

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

June 21, 2011

The Rhode Island Ethics Commission held its 10th meeting of 2011 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, June 21, 2011, pursuant to the notice published at the Commission Headquarters, the State House Library, and electronically with the Rhode Island Secretary of State.

The following Commissioners were present:

Ross Cheit, Chair Frederick K. Butler*

Deborah M. Cerullo SSND, Vice Chair Edward A. Magro

J. William W. Harsch, Secretary John M. LaCross

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Staff Attorneys Dianne L. Leyden and Amy C. Stewart; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:01 a.m. the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held

on June 7, 2011. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Magro, it was unanimously

VOTED: To approve minutes of the Open Session held on June 7, 2011.

*** Commissioner Butler arrived at 9:05 a.m.**

The next order of business was advisory opinions. The advisory opinion was based on a draft advisory opinion prepared by the Commission Staff for review by the Commission and was scheduled as an item on the Open Session Agenda for this date. The advisory opinion was that of Stephen Durkee, a Providence City Plan Commission (“CPC”) member. Staff Attorney Stewart presented the Commission Staff recommendation on behalf on Senior Staff Attorney Katherine D’Arezzo. The Petitioner was present.

In response to Chair Cheit, the Petitioner stated that he was very sensitive to these circumstances and that he wanted to ensure that he did the right thing at the CPC meeting that night. Commissioner Harsch asked if there was any restriction on the use of Petitioner’s name in the title of his former architectural firm. The Petitioner stated that when he separated from his former firm, Durkee Brown, they were not able to change the name, and he could not force the removal of his name from the firm. Chair Cheit asked why they wanted his name even though he was no longer a member of the firm. In

response to Commissioner Harsch, the Petitioner said there were no restrictions on him as part of the separation agreement.

In response to Commissioner Cerullo, the Petitioner said that Armory Revival was a former client, but that he did not know if it is a current client of Durkee Brown. Commissioner Cerullo asked if the Petitioner would receive a financial benefit if Armory Revival is a current client of Durkee Brown.

Staff Attorney Stewart explained that even if Armory Revival were a current client of Durkee Brown, if Durkee Brown is not involved in the matter before the CPC, then the Petitioner can participate in a matter before the CPC. The Petitioner stated that Armory Revival was scheduled to come before the CPC that night regarding the Rising Sun project, in which Durkee Brown was never involved. Commissioner Cerullo inquired whether Durkee Brown represented Armory Revival on another project in this state. The Petitioner stated that it is possible. Commissioner Cerullo then asked if there would be a financial benefit to Durkee Brown if it receives compensation from Armory Revival. The Petitioner stated that it is possible.

Commissioner LaCross asked the Petitioner if he could ask Armory Revival at the CPC meeting if Durkee Brown is representing them to determine whether or not a conflict of interest exists. The Petitioner stated that he did not know if Durkee Brown is representing Armory Revival somewhere else. Commissioner Cerullo expressed concern

that if Durkee Brown is financially impacted then the Petitioner may be financially impacted as well.

The Petitioner stated that he recused in the past when he was still a member of Durkee Brown, for example he recused from Brown University matters for over 10 years and he does not know if Durkee Brown is still involved in any Brown University matters, but he would like to participate in Brown University matters now before the CPC. Staff Attorney Stewart stated that the representations provided were that Brown University and Armory Revival are former clients of Durkee Brown. She further suggested that it would be unreasonable for the Petitioner to account for all of Durkee Brown's former clients when they are not his business associates under the Code.

In response to Commissioner Cerullo, the Petitioner stated that he is receiving fixed payments per the separation agreement and would receive no financial benefit from future Durkee Brown income. The Petitioner stated that he would recuse if Durkee Brown appeared before him, but he wanted it to be clear that former clients did not require recusal. In response to Commissioner Harsch, the Petitioner stated that there were no controversies regarding his former firm.

Upon motion made by Commissioner Magro and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Stephen

Durkee, a Providence City Plan Commission member.

