

**City of Norwich, CT
Ethics Commission
Ruling, Cases 2011-2 and 2011-4**

History of the Complaints

Complaint 2011-2, submitted by Mary Susan Sabol, was received by the City Clerk on May 16, 2011. Complaint 2011-4, submitted by Margery Chase, was received by the City Clerk on June 1, 2011. Both complaints dealt with the conduct of a contest to replace a portrait of Abraham Lincoln, painted by John Denison Crocker, which was stolen from City Hall in 1994. The contest was funded by a grant from the Sachem Fund to the Norwich City Manager's office. The prize money was city money, the contest judges were paid by the city, and the winning portrait is now the property of the city and hangs in City Hall. The contest was conceived as a partnership between the city and the Slater Memorial Museum of Norwich Free Academy. However, the contest was actually run and administered by Vivian Zoe, the director of Slater.

Both complaints named Ms. Zoe and another respondent. On June 13, the Commission voted to combine the two complaints and establish a subcommittee to conduct a probable cause investigation. On July 14, the investigating subcommittee questioned respondent Zoe. On July 15, the investigating subcommittee questioned the second respondent. On July 25, the Commission found probable cause to believe that respondent Vivian Zoe had violated the Code of Ethics. The Commission found no probable cause to believe that the other respondent had violated the Code of Ethics and in accordance with the Code, the second respondent is not identified in this ruling.

Commission chairman Charles Arian named a hearing panel consisting of Commissioners Robert Davidson, Joseph Sastre, Tamara Lanier, and Marcia Marien, with himself as chair. A hearing date was set for August 15, and the respondent and complainants were notified in accordance with the Ethics Code and the Commission's Rules and Procedures.

On August 1, respondent Zoe notified the Chairman via e-mail that a prior commitment prevented her from attending the August 15 hearing. A special meeting of the Ethics Commission on August 4 decided to convene the hearing as scheduled on August 15 without hearing testimony, and to offer August 16 and 17 as possible dates to reconvene so that respondent Zoe could be present. Later that same evening, respondent Zoe confirmed by e-mail her availability to appear on August 16.

Both complainants notified the chair that they were unable to attend. Three additional artists contacted the chair asking to submit testimony. The commission rules permit written testimony if it will expedite the hearing, if it will not substantially prejudice the interests of the parties, and if it is sworn. The hearing panel voted to accept written testimony from the complainants and from artists Maura McGurk and Richard Conover. The chair ruled that written testimony from artist Laura Levine must be excluded as her name did not appear on the list of witnesses given to the respondent. The hearing panel heard oral testimony from City Manager Alan Bergren on August 16.

Respondent Zoe did not appear for the hearing. On August 12 she sent a letter to the Chairman referencing her previous notice that a schedule conflict prevented her from appearing on August 15, and the Chairman's acknowledgment of that notice. She did not refer to her August 4 e-mail stating that she was available to appear at the hearing on August 16. She closed her letter by

stating that she does not believe that the Code of Ethics or the Ethics Commission have jurisdiction in this case.

Since the respondent failed to appear for the hearing, we were unable to question her. In the absence of Ms. Zoe's oral testimony, the hearing panel voted to admit into evidence her previous written responses to the complaints, her testimony before the investigating panel, and subsequent e-mail correspondence with the Commission.

Substance of the Complaints

The basic facts of the case are relatively straightforward and not disputed by the respondent. It is the significance of those facts which the Commission is called upon to adjudicate.

In late 2010, respondent Zoe began publicizing the Lincoln Portrait Contest. An article with her byline appeared in the *Bridgeport Banner* dated Nov. 16, 2010. The article instructed artists who were interested in participating in the contest to contact the Slater Museum to purchase a CD-ROM with contest rules and prospectus, as well as images of other Crocker portraits. Both the article and the "Submission Standards and Rules" included on the CD-ROM stated that the exhibit held in conjunction with the contest would be held at the Norwich Arts Council gallery and that *all* submitted paintings would be displayed. The rules additionally stated that artists who did not win the prize award could offer their paintings for sale from the exhibition.

