

# **MINUTES OF THE OPEN SESSION**

## **OF THE RHODE ISLAND ETHICS COMMISSION**

**August 17, 2010**

**The Rhode Island Ethics Commission held its 14th 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, August 17, 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**

**Also present were Edmund L. Alves, 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 a motion to approve minutes of the Open Session held  
on July 20, 2010. Upon motion made by Commissioner Magro and  
duly seconded by Commissioner Harsch, it was**

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

**AYES: J. William W. Harsch, Edward A. Magro and Barbara R. Binder.**

**ABSTENTIONS: Deborah M. Cerullo SSND, Frederick K. Butler, James V. Murray and Ross Cheit.**

**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 Paul J. Agatiello, M.D., FACP, a physician at the Rhode Island Veteran's Home. Staff Attorney Gramitt presented the Commission Staff recommendation. He advised that the Petitioner was unable to be present today. Upon motion made by Commissioner Murray and duly seconded by Commissioner Butler, it was unanimously**

**VOTED: To issue an advisory opinion, attached hereto, to Paul J. Agatiello, M.D., FACP, a physician at the Rhode Island Veteran's Home.**

**The next advisory opinion was that of Andrew B. Shapiro, Vice Chair of the East Bay Energy Consortium (EBEC). Staff Attorney DeVault**

presented the Commission Staff recommendation. The Petitioner was present, along with EBEC's legal counsel, Don Wineberg, Esq. The Petitioner stated that the Vice Chair is elected from among the 9 EBEC members. He read to the Commission the definition of "advisory" found in Webster's New College Dictionary, The American Heritage Dictionary and The World Book Dictionary, with which he stated his agreement. He voiced his concern that the draft opinion contained only those portions of the documents which he had submitted that the staff chose to include, as well as portions of about five telephone conversations he had with Attorney DeVault.

The Petitioner noted that he serves on the Architectural Review Board, the decisions of which are final and, therefore, not "advisory," much like that of the Zoning Board of Appeals. Commissioner Cheit asked the Petitioner to focus on the facts of this case. The Petitioner stated that page one of the draft indicates that the Arnold Group was employed by EBEC. He represented that the Arnold Group was working with EBEC but was hired by Roger Williams University. He referenced the Memorandum of Agreement (MOA) which establishes EBEC's existence and its relationship to the municipalities. In response to Commissioner Cheit, the Petitioner stated that the municipalities could go forward even if EBEC were to decide that the wind energy systems were not feasible. He indicated that EBEC would turn the result of the study over to the municipalities for them to decide. He noted that municipalities can withdraw from EBEC at any time.

**In response to Commissioner Cheit, the Petitioner represented that the municipalities are not bound in any way by EBEC's factual determinations. The Petitioner stated that EBEC votes to accept the report of the consultant. Attorney Wineberg, who clarified that he was present only on behalf of EBEC, stated that the municipalities can do anything that they want. The Petitioner noted that page two of the draft opinion references EBEC's rules of procedure. He expressed that he does not see how EBEC's adoption of rules has any bearing on whether it is advisory or not. Chair Binder stated that it seems like EBEC is actually working on behalf of the municipalities to achieve consensus. Attorney Wineberg indicated that that is not so, and he stated that there is a sensitivity at the EBEC level that EBEC cannot tell the municipalities what to do. He represented that EBEC had submitted an advisory opinion request which was rejected given that EBEC was not subject to the Code of Ethics.**

**In response to Chair Binder, Attorney Wineberg stated that EBEC makes recommendations, such as to engage ASA as a feasibility consultant, a recommendation that was accepted by the Town of Bristol. Commissioner Cerullo requested information regarding the process by which Bristol accepted its recommendation. Attorney Wineberg replied that he does not believe that it involved a Town Council meeting but that it was just accepted by the Town Administrator. In response to Commissioner Cerullo, Attorney Wineberg stated that EBEC votes on approving bills at its meetings**

