

JOSEPH M. FERNANDEZ
City Solicitor

DAVID N. CICILLINE
Mayor



Department of Law

DEPARTMENT OF LAW ANNUAL REPORT

July 22, 2009

INTRODUCTION

This Report is provided to the City Council and the Mayor pursuant to Home Rule Charter Section 1201(e) and Section 2-98 of the Code of Ordinances. Part I describes the organizational structure of the Department of Law. Part II summarizes major accomplishments by the Law Department in fiscal year 2008-2009.

ORGANIZATIONAL STRUCTURE

City Solicitor Joseph M. Fernandez is the Chief Executive of the Law Department, supervising the legal and administrative work of the Department, making legal, policy and strategic decisions concerning work product, and serving as liaison and chief counsel to the City Council and the Administration. Day-to-day office management is provided by Deputy City Solicitor Adrienne G. Southgate, who also provides regular counsel to the City Council and certain city departments. Primary responsibility for litigation management rests with Senior Assistant City Solicitor Anthony F. Cottone, while corporate and regulatory matters fall within the ambit of Senior Assistant City Solicitor Frederick W. Stolle's portfolio.

The City's FY2009 budget authorizes and funds five senior assistant city solicitors. In addition to Mr. Cottone and Mr. Stolle, the ranks include Senior Assistant City Solicitor Kevin F. McHugh, who specializes in federal court trial practice, particularly in representation of the Providence Police Department; Senior Assistant City Solicitor William T. Smitherman, who focuses his practice on tax and financial litigation; and Senior Assistant City Solicitor Kenneth B. Chiavarini, who handles labor and employment matters.

Ten¹ assistant city solicitors -- Olajumoke O. Akinrolabu, Michael A. Calise, Steven L. Catalano, Brenda E. Carcieri, June E. Daniel, Maxford O. Foster, Lincoln S. Lennon, Stephen J. Ryan, Michael A. Tarro and Melissa C. Tucker -- function as prosecutors in the District, Municipal, Housing and Family courts; as counsel to the Providence School Department, the Human Resources Department, the Board of Licenses, the Human Relations Commission, the Zoning Board, and the External Review

¹ Both Ms. Carcieri and Mr. Tarro work part-time.

Authority; and as civil litigators in the Superior and District courts. All members of the Law Department are admitted to practice before the Rhode Island Supreme Court and the United States District Court for Rhode Island; seven are also admitted to the United States Court of Appeals for the First Circuit and three to the United States Supreme Court.

The office will miss the good services of Carolyn Ranucci, who recently retired after serving as a legal secretary for the City for the last twenty-four years. The remaining support and paraprofessional staff include office manager Sheila Sanchez, Allison Chiaverini, Ramona Liberato, Sharon Mulcahey, Cheryl Keeler and Gregory Marcogliese.

DEPARTMENT ACCOMPLISHMENTS

The Law Department operates under a set of goals and objectives which were put in place in 2005. The goals include satisfactory resolution of claims and lawsuits against the City of Providence; accurate and timely response to the City Council and City departments requesting legal assistance and support; fulfillment of the Solicitor's Home Rule Charter obligation to ensure the ethical conduct of City officials and employees; and representation of the City in a dispassionate, professional and competent manner. The objectives include enhancement of the Law Department's reputation and the respect accorded to its members in the courts, conference rooms and board rooms of the City; and the training and mentoring of the next generation of municipal attorneys.

During the past year, the Department has met these goals:

- The Department has compiled an admirable record for claims and lawsuits settled or filed since 2003, paying out a mere 0.35% of the total value of claims and 30.32% of the total claimed value of settled lawsuits.
- Although there is no way to quantify completely the myriad requests for legal assistance from the City Council and various departments -- the gamut of transactions includes responses to public records requests, guidance on open meetings issues, drafting of resolutions and ordinances, issuance of formal legal opinions, preparation of Executive Orders, contract and lease preparation or review, ethics opinions, bond financing document preparation or review, drafting of rules and regulations, research on and drafting of legislation, and other requests for advice or counsel -- the Department has drafted approximately fifty Resolutions, one hundred thirty Ordinances, and seventeen Executive Orders in the past year.
- To fulfill the Solicitor's Home Rule Charter obligation to ensure ethical conduct of City officials and employees, the Department had participated in the work of the Mayor's Ethics Task Force and shepherded the process of adopting the new City Code of Conduct, and has since designated an Assistant City Solicitor as Municipal Integrity Officer (MIO) to conduct

ethics education seminars for all City departments and to provide advisory opinions to those seeking to determine whether a course of conduct meets the City or State requirements. The Department obtained several formal advisory opinions from the Rhode Island Ethics Commission and responded to numerous employee inquiries seeking guidance on various ethical issues.

- A set of targets has been established to measure the prompt and competent completion of various types of assignments.

The remainder of this report highlights some of the important achievements over the 2008-2009 period.

1. Litigation

The Law Department is defending the City and various City officials in approximately 600 civil cases pending in state Superior and District courts and in approximately twenty cases pending in the federal courts. The great bulk of the cases being handled by the Department involve tax appeals or personal injury claims involving either slip and falls on city sidewalks or motor vehicle accidents involving City personnel. Tax appeal litigation has increased substantially in the second half of the fiscal year. In the first six months of calendar year 2009, 40 new tax appeal complaints were received, as compared with 46 complaints in all of calendar year 2008.

A number of pending cases also involve employment matters and appeals from the city's Zoning and Retirement Boards, as well as challenges to action taken by the Department of Inspection and Standards. In addition, the legal needs of the Providence School Department have included a number of teacher termination hearings, one of which was recently affirmed by the Rhode Island Department of Education; three additional termination hearings are currently pending. The Department continues to handle arbitration of teacher grievances, and will begin handling teacher grievances at the Level B hearings and working on procedures for those hearings as well.

Of course, the Law Department also acts as the prosecutor for the City each week in the Municipal Court (environmental, traffic and miscellaneous code violations)², Housing Court (housing code violations and related matters)³ and the state District⁴ and Family⁵ Court (juvenile and misdemeanor prosecutions) in addition to serving as counsel

² Approximately 1600 cases are heard annually in Municipal Court.

³ Between 500 and 600 cases are heard annually in Housing Court.

⁴ An average week's caseload in District Court is 90 cases.

⁵ Approximately 600 cases are heard annually in Family Court.

to the executive and legislative branch of the City and to various boards and commissions.

A list of those pending cases which the Law Department estimates represent a greater than \$250,000 exposure to the City are attached as Exhibit A. Some recent matters of interest, which either were recently concluded or for which a decision is pending, include the following:

Binding Health Care Arbitration per order of the Supreme Court - Senior Assistants Cottone and Chiavarini have been defending the City's right to save millions in administrative fees by awarding the contract for the third party administration of the medical benefit plans it provides to employees and retirees to UnitedHealthcare ("UHC"). The City's October 14, 2008 contract award to UHC was challenged by all the unions in Superior Court before it was referred to binding arbitration. The arbitration has been conducted for the last several months before a court-appointed arbitrator, who has dismissed all the unions' so-called "failure-to-bargain" claims and is expected to render a final decision within the next few months.

Consolidated Retirement Board Matters involving Frank E. Corrente, Anthony E. Annarino, Urbano Prignano, Jr., Kathleen Parsons and John J. Ryan - Senior Assistants Cottone and Chiavarini are defending these challenges to recent Retirement Board action pursuant to the City's honorable service ordinance, which have been consolidated to consider common legal issues regarding the legal validity and interpretation of the ordinance.

City of Providence v. Estate of Stephen A. Tarro - the Supreme Court recently rendered a decision in the City's favor affirming that the owners of an historic school had illegally commenced demolition without proper approvals and were properly fined and reversing the trial court's finding that the school had to be demolished.

Encarnacion v. City of Providence - Senior Assistant McHugh just tried this wrongful death action against the City and School Board based upon the alleged failure of a school to develop a special protocol for a student with a serious heart condition. The City is awaiting a jury verdict.

