

**STATE OF RHODE ISLAND**  
**BEFORE THE RHODE ISLAND ETHICS COMMISSION**

**In re: Peter Palumbo**  
**Respondent**

**Complaint No. 2014-6**

**Decision and Order of the Ethics Commission**

*Background*

This matter was adjudicated by the State of Rhode Island Ethics Commission (Commission) on February 7, 2017, pursuant to R.I. Gen. Laws § 36-14-13, § 42-35-9, and Ethics Commission Regulation 1015. The following Commissioners were present for the entire adjudicative proceeding and participated in the deliberations and rendering of this Decision and Order: Ross E. Cheit, Chair, James V. Murray, Mark B. Heffner, John D. Lynch, Robert A. Salk, M. Therese Antone, Marisa A. Quinn, Timothy Murphy, and Douglas Bennett.

Katherine D'Arezzo, staff attorney for the Commission, prosecuted the case. Respondent, Peter Palumbo, was present during the proceedings and was represented by Attorney Terrence Livingston. Edmund L. Alves, Jr. attended all proceedings as legal counsel for the Commission.

At the conclusion of the adjudicative proceeding, the Commission, by a vote of 6-3 (Commissioners Murray, Lynch and Heffner dissenting), found that the Respondent had committed a knowing and willful violation of Commission Regulation 36-14-5007 (Regulation 5007) when on September 6, 2013, as an elected member of the Rhode Island House of Representatives, he submitted a bid to the Rhode Island State Division of Purchases to operate the Roger Wheeler, Scarborough, and Misquamicut state beach concessions. The Commission, by a vote of 9-0, imposed a civil penalty of \$1,000 for this violation.

### *Travel of the Case*

On August 7, 2014, John Marion filed a complaint with the Commission naming Peter Palumbo, a former member of the Rhode Island House of Representatives, a State elected official, as the Respondent. The complaint alleged that the Respondent violated Regulation 5007 when he bid on State beach concessions while serving as a member of the Rhode Island House of Representatives.

Pursuant to Commission Regulation 1003, the Commission on August 19, 2014 made an initial determination that the complaint alleged facts, which if proven, were sufficient to constitute a knowing and willful violation of the Code of Ethics. The Commission authorized a full investigation to determine whether probable cause existed to support the allegations.

The Commission conducted a probable cause hearing in this matter on February 3, 2015 pursuant to R.I. Gen. Laws § 36-14-12(c)(4) and Commission Regulation 1006. After considering the Investigative Report and the arguments of counsel, the Commission by a vote of 6-1 (Commissioner Lynch dissenting) adopted the following finding of probable cause:

That, there is probable cause to believe that the Respondent, Peter Palumbo, while serving as an elected member of the Rhode Island House of Representatives, bid on a Rhode Island Department of Environmental Management contract to operate State beach concessions, in violation of Commission Regulation 36-14-5007.

The adjudication hearing on the complaint was conducted in open session on February 7, 2017. A stenographer was present during the open session. At the conclusion of the hearing, the Commission immediately began deliberations in executive session with only the nine Commissioners who were present during the adjudicative hearing and the Commission's legal counsel in attendance. After deliberating, the Commission, by a vote of 6-3, (Commissioners Murray, Lynch, and Heffner dissenting), found that Respondent had committed a knowing and

willful violation of Regulation 5007 when on September 6, 2013 he bid on State beach concessions while serving as a member of the Rhode Island House of Representatives. The Commission, by a vote of 9-0, imposed a civil penalty of \$1,000 for this violation.

### ***Findings of Fact***

The Prosecution and Respondent entered into a Joint Stipulation with Exhibits A through M attached (Joint Exhibit #1) agreeing to certain findings of fact. The Commission accepts this Joint Stipulation and, after its consideration of all the evidence presented, hereby makes the following findings of fact:

1. The Respondent was first elected to the Rhode Island House of Representatives in November, 1994 and served continuously in said capacity until January, 2015.
2. At all times hereto relevant, the Respondent was subject to the Rhode Island Code of Ethics in his capacity as a state elected official.
3. On July 25, 2013, the Rhode Island Division of Purchases ("Division of Purchases"), through its Chief Buyer, David A. Cadoret, created a Request for Quote ("RFQ"), Bid # 7484379, entitled "Rhode Island State Park and Beach Food and Sundry Concessions", for the provision of concession services to thirteen (13) locations.
4. The RFQ was for a blanket period of five (5) years beginning April 1, 2014 and ending October 31, 2018. Bidders could submit proposals for all thirteen (13) locations or any individual location(s) of their choosing.
5. The Rhode Island Department of Environmental Management ("DEM") Division of Parks and Recreation drafted the specifications for the RFQ, which was published on the Division of Purchase's website at [www.purchasing.ri.gov](http://www.purchasing.ri.gov).

6. Pursuant to the RFQ, anyone intending to submit a bid proposal was required to attend a mandatory pre-bid conference for each location on which they would bid, with conferences held on August 21-22, 2013. A representative of the bidder was required to register and disclose the identity of the vendor which he or she represented. Failure to attend and register at the pre-bid conference would disqualify a submitted bid as being non-responsive to the RFQ.

7. On August 22, 2013, the Respondent, as a representative of EMP, LLC ("EMP"), attended mandatory pre-bid conferences for the Roger Wheeler, Scarborough North & South, and Misquamicut State Beach locations.

8. On September 4, 2013, EMP's articles of organization were filed with the Rhode Island Secretary of State.

9. On September 6, 2013, bids submitted in response to the RFQ were opened at the Division of Purchases, pursuant to an open and public process. A total of thirteen (13) responsive bids were received.

10. The Respondent submitted a bid, on behalf of EMP, 67 Kearney Street, Cranston, RI 02920, to operate food and sundry concessions at the Roger Wheeler, Scarborough North & South, and Misquamicut State Beach locations for the five (5) year period from May 1, 2014 to September 3, 2018.

11. The Respondent signed the bid submission as EMP's President/Manager.

12. As set forth on the Respondent's Revised Bid Sheet, the Roger Wheeler bid was for a total amount of \$388,885, specified as \$77,777 per year. The Scarborough bid, for concessions at both the North and South beach pavilions, was for a total amount of \$728,885, specified as \$145,777 per year. The Misquamicut bid was for a total amount of \$658,885, specified as \$131,777 per year.

13. The Respondent's bid submission stated that he, as a principal in T.J. and Company, Inc., previously operated the Scarborough State Beach concessions from 2000-2008, as well as the food and sundry concessions at Misquamicut State Beach from 2004-2008.

14. On his 2001-2008 Financial Statements filed with the Ethics Commission, the Respondent disclosed that T.J. and Company, Inc., in which he served as Vice President, operated the concessions at both the Scarborough and Misquamicut State Beaches. The Respondent was a member of the Rhode Island General Assembly during this time period.

15. The Respondent and/or EMP responded to a RFQ posted by the State of Rhode Island ("State") through an open and competitive bidding process.

16. The Respondent and/or EMP did not participate in the bid development process for the RFQ.

17. Pursuant to the RFQ, no bid bond was required.

18. On October 8, 2013, the Division of Purchases, through Mr. Cadoret, notified the Respondent via email that he was the high bidder on the Roger Wheeler, Scarborough North & South, and Misquamicut State Beach locations.

19. Attached to said email was a separate notice from the Division of Purchases advising EMP that the DEM was authorized to begin contract discussions regarding the specified bids for the aforesaid state beaches. The notice directed EMP to provide insurance documentation, with respect to liability, property damage, workers' compensation, and auto liability coverage, within ten (10) calendar days of the notice.

20. On October 9, 2013, the Respondent contacted Mr. Cadoret via email and advised that, as explained in an attached letter, he had made a critical clerical error when preparing his

bid package. The Respondent also informed that he would not be able to secure the required insurance and stated that he would have to drop out of the process.

21. The attached letter, addressed to Mr. Cadoret and signed by the Respondent as President of EMP, informed that, due to post submission identification of a clerical error in its cost proposal, EMP must withdraw its bid.

22. Subsequent to the Respondent's bid withdrawal, the contracts for the Roger Wheeler, Scarborough North & South, and Misquamicut State Beach locations were awarded to the next highest responsive bidder.

23. