

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

November 20, 2012

The Rhode Island Ethics Commission held its 15th meeting of 2012 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, November 20, 2012, 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 Mark B. Heffner

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

John D. Lynch, Jr., Secretary 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 and Amy C. Stewart; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:03 a.m. the Chair opened the meeting. The first order of business was the approval of minutes of the Open Session held on

November 7, 2012. Upon motion made by Commissioner Magro and duly seconded by Commissioner Cerullo, it was

VOTED: To approve minutes of the Open Session held on November 7, 2012.

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

ABSTENTIONS: John D. Lynch, Jr.; James V. Murray; Mark B. Heffner.

The next order of business was a public hearing regarding adoption of Regulation 36-14-17009 – Out-of-state travel. The hearing was stenographically recorded and a transcript of the proceeding is available at the Commission Offices.

Staff Attorney Gramitt stated that this hearing was part of the continuing consideration of this regulation, which was proposed by Common Cause of Rhode Island in May, 2012. He informed that at the last public hearing on this matter in October the Commission directed Staff to add subsection (b) to the regulation, which was a non-exclusive list of circumstances that would lead a person to believe that the travel would not have been provided but for the public official's or employee's public office. He stated that the regulation was re-noticed for another 30-day comment period and that the Commission has received one additional comment.

In response to the discussion at the last hearing, Staff Attorney Gramitt proposed adding an express exception to line 7 of the regulation that would exclude travel provided by a public official's or employee's regular private employer. He explained that this was not a substantive change; rather, it clarified what had always been intended by the regulation. Legal Counsel Alves concurred that this amendment was not a substantive change. Commissioner Murray stated that he is in favor of this amendment.

The Commission opened up the floor to public comment, noting that one (1) person signed up to speak. John Marion, on behalf of Common Cause of Rhode Island, spoke in favor of adopting this regulation. He commented that several of the subsection (b) paragraphs refer to the travel as a gift. He stated that this could be confused with the definition of a gift under the gift prohibition. He suggested replacing each use of the word gift with "out-of-state travel and related transportation, lodging, meals and entertainment" to match subsection (a) and add clarity.

Commissioner Cerullo made a similar comment with respect to the use of the word donor, suggesting that it might be confusing. She stated that some people may view the out-of-state travel not as a donation but as an expense. Commissioners Lynch and Magro proposed replacing the word donor with "provider." Staff Attorney Gramitt stated that it would not be a substantive change to replace

each instance of donor with “provider.”

Commissioner Heffner questioned whether the word “necessarily” in line 13 was surplusage. Staff Attorney Gramitt replied that it could be deleted without changing the meaning of the sentence.

Commissioner Lynch questioned whether the illustrative circumstances in subsection (b) would apply when the purpose of travel is directly related to the public official’s or employee’s public position, such as the speaker of the house going to a conference for speakers of the house. Staff Attorney Gramitt replied that an additional paragraph could be added to subsection (b) as paragraph (9) that states: “If the travel involves a conference or seminar, the subject matter of the conference or seminar directly pertains to the public official’s or employee’s official duties.”

The public comment portion concluded with no one else interested in speaking. Legal Counsel Alves advised that the Commission could move to adopt the regulation and all amendments at one time.

Commissioner Cerullo moved to adopt proposed Regulation 36-14-17009, amended in the following ways:

1. Adding the phrase “or his or her regular private employer” to line 7 between “employed” and “if.”

- 2. Striking the word “necessarily” from line 13.**
- 3. Replacing the word “donor” with “provider” every time it appears in subsection (b).**
- 4. Replacing the word “gift” with “out-of-state travel and related transportation, lodging, meals and entertainment” every time it appears in subsection (b).**
- 5. Adding paragraph (9) to subsection (b), stating, “If the travel involves a conference or seminar, the subject matter of the conference or seminar directly pertains to the public official’s or employee’s official duties.”**

She also moved that the Ethics Commission find: that there was no alternative approach to the regulation which would be as effective and less burdensome to affected private persons; that no other state regulation which is overlapped or duplicated by this proposed regulation has been identified; that no indication that the regulation would have a significant economic impact on small business has been received; and that Regulation 36-14-17009, as amended, be adopted. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Magro, it was unanimously

VOTED: To adopt Regulation 36-14-17009, as amended.

The next order of business was a motion hearing in the matter of In re: John Winfield, Jr., Complaint No. 2010-6. The Commission heard argument from Commission Prosecutor Gramitt regarding the Prosecution's Motion to Dismiss. He informed that the Respondent's attorney was notified of this hearing, concurred with the motion and was not present.