First Portland Corporation v. Gelati - Senior Assistant Smitherman recently won a case where the Supreme Court held that tangible property leased to a non-profit hospital was taxable even if the lease purported to transfer title of the property to the hospital. The taxable property at issue was valued at over \$4 million.

Providence School Board v. Receiver of the Education Partnership - Senior Assistant Cottone is representing the School Board as it challenges the Receiver's attempt to include the compromised proceeds of a \$1 million D & O insurance policy as part of the Receivership Estate. The Education Partnership mishandled and lost \$451,000 from

the Wallace Foundation it was holding on behalf of the Board, money which was slated for various teacher education programs.

RI Chapter of the ACLU v. City Board of Canvassers - Senior Assistant Cottone successfully defended this suit seeking to prevent the Board from using City Hall as an alternate polling location.

RI Chapter of the ACLU v. Col. Dean Esserman - Senior Assistant Cottone successfully defended this suit challenging the Police Department's policy regarding the use of video surveillance cameras in public locations.

RI Public Towing Association v. The City of Providence - this challenge to the City's attempt to regulate the so-called tow list used by the City was originally dismissed by the Superior Court after a trial conducted by Senior Assistant Cottone, and then on appeal the case was remanded, only to be dismissed again by the Superior Court after another trial. Recently, on appeal, the Supreme Court affirmed the material aspects of the Superior Court's ruling allowing the City to go forward with the substantial aspects of its proposed regulatory program.

The 903 Condominium Association v. The Providence City Council and Carpinato Properties - Senior Assistant Cottone is defending the City in this action challenging a development project slated for Harris Avenue.

Walden v. City of Providence - this case brought by over 100 police and fire employees and their families involved alleged constitutional violations and violations of the federal and state wiretap statutes was tried by Senior Assistant McHugh over three weeks before a jury and Magistrate Judge Almond. The jury awarded nominal damages as to the constitutional claims and approximately \$500,000 under the state wiretap statute. The City's appeal to the First Circuit as to various issues is pending.

2. Transactional, Legislative and Regulatory Work

Senior Assistant Chiavarini, one of the principal negotiators in the collective bargaining process for Local 1033 and the Providence Teachers Union, saved the City a significant amount. His role in labor matters is continuing to increase, particularly as he now has assistance from three assistant city solicitors as well as periodically from Senior Assistant Cottone.

Deputy Solicitor Southgate devoted substantial energy to the transfer of the Hurricane Barrier from the City to the Army Corps of Engineers, including negotiating an interim operating agreement for the period during which the Corps had no money in its budget for the barrier's operation and maintenance. In addition, she negotiated an agreement with the Narragansett Bay Commission over the possible condemnation of the Providence Animal Shelter, resulting in the NBC's contribution of a well-situated parcel

of land and more than \$1MM in design-build construction costs for a new, state-of-the-art animal control facility.

A major initiative launched by Chairman John Iglizzi and the City Council Committee on Finance has involved a revamping of the City's pension ordinances. Senior Assistant Chiavarini has taken a lead role in crafting pension reforms whereby the minimum age for service retirement was extended along with the implementation of early retirement reduction factors, as well as the drafting of a 10-year vesting requirement in order to qualify for a pension benefit.

The Department represented the City of Providence and its departments in numerous contractual and financial matters throughout 2008-2009. Such representation involved consultation; drafting of requests for proposals; review of pertinent charter, statutory or code prescriptions; review of proposals, leases, and title reports; drafting of documents; and negotiating the matter through finalization. Our office works closely with the Departments of Administration, Finance and Purchasing to ensure that the City's interests are represented. The Department also represented the City in connection with the transition of the branch library system to the Providence Community Library. We worked with the Substance Abuse Prevention commission to design a program that might assure its continued viability in the City. With respect to real property, the Department worked both with the Parks Department and with other departments in connection with the acquisition, disposition, and leasing of various parcels of real property, resolving significant issues in respect of those properties. The Department also represented the City in negotiations with Johnson & Wales and Brown Universities in connection with a disposition of properties created in the I 195 project, and worked with other attorneys and consultants in respect of state statutes proposed by Johnson & Wales in connection with such property dispositions.