**and the Town has not rejected its recommendations.**

**The Petitioner represented that there has been a major misunderstanding with respect to the outline of EBEC's governing structure contained on page two of the draft. He further stated that EBEC is a very unique organization which is not static. He asked that the Commission focus on what EBEC is right now, not what it could be in the future. Attorney Wineberg represented that if EBEC changes in the future, such as through the acquisition of land or application for grant funds in its own name, there is no question that it would be subject to the Code. In response to Commissioner Cheit, Attorney Wineberg indicated that EBEC does not have discretionary authority over \$140,000 because it is not the ultimate decision maker and cannot compel the expenditure of grant funds. Attorney Wineberg stated that EBEC's role was to recommend the expenditure, a recommendation accepted by Bristol. In response to Commissioner Cheit, the Petitioner agreed that EBEC recommended who received the funds and that they did receive them. Commissioner Cheit commented that that is likely why the staff concluded that EBEC is not purely advisory.**

**Attorney Wineberg cautioned against the slippery slope of taking a position that advisory boards whose advice is not taken are just advisory in nature. Commissioner Cheit stated that it seems like there is more than just advice at issue here. In response to Chair Binder, Attorney Wineberg stated that he was engaged by EBEC and**

**the Town of Bristol. The Petitioner stated his belief that the prior advisory opinions cited in the draft support his position that EBEC is advisory. He indicated that EBEC is not an entity, it cannot sign contracts, it has no control over spending its funding, it is limited to the terms of the MOA, and it is not a lobbying organization trying to convince the towns one way or another. The Petitioner represented that the following individuals/entities believe that EBEC is advisory only: Keith Stokes, Executive Director of the EDC; the Rhode Island Foundation; Diane Medeiros, the Bristol Town Administrator; all nine Bristol Town Council members; June Speakman, Chair of the Barrington Town Council; the Mayor of Newport; and Christine Foster, attorney and representative for Middletown.**

**Attorney Wineberg emphasized EBEC's lack of substantive decision making. In response to Commissioner Harsch, Attorney Wineberg confirmed that EBEC files notice of its meetings with the Secretary of State and that the municipal officials who serve on EBEC are subject to financial disclosure. In response to Commissioner Cheit, the Petitioner stated that at this time he is not putting before the Commission a change in personal circumstances which he referenced in his request letter. In response to Commissioner Cheit, the Petitioner stated that it is not relevant that his EBEC service is unpaid. In response to Commissioner Butler, Staff Attorney DeVault indicated that she did not look into the financial disclosure status of individuals on EBEC because it would not have been determinative to the analysis. She noted that many people, such as herself, are**

**subject to the Code but are not subject to the filing requirement.**

**In response to Commissioner Cheit, Staff Attorney DeVault indicated that, while she has not spoken to Bristol officials regarding their reliance upon EBEC recommendations, it is her belief that that is what the Petitioner and Attorney Wineberg have represented. She stated that the fact that Bristol writes the check does not alter her analysis. Attorney Wineberg stated that he strongly disagrees that Bristol relies on EBEC recommendations. He noted that although it has never rejected any recommendation, it could do so. In response to Commissioner Cerullo, Attorney Wineberg confirmed that, independent of EBEC, Bristol could hire attorneys or consultants for EBEC. Commissioner Cheit expressed that having the capacity to reject a recommendation does not mean that there is no influence. Attorney Wineberg replied that he is not saying that EBEC has no influence but, rather, that it does not have the ability to make public decisions.**

**Chair Binder commented that Legal Counsel has pointed out that EBEC can hire the Executive Director or other consultants. She inquired how that is squared away with Bristol having the final say on everything. Attorney Wineberg replied that the rules were adopted before he represented EBEC and that EBEC has not implemented any of them. Commissioner Cheit stated that Attorney Wineberg's view of how EBEC operates is different than as it appears on paper. In response to Chair Binder, Legal Counsel Alves referenced EBEC's**

rules and opined that its powers are not simply advisory. Attorney Wineberg noted that the rules were adopted without the advice of counsel.

Commissioner Butler pointed out that the outline of EBEC's governing structure indicates that the guidelines are not binding until EBEC incorporates. Legal Counsel Alves stated that the document is not binding and there is no indication that the earlier document had been repealed. Legal Counsel Alves disagreed with Attorney Wineberg's representation that, in the event of a conflict between the rules and the outline, the outline is controlling. Chair Binder disclosed that she just became aware that Attorney Wineberg's law firm does work with her husband's business, and she stated that she is recusing.

