

**MINUTES OF THE PUBLIC SESSION OF THE
OCTOBER 25, 2022 MEETING OF THE
COMMISSION ON ETHICS AND LOBBYING IN GOVERNMENT
540 BROADWAY
ALBANY, NEW YORK 12207**

Interim Chair: Frederick A Davie (Albany)

Interim Vice-Chair: Leonard B. Austin (Albany)

Members: Michael A. Cardozo (Albany)
Edward D. Carni (Albany)
Claudia L. Edwards (Albany)
Nancy G. Groenwegen (Albany)
Seymour W. James, Jr (WebEx)

Staff: Sanford N. Berland, Interim Executive Director (Albany)
Carol Quinn, Acting Co-General Counsel and Deputy Director of
Lobbying (Albany)
Keith C. St. John, Acting Co-General Counsel and Director of Ethics
(Albany)
Michael Sande, Deputy Director of Ethics Guidance (Webex)
Meghan E. Hennigan, Deputy Director of Education (WebEx)
Kavita Bhatt, Associate Counsel (Webex)
Jennifer Bliss, Associate Counsel (Albany)
Peter Smith, Chief Investigative Officer (Webex)
Marlena Diaz, Assistant Director of Communications (Albany)
Lori Donadio, Principal Investigative Analyst (Albany)
Kelly McCready, Confidential Assistant (Albany)

I. CALL TO ORDER

Interim Chair Frederick Davie called the meeting to order and announced that a quorum of six Commissioners were present at the meeting location in Albany. Interim Chair Davie announced a procedure would need to be conducted before Commissioner James, who had tested positive for Covid, could officially join the meeting by video conference. Interim Executive Director Sanford Berland reported that earlier in the day, pursuant to Section 103-a of the Public Officer's Law, Commission staff conducted a hearing on a proposed resolution, Resolution 22-03, pursuant to an amendment to the Public Officers Law, made

by Chapter 56 of the Laws of 2022, that permits remote participation by members of a public body, including participation by video conferencing, under extraordinary circumstances. The Commission received no public comment, whether by email, WebEx or in person, during the hearing or thereafter. The proposed resolution before the Commission, Resolution 22-03, had been posted on the Commission's website and circulated to all members of the Commission. In addition, a set of procedures, as called for by Section 103-a, were also the subject of the public hearing. The Commission received no comment, either in person, by WebEx or by email, with respect to those procedures, which outlined when video conferencing may be conducted in accordance with the provisions of section 103-a of the Public Officer's Law. Interim Executive Director Berland proposed to the Interim Chair and the Commission that there be a motion to adopt Resolution 22-03 as the procedure to allow Commission members the ability to attend meetings remotely, in the case of extraordinary circumstances, such as illness, that would prevent in-person attendance by a member of the Commission, in circumstances where a member of the public could not attend at the video conferencing site used by that member.

A motion was made by Commissioner Cardozo, seconded by Commissioner Edwards, to adopt Resolution 22-03, allowing remote participation by a Commission member in extraordinary circumstances. The motion carried by unanimous vote.

A motion was made by Commissioner Edwards, seconded by Interim Vice-Chair Austin, to adopt the rules for video conferencing by a Commission member in extraordinary circumstances. The motion carried by unanimous vote.

Interim Chair Davie welcomed Commissioner James to the meeting. Commissioner James joined the meeting by videoconference pursuant to the Commission's procedures for remote participation in extraordinary circumstances.

Interim Chair Davie acknowledged a recent newspaper article concerning one of the members of the Commission and made the following statement:

“I want to assure the public that each Commissioner of the New York State Commission on Ethics and Lobbying in Government takes very seriously the standards by which we should conduct ourselves. We are unequivocally committed to adhering both to the letter and to the spirit of the law and to the rules and regulations that govern how we comport ourselves as commissioners. I am confident you will see us live up to this for the duration of our tenure on this Commission.”

Interim Vice-Chair Austin thanked Interim Chair Davie and the members of the Commission and made the following statement:

“Mr. Chairman, Members of the Commission, and members of the public, I've learned a valuable lesson recently that our obligation is to not only to be adherent to the law but also to the spirit of the law. Because the transparency of this Commission is so vitally important, we must do that.”

