

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

September 20, 2011

The Rhode Island Ethics Commission held its 13th 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, September 20, 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 John M. LaCross

Deborah M. Cerullo SSND, Vice Chair John D. Lynch, Jr.

J. William W. Harsch, Secretary Edward A. Magro

Frederick K. Butler James V. Murray

Mark B. Heffner

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, 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 August 16, 2011. Upon motion made by Commissioner Murray and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To approve minutes of the Open Session held on August 16, 2011.

ABSTENTIONS: J. William W. Harsch; Frederick K. Butler; John D. Lynch, Jr.

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:

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”), requesting an advisory opinion regarding whether the Code of Ethics prohibits him from continuing to provide consulting services, in his private capacity, to another state agency as an independent contractor.

Staff Attorney Stewart presented the Commission Staff

recommendation. The Petitioner was present. Staff Attorney Stewart stated that the Petitioner has yet to begin his employ with the DOC and currently has a start date of October 11, 2011. In response to Chair Cheit, the Petitioner stated that he has not started his job at the DOC in part because he was waiting for the outcome of this advisory opinion request. In response to Commissioner Heffner, the Petitioner said that he will advise the Office of Rehabilitative Services (“ORS”) that he will no longer accept referrals for psychological evaluations of people who have been incarcerated at the DOC. The Petitioner said that while he has performed forensic evaluations in criminal cases for lawyers in the past, he would no longer accept such cases in the future given his employ at the DOC.

In response to Chair Cheit, the Petitioner represented that he would not accept a referral that he knew came to him by reason of his position at the DOC. Chair Cheit directed Staff Attorney Stewart to add a sentence to the advisory opinion directing that the Petitioner cannot accept a referral that he knew came to him by reason of his position at the DOC. The Petitioner had no objections. Upon motion by Commissioner Magro and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion as amended, attached hereto, to Louis A. Cerbo, Ed.D., who has accepted an offer of employment as the Clinical Director (Psychologist) for the Rhode Island Department of Corrections.

The next advisory opinion was that of:

The Honorable Angel Taveras, the Mayor of the City of Providence, who in his mayoral capacity serves as chairman of the Providence Economic Development Partnership (“PEDP”), requesting an advisory opinion regarding the appropriate process for handling a certain loan application before the PEDP in light of legal work he performed in his private capacity prior to his election as Mayor.

Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present along with Jeffrey Padwa, Esq., the Providence City Solicitor. Mr. Padwa stated that he was prepared to answer the four questions posed to the Petitioner at the previous hearing for this advisory opinion. He recalled that the Commissioners’ previous questions related to the following topics: the timeline of events to purchase this property; the standard applied by the PEDP when determining whether to grant a loan; the appointment of the PEDP board members; and the source of the PEDP funds.

Mr. Padwa stated that the commercial property in question was on the market for two years before the current buyer expressed interest, which was approximately eighteen months to two years ago. He informed that first there was informal contact with the PEDP program about funding assistance, followed by the formal application process.

He said that after the Petitioner took office as Mayor, the Petitioner told the Providence Law Department about his conflict with this loan application before the PEDP.

Mr. Padwa explained that the PEDP loan process begins with informal discussions and is followed up by a formal written application requiring financial disclosures and tax returns. He said that the PEDP is a lender of last resort and requires collateral for all loans. He also informed that the PEDP will look at three factors: what does this loan achieve for the city; does it create new jobs; does it comply with federal community development objectives. He said that the purchase and sale agreement was for \$1.7 million and that the PEDP loan request could be for part or all of the purchase price, or for a guarantee.

With respect to the tenure of the current PEDP Board members, Mr. Padwa informed that six members and one alternate were appointed in April 2009 for a three-year term. He said that the remaining eight members were appointed in June 2003 and are currently serving with expired terms. Mr. Padwa informed that the Petitioner has not appointed any of the members of the PEDP. Finally, he said that the PEDP Revolving Loan Fund is administered by the City with City employees as signatories.