In response to Commissioner Harsch, Attorney Wineberg stated his belief that the Town could use the money for a purpose other than as recommended by EBEC, as long as it is consistent with the grant. Commissioner Harsch noted that the grant specifies EBEC and that the Town is also narrowly bound in that it cannot use funds other than as set forth in the grant. Commissioner Cheit inquired how the Rhode Island Foundation would view it if the Town said it would spend the money in a way that EBEC does not recommend. The Petitioner replied that he believes that the Foundation could terminate its agreement. Commissioner Cheit pointed out that his response supports the notion that EBEC has more than advisory power. Upon

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

**VOTED: To issue an advisory opinion, attached hereto, to Andrew B. Shapiro, Vice Chair of the East Bay Energy Consortium (EBEC).**

**AYES: Deborah M. Cerullo SSND, J. William W. Harsch, James V. Murray, Edward A. Magro and Ross Cheit.**

**NOES: Frederick K. Butler.**

**RECUSAL: Barbara R. Binder.**

**The next advisory opinion was that of Les Rolston, a building inspector for the City of Warwick. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. In response to Commissioner Harsch, Staff Attorney DeVault advised that the Petitioner's representation that he would not accept work within the town was made to her orally in a telephone conversation. She clarified that he has not submitted that representation in writing. Commissioner Cheit noted that the representation is contained within the advisory opinion, so the Petitioner would be bound by it. Commissioner Cerullo stated her concern where someone is in a clear position to use his position to solicit customers or business for a second job, and she questioned how it would be presented in the Petitioner's particular circumstance.**

**Staff Attorney DeVault replied that she made it clear to the Petitioner in her telephone conversation with him that he cannot solicit anyone or hand out his business cards.**

**Commissioner Harsch inquired whether the Petitioner's superior is going to be aware of the Commission's action. Staff Attorney DeVault indicated that it would be incumbent upon the Petitioner to notify his superior of any issued opinion. She stated that in drafting the opinion she relied upon the Petitioner's representation that he would remove himself from matters involving Stormtite. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Magro, it was unanimously**

**VOTED: To issue an advisory opinion, attached hereto, to Les Rolston, a building inspector for the City of Warwick.**

**Commissioner Cerullo expressed concern regarding the fact that an advisory opinion may limit what a person can do and the only person who knows it is the Petitioner. She stated that the individual may be aware of the limitations upon issuance of the opinion but might not remember it a year later. Commissioner Cheit stated that the issued opinions are posted on the Commission's website. Chair Binder noted that municipal solicitors review the opinions, which are also published in Lawyers Weekly.**

**At 10:20 a.m., upon motion made by Commissioner Magro 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 July 20, 2010.**

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

**c.) In re: John Winfield, Jr.,  
Complaint No. 2010-6**

**d.) Status Update:**

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

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

**At 10:43 a.m., the Commission returned to Open Session. The next order of business was a motion to seal the minutes of the Executive Session held on August 17, 2010. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously,**

**VOTED: To seal minutes of the Executive Session held on August 17, 2010.**

**Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on July 20, 2010; 2) initially determined that In re: John Winfield, Jr., Complaint No. 2010-6, alleged sufficient facts to support a knowing and willful violation of the Code and authorized full investigation; 3) approved an Informal Resolution & Settlement in In re: Peter Adam, Complaint No. 2010-5; and 4) received a status update on Larisa v. RI Ethics Commission.**

**The next order of business was the advisory opinion of Peter A. Adam, Chief of the Manville Fire Department. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present, along with Peter Fucci, Chair of the Manville Board of Fire Wardens. The Petitioner inquired what would happen if Mr. Fucci were not re-elected. Staff Attorney Leyden recommended that the Petitioner seek further guidance from the Commission, as the opinion is specifically limited to an alternate chain of command involving Mr. Fucci. In response to Commissioner Cerullo, Mr. Fucci indicated that he will assign all work shifts. Upon motion made by Commissioner Murray and duly seconded by Commissioner Magro, it was unanimously**