II. APPROVAL OF MINUTES

A motion was made by Interim Vice-Chair Austin, seconded by Commissioner Cardozo, to approve the public session minutes from the October 6, 2022 Commission meeting. The motion carried by unanimous vote, with Commissioner James participating in the vote on the motion and voting by videoconference pursuant to the Commission's procedures for remote participation in extraordinary circumstances.

III. REPORT FROM STAFF

Operations Update

Interim Executive Director Berland presented the Operations Update. He noted that the Report, under Tab B, includes the figures for the current period and for the year to date, as

requested by the Commissioners at the last meeting. Also included in the Report are comparisons of the staff operations from the inception of the Commission on July 8, 2022 through September 23, 2022 against the corresponding period in 2021 for the predecessor agency. Interim Executive Director Berland also clarified that until this Commission convened and conferred authority upon staff--both with respect to the staffing plan and with respect to the general delegation of authority to the Executive Director, the ethics staff guidance function was advisory only and awareness of that in the state workforce may have resulted in a lower, though still robust, number of guidance requests as compared with the corresponding period in the previous year. Interim Vice-Chair Austin inquired as to the extent to which the pandemic affected the numbers. Interim Executive Director Berland responded that during the pandemic--on the lobbying side--there was a reduction in reported lobbying activity and--in terms of the ethics side, particularly with respect to outside activity approval requests, there was probably less activity occurring as a result of the impact of the shutdown and the need for social distancing. Acting Co-General Counsel and Deputy Director of Lobbying Carol Quinn reported that there was a dip in lobbying spending in 2020. However, the Annual Report for 2021 reported \$292 million spent last year, which is a close return to pre-pandemic levels. In addition, lobbying inquiries tend to have a larger volume in requests in the first half of a biennial reporting period than in the second half of the biennial. Acting Co-General Counsel and Deputy Director of Lobbying Carol Quinn stated she expects an uptick in the number of lobbying inquiries in the coming year for the start of the 2023-2024 biennial and informed Commission members the pandemic resulted in a pause in the random audit program which impacted the 2021 numbers, however, the program for the most part has returned to regular numbers. Acting Co-General Counsel and Director of Ethics Keith St. John added that consequences of the pandemic, particularly people working from home, did somewhat suppress the number of requests that would otherwise be expected. However, as individuals are slowly returning to the workplace, the division is seeing an uptick in the numbers of requests.

Job Postings

Interim Executive Director Berland reported that the Commission has received a broad spectrum of applicants with a total of 180 resumes for the thirteen vacancies originally

posted, with a response deadline of October 28, 2022. One additional posting was created for the administrative position in the New York City Office, bringing the total number of positions posted to fourteen. Commissioner Cardozo asked, given the number of vacancies and the importance of the positions, what the Commissioners could do to help facilitate bringing in potential applicants to these vital positions. Interim Executive Director Berland agreed with Commissioner Cardozo and encouraged all Commissioners, including Commission staff, to reach out to their respective networks to assist the Commission in its recruitment efforts to fill employment vacancies. Interim Chair Davie, Interim Vice-Chair Austin, Commissioner Cardozo, Commissioner Edwards, and Interim Executive Director Berland continued their discussion on employment vacancies and reiterated the importance of Commissioners and staff to reach out to potential qualified applicants and encourage them to apply. Commissioner Edwards asked for insight regarding the demographic makeup of applicants with respect to applicants applying from within and outside state government and Interim Vice-Chair Austin inquired as to the number of current staff applying for the posted positions which Interim Executive Director stated was minimal.

Implementing the Executive Law § 94(8) Ethics and Lobbying Training, Tracking and Reporting Requirements - Update

Interim Executive Director Berland reported that staff have had conversations with the Office of Employee Relations, which manages the learning management system for New York State employees. The Commission is looking at the potential for utilization of that system to manage ethics training for a substantial portion of the State workforce. The SLMS system in its current configuration is not particularly well-suited for use in the live training that the Commission must provide on a biennial basis. In the intervening years, there is a click through refresher course that can be managed through SLMS, but live training is not something that system is equipped to handle now. There are some possibilities for the future. In the interim, staff is working with NYS Office of Information Technology Services to build a system that will allow the Commission to monitor mandated ethics training for the entire State workforce. This effort is being led by Deputy Director of Education Meghann Hennigan and her team, who work directly with ethics officers and have updated the training materials that the Commission and ethics officers

are using to accommodate the more diverse and broader workforce for which mandatory ethics training is now required.