When the artists brought their paintings to the NAC Gallery on April 15, they were asked to sign a drop-off form which stated that not all paintings would necessarily be displayed and that Slater reserved the right not to display a particular painting for any reason. The written testimony from Ms. McGurk states that she was later told by a reporter that Ms. Zoe said that the drop-off form had been posted at some point before April 15 on the Slater website. We were unable to ask Ms. Zoe if this was indeed the case and if so, when and why this was done, because she failed to appear to testify as scheduled.

At some point before the exhibition was mounted, Ms. Zoe decided to display only 29 of the 62 submitted paintings. She acknowledged in her written response and reaffirmed in her July 14 testimony to the investigating subcommittee that she decided on her own, based on her evaluations of their quality and adherence to the guidelines, which of the paintings to drop from the contest and exhibition. Subsequent to this, and after rejection e-mails had already gone out, Ms. Zoe states that 24 of the 33 rejected paintings were seen by the jurors and they agreed that none were contenders for the award. Before the judges saw this group, nine of the rejected paintings had already been reclaimed by the artists.

Those artists whose paintings were not chosen were instructed to pick up their paintings or to contact the promoters of a different, unaffiliated exhibit to see if the paintings might be displayed there. In addition, "10 lucky painters on a first-come, first-served basis" (Vivian Zoe e-mail to Maura McGurk, April 20) were offered the opportunity to display their painting in a downtown shop window.

Complainants and their supporting witnesses allege that Ms. Zoe acted unethically by changing the rules of the contest after they were promulgated, both in terms of the failure to display *all* entered portraits and by virtue of the fact that the rejected portraits were culled by Ms. Zoe rather than the judges.

Artists entering the contest did so relying on the Slater Museum's promise that *all* entered paintings would be displayed and offered for sale; and that *all* would be evaluated by the judges of the contest. Both complainants in their written testimony explicitly state that their complaints are not about not winning the contest. Their complaints deal rather with the fact that their paintings were not displayed as promised and that additionally, the decision not to display them was made by Ms. Zoe and not the judges.

The artists who submitted paintings expended a great deal of effort as well as money. Ms. McGurk testifies that her direct out-of-pocket expenditure for materials and the cost of getting her painting to Norwich and back was \$688. The enticement to invest the time and money was not merely the possibility of winning the \$8000 purchase award. It was also the *guarantee* of having a painting displayed at an exhibition sponsored by the well-regarded Slater Museum.

There were actions which we believe Ms. Zoe could and should have taken which would have prevented this debacle from ever arising. Ms. Zoe notes in her written response to the charges that the rules were originally written with the assumption that the exhibition would take place in a gallery in Slater Museum. It was only later that the exhibition site needed to be moved to the NAC gallery due to construction in Slater, something over which Ms. Zoe clearly had no control.

Nevertheless, it must be noted that however late in the process Ms. Zoe was faced with the need to move the exhibition from Slater to NAC, that change in plans occurred *prior* to the announcement of the contest and promulgation of the rules. We believe that this is significant. Ms. Zoe in her written response devotes quite a lot of space to the fact that the move from Slater to NAC was not something that she either wanted or was responsible for. But she also notes that she had concluded by **September** that she would be unable to hold the exhibition in Slater. The November *Bridgeport Banner* article, and the rules themselves, both state that the exhibition will be at the NAC gallery and that *all* paintings will be displayed. Ms. Zoe in her written response states that when she had to move the site she "neglected the need to change language regarding the exhibition." Why did this neglect occur? We don't know, because Ms. Zoe did not appear to testify as scheduled. But it is this very neglect which created this entire problem.

At what point did Ms. Zoe realize that she had a potential problem and that she might not, in fact, be able to display *all* submitted portraits as promised? At what point, if ever, did she measure the NAC gallery to determine how many portraits could be displayed? (It should be noted that all submitted portraits were required to be exactly the same size so it would have been relatively simple to ascertain how many portraits could be hung in the available space.) Again, we don't know the answer to these questions, because Ms. Zoe did not appear to testify as scheduled.

Had the rules which were promulgated not promised that *all* submitted paintings would be displayed, there would be no issue. We can assume that Ms. Zoe's original failure to change the written rules before promulgating them was a legitimate oversight, but at some point between January (when Ms. McGurk's purchased CD was postmarked) and April, if not before, we believe Ms. Zoe should have realized that she had a potential problem on her hands.

