

MINUTES OF THE OPEN SESSION

OF THE RHODE ISLAND ETHICS COMMISSION

August 16, 2011

The Rhode Island Ethics Commission held its 12th 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, August 16, 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 Edward A. Magro

Deborah M. Cerullo SSND, Vice Chair Mark B. Heffner*

James V. Murray John M. LaCross

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Staff Attorneys Jason Gramitt, Nicole B. DiLibero and Amy C. Stewart; and Commission Investigators Steven T. Cross and Peter J. Mancini.

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 July 19, 2011. Upon motion made by Commissioner Cerullo and

duly seconded by Commissioner Murray, it was unanimously

VOTED: To approve minutes of the Open Session held on July 19, 2011.

ABSTENTION: Edward A. Magro

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 the Marjorie F. Frank, a member of the Charlestown Town Council. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present.

***Commissioner Heffner arrived at approximately 9:07 a.m.**

In response to Commissioner Murray, Staff Attorney Stewart explained that Ms. DiBello's charge before the Rhode Island Human Rights Commission ("HRC charge") does not currently include a request for monetary damages, but the matter will likely proceed to state or federal court where monetary damages could be sought. Chair Cheit inquired whether the decision to indemnify those named in the HRC charge is a ministerial act given the language of the indemnification statute and ordinance. Staff Attorney Stewart responded that the Town Council must allocate funds for legal fees.

In response to Commissioner Cerullo, Staff Attorney Stewart explained that this is an initial budgetary measure related to the Town's duty to defend the Town officials named in the HRC charge. She said that the determination of liability and indemnification will happen at a later point in the litigation process. In response to Chair Cheit, Staff Attorney Stewart confirmed that the Petitioner is named in her individual and official capacity in the HRC charge. She stated that there are five members of the Town Council: two are named in this HRC charge and one is the complainant who filed the HRC charge, which leaves two members who are presumably are not involved in this dispute. She explained that, although the Staff recognizes a quorum problem, the matter is not yet ripe for the Commission's consideration of the Rule of Necessity.

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

VOTED: To issue an advisory opinion, attached hereto, to Marjorie F. Frank, a Charlestown Town Council member.

The next advisory opinion was that of John J. Iglizzi, Esq., a member of the Providence City Council, who is also a member of the Providence Board of Contract and Supply. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was not present. Attorney Michael Calise appeared on the

Petitioner's behalf. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to John J. Iglizzi, Esq., a member of the Providence City Council, who is also a member of the Providence Board of Contract and Supply.

The next advisory opinion was that of Gregory J. Avedisian, a member of the Charlestown Town Council. Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Gregory J. Avedisian, a Charlestown Town Council member.

The next advisory opinion was that of Louis A. Cerbo, Ed.D., a licensed clinical psychologist, who has accepted an offer of employment as the Clinical Director (Psychologist) for the Rhode Island Department of Corrections ("DOC"). Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was not present.

In response to Commissioner LaCross, Chair Cheit clarified that in general a state employee is not prohibited by the Code of Ethics from working as an independent contractor for the state in a second job,

after state work hours and without use of state resources. Discussion ensued regarding the extent to which the Petitioner's Office of Rehabilitation Services ("ORS") referrals could conflict with his work as Clinical Director for the DOC. The Commissioners sought more information about the factual circumstances of the ORS referrals and decided to continue the matter to the next meeting to allow the Petitioner to attend and answer questions.

Discussion ensued regarding whether the Commission should withdraw the safe harbor of the draft opinion. Upon motion made by Commissioner LaCross and duly seconded by Commissioner Magro, it was unanimously

VOTED: To remove safe harbor from Louis A. Cerbo's draft advisory opinion and continue the matter to the next meeting.

The next order of business was a Commission discussion regarding constitutional issues raised by the receipt of a request for rulemaking regarding candidates for public office who seek and obtain a collective bargaining unit's endorsement. At the last meeting, the Commission instructed the Staff and Legal Counsel to analyze whether there are any constitutional barriers to proceeding with this rulemaking request, particularly as to the First Amendment freedoms of Speech and Association. Staff Attorney Gramitt presented a memorandum to the Commission and explained that the requested rule would require a public official to recuse from participating in contract negotiations with a collective bargaining unit if that unit had

endorsed the public official's election for public office. He advised that Justice Kennedy's concurrence in the recent United States Supreme Court case, Nevada Commission on Ethics v. Carrigan, raises concerns that the rule proposed would hamper political speech, chill the endorsement process, and chill a public official's ability to associate with likeminded individuals in violation of the First Amendment.

In response to Chair Cheit, Staff Attorney Gramitt explained that this proposed rule would violate the First Amendment because it is content based, focusing on political relationships and political speech. In contrast, he stated that the existing ethics statutes and regulations are content neutral, not looking at speech but, rather, defining conflicts of interest based on existing familial and financial relationships between a public official and his or her family members, employers or business associates.

