

STATE OF RHODE ISLAND
BEFORE THE RHODE ISLAND ETHICS COMMISSION

In Re: David Swain

Complaint No. 2000-9

ORDER

This matter having been heard before the Rhode Island Ethics Commission on October 11, 2005, pursuant to Commission Regulation 1011, and the Commission having considered the Complaint herein, the arguments of counsel and the proposed Information Resolution and Settlement, which is incorporated by reference herein, it is hereby

ORDERED, ADJUDGED AND DECREED

THAT, the Commission approves the Informal Resolution and Settlement as submitted; and

THAT, the Commission incorporates by reference herein its findings of fact and conclusions of law as those set forth in the Informal Resolution and Settlement; and

THAT, the Respondent is ordered to pay a civil penalty in the amount of Seven Hundred Fifty (\$750) Dollars.

Entered as an Order of this Commission,



10/18/2005

James Lynch, Sr.
Chairperson

Dated

STATE OF RHODE ISLAND
BEFORE THE RHODE ISLAND ETHICS COMMISSION

In Re: David Swain

Complaint No. 2000-9

INFORMAL RESOLUTION AND SETTLEMENT

Respondent David Swain and the Rhode Island Ethics Commission hereby agree to a resolution of the above-referenced matter as follows:

I. FINDINGS OF FACT AND ADMISSIONS

A. CMS Application

1. The Respondent was elected to the Jamestown Town Council in 1999 and served as a member of the Town Council until May 2003. In said capacity, the Respondent served as the Town Council's liaison to the Jamestown Harbor Management Commission.
2. The Jamestown Town Council also sits as the Jamestown Board of Water and Sewer Commissioners.
3. In his private capacity, the Respondent is the president and principal owner of Ocean State Scuba, Inc., a corporation located at 79 North Main Road, Jamestown. Ocean State Scuba engages in the retail sale and leasing of diving equipment and kayaks, as well as the provision of related services and instruction. Ocean State Scuba primarily operates from its North Main Road location.
4. Ocean State Scuba also rents dock space at One Ferry Wharf, Jamestown from Conanicut Marine Services, Inc. Ocean State Scuba rents kayaks from said location as a part of its operations.

5. Conanicut Marine Services, Inc., d/b/a/ Conanicut Marina, (hereinafter "CMS" or Conanicut Marina) is a corporation located at One Ferry Wharf, Jamestown, which furnishes marine repair, yacht maintenance and mooring facilities. William S. Munger is the president and co-owner of CMS.

6. The Town of Jamestown owns some of the waterfront property from which CMS operates. On June 6, 1995, the Town entered into a ten (10) year lease agreement with CMS regarding the use of property on what is known as the East Ferry waterfront for the construction, maintenance, and operation of a marina, together with the right of CMS to place dockage attachments to the steel pier and the right to use the basin for a marina.

7. Pursuant to the Town's lease agreement with CMS, the dockage fee rate for the Town wood pier and the northern face of the steel pier shall be set each year by the Town Council based upon the recommendation of the Harbor Management Commission. By the terms of the relevant lease, CMS paid an initial fixed rent of \$14,000.00 per year for the entire demised premises, subject to annual increases based upon the percentage increase in CMS' published or actual seasonal per foot slip rental fees and dockage fees.

8. Through the Respondent, Ocean State Scuba entered into rental agreements with CMS for use of its dock space at One Ferry Wharf during the 1999 and 2000 boating seasons, running from May 1st through October 15th of each respective year.

9. During the 1999 boating season, Ocean State Scuba rented a twenty-five (25) foot slip at One Ferry Wharf from CMS for the amount of \$875.00. During the 2000 boating season, Ocean State Scuba rented a twenty-five (25) foot slip from CMS for the amount of \$918.75. Both rental agreements reflect that the rental amounts were subject to increase, subject to any Town mooring rate increases.

10. CMS and/or Mr. Munger allow(s) Ocean State Scuba, for a fee, to use other dock space that he/CMS owns. Ocean State Scuba uses said space for its kayak rental business. No written agreement exists between the parties as to the lease of space for kayaks, and payment is made at the end of the boating season based upon the amount of kayak business done by Ocean State Scuba. Ocean State Scuba pays CMS/Munger 20% of its gross fees from its kayak rental business.

11. On an independent contractual basis, Ocean State Scuba occasionally performs diving work for CMS involving the removal of rope or other foreign matter attached to CMS customers' boat propellers. Either Mr. Munger or CMS customers pay Ocean State Scuba directly for such services.

12. Mr. Munger also has employed Ocean State Scuba's services to perform routine mooring maintenance for CMS.

13. Prior to the Respondent's election to the Town Council, CMS submitted an application to the Jamestown Zoning Board of Review for a change and expansion of use regarding its Conanicut Marina facility. Thereafter, in June 1999, the Town Council considered whether the Town, as an abutting landowner, would take a position with respect to CMS's zoning application.