RECUSED: Commissioner Butler

At 9:18 a.m., upon motion made and duly seconded, 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 June 7, 2011.

b.) Commission Collection Update:

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

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

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

**In re: John A. Celona,
Complaint Nos. 2003-9, 2004-4 & 2004-8**

**In re: Patrick T. McDonald,
Complaint Nos. 2001-41 & NF2002-13**

**In re: Donna J. Hayden,
Complaint Nos. NF2008-6 & NF2009-7**

**In re: Vincent J. Polisen,
Complaint No. 2010-10**

c.) Motion to return to Open Session.

The Commission returned to Open Session at 9:26 a.m. The next order of business was a motion to seal minutes of the Executive Session held on June 21, 2011. Upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To seal minutes of the Executive Session held on June 21, 2011.

Chair Cheit reported that the Commission took the following actions in Executive Session: 1) unanimously approved minutes of the Executive Session held on June 7, 2011; and 2) received a collection actions update.

The next order of business was a report of the Regulation Subcommittee regarding participation in employee contract negotiations. Commissioner Cerullo informed that Staff Attorney Stewart is now assisting the Subcommittee. Commissioner Cerullo reported that the Subcommittee was pleased with the straightforward language of the current proposed regulation. She stated that the Subcommittee considered revisiting the business associate language but found that it would be more complex, requiring two separate regulations. She said that the current version of the regulation provides for recusal during contract negotiations and allows for participation in the vote on the final contract.

In response to Chair Cheit's invitation of discussion by the full Commission, Commissioner Butler said that he supports this regulation and that it is simple and straightforward. Commissioner LaCross concurred.

Chair Cheit referred to previous testimony regarding comparables and inquired as to whether the Subcommittee identified specific testimony that demonstrated a need for this type of regulation. In response, Commissioner Cerullo advised that there was not much written comment regarding the use of comparables, most of it was recollection of oral testimony. She noted that the Commission could explore this issue again in the rulemaking process. Commissioner Magro stated that the Commission originally attempted to address this with a general advisory and then decided to move forward with

regulation.

Chair Cheit questioned the Subcommittee members as to what was the underlying problem that the Commission needed to regulate. He asked if there is some reason to think that without this regulation, something goes awry where a member of the negotiating team is a member of an organization on the other side of the bargaining table. For example, he questioned how a teacher on a school committee could steer negotiations in favor of the teachers without the other members of the negotiating team noticing it or being unable to stop it.

Commissioner Butler stated that it is the Commission's job to regulate conflicts and not the outcome. He explained that there is a perception of a conflict generated by the umbrella organizations. In response to Commissioner Butler, Chair Cheit agreed that there is an appearance issue but that he could not see a problem that needed to be regulated. He said that negotiations happen in an institutional setting, the public official is part of the negotiating team, which has a charge from the full committee, their biases are visible to those on the negotiating team, and they could be removed from the team if they are trying to undercut the interests of the school committee. Commissioner Butler stated that it is not whether they use the conflict but rather that the conflict exists. Chair Cheit said that the process of collective bargaining ensures that the public official does not use the conflict to the detriment of the public body on which he or

she serves.

In the context of school committees, Commissioner Harsch advised that each member of the negotiating team has a vote and the ability to influence discussions. He explained that although there is a charge from the full school committee, the negotiating team may not necessarily fulfill the details of the charge and that the charge does not bind the outcome of the bargaining. He also noted that each member of the negotiating team has a vote for the decision to go before the full school committee. Chair Cheit noted that it would be a majority vote so one person could not have a significant effect. Commissioner Harsch responded that like a jury, one person could tie things up for a long period of time.

Chair Cheit noted that any conflict here is indirect because it is not generally talking about the public official's own employment contract.

Commissioner Butler replied that there can be an attenuation of directness in some of the conflicts under the Code of Ethics, such as nepotism. He stated that he looks to whether there is a particular relationship that sets up a conflict of interest. Chair Cheit stated that the structure of collective bargaining makes it impossible for a member of the negotiating team to exercise a personal conflict. He asked the other Commissioners what the direct effect is. Commissioner Cerullo replied that there is an eventual benefit to the public official's own employment terms based on the comparison to similar contracts.