Legal Counsel Alves stated that he concurred with the Staff's analysis that this request for rulemaking would run afoul of the First Amendment freedoms of Speech and Association. He advised the Commission of its options for proceeding with this matter: it could decide to initiate rulemaking; deny the rulemaking petition; or seek further information. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To reject the petition for rulemaking based on the

constitutional concerns raised by Staff and Legal Counsel that the rule proposed would implicate the First Amendment's protections of Speech and Association.

Chair Cheit stated that he thought it was appropriate for the Commission to consider threshold constitutional issues before initiating rulemaking because it is the duty of all citizens and government officials, not only judges, to consider and enforce the protections of the Constitution.

The next order of business was a Commission discussion of and potential vote to initiate the rulemaking process on proposed draft regulations regarding participation in employee contract negotiations. Staff Attorney Stewart summarized the draft regulations provided to the Commission for consideration at this meeting. Chair Cheit noted that as the process moves forward it is important for the concise summary to state the purpose of the regulation.

Commissioner Cerullo recalled that the Commission previously approved several advisory opinions where it opined that it was not a conflict for a public official to negotiate with a representative of his or her umbrella union. She stated that she sees a conflict in the facts of those previous advisory opinions. She said that the Commission needs to identify the specific conflict, how far it extends (to the regional and/or national umbrella union), and what it would be based

on (same profession or dues paying link). She stated that, in the interest of fairness to the public, the Commission needs to articulate its change of position that such a fact pattern would now be considered a conflict. In response to Chair Cheit, Commissioner Cerullo stated that she is not wedded to the broadest of the regulatory options but would prefer a regulation that extends the conflict to any place that the dues flow, up the chain to the umbrella organization. She also said that she prefers the draft submitted by Legal Counsel Alves over using the business associate model.

Chair Cheit noted that the fact that the Commission is considering new regulations does not require the Commission to actually adopt a regulation at the end of this process. He stated that thus far the rulemaking process has not convinced him that a regulation would be useful. Commissioner Heffner concurred and questioned whether it is possible to draft a rule that is actually workable and useful, no matter how well crafted it is. Commissioner Murray agreed and added that he is not sure that the rulemaking process should continue any further.

In response to Commissioner Cerullo, Staff Attorney Gramitt summarized the status quo of this issue based on prior advisory opinions: a public official cannot participate in negotiations with his or her own local bargaining unit, which is a section 5(a) and 5(d) conflict, but that a public official would be permitted to participate in negotiations with another local bargaining unit that is under the same

umbrella organization.

Chair Cheit suggested that future advisory opinions could become more restrictive. Commissioner Magro responded that the Commission should put people on notice if it is changing course on an issue. In response to Commissioner LaCross, Chair Cheit stated that he believed that the Commission has never received a complaint on this issue, only advisory opinion requests.

Commissioner Cerullo stated that initially the discomfort arose from the use of comparables by local unions in the collective bargaining process. Commissioner Magro said that he sees an obvious conflict where an umbrella union is negotiating a contract with a member of one of its locals and uses comparables to negotiate that contract. In response to Chair Cheit, who questioned whether a small town and a large city are comparable, Commissioner Magro said that he believes that teachers will look at all other teachers for comparables during contract negotiations. Chair Cheit stated that if there is a conflict it is indirect. Commissioner Magro disagreed. Commissioner Cerullo suggested that the conflict directly extends to the umbrella organization by following the path of the dues through the local to the umbrella.

Discussion ensued regarding the General Commission Advisory (“GCA”) drafted at the beginning of this rulemaking process. Chair Cheit opined that, even if the Commission issues a GCA to show that

it has changed its interpretation of the union bargaining issue, a violation of a GCA would not amount to a violation of the Code unless the Commission adopts a regulation prohibiting specific conduct. Staff Attorney Gramitt added that if there is a consensus amongst the Commissioners that there is a problem to fix rulemaking would be the better way to fix that problem.

Commissioner Cerullo reiterated her concern that without a regulation it will be difficult to put the public on notice that they cannot rely on the prior advisory opinions. Chair Cheit suggested that there are times when the Commission uses its “extra” power in the advisory opinion context, which is limited and symbolic, by refusing to give its blessing to an advisory opinion based on appearance issues. He noted that if an advisory opinion was not approved, it would not mean that a complaint would be sustained; rather it demonstrates that the advisory opinion process is not a rubber stamp. Chair Cheit stated that only a regulation would tell people that certain conduct is prohibited and that they would face consequences under the Code of Ethics.

The Commissioners discussed whether they should have a vote today or wait until the next meeting. Commissioner Magro suggested that the Commission should wait until the next meeting to vote on this matter given the absence of some Commissioners.