14. On June 16, 1999, the Respondent submitted an advisory opinion request to the Ethics Commission by which he requested guidance as to whether he could participate in the Town Council's consideration of whether the Town, as an abutter to the CMS property, should adopt a position with respect to CMS's proposed expansion. By his correspondence, he communicated his intent to recuse from the Town Council's consideration of whether to support or oppose the proposed expansion.

15. On July 13, 1999, the Commission issued Advisory Opinion No. 99-107 to the Respondent in which it opined that the Respondent:

“may not participate in a discussion on whether the Town should take a position in a matter where it is an abutter given that he has a financial interest in the particular project at issue. By participating in discussions and votes as to whether the Town should take a position as an abutter would affect the likelihood of approval of the development project, thereby affecting the petitioner and/or his business associate.”

16. The Respondent was present before the Commission on July 13, 1999, and requested clarification of the opinion, including an inquiry as to his future involvement on matters concerning the waterfront. Commission Legal Counsel advised that the opinion made it clear that the Respondent could not vote on such matters based upon his business relationship with CMS.

16. Subsequently, CMS submitted an application to the Jamestown Board of Water and Sewer Commissioners for a water and sewer connection as part of an application to the Jamestown zoning board and planning board for a change of use regarding property located at Assessor's Plat 8, Lot 166; 20 Narragansett Avenue.

17. By its application to the zoning board, CMS sought permission to convert the 20 Narragansett Avenue property, which previously had been a gas station, into a support facility for Conanicut Marina, involving the creation of a first floor commercial area that would contain toilet, shower, and laundry facilities for use by CMS customers. CMS sought the Board of Water and Sewer Commissioner's approval of a water and sewer connection for that purpose.

18. On February 22, 2000, the Respondent participated in the Board of Water and Sewer Commissioners' consideration of CMS's application relative to the 20 Narragansett Avenue property. John A. Murphy, Esq. represented CMS before the Board.

19. During the hearing on CMS's application, the Respondent questioned Mr. Munger regarding CMS's estimated water usage and participated in the Board of Water and

Sewer Commissioners' vote to approve the application for a water and sewer connection, upon finding that it met the requisite regulatory criteria.

B. Clarification of CMS Lease

1. The Town of Jamestown owns some of the waterfront property at One Ferry Wharf, Jamestown, from which CMS operates. Prior to the Respondent's election to the Town Council, on June 6, 1995, the Town entered into a ten (10) year lease agreement with CMS regarding the use of property on what is known as the East Ferry waterfront for the construction, maintenance, and operation of a marina, together with the right of CMS to place dockage attachments to the steel pier, and the right to use the basin for a marina.

2. Pursuant to the Town's lease agreement with CMS, the dockage fee rate for the Town wood pier and the northern face of the steel pier shall be set each year by the Town Council based upon the recommendation of the Harbor Management Commission. By the terms of the relevant lease, CMS paid an initial fixed rent of \$14,000.00 per year for the entire demised premises, subject to annual increases based upon the percentage increase in CMS's published or actual seasonal per foot slip rental fees and dockage fees.

3. On January 12, 2000, the Town of Jamestown Harbor Management Commission interpreted the Town's lease with CMS to clarify parking and storage arrangements. The Respondent participated in the Harbor Management Commission's unanimous vote to clarify the lease, pending review with Mr. Munger.

II. CONCLUSIONS OF LAW AND SETTLEMENT

A. CMS Application

1. The Commission finds that, at all times hereto relevant, the Respondent was a municipal elected official subject to the Code of Ethics, pursuant to R.I. Gen. Laws § 36-14-4(1).

2. The Commission further finds that, on February 22, 2000, the Respondent participated and voted in the Jamestown Board of Water and Sewer Commissioners' consideration of an application filed by Conanicut Marine Services, Inc., d/b/a/ Conanicut Marina (CMS), for a water connection related to a zoning application for a change of use with respect to the property located at 20 Narragansett Avenue.

3. The Commission further finds that, at the time of the Respondent's participation and vote, the Respondent had an ongoing relationship with applicant CMS involving the lease of dock space located at One Wharf Ferry, Jamestown. At said time, the Respondent's business, Ocean State Scuba, Inc., conducted a portion of its kayak rental business from dock space rented from CMS.

4. The Commission further finds that the Respondent participated in questioning William Munger, the president and co-owner of CMS, on issues relative to CMS's application for a water and sewer connection.

5. The Respondent does not contest that the Commission has sufficient evidence to establish that, by participating and voting in the Jamestown Board of Water and Sewer Commissioners' consideration of CMS's application, as detailed in Section A above, the Respondent violated R.I. Gen. Laws §§ 36-14-5(a) and 5(f).

B. Clarification of CMS Lease

1. The Commission finds that, at all times hereto relevant, the Respondent was a municipal elected official subject to the Code of Ethics, pursuant to R.I. Gen. Laws § 36-14-4(1).