Chair Cheit thanked Mr. Padwa for the information and invited questions from the Commissioners. Commissioner Heffner noted

that he was surprised that eight of the PEDP Board members have been serving since 2003 with expired terms. He asked if there was a current intention or policy to bring the PEDP Board appointments current. The Petitioner replied that his Deputy Chief of Staff handles the board and commission appointments. He stated that he was surprised to learn that those PEDP Board members had been serving for so long without re-appointment. He informed that his senior advisors, along with his Deputy Chief of Staff, make recommendations regarding new appointments for City boards and commissions. He said that some people have expressed interest and may have submitted information online to seek a City appointment. He said that the PEDP Board has continued to meet despite the eight members serving with expired terms.

In response to Commissioner Heffner, the Petitioner stated that while he wants to bring appointments for the PEDP Board up do date, he is waiting for guidance from the Ethics Commission given his request for an advisory opinion. The Petitioner said that he has recently made appointments to other City boards, but not the PEDP. The Petitioner said that appointments tend to percolate up, that he is very busy and handles appointments as needed.

Chair Cheit commented that it is significant that the Petitioner has not appointed any of the PEDP Board members because there is no appearance that they are beholden to him. Commissioner Heffner stated that he agrees with Chair Cheit and is comfortable that there is

no conflict with the appointment process at present.

The Petitioner stated that he was not sure who was serving expired terms without consulting a list of members and their appointment information. He said that he has no recollection of anyone directly asking him to be re-appointed but could not rule out the possibility that someone may have approached his staff. Mr. Padwa added that he does not know if any of the members would like to be re-appointed. The Petitioner stated that the PEDP is staffed by City Employees of the Planning Department.

Commissioner Cerullo asked if there is any outside recourse for a loan applicant who is denied funding by the PEDP. Mr. Padwa replied that the federal Department of Housing and Urban Development (“HUD”) audits the PEDP’s activities. The Petitioner stated that he did not believe that there was an appeals process. Mr. Padwa stated that the PEDP Revolving Loan Fund consists of HUD and U.S. Economic Development Administration (“EDA”) funds.

Chair Cheit inquired if it was a matter of public record as to what the new use of the commercial property would be given that its current use is a strip club. The Petitioner stated that he did not know if he was at liberty to disclose the new use but informed that it would no longer be a strip club.

The Petitioner stated that he realized from the beginning that he could

not participate in the PEDP's decision to grant or deny this loan given his personal interest in this matter. He said that he understood that it would be a violation of the Code of Ethics even to deny this loan. In response to Commissioner Cerullo, the Petitioner stated that he does not sign the loan checks for the PEDP, or any checks for that matter, and if he did they would seek an alternate signatory. Upon motion by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to the Honorable Angel Taveras, the Mayor of the City of Providence.

The next advisory opinion was that of Kristen Catanzaro, a North Providence Town Council member. Staff Attorney DiLibero informed that she received additional information from the Petitioner last Friday afternoon, which added significant facts to the original request. She stated that this matter will be postponed to allow the Petitioner to submit a more detailed written request.

At approximately 9:47 a.m., upon motion made by Commissioner Harsch 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 August 16, 2011, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4).

b) In re: Frank Sylvester, Complaint No. 2011-2, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4).

The Commission reconvened in Open Session at 9:55 a.m.

The next order of business was a motion to seal minutes of the Executive Session held on September 20, 2011. Upon motion made by Commissioner Murray and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To seal minutes of the Executive Session held on September 20, 2011.

Chair Cheit reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on August 16, 2011; 2) initially determined, by unanimous vote, that In re: Frank Sylvester, Complaint No. 2011-2, alleges sufficient facts to constitute a knowing and willful violation of the Code of Ethics.