Deputy Director of Education Hennigan stated the agency currently has a train-the-trainer WebEx event planned for November 9, 2022, with includes approximately 100 ethics officers and their designees who will receive training by Commission staff to deliver live ethics training at their respective agencies. Once that train-the-trainer session concludes, Commission training staff will resume its internal training program. Interim Executive Director Berland explained the challenges in monitoring training efforts and discussed the Commission's quarterly reporting requirements and its work with ITS to develop and design the Commission's own tracking system. Interim Chair Davie thanked staff for its efforts with respect to the training requirements outlined in the regulations and developing an interim plan to reassure the public that a process is in place in ensuring those required to take training will be trained. Deputy Director of Education Hennigan was asked by Interim Chair Davie how many of those one hundred plus individuals who will be trained on November 9th will be trained to train others in their respective agency to conduct trainings. Deputy Director of Education Hennigan responded that agencies with large numbers of employees are going to need to increase their training capacities substantially.

IV. PROPOSED FURTHER AMENDED PART 941 REGULATIONS

Interim Chair Davie reported the Commission is going to conform the language of the regulations and rules that the Commission is governed by with the new legislation that established the Commission. Interim Executive Director Berland noted that there are some changes that ECRA effectuated in the way investigations and enforcement matters are to be handled by the agency. The former 60-day vote by the Commission on whether to open an investigation after a verified complaint or referral has been received is no longer part of the procedural mechanism for initiating a formal investigation. Instead, the burden is now on staff to conduct a preliminary review and to make assessments on referred matters, incoming complaints (verified or unverified), and matters that are either self-generated or that come from other sources. Either the Commission or staff can then "elevate" a matter

into an investigation, at the conclusion of which, pursuant to a procedure that ECRA introduces, staff makes a recommendation to the Commission for a vote on next steps, i.e., whether to take the matter to hearing, settle it, close it, or continue to investigate. As a result, portions of the regulations that refer to the investigative process need to be modified to adapt to the new requirements of the statute. Interim Executive Director Berland also discussed the need to clarify the status of the person who will conduct hearings. The prior statute made no specific reference to or provision for the presiding officer to conduct hearings, leaving it entirely to the Commission to adopt regulations governing due process hearings in compliance and enforcement matters. Under the prior commission, the regulations provided for the creation of a panel of independent well-qualified individuals who would be randomly selected to preside as hearing officers over individual matters as hearings came up. The new statute continues to allow the Commission the ability to shape the form of that proceeding but it speaks of an “independent arbitrator.” After significant research, staff concluded that the “hearing officer” concept that had been adopted by the prior commission is synonymous with the “independent arbitrator” referred to in the statute and so there's a conforming definition in the proposed amended regulations to address that. The proposed amendments also clarify that in the course of the hearing, a hearing officer can issue subpoenas for purposes of bringing individuals or evidence to the hearing and, likewise, that counsel for the respondent can issue subpoenas in accordance with the CPLR for that same purpose. In other words, this provision does not re-open some sort of discovery procedure - which would be otherwise governed by SAPA, the State Administrative Procedure Act, which leaves it to the discretion of the hearing officer to decide whether or not there will be discovery – but rather, the subpoena provision is within the hearing process. And that is different, too, from the Commission’s investigative subpoenas, which were dealt with in a prior amendment that the Commission approved on an emergency basis and which is now the subject of a separate rulemaking. In addition, the proposed amendments include adding the definition of “victim,” as provided in the statute, who may also, but need not, be “complainants,” as well. Interim Executive Director Berland further stated that these are the mechanisms for investigation and enforcement proceedings to be incorporated into the regulations and which are substantively the changes that are made in these proposed amended regulations.