**VOTED: To issue an advisory opinion, attached hereto, to Peter A.**

**Adam, Chief of the Manville Fire Department.**

**The next order of business was the Respondent's Motion to Dismiss in the matter of In re: James Botvin, Complaint No. 2009-7. Commissioner Murray noted that he is recused on this matter but will remain seated given that this is in Open Session. William Devereaux, Esq., the Respondent's legal counsel, advised that he has supplemented the record with an affidavit of Marci Coleman, Esq., Legal Counsel to the Dealer's Board. He stated his understanding that the Prosecution does not oppose his Motion to Dismiss. Attorney Devereaux argued that the Respondent acted with reason and in good faith given that there was: 1) disclosure; 2) the seeking of advice; and, ultimately, 3) a vote against the client of the attorney with whom he had a relationship.**

**Attorney Devereaux represented that when Mr. Teverow appeared before the Board the Respondent disclosed that Mr. Teverow had previously represented him, as well as the fact that he knew all of the parties. Attorney Devereaux stated that all parties indicated that there was no issue with the Respondent participating. He further stated that the Board's counsel indicated that she did not see it as a problem and told the Respondent that it was OK for him to sit. Attorney Devereaux stated that the Respondent voted against Mr. Teverow's client, and he noted that Mr. Teverow got paid no matter what the outcome. Attorney Devereaux requested dismissal of the Complaint.**

**Commission Prosecutor Leyden advised that, after the Commission issued its probable cause finding, Attorney Devereaux informed her that Ms. Coleman had listened to the audiotapes of the subject hearing and would provide an affidavit. After receiving a copy of the affidavit, Commission Prosecutor Leyden informed that she instructed Investigator Mancini to question Ms. Coleman as to whether she informed the Respondent that he could participate. Commission Prosecutor Leyden stated that Ms. Coleman confirmed that she told the Respondent it would be fine to participate. She advised the Commission that she could not prove a knowing and willful violation of section 5(f) given that the Respondent had disclosed the relationship to the Board and the Board's counsel informed him that he could participate. She submitted that the Respondent acted reasonably and in good faith by disclosing the relationship to the Board and obtaining the advice of its Legal Counsel.**

**Upon motion made by Commissioner Butler and duly seconded by Commissioner Magro to grant the Respondent's Motion to Dismiss, there was discussion. Commissioner Cheit expressed that, while he is in favor of the motion, he wishes that the Commission had heard from Ms. Coleman beforehand. He stated his belief that the motives of a Complainant are not relevant. He further stated that the need to recuse cannot be waived. Commissioner Cheit indicated that the Board's counsel told the Respondent something that he finds**

**inexplicable, but the Respondent's reliance upon her advice is definitive. Upon the original motion, it was unanimously**

**VOTED: To grant the Respondent's Motion to Dismiss.**

**RECUSAL: James V. Murray.**

**The next order of business was the Director's Report. Executive Director Willever advised that there are three complaints and one advisory opinion pending. There is no litigation presently pending. He reported that seven formal APRA requests have been granted since the last meeting. Director Willever announced with regret that Staff Attorney DeVault will be leaving the Commission to accept a position with the Appellate Division of the RI Supreme Court. He complimented her on the fine work she has done for the Commission and wished her well in her new employ. On behalf of the Commission, Chair Binder thanked Staff Attorney DeVault and stated that she will be missed.**

**The next order of business was New Business proposed for future Commission agendas and general comment from the Commission. Commissioner Harsch requested that Staff look into EBEC's financial disclosure status and whether those members who are not municipal officials already subject to the filing requirement should perhaps be required to file. Chair Binder and Commissioner Cheit commented that fire districts seem to present an issue for the Education Program**

**to address. Chair Binder noted that the Commission will resume its consideration of Probable Cause within the next two meetings.**

**At approximately 11:03 a.m., upon motion made by Commissioner Harsch and duly seconded by Commissioner Murray, it was unanimously**

**VOTED: To adjourn.**

**Respectfully submitted,**

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**J. William W. Harsch**  
**Secretary**