During the reporting year, increasing attention has been paid to "sunshine" in government, not only in the context of the Open Meetings Act (OMA) but also when the Access to Public Records Act (APRA) is involved. Three City departments were admonished in Attorney General findings for having unwittingly violated some aspect of the OMA, and an additional finding was made on an APRA matter. To respond, the Law Department mobilized, conducting seminars for several individual departments as well as circulating to all departments a primer on responding to records requests.

The Department has had an on-going relationship with the Roger Williams University School of Law. During the previous fiscal year, we initiated a new phase, bringing in third year law students under Rhode Island Supreme Court Rule 9 (a provision authorizing students to practice before state and municipal courts, under supervision) to handle cases in both District and Housing Courts. The students have obtained excellent courtroom experience while bringing a level of vitality to the preparation of these cases.

The City's Board of Licenses has been very active this year. The Prosecution Bureau has begun employing a rarely-used law to focus on over-service of alcoholic beverages in Providence bars and nightclubs. Very few licensed establishments within the State of Rhode Island knew that bars, nightclubs and restaurants are prohibited from selling full bottles of distilled liquor, and may sell full bottles of champagne only if served with food or to more than one person. Some months ago, the Board of Licenses sent letters to all liquor establishments within the City informing them that the City will begin aggressive enforcement of these provisions.

Following this notice, the Prosecution Bureau sent undercover police officers and civilian assistants into nightclubs within the City, and attempted to purchase full bottles of distilled liquor and champagne. As a result of these undercover operations, in March 2009, the Board of Licenses heard its first litigated case involving violation of this law, resulting in a fine of \$500. In subsequent hearings, violations at a number of other establishments have generated over \$5,000 in fines. More importantly, in follow-up visits, the police have found no subsequent violations.

The Providence School Department has been involved with drafting contracts for the hiring of both a new superintendent and new assistant superintendent in charge of operations, as well as the revivification of the Providence School Department's associated 501(c)(3) corporation, the Rekindling the Dream Foundation. In addition, the Department continues to manage School Department contracts, including agreements relating to the increased ticketing of those who fail to yield to stopped school busses, to curriculum programs and training, and to a joint venture with Johnson & Wales for a teacher training program. The Department also worked this year with the School Board nominating committee to find and prepare qualified candidates to the School Board, prepared presentations about school board law for the School Board orientation, assisted with School Board with drafting its policies, and managed various board liability issues. The Department initiated discussions with Rhode Island Department of Education to revisit termination procedures, and worked with the School Department and RIDE in managing the legal implications of implementing the Commissioner of Education's initiatives for underperforming schools, including a criterion-based hiring program. The Department also initiated and continues to work on human resource policies for the School Department. The Department also assisted the School Department with the US Department of Education's ELL program audit, and worked with the Vartan Gregorian School, the School Department, the PPL and RIDE in connection with a possible joint-location agreement. The Department has also been involved in protecting the City's interest should a state education funding formula be instituted, both in respect of being educated and educating others as to possible legislation issues and potential litigation concerns, and has monitored issues coming before the Rhode Island Urban Education Task Force.

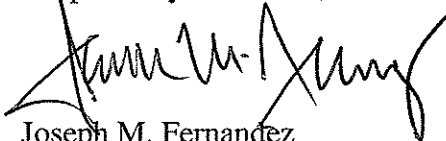
The Department also worked closely with the Providence After School Alliance (PASA) in respect of its relationship with the City.

