioner Heffner, he stated that Senator Lenihan had introduced a companion bill in the Senate.

The next order of business was the Director's Report. Executive Director Willever reported that there are no advisory opinions, seven complaints, and one appeal under the APA currently pending. He noted that three formal APRA requests have been granted since the last meeting.

The next order of business was New Business proposed for future Commission agendas and general comment from the Commission. Chair Binder stated that the Commission would like to decrease the number of meetings scheduled for June from two to three. After some discussion, it was agreed that the Commission would maintain the June 1st meeting date, cancel the June 15th and June 30th dates, and schedule a meeting for June 22nd.

Chair Binder also stated that the Commission would like to have an overview on the structure and history of the Probable Cause standard as well as an overview as to when the Commission should be considering the knowing and willful element and would like these

overviews to occur at the June 22nd meeting.

Upon motion made by Commissioner Cheit and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch
Secretary