

Report to Port of Olympia Legal Counsel

To: Heather Burgess, Port of Olympia Legal Counsel
From: Thomas McPhee
CC: Michele Wilson, JAMS Case Manager
Date: July 9, 2020
Re: Investigation and Report re Ethics Complaint dated April 15, 2020

I was appointed by Port of Olympia Legal Counsel to investigate and report on an ethics violation filed by Mr. Frank Gorecki against Commissioner Zita. Mr. Gorecki's complaint is dated April 15, 2020. My appointment occurred on May 26, 2020. This report is directed only to Port Legal Counsel and has not been disclosed to anyone except the case manager at JAMS-Seattle.

The ethics complaint contends that Commissioner Zita violated a specific provision of Resolution 2008-16: "A Commissioner may not use information acquired in confidence for other than port purposes." It is based upon the report in Special Commission Meeting Minutes dated January 7, 2020, to wit: "The mediation resulted in a proposed settlement, the terms of which are set out in a proposed Consent Decree which will remain confidential until fully executed by the parties and filed with the Court."

In the process of conducting my investigation, I interviewed port counsel and requested copies of all relevant documents she could identify. I also provided to Mr. Gorecki and Commissioner Zita the opportunity to submit in writing evidence and argument related to the complaint. Both sides responded and included copies of additional materials. In addition, I viewed and listened to the video of the commission meeting on January 27, 2020, relating to the controversy; I viewed Commissioner Zita's

Facebook page;¹ and I conducted a telephone interview with Dr. Helen Wheatley, whose role in the controversy is addressed below.

There are no material disputes about the relevant facts:

- In December 2019 the Port and the Waste Action Project (WAP) concluded a mediated settlement of a pending lawsuit in the U.S. District Court. The settlement was conditioned on the approval of the Port Commissioners.²
- On January 7, 2020 the Port Commission met in executive session to consider the negotiated settlement. The executive session concluded at 1:15 PM. Immediately thereafter the commission met in an open meeting where port counsel reported a summary of the executive session, including that the “proposed Consent Decree will remain confidential until fully executed by the parties and filed with the Court.” The Commission then approved the consent decree and adjourned at 1:22 PM.
- The consent decree was produced by WAP’s counsel. After the commission meeting it was completed by port counsel, signed by the Port’s executive director, and transmitted to WAP’s counsel on January 7 at 2:09 PM. It was signed by WAP’s executive director and filed at the court by WAP’s counsel on January 8 at 1:10 PM.
- On January 7 at 9:56 PM Dr. Wheatley posted her report of the settlement on her website named Helen Wheatley for Port of Olympia. The report consists of 17 paragraphs. Paragraphs 2 – 5 and 17 describe the consent decree in broad strokes, the rest is publicly available history. It is fair to describe the post as containing some terms of the consent decree.
- On January 8 at 10:22 AM Commissioner Zita reposted the Wheatley post on Zita’s Facebook page. This occurred 12 hours 26 minutes after the Wheatley post and 2 hours 48 minutes before the fully executed consent decree was filed with the court. Zita’s repost clearly identified Dr. Wheatley as the originator of the report and added nothing in her repost except “Thank you for publishing this information.” At the time of Zita’s repost the information about the settlement and consent decree was already in the public domain.

Commissioner Zita’s attorney in her written response raised the question of whether Mr. Gorecki’s complaint intended to allege that Zita was the source of

¹ Viewing Commissioner Zita’s Facebook page was solely to determine if it identifies her as a Port Commissioner. It does.

² Port counsel included in the material submitted to me the mediator’s engagement letter because it contains a confidentiality provision. Mr. Gorecki did not identify this confidentially provision as a source of his complaint, but I reviewed it because it was submitted. The mediator’s confidentiality provision relates to statutes, evidence rules, and court rules. It is restricted to use of mediation information in court and does not apply here.

Wheatley's information. Rather than seeking clarification from Mr. Gorecki, I interviewed Dr. Wheatley. She reported that neither Commissioner Zita nor any person associated with the Port of Olympia communicated with her or was the source of her information. She was very specific about the person who communicated with her and details of the information provided by that person.

The confidentiality provision identified in the January 7 minutes is not an express provision of the consent decree. Commissioner Zita was present at the executive session when the confidentiality provision was discussed and was present at the open public meeting where port counsel described the confidentiality provision.

Resolution 2008-16 contains seven titled sections proscribing acts that are identified as violating ethical standards for Port Commissioners. Under the section titled *Use of Port Authority or Facilities* is the proscription, "A Commissioner may not use information acquired in confidence for other than port purposes." This is the provision relied upon by Mr. Gorecki, but he does not explain how Commissioner Zita's reposting of the Wheatley post was done for other than port purposes. An important obligation of any elected official is to keep that official's constituents apprised of public business. The posting, first by Wheatley and then by Zita clearly accomplished a port purpose. I find that Commissioner Zita did not violate the provision of Resolution 2008-16 quoted above.

In addition to deciding the literal allegation submitted by Mr. Gorecki, I considered the facts he alleges and any other provisions of Resolution 2008-16 that might apply. Only two possibilities are evident, both under the section titled *Conflicts of Interest*:

- "No commissioner shall intentionally engage in any act which conflicts with his or her performance of Port duties."
- "A commissioner shall not falsely represent himself/herself as . . . giving information on behalf of the Port . . ."

The first bulleted provision creates an issue related to the facts recited in Mr. Gorecki's complaint. If the executive session confidentiality provision is viewed as creating a duty for Commissioner Zita, in some circumstances disclosure of the consent decree terms before court filing could be a violation of that duty. I conclude that the circumstances here do not result in violation of that ethical standard. The purpose of the confidentiality provision is not stated in the January 7 minutes, but a reasonable surmise is that it was intended to prevent third parties from interfering with the settlement before it was filed in court.³ Commissioner Zita's acts did not create that

³ In his complaint, Mr. Gorecki contended that "This breach of confidentiality jeopardized the enforceability of the settlement, which could be challenged by any Port constituent who doesn't like its terms."

opportunity, it already existed. The Wheatley posting disclosed the settlement and some of the terms of the consent decree. Those terms were in the public domain more than 12 hours before Zita's reposting. Her reposting added nothing to the information already available to the public.

The second bulleted provision does not apply here. Although Commissioner Zita's Facebook page identifies her as a Port Commissioner, her repost of the Wheatley post makes clear that Wheatley is the author. The repost does not state or imply that it is information given on behalf of the Port.

Mr. Gorecki included in his submitted materials texts of three Olympian newspaper articles that he contends show a pattern of prior ethical violations by Commissioner Zita. I considered the submissions but found them not relevant. I note that all articles were from 2016; all involved issues unrelated to the consent decree, and none disclosed any evident ethics issues.

Respectfully submitted on July 9, 2020

A handwritten signature in blue ink that reads "T. McPhee". The signature is written in a cursive style with a horizontal line underneath the name.

Judge Thomas McPhee (ret.)