Matters involving the Department of Planning and Development consistently require the engagement of more than one full-time attorney. During the past year, a number of neighborhood charettes, each of which is an input to the Comprehensive Plan, have been conducted. The Technical Review Committee (composed of representatives from the departments of Inspections & Standards, Planning and Development, Parks, Public Works, Traffic Engineering and Law) which oversees major development projects, has been a factor in streamlining the City's permitting process. Monthly meetings of the City Plan Commission, Historic District Commission, Downcity Design Review Commission, the Zoning Board, and the Providence Redevelopment Authority are part of the Department's responsibilities. In addition, the Department reviewed numerous agreements for new lending and grants programs for the Planning Department, and initiated an ongoing project to review all lending or grant agreements for consistency and enforceability issues.

3. Professional Activities

The Solicitor encourages the attorneys to engage in professional community service, which helps to enhance the Department's reputation. In March 2009, the Solicitor was again asked by the Rhode Island Bar Association to teach a continuing legal education course on ethics and professionalism for government attorneys. In April 2009, the Solicitor taught a seminar on the open meetings and access to public records laws. The Solicitor continues in his role as a member of the Rhode Island Advisory Committee to the United States Commission on Civil Rights.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joe Fernandez", written over a horizontal line.

Joseph M. Fernandez
City Solicitor

Attachment

EXHIBIT A

Beede Waste Oil Superfund Site – case involving the City as a “potentially responsible party” liable for the environmental cleanup of a site formerly occupied by Beede Waste Oil. The case settled for \$751,528.96. Half of the settlement amount is to be paid when the settlement is approved by the court, with the remaining half (\$375,764.48) to be paid by the City during the next fiscal year ('09).

Crespo v. Napolitano - action arising from a collision between a Providence fire engine and a passenger car operated by a woman who was killed in the accident. The City is defending the firefighter who was driving the engine, who has been sued in his individual and official capacities. The City will vigorously defend this claim but if proven, damages against the City could exceed \$1.2 million.

Donilon v. City of Providence – wrongful discharge and discrimination claim by former Recreation Department employee is scheduled for trial in September of 2008. Damages against the City could exceed \$500,000 if proven.

Escobedo v. City of Providence – wrongful death action against the City and School Board based on alleged failure of school to develop special protocol for student with serious heart condition. Damages against the City could exceed \$2.75 million if proven.

Fleet National Bank v. City of Providence - action challenging property tax valuations for several years. Damages against the City could exceed \$1,000,000 if proven.

Ponce de Leon v. City and Providence Water Supply Board – consolidated wrongful death and personal injury actions arising from an act of arson in February of 1993 which resulted in the death of six individuals and personal injury to another. The plaintiffs have alleged gross negligence with respect to the City's efforts to contain the fire. If plaintiffs are successful, damages against the City could amount to \$700,000.

King v. City of Providence - action claiming age discrimination in failing to hire a police officer candidate. Damages include back pay and pension rights and could exceed \$1,000,000 if proven.

Landero v. City Providence – wrongful death action alleging gross negligence on the part of the city and two emergency medical technicians. Damages against the City could exceed \$750,000 if proven.

Medeiros v. Providence School Board – action for negligent supervision during Special Olympics involving alleged sexual assault upon developmentally disabled student. If plaintiff prevails, damages against the City could be in excess of \$650,000.

Mentor v. Providence School Board – action for breach of contract, violation of civil rights and defamation arising from plaintiff's failure to be awarded continuation of a contract for provision of adult education services. The City is vigorously defending the claim and trial is expected in 2008. If plaintiff prevails damages could be in excess of \$800,000.

Newport School Committee v. Providence School Board - matter before the Commission of Education concerning a dispute over the residency status of approximately 40 students and the cost of their education, alleged to be approximately \$287,000.

Providence Journal v. Rossi, in his capacity as Tax Assessor - action challenging property tax valuations for multiple years and properties which, taken together, may involve tax credits of more than \$100,000 for each year of assessment.

Walden v. City of Providence - action stemming from electronic surveillance conducted within the City's Public Safety Complex. A \$525,000 judgment against the City entered after trial and an additional \$600,000 is being claimed in attorneys' fees. The City has appealed.

IN CITY COUNCIL
JUL 27 2009

READ
WHEREUPON IT IS ORDERED THAT
THE SAME BE RECEIVED.

Cyril M. Stetson CLERK