Chair Cheit informed that he and a research assistant looked into Rhode Island school committees for evidence of the use of comparables. He reported that seven (7) school committees based negotiations on a state average; another school committee looked at eight (8) other comparable communities. Commissioner Harsch asked to see the results of Chair Cheit's research.

As to the proposed language of the draft regulation, Chair Cheit noted that the Subcommittee removed the language about comparables. He found this draft regulation broader than the last one because it covers more than a business associate analysis. Commissioner Cerullo said that the Subcommittee's intent was to limit the bargaining prohibition to the same profession given concerns raised at previous meetings about comparing different professions.

Chair Cheit recognized that there is an appearance of impropriety, but he questioned if there is a conflict underneath such appearance. He suggested that given the enormous complexities surrounding this issue it might be best to continue making determinations in the context of advisory opinions. He stated that he is not convinced that there is a way to regulate it.

Chair Cheit inquired as to how this regulation would affect school administrators. Commissioner Cerullo responded that a school administrator's profession would be considered that of an educator,

similar to a teacher. Chair Cheit replied that he did not believe that administrators are the same as teachers given that administrators are in management. Commissioner Harsch disagreed with Commissioner Cerullo; he said that school administrators would fall into their own bargaining category.

Chair Cheit asked if the conflict of interest sought to be regulated here is a direct conflict. Commissioner Harsch provided the example of auto worker unions. He said that the unions would select one company and negotiate the best collective bargaining agreement (CBA) possible. He explained that the unions would then use that CBA as a minimum standard in bargaining with other companies. Commissioner Harsch also stated that in the context of school committee negotiations there is no public visibility of the process because it happens behind closed doors. He said that the umbrella organizations have different objectives for each category of workers, e.g., teachers, school administrators, plumbers, etc. He said that there are distinct categories in contract negotiations that support this regulation's comparison by same trade, profession or occupation.

Chair Cheit inquired whether there would be a situation in which a non-union member would be covered by this regulation. Commissioner Harsch said that there should be a one-on-one comparison under this regulation, for example teachers compared with teachers. Chair Cheit asked whether Diane Nobles, a CCRI professional staff member, could participate in the Narragansett

teacher contract negotiations in her role as a Narragansett School Committee member under this regulation. Commissioner Harsch asked if Diane Nobles was part of the same umbrella union as the teachers' union with which she sought to negotiate. Commissioner Butler stated that union dues go to the umbrella so there could be a conflict there. Chair Cheit commented that this regulation does not look at whether the public official is a member of the same umbrella union with which they seek to negotiate. He agreed that there could be a business associate relationship based on membership in the same umbrella union. Chair Cheit suggested that there be two alternatives for rulemaking, the current regulation discussed at this meeting and another that addresses membership in the same umbrella organization.

Commissioner Harsch proposed that it does not make sense to go back to the Subcommittee at this point. He asked the staff to draft another regulation that speaks to the conflict presented by membership in the same umbrella organization. He also asked Legal Counsel Alves to draft a regulation on the same issue for review at the next meeting. He stated that it would be best to have at least one alternative to consider in conjunction with the current draft regulation regarding employee contract negotiations. Chair Cheit complimented the Subcommittee for its good work on a very difficult issue. However, he stated it would be best to continue with this process before the full Commission in order to get feedback from all of the members.

Chair Cheit inquired whether the Subcommittee intended this regulation to cover retirees. Commissioner Harsch responded that they would not normally be affected by the collective bargaining process. Chair Cheit responded that in this economic climate there is a sense that retirees could be affected. Commissioner Harsch said that retirees are no longer in a trade, profession or occupation. Commissioner LaCross said that sometimes retirees' benefits are included in the negotiation of a new CBA, for example, health care benefits for retired police officers. Staff Attorney Stewart advised that as drafted the regulation only covers present employees and suggested that retirees are not considered employees of the state or municipal agency.

Chair Cheit next asked if the Commission had any sense of how many people would be prohibited from participating in negotiations if this regulation were enacted. He asked whether the majority of the impact would be on school committees and fire districts. Commissioner Butler said that the Commission should seek to resolve the conflict of interest and then let the impact fall where it may. Commissioner Harsch said that fire districts do not tend to attract the large number of fire professionals to its boards in the same way that school committees attract teachers and other people employed in the field of education. He noted that school committees are targeted by the umbrella organizations involved.