Commissioner Cardozo asked if any of the changes were policy changes or if these are all technical and procedural changes to conform with ECRA. Interim Executive Director Berland responded that it was his intention and that of the former Director of Investigations and Enforcement in drafting the amendments to conform the Commission's regulations to ECRA. He also noted, parenthetically, that there was one non-substantive conforming insertion needed in the proposed amendment to Section 941.3(b), not included in the attached proposal, which is to insert at the start of Section 941.3(b) the same introductory clause that appears in Section 941.3(c), that is "If following presentation of the matter to the Commission pursuant to Executive Law Section 94(10)(f)". Staff was very careful not to make any changes that could be considered policy changes. These are all measures the Commission needs to adopt in order to continue to conduct business in accordance with ECRA. Interim Chair Davie asked whether there were any substantial policy changes contained in the amended Part 941 regulation. Interim Director Berland reiterated staff's view that no policy changes were effectuated by the proposed amendments to the regulations, which are intended to conform the Commission's regulations to the requirements of ECRA, and suggested that if Commissioners have questions about whether statutory changes effectuated by ECRA could be deemed substantive or policy changes, or if they have legal questions concerning statutory construction – for example, under prior law, staff made the decision whether to bring a matter to hearing after the Commission had voted to open an investigation, but under ECRA, staff can elevate a matter to an investigation, after the completion of which the Commission votes on whether to advance a matter to hearing or to close it or to take other steps - he would welcome discussing those matters in Executive Session and to resolve any lingering question of statutory interpretation. The further recommendation by staff is that, when the Commissioners have gained more experience with the statute and its application and the work of the Commission, consideration be given across the board, as appropriate, as to whether there are particular procedural aspects of the regulations, not per se dictated by the statute, that they might wish to consider modifying. Interim Chair Davie stated that even though staff now could and would initiate investigations without the vote of the Commission, the Commissioners would be kept informed of all investigations that have been initiated and obviously the resolution of those because some of them the Commissioners will have to

vote on. Interim Executive Director Berland expressed along with Acting Co-General Counsel and Deputy Director of Lobbying Quinn that the proposed amendments to the regulations needed to be implemented on an emergency basis so that the Commission could begin using the procedures immediately, while they were subject to a formal rulemaking under SAPA. The Commission could adopt on an emergency basis, for 90 days from publication, which would be in two weeks.

A motion was made by Commissioner Carni and seconded by Commissioner Groenwegen, inclusive of the subsequent friendly amendment offered by Interim Chair Davie regarding the additional clause that Interim Executive Director Berland proposed be added to proposed amended Section 941.3(b), and accepted by Commissioner Carni, to proceed with a notice of emergency rulemaking. The motion carried by unanimous vote, with Commissioner James participating in the vote on the motion and voting by videoconference pursuant to the Commission's procedures for remote participation in extraordinary circumstances.

V. PROPOSED COMMITTEES

Interim Chair Davie reported that the meeting would be turned over to Interim Vice-Chair Austin for a discussion of a proposed committee structure for the Commission and that the public should be aware there are a number of committees working on various aspects of how this Commission will conduct business. The Commission will be reporting out those discussions in subsequent meetings, but right now there was a proposal from the Committee on Committee Structure, chaired by Interim Vice-Chair Austin, for the Commission to consider. Interim Vice-Chair Austin reported that proposed resolution was circulated with regard to the creation of committees that were believed to be necessary in order to have effective Commission oversight of staff operations. Interim Executive Director Berland had been very helpful in pointing out some of the legal implications of the proposed Commission organization and his recommendations had been substantially incorporated into the Committee on Committee Structure recommendations. The proposed committees were:

- Administration Committee
 - Personnel
 - Budget
 - Annual Report

- Ethics Committee
 - Financial Disclosure
 - Advice and Guidance

- Legal Committee
 - Investigation and Enforcement
 - Litigation (pending and anticipated)

- Communications Committee
 - Website
 - Public Relations
 - Public and Press Statement Policy Formulation

- Education and Training Committee

Commissioner Cardozo recommended that wording be added to paragraph eight of the draft resolution stating “not only should the committee review the regulations and advisory opinions of prior commissions but also, any new regulations that may be adopted by this commission,” so that it would be clear that if there were something the Commission wanted to change in the regulation it had just adopted, the relevant committee could recommend such a change.