While it is certainly the case that Ms. Zoe did not know in advance precisely how many portraits would be submitted on drop-off day, she knew how many artists had purchased the Crocker CD-ROM from Slater, which she directs, and she had their names and addresses. We believe that she could have mitigated her problem when she realized that she might not have room for all submitted portraits by contacting all the artists who had purchased CDs and letting them

know that the rules had been changed. Chances are that every artist who submitted a painting had purchased the Crocker CD-ROM beforehand. We don't know this for a fact, since Ms. Zoe did not appear to testify as scheduled.

The artists in their complaints state that the NAC gallery could have accommodated all the submitted paintings if they had been "stacked," i.e. displayed in two rows rather than one. Ms. Zoe did not dispute this in her written response to the complaints. Why didn't Ms. Zoe choose to "stack" the paintings so that *all* could be displayed in accordance with the rules as promulgated? We don't know, because Ms. Zoe did not appear to testify as scheduled.

Whether or not there exists clear and convincing evidence that Ms. Zoe violated the Norwich municipal Code of Ethics, we believe that it is clear, and we are convinced, that there were serious errors in the conduct of the contest. These errors left many artists angry, feeling that they had expended time and money to enter a contest under one set of rules only to find that the contest was conducted under another set of rules. We agree with the artists that this is not just a case of sour grapes. The artists were offered a *quid pro quo*: paint a Lincoln portrait meeting the criteria promulgated in the contest rules, bring it to Norwich on April 15, and it *will* be displayed *at the NAC gallery*. Sixty-two artists followed the rules but only 29 of them had their portraits displayed. The size of the paintings and the size of the gallery were both known well in advance. We believe that the rules could and should have been written in a way that did not guarantee that *all* paintings would be displayed. We believe that even after the rules went out, Ms. Zoe could and should have contacted the artists who purchased the Crocker CD-ROMs, informing them of the problem, and letting them know as soon as she realized her acknowledged neglect. Ms. Zoe writes in her written response that the project "alienated them (the artists) and caused distress and frustration." We agree.

The Question of Jurisdiction

The Norwich Code of Ethics applies to "officials and employees" and further defines these categories as "Members of all departments, boards, commissions, committees or other agencies of the City of Norwich, including the City Council, whether they be elected or appointed, paid or unpaid, full or part time, and all classified and unclassified employees of the City of Norwich."

In order to violate the Code of Ethics, one must of necessity be subject to the Code of Ethics. One who is not subject to the code cannot violate it, regardless of how reprehensible his or her acts may be.

The question of jurisdiction was first raised by Ms. Zoe in a letter to the Chairman dated August 12 and received at City Hall on August 15, the date the hearing was convened. In that letter Ms. Zoe states "I do not believe that the City of Norwich Code of Ethics, nor the Ethics Commission have jurisdiction in this case."

Ms. Zoe does not state in her letter *why* she believes that the Commission lacks jurisdiction. We were not able to question her on this point, nor did she present her reasoning, due to her unilateral failure to appear. The issue of jurisdiction was *not* raised by Ms. Zoe in her initial written response, nor did she raise it when she met with the investigative subcommittee on July 14. At all points prior to the Commission's finding of probable cause, Ms. Zoe acted in all ways as someone who believed that the Commission had jurisdiction. Her written response to the

charges was lengthy and detailed, and her testimony before the investigative subcommittee was responsive to the questions asked.

Ms. Zoe *did*, in an e-mail to the Chair on August 4, say that she had never been informed that she was subject to the Code of Ethics, nor been given a copy of it, and that she had cooperated with the Commission “to this point, out of respect for the City, the process and the artists.” But even in that e-mail, she never raised the question of the Commission’s jurisdiction.

The Commission in its probable cause investigation found sufficient cause to advance the complaints to a hearing. However, the threshold for finding “probable cause” is much lower than the threshold for finding a violation. Having found probable cause, the Commission then becomes obligated to receive testimony and investigate more fully.