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. Commissioner Cerullo stated that the Commission has been considering this question for a substantial amount of time since about December 2008. She said that the prior rule held that it was not a conflict of interest for a person who is subject to the code, who is also a union member, to negotiate a different local union contract with the umbrella union of which they are a member so long as they are not an officer or director of the union. She recalled the evolution of this process from the initial 6 to 1 vote to move forward with a General Commission Advisory (“GCA”), public comment, change to a rulemaking process, focus on comparables, and the Regulation Subcommittee’s attempt to broaden the rule beyond unions, the result of which the full Commission did not favor. Commissioner Cerullo said that in her opinion a person subject to the Code, who is a member of a union, has a conflict when negotiating with its umbrella union because a portion of that person’s dues flow up to the umbrella union.

Commissioner Cerullo made a motion for the Commission to proceed with rulemaking with the draft regulation called Option A. She said that it most closely mirrored the draft GCA on this issue. Commissioner Magro seconded this motion and discussion ensued.

Commissioner Lynch stated that the Code of Ethics already prohibits direct financial benefits and cautioned that it was a step backward to regulate an indirect financial link based on union dues. He said that based on the current information it was not a blatant problem and

such a regulation would eliminate a board's opportunity to use a particular individual's expertise in bargaining.

Commissioner Harsch stated that in his personal experience working with town councils, union membership on school committees is a fairly common complaint and some town council members are uncomfortable with it. He stated that the Commission has put a lot of time into this, examined a variety of alternatives, at least twenty, and that he believes the public should have access to the work done by staff. He said that he wants to see this rulemaking process to its final conclusion. Commissioner Harsch said that he concurs with Commissioner Lynch that this should be done by rulemaking rather than by GCA.

Commissioner Lynch said that it is fine to regulate a direct conflict but the Commission should not create a special class that is prevented from doing what they were elected to do. Commissioner Harsch said that he would like to invite some town council members that he knows to come before the Commission and provide comment to show that this is a real problem. He would like those with an interest to be heard and make a public record. Chair Cheit acknowledged the spirit of Commissioner Harsch's comments but noted that the Commission is not voting to look at this topic more; this is a vote to proceed with rulemaking on a particular draft regulation or not to proceed with rulemaking.

Commissioner Cerullo recalled that the Commission already received public comment and held workshops during the GCA process. She stated that there is a problem and she prefers the business associate model which is concerned with a financial nexus based on union dues that flow up to the umbrella organization. She said that the umbrella organizations work to enhance the employment benefits of their members. In response to Chair Cheit, Commissioner Cerullo stated that the members of the union are getting a financial benefit from the local bargaining process. Chair Cheit commented that the Commission regulates individuals. He inquired if this rule would apply to the Chamber of Commerce. Commissioner Magro said that it was unclear. Chair Cheit said it is a problem if the Commission does not understand the breadth of the regulation. Commissioner Magro said that they should still go forward.

Chair Cheit inquired why this singles out unions, what about the Chamber of Commerce, trade groups and other umbrella organizations. Commissioner Cerullo replied that the union issue has come before the Commission in advisory opinions. Chair Cheit stated that the Commission has never had a complaint on this issue, but had a couple of complaints involving trade associations. Commissioner Harsch noted that the union dues are a cash nexus, flowing up from the individual to the local and umbrella union.

Commissioner Butler said that in the absence of a GCA or new regulation, the Commission can handle these matters on a case by

case basis. He noted that we are here because the Commission wanted to clarify its position for the public. Chair Cheit stated that this has been a difficult task with many issues and concerns. Commissioner Harsch said that the Commission needs an organized record. He said that if the Commission does not go ahead with this regulation it amounts to an unintentional safe harbor in the minds of others by not acting.

Chair Cheit said that the people who come before the Commission for advisory opinions are reluctant union members required to pay dues whether they want to or not. He stated that bargaining committees would not select people who will work against their board's interest. He reiterated that the Commission already had public workshops on this matter. Commissioner Harsch replied that the process is only obvious to the people who follow us closely and that he thinks that it needs more publicity.