Interim Chair Davie asked for a motion to be followed by a discussion. Interim Vice-Chair Austin made a motion, seconded by Commissioner Cardozo, to move the adoption of the resolution, with the friendly amendment, but no vote was taken at the time.

Commissioner Groenwegen expressed concern regarding the implications of a committee structure as detailed as the one proposed on Commission staff which is right now limited with many staff members doing double and triple duties. While having the Commissioners

give input in multiple areas could be helpful, Commissioner Groenwegen believed that, as a practical matter, this level of committee work could have the effect of creating more work for staff. Commissioner Groenwegen further inquired if this possibility had been discussed and how Commissioners saw the committee members and its work intersecting with the day-to-day obligation of the staff. Interim Vice-Chair Austin, Commissioner Groenwegen, and Commissioner Edwards discussed the goal for the Commissioners' involvement. Interim Vice-Chair Austin reported the committee structure is designed to help with the learning curve for the new Commissioners and to help them understand the substantive rules and regulations governing the Commission. Commissioner Edwards added the committee structure would provide better oversight to becoming better educated on the laws and regulations without interfering in the day-to-day operations of staff; rather, it would provide oversight. Commissioner Groenwegen asked for clarification that the legal committee and the subcommittee for investigations and enforcement would focus on process rather than the particular cases with which the agency is involved and that the committees would be structured as a species of an administrative function rather than policymaking. Interim Vice-Chair Austin clarified that the committees would not be handling policymaking, and that that was an important understanding expressed by Commissioner Groenwegen. Interim Executive Director Berland expressed on behalf of staff how crucial it was for there to be an effective and efficient working relationship between staff and the Commissioners at every level, particularly at the executive level. Interim Chair Davie agreed that the committees are intended to communicate with staff more efficiently on various issues, but that it is also important that the efficiency and working capabilities of staff not be overly diverted. Commissioner Groenwegen stated that the clarifications that it is not a policy role but rather more one of oversight of the process is a way to balance the committee structure and staff involvement. Interim Chair Austin reported that due to the number of committees, there would be cross-pollination that will be helpful to the Commissioners to get a little flavor for more than one area in which the Commission functions.

A motion was made by Interim Vice-Chair Austin, seconded by Commissioner Cardozo, to move the adoption of the resolution, with the friendly amendment. The motion carried by unanimous vote, with Commissioner James participating in the vote on the motion and voting by videoconference pursuant to the Commission's procedures for remote participation in extraordinary circumstances.

Interim Vice-Chair Austin thanked Commissioners Cardozo and Edwards for their involvement and attentiveness to the creation of this resolution and process. Interim Chair Davie thanked all three Commissioners for their hard work on the resolution, making it possible to be able to have it voted upon today.

VI. NEW AND OTHER BUSINESS

None.

VII. MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO PUBLIC OFFICERS LAW § 105 AND EXECUTIVE LAW § 94(11) TO ADDRESS MATTERS CONCERNING EMPLOYMENT OF PERSONNEL, PENDING LITIGATION, AND INVESTIGATIVE AND ENFORCEMENT MATTERS THAT ARE CONFIDENTIAL PURSUANT TO SECTION 94 OF THE EXECUTIVE LAW

A motion was made by Interim Vice-Chair Austin, seconded by Commissioner Cardozo, to enter into Executive Session pursuant to Public Officers Law § 105. The motion carried by unanimous vote, with Commissioner James participating in the vote on the motion and voting by videoconference pursuant to the Commission's procedures for remote participation in extraordinary circumstances.

VIII. PUBLIC ANNOUNCEMENTS OF ACTIONS FROM EXECUTIVE SESSION

[Commissioner James was not present for the remainder of the meeting.]

Interim Executive Director Berland announced that, during the Executive Session, the Commission discussed matters related to legal advice. The Commission decided one financial disclosure statement exemption appeal pursuant to 19 NYCRR Part 935 and

Section 94(9)(k) of the Executive Law. The Commission ratified staff's authority to issue informal guidance opinions pursuant to Executive Law Section 94 sub 7 during the period July 8, 2022 through September 11, 2022. The Commission closed one matter and discussed several other investigative matters. The Commission discussed one personnel matter.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Interim Vice-Chair Austin, seconded by Commissioner Cardozo, to adjourn the public meeting. The motion carried without objection.