Although Ms. Zoe did not raise the issue of jurisdiction until the business day before the commencement of the hearing, as a matter of law the failure to raise the issue earlier in the process does not preclude her from raising the issue at any time prior to the issuance of a ruling. A defendant or respondent, by law, retains the right to raise the issue at any point in the process.

Courts or commissions do not, as a rule, consider the question of jurisdiction unless and until a defendant or respondent raises it. At no point prior to her letter of August 12 did Ms. Zoe assert that she was not bound by the Code of Ethics. Indeed, we noted this in our formal statement of probable cause. With Ms. Zoe having raised the issue, the Commission is now obligated to consider the question of jurisdiction. Had the issue been raised earlier in the process, we would have thoroughly dealt with it earlier in the process.

As we have already noted, Ms. Zoe in her letter dated August 12 does not state *why* she believes the Commission lacks jurisdiction. But it is reasonable to assume that her belief is rooted in the fact that as an employee of the Norwich Free Academy, she is not an employee of the City of Norwich. While the status of NFA is somewhat ambiguous -- it describes itself as an independent school while the State of Connecticut calls it a public school -- it is at any rate not a part of the Norwich Public Schools system and its faculty and staff are clearly not City employees.

If NFA were part of the Norwich Public Schools there is no question in our eyes that we would have jurisdiction. Similarly, if the actions which Ms. Zoe acknowledges had been committed by the City Manager himself, rather than by Ms. Zoe, there would be no question that the Commission would have jurisdiction. The question of jurisdiction only arises because NFA is not part of the Norwich Public Schools.

The complainants seemed to believe that Ms. Zoe *is* a city employee, since most people who are not from the Norwich area assume that NFA is part of the Norwich Public Schools system. The Commission of course knew from the beginning that Ms. Zoe is not a city employee. Why then, did we not dismiss the complaint for lack of jurisdiction, rather than find probable cause?

The nexus for consideration of the complaint arises out of the fact that the City Manager’s office was so deeply involved in the contest. Several thousands of dollars of city money were expended and the winning portrait became the property of the city. Had the contest been produced solely by the Slater Museum, without city involvement, the Commission would have immediately declined to act because of lack of jurisdiction.

City Manager Alan Bergren's testimony before the Commission on August 16 demonstrates quite clearly that Ms. Zoe was acting on behalf of the city in conducting the contest. She had discretionary authority to set the rules and to manage the contest. Based on her decisions, city monies were spent and property (the painting) purchased.

Ms. Zoe was not acting as a city employee in her role because she is not, in fact, a city employee. However, the Ethics Code does not apply only to employees. There are dozens of elected and appointed members of boards, commissions, and authorities. With the exception of the Mayor and City Council, none of these are paid yet all are subject to the Code of Ethics.

The Code of Ethics includes both employees and officials -- which it then defines as "members of all departments, boards, commissions, committees, or other agencies of the City of Norwich." Ms. Zoe was acting as an *agent* of the City but that does not make her a member of a department, board, commission, committee or agency.

The statutes which created the various boards and commissions contain different methods of appointment. However, in all such cases there is a formal process of appointment, which could involve a vote of the City Council or some similar mechanism. Here, there was no such formal appointment, merely an informal agreement between the City Manager and a staff member of a local, though non-municipal, school and its museum.

Conclusion

We do not believe that the City Council when passing the Code of Ethics, contemplated an informal arrangement made by the City Manager as being under the jurisdiction of the Ethics Commission. Accordingly, we agree with Ms. Zoe that we lack jurisdiction and **decline to rule** on these two complaints.

Since we lack jurisdiction over Ms. Zoe, we cannot make recommendations to the City Council and City Manager concerning her. However, in the wake of our investigation we would like to make the following recommendations to the City Council and City Manager:

- 1.) Discretionary authority should not be given to non-employees or those who are not officials or officers of the city without appropriate safeguards to insure that the norms of the Code of Ethics are followed.
- 2.) Our **second recommendation** is that the city write **letters of apology** to the 33 artists. They had a reasonable expectation that the written rules would be followed. The artists devoted months of time, effort, and expense to their paintings. We cannot compensate them for their time, effort, or lost opportunity, but the city can at least express regret for the errors and the outcome.