Commission Prosecutor Gramitt summarized the travel of the case. He stated that the probable cause finding was related to the Respondent's wife appearing before the Scituate Town Council ("Town Council"), of which he was a member, during the public comment portion of a Town Council meeting regarding whether the Town should enact an ordinance to regulate wind turbines. He stated that the investigation found that there was no financial impact on the Respondent with respect to the wind turbine matter. He further informed that the Respondent received legal advice from both his private attorney and the Town Solicitor that recusal was not necessary because his property did not abut the proposed turbine. However, he stated that Commission Regulation 36-14-5002 ("Regulation 5002"), as it existed at the time, required the Respondent to recuse regardless of financial impact. Therefore, probable cause was found as to this instance of conduct based upon a violation of Regulation 5002.

Commission Prosecutor Gramitt stated that since the finding of probable cause the Commission has amended Regulation 5002 to

include an exception that would have applied to these facts, specifically Regulation 5002(b)(2). He noted that, at the time the amendment was adopted, he mentioned that this exception could have an impact in this particular case. Commission Prosecutor Gramitt argued that the same public policy reasons that supported the adoption of the amendment to Regulation 5002 similarly supported the dismissal of the instant complaint.

Discussion ensued. In response to Commissioner Cerullo, Commission Prosecutor Gramitt stated that the complainant was notified of this hearing and did not contact the Commission. He stated that probable cause was found on May 17, 2011. He argued that dismissal is fair and equitable, given that the Respondent's conduct was not objectionable, that he had sought and received advice from legal counsel, and because such conduct is no longer a violation of the Code.

There was discussion regarding whether it was appropriate to retroactively apply this regulatory amendment to this case. Commissioner Heffner inquired if the case could be settled with an admission of a Code violation but no fine, acknowledging that the conduct violated the rule in existence at the time. Commission Prosecutor Gramitt stated that it is possible if the motion today was not granted. However, he questioned whether the Commission believed that the conduct at issue was sufficiently reprehensible to support the branding of the Respondent as a violator of the Code of

Ethics.

There was more discussion about not taking steps backward and punishing conduct which the Commission has since decided should not be prohibited. Commissioner Magro noted that the finding of probable cause was based on a very low standard and there are defenses to be raised by the Respondent. He questioned if the conduct complained of was something that the Commission wanted to pursue to adjudication. Commissioner Murray and Chair Cheit stated that they were both inclined to dismiss. Commissioner Lynch stated that this was conduct that should not have been prohibited in the first place and that it would not be fair to go back and punish the Respondent now for something that is no longer a violation.

Commissioner Heffner disagreed and suggested that an artfully drafted settlement agreement would address his and Commissioner Cerullo's concerns. Commissioner Cerullo stated that it was a close call and she was concerned given the change in the law.

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

VOTED: To grant prosecution's motion to dismiss In re: John Winfield, Jr., Complaint No. 2010-6.

AYES: James V. Murray; Edward A. Magro; John D. Lynch, Jr.; Ross

Cheit.

NOES: Mark B. Heffner; Deborah M. Cerullo.

The next order of business was the Director's Report. Executive Director Willever reported that there are nine (9) complaints pending, three (3) advisory opinions and one (1) litigation matter pending. He also stated that one (1) APRA request was granted since the last meeting.

The next order of business was review and approval of tentative 2013 Commission meeting schedule. Chair Cheit directed Staff to continue this matter to the next meeting.

At approximately 10:05 a.m., upon motion made by Commissioner Lynch and duly seconded by Commissioner Heffner, it was unanimously

VOTED: To go into Executive Session, to wit:

- a) Motion to approve minutes of Executive Session held on November 7, 2012, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4).**
- b) In re: Gordon Rogers, Complaint No. 2012-1, pursuant to R.I. Gen. Laws § 42-46-5(a)(2).**

The Commission reconvened in Open Session at approximately 11:25 a.m.

The next order of business was a motion to seal the minutes of the November 20, 2012, Executive Session. Upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To seal the minutes of the November 20, 2012 Executive Session.

Chair Cheit reported that the Commission took the following actions in Executive Session:

1. Voted to approve the minutes of the Executive Session held on November 7, 2012.

[Reporter's Note – The vote was as follows:

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

ABSTENTIONS: John D. Lynch, Jr.; James V. Murray; Mark B. Heffner.]

2. Found that there is probable cause to believe that the Respondent violated the Code of Ethics in the matter of In re: Gordon Rogers, Complaint No. 2012-1.

[Reporter's Note – The vote was as follows:

AYES: Mark B. Heffner; Edward A. Magro; John D. Lynch, Jr.;

Deborah M. Cerullo; Ross Cheit.

NOES: James V. Murray.]

The next order of business was New Business and general comments from the Commission. Chair Cheit suggested that there should only be one meeting in December. After discussion, it was decided that the December meeting will be held on December 4, 2012, and the meeting scheduled for December 18, 2012, will be cancelled.

Chair Cheit also noted that there was discussion today of instances of public officials relying on incorrect advice from town solicitors. He asked the Staff for input as to how to better communicate with solicitors about the Code of Ethics and advising public officials to recuse or get advisory opinions.

At 11:30 a.m., upon motion made by Commissioner Magro and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To adjourn.

Respectfully

submitted,

John D. Lynch, Jr.

Secretary