2. The Commission finds that, as a member of the Jamestown Harbor Management Commission, the Respondent participated in the Harbor Management Commission's January 12, 2000, vote to clarify the Town's lease agreement with CMS.

3. The Commission further finds that the Respondent participated and voted to clarify the Town's lease with CMS while the Respondent was engaged in an ongoing relationship with CMS relative to the use of dock space at One Ferry Wharf, Jamestown.

4. The Respondent does not contest that the Commission has sufficient evidence to establish that, by participating in the Harbor Management Commission's vote to clarify the Town's lease agreement with CMS, as detailed in Section B above, the Respondent violated R.I. Gen. Laws § 36-14-5(a).

C. Mitigating Factors

In mitigation of the conduct detailed above, the Respondent submits the following:

A. With respect to the CMS application:

1. The property located at 20 Narragansett Avenue is not on the waterfront in Jamestown and the Respondent believed in good faith that the July 13, 1999, Commission advisory opinion did not extend to property or issues that did not involve the waterfront.

2. CMS's application to the Board of Water and Sewer Commissioners was simply for a water and sewer connection, which is required whenever a landowner seeks a change of use from the zoning board. The property at 20 Narragansett Avenue already had both a water and sewer connection, but CMS sought to re-route the sewer connection.

3. Although the minutes of the Board of Water and Sewer Commissioners state that the Respondent voted to approve CMS's application "for change and expansion of use" of the property, only the zoning board has the authority to permit expansion or change of use. The actual vote of the Board of Water and Sewer Commissioners was solely to approve the proposed water and sewer connections at 20 Narragansett Avenue.

4. The Respondent participated in the discussions and vote of the Board of Water and Sewer Commissioners with respect to CMS's application based on his good faith understanding that the application did not affect the waterfront at all, as testified to by William Munger.

B. With respect to the Harbor Management Commission's Clarification of the CMS lease:

1. The Harbor Management Council did not vote to change or modify the CMS lease, but merely interpreted the existing lease. The issue presented was whether the "steel pier" could be used by persons other than CMS under the terms of the lease. The Harbor Management Commission considered the terms of the lease and advised CMS that others had the right to use the steel pier. The Harbor Management Commission's decision was contrary to CMS's interests, although it, in fact, had no impact, because it only clarified what was already in place. The Harbor Management Commission's decision simply clarified that the public had the right to use the steel pier, subject to CMS's use as well.

2. Because no change or modification of the CMS lease was at issue or considered by the Harbor Management Commission, the Respondent in good faith believed that CMS would not derive a direct monetary gain or suffer a direct monetary loss by reason of the Respondent's participation in the discussion and clarification of the CMS lease.

C. Generally

1. The Respondent believes in good faith that a landlord and tenant are not "business associates" as that term is defined by the Code of Ethics, in that a landlord and tenant are not joined together to achieve a common financial objective, but are, instead, in a relationship in which each has a separate financial objective.

2. The Respondent in good faith did not believe that the Commission's July 13, 1999, advisory opinion went any further than the immediate issue of the Town taking a position as an abutter with respect to CMS's then-pending zoning application. To the extent that the

Respondent sought clarification with respect to other "waterfront" issues, the Respondent in good faith believed that the Commission's opinion only related to waterfront issues affecting CMS's expansion plans.

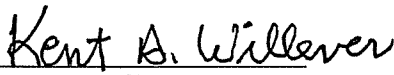
3. The Respondent is not an attorney. Attorney members of the Jamestown Town Council advised the Respondent, prior to his participation, that they believed that the Respondent could participate in the Board of Water and Sewer Commissioners' consideration of CMS's application for water and sewer connection at the 20 Narragansett Avenue property and could participate in the Harbor Management Commission's consideration of the clarification of CMS's lease, without violating the Code of Ethics.

D. Settlement

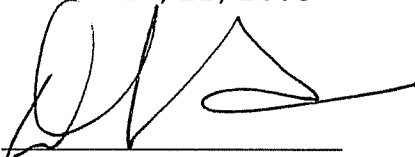
The Respondent agrees that, pursuant to the above Findings of Fact, Conclusions of Law, and Mitigating Factors, the Prosecution will recommend, pursuant to R.I. Gen. Laws § 36-14-13(d), the imposition of a civil penalty in the amount of \$750.00. The Respondent reserves the right to argue for a lesser penalty or the imposition of no penalty.

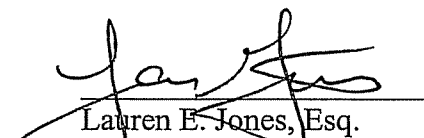
The above terms represent the full and complete Informal Resolution and Settlement for Complaint No. 2000-9.

Dated: 10/11/2005


Kent A. Willever
Executive Director

Dated: 10/11/2005


David Swain
Respondent


Lauren E. Jones, Esq.
Respondent's Counsel