In response to Chair Cheit, Legal Counsel Alves clarified the procedural posture of this matter as listed on the agenda. Legal Counsel Alves stated that there is a motion on the table to put Option A into rulemaking. Chair Cheit asked, hypothetically, if Options C or D were better, would they have to start over with rulemaking. In response, Legal Counsel Alves said that someone could move to put all four options up for rulemaking. Commissioner Harsch suggested that Commissioner Cerullo could amend her motion to include all four options. Chair Cheit inquired if the Commission compared and

contrasted the merits of the draft regulations. In response to Commissioner Murray, Legal Counsel Alves stated that if rulemaking proceeded on any option, the Commission was not required to adopt a regulation at the end of the process and could vote all of the options down. He advised, however, that if there was a substantial change to a draft regulation during rulemaking, the process may have to start again.

Commissioner Heffner acknowledged Commissioner Harsch's desire for more public comment but noted that it is not likely that the universe of comment will be greatly expanded. Commissioner Heffner said that there was an opportunity to comment already. He stated that he does not see this regulatory process as the way to fix this conflict and he agreed with Chair Cheit's concerns of singling out a particular class, here the unions. He suggested that the Commission vote on Commissioner Cerullo's original motion, which he is inclined to disfavor. He said that this issue has been well vetted, through what was effectively an attempt at rulemaking. He disagreed with Commissioner Harsch's opinion that no action by the Commission equals a safe harbor. He said that this is a very difficult topic that lends itself better to case by case analyses than rulemaking.

Commissioner Harsch said that the process was visible to the Commission but invisible to the world at large. Commissioner Heffner responded that he believes the relevant universe of people

wishing to provide comment have already come forward. Staff Attorney Gramitt stated that the Commission Staff notified all of the cities and towns and all of the unions for both of the previous workshops.

Commissioner Cerullo stated that there is a conflict here and the Commission needs to change the state of the old advisory opinions. She said that it is a conflict for a business associate to negotiate with its union. Chair Cheit stated that this situation is unique because union members do not have a choice but are forced to be members. He said that this is a required association that is different from most business associate relationships. He stated that the Commission can depart from the old advisory opinions.

Commissioner LaCross said that he is not convinced that there is something that needs to be fixed based on the information that there have already been workshops where all of the cities and towns were notified, and yet the Commission still lacks concrete evidence of a conflict. Commissioner Heffner agreed with Commissioner Butler that the Commission can still change its mind on a case by case basis with advisory opinions.

Chair Cheit noted that these draft regulations are broader than a direct financial gain. He clarified that the draft GCA was never adopted. Commissioner Cerullo said that the Commission will likely never receive an advisory opinion on this topic again because people

will rely on the old advisory opinions. Chair Cheit said that he believed that the conflict rarely occurs and that it was why we receive so few advisory opinions.

Upon the motion previously made by Commissioner Cerullo and duly seconded by Commissioner Magro, it was

VOTED: To proceed to rulemaking with Option A.

AYES: Edward A. Magro; Deborah M. Cerullo SSND; J. William W. Harsch.

NOES: John D. Lynch, Jr.; John M. LaCross; Frederick K. Butler; Mark B. Heffner; James V. Murray; Ross Cheit.

Chair Cheit stated that this does not end the matter entirely, but means that we are not proceeding with rulemaking at this time.

The next order of business was the Director's Report. Executive Director Willever reported that there are sixteen complaints pending: eleven non-filing complaints and five conflict of interest complaints. He stated that there are three advisory opinions pending and that three formal APRA requests were granted since the last meeting. He noted that there is a time sensitive matter scheduled for the next meeting, on October 4, 2011, for which we need a quorum. Commissioner Magro stated that he cannot attend the October 4

meeting.

The next matter was New Business. There being no New Business, at 10:47 a.m. upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To adjourn.

Respectfully

submitted,

J. William W.

Harsch

Secretary