Chair Cheit informed that his research assistant ascertained the professions of 153 school committee members in Rhode Island. He stated that 6 of 153 were teachers and 8 of 153 were school administrators. He said that these small numbers do not suggest that the problem is as big as originally thought. He also questioned whether the Commission should be equally worried about management, specifically school administrators, unfairly affecting the employment conditions of the teachers.

Commissioner Cerullo stated that the CBA, which the public official negotiates, will at some point be used as a comparable affecting their financial condition and terms of employment. Chair Cheit stated that a CBA might be used. Commissioner Magro stated that the CBA will be used. Chair Cheit said that his research revealed two types of comparables: 1) a state average, and 2) a sampling of other similar CBAs in comparable communities. He stated that this regulation as drafted does not take into account the comparables or address the concern that your action as a public official can have some impact on the terms of your public employment.

Commissioner Butler informed that just because a community might be using an average as a comparable, it does not mean that the average is an innocent comparison. He stated that the umbrella organization in the state can have an interest in keeping the average salaries high for a better position in bargaining. Commissioner Magro stated that a teacher in Rhode Island is comparable to another

teacher in Rhode Island. Commissioner Cerullo agreed that it is not too attenuated to say that such negotiations will benefit the public official eventually.

Chair Cheit referred to the definition of comparable in arbitration statutes, which specifically look at communities of a similar size and demographic. In response to Commissioner Butler, he said that his research revealed that where there is an explicit mention of comparables, the city or town listed communities that are comparable in size. Commissioner Butler also asked if Chair Cheit had reviewed the terms and conditions in the teacher contracts and questioned whether they were similar statewide. Chair Cheit said that because this statute is so indirect it does not make sense to regulate the potential use of comparables. Commissioner Harsch replied that the directness comes from taking the best contract in that category and using it as the model for negotiating statewide. He stated that it is common for the umbrella union to cherry pick the best terms from CBAs around the state.

Chair Cheit posited why a school committee would put someone on the negotiating team who would undercut the whole process. Commissioner Harsch said that in the school committee context, a teacher is put on the negotiating team because they are familiar with the process based on their public employment in another city or town as a teacher. Chair Cheit replied that it would be a benefit to the town and school committee to put a teacher on the negotiating committee.

Commissioner Harsch recognized that although there may be a benefit there is still a conflict of interest. Chair Cheit asked what is the problem we are trying to regulate if there are only 6 out of 153 school committee members that are teachers. Commissioner Harsch said that the problem is with the members of the umbrella union being able to sit behind closed doors where negotiations include the best provisions for employment taken from other already negotiated CBAs.

Chair Cheit noted that even if there is an appearance of a conflict, this system has built in democratic checks. He stated that an official has to be elected, their campaign would reveal their profession to the electorate, then if elected they have to be selected for the negotiating team by the other board members. He opined that given all of these checks he did not see a need for the Commission to regulate it. Commissioner Cerullo explained that the current version of the regulation was drafted to expand the scope beyond unions. Commissioner Harsch proposed that the Commission consider alternatives and notify the members who were absent from this meeting about this discussion. Chair Cheit agreed and noted that the minutes should be informative for absent members.

In response to Commissioner Harsch, Chair Cheit provided a list of additional issues that he wanted to discuss in relation to the proposed regulation:

1) R.I. Gen. Laws § 16-2-9 lays out the powers and duties of the school committee. If union members have such a great conflict, what are the implications to the other statutory duties, for example, disciplinary proceedings?

2) Can teachers participate in executive session discussions that provide the direction or charge to the negotiating team? Commissioner Harsch replied that such participation is not prohibited here.

3) Is the school committee's negotiating team secretly or openly undermined if a teacher, who is also a union member, is negotiating on behalf of management?

4) Should school administrators be able to sit on school committees? How are they different or similar to a teacher on the school committee?