Chair Cheit recalled that this matter arose after a few advisory

opinions raised some concerns, in particular the Diane Nobles advisory opinion. Staff Attorney Gramitt stated that in response to those concerns the Commission held workshops on this very topic and received oral and written comment from unions, good government groups and political parties. Commissioner Magro stated that he had felt constrained by the previous line of advisory opinions. Chair Cheit responded that there are two ways to go against the precedent of past advisories: either change the rules to enable the Commission to vote no based on that new rule or vote no because of an appearance of impropriety, noting however, that the latter option will not sustain a complaint. Chair Cheit said that looking back on the Diane Nobles advisory opinion now, he cannot see how her actions on the Narragansett School Committee could affect her employment at CCRI; the connection is too attenuated. Commissioner Heffner stated that the composition of the Commission changes, times change, and he does not feel compelled to vote for an advisory opinion that he disagrees with because of precedent.

Discussion returned to the topic of the old GCA drafted on this issue. Staff Attorney Gramitt explained that a GCA puts people on notice as to how the Commission interprets a specific section of the code. He said that GCA's have been traditionally used for particular fact patterns, such as whether a public official can increase their own stipend or salary. He stated that a GCA can be very helpful to clarify the Commission's interpretation of ambiguous language in the Code.

However, he said that the better course of action would be to clarify the Code by amending the ambiguous language. He stated that the GCA defines rank and file union members as business associates of their local bargaining unit and any umbrella organization to which of portion of the member's dues flow. Staff Attorney Stewart added that the GCA most closely mirrors Option A, one of the draft regulations under consideration by the Commission.

Chair Cheit stated that if someone was subject to a complaint for violating conduct outlined in a GCA that person could argue that the GCA is not binding, but merely an interpretation of the Code of Ethics. Staff Attorney Gramitt stated that a respondent could make some compelling arguments against being found in violation of a GCA's interpretation of ambiguous language. Legal Counsel Alves agreed and acknowledged that the GCA could lead to problems of enforcement in the case of judicial review, and he noted that if the Commission wants to prevail on appeal, a GCA will not work, the Commission needs a regulation.

Chair Cheit said that he is open to the idea that there is conduct worth regulating, but actually drafting a clear regulation that is not overbroad and will stand up to judicial review has proved to be difficult. Commissioner Magro stated that the Commission should not give up because this regulatory process is difficult. He said that he could live with some of the proposed regulations and expressed a preference for Legal Counsel's submission.

Commissioner LaCross suggested that the matter be continued for one more month to let the absent members weigh in. Upon motion made by Commissioner LaCross and duly seconded by Commissioner Cerullo, it was

VOTED: To continue this matter to the next meeting for Commission discussion of and potential vote to initiate rulemaking process on proposed draft regulations re: Participation in employee contract negotiations.

AYES: Edward A. Magro; Deborah M. Cerullo SSND; John M. LaCross; Ross Cheit.

NOES: James V. Murray; Mark B. Heffner.

The next order of business was an update on the process to initiate online filing for Financial Disclosure Statements. Staff Attorney Gramitt informed that the Staff has made progress with the state's Division of Information Technology ("DoIT"), the Department of Administration, and RI.gov. He informed that the Staff entered into an agreement with RI.gov to develop an online filing module. He extended thanks to Staff member Michelle Berg for her hard work on this project. He stated that the goal is to have the online filing system up and running for next spring's filing of the 2011 Financial Disclosure Statements. He said that initially online filing would be

optional, but the goal is to have mandatory online filing in the future, subject to certain waivers.

The next order of business was a Commission discussion regarding proposed changes to the Commission meeting schedule. Executive Director Willever informed that Legal Counsel Alves has a conflict with the September 13, 2011 meeting. He proposed cancelling the September 13 and September 27 meetings and instead hold meetings on September 20 and October 4. After receiving no objections from the Commissioners, Chair Cheit directed the Staff to make the schedule changes proposed by Executive Director Willever.

The Commission continued the follow-up discussion on Collection Actions to the next meeting.

At approximately 11:10 a.m., upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, 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 19, 2011.

The Commission reconvened in Open Session at 11:16 a.m. Chair

Cheit reported that the Commission took the following action in Executive Session: unanimously approved minutes of the Executive Session held on July 19, 2011.

The next order of business was a motion to seal minutes of the Executive Session held on August 16, 2011. 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 August 16, 2011.

The next order of business was a motion to approve the minutes of the Regulation Subcommittee's June 7, 2011 meeting. Of the three Subcommittee members, Commissioners Cerullo and Magro were present, constituting a quorum. Upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To approve the minutes of the Regulation Subcommittee's June 7, 2011 meeting.

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

B. DiLiberio, who recently began her employ as a Staff Attorney.

At 11:20 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Murray, it was unanimously

VOTED: To adjourn.

Respectfully

submitted,

J. William W.

Harsch

Secretary