5) What does "trade, profession or occupation" mean? Is a CCRI professor the same as a teacher under this regulation as drafted? Chair Cheit said that he thought these categories were incredibly broad. In his opinion, there is no plausible argument that an elementary school teacher is the same as a CCRI professor.

6) The Commission should look at a series of old advisory opinions and see if this regulation addresses its original concerns.

7) The Commission should ascertain more facts about fire districts and this regulation's effect on them.

Commissioner Butler added that he is concerned with the situation when a public official runs for local office and accepts support from a

union organization, a local or an umbrella organization, that the union organization expects that person, if elected, to lean in the union's favor during negotiations. He suggested that this is a problem that the Commission could consider here or somewhere else.

Chair Cheit noted that during the process of rulemaking the Commission needs to make a finding that there is a problem which can be fixed by this new regulation. Legal Counsel Alves explained that in the regulatory process the Commission must identify the need for the regulation and demonstrate that this regulation is the most effective and least burdensome alternative.

Commissioner Harsch noted that school committees are very unique in municipal government. In response to Commissioner Butler, Chair Cheit asked why the non-teacher members of school committees, who do not have a conflict, would select a teacher, who has a conflict, to help the school committee negotiate with the teachers' union. He explained that if the teacher is helpful to the school committee the conflict becomes illusory. He said that the school committee looks at the conflict differently if having a teacher on the negotiating team is a benefit to management.

The Commission took a brief recess at 11:04 a.m. and reconvened at 11:12 a.m.

Chair Cheit stated that he is an advocate of open government,

emphasizing the importance of public deliberations. He explained that his first inclination is to define the problem and then place emphasis on potential unintended consequences. He thanked the Commissioners for their good will and good intentions to do the right thing on a very difficult issue. In response to Chair Cheit, Commissioner Butler said that his points were appreciated and well taken. Commissioner Harsch agreed with the benefit of public discussion. He stated that he preferred the discussion with the full Commission because at the Subcommittee level only a few members of the public stay for the meeting to listen and too few Commissioners participate. He said that based on his background, “if it ain’t broke don’t fix it.”

Commissioner Harsch made a motion which asked the staff to: 1) provide the Commission with a staff opinion whether this path to regulation should be pursued or not; and 2) provide the Commission with an additional regulation or regulations for consideration at the next meeting. He also wanted to ensure that the absent members were notified about the importance of attending the next meeting. Additionally, Commissioner Harsch asked Legal Counsel Alves to address the same matters that he proposed to the staff.

Commissioner Cerullo also expressed her appreciation for the open conversation at this meeting. She clarified that the Subcommittee was held in open session. She proposed considering an additional regulation which addressed public officials bargaining with members

of the umbrella organization of which they are a member. She would like the option to vote on any or all proposed regulations at the next meeting. Chair Cheit indicated that he would talk to Commissioner Lynch about ideas for proposed regulation language that he raised at a previous meeting.

Upon motion made above by Commissioner Harsch and duly seconded by Chair Cheit, it was unanimously

VOTED: To ask Commission Staff and Legal Counsel Alves to separately provide a recommendation as to how to proceed with this matter and submit additional versions of regulation language for consideration at the next meeting.

The next order of business was the Director's Report. Executive Director Willever reported that there are five complaints and three advisory opinions pending. He stated that two formal APRA requests have been granted since the last meeting. He informed that reminder letters have been sent out for non-filing of financial disclosure statements and that non-filing complaints will be filed soon. He also announced with regret that Staff Attorney Leyden will be leaving the Commission to accept a position with the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals. He complimented her on the fine work she has done for the Commission and wished her well in her new employ.

The next order of business was New Business. Chair Cheit thanked Staff Attorney Leyden for her excellent work, wished her congratulations, and said that she will be missed. Chair Cheit noted the United States Supreme Court's decision in Nevada Commission on Ethics v. Carrigan, No. 10-658, decided June 13, 2011. He informed that the unanimous decision, written by Justice Scalia, held that legislative power is not personal to the legislator but it belongs to the people and, therefore, it is a not a right protected by the First Amendment.

At 11:26 a.m., upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To adjourn.

submitted,

Respectfully

Harsch

J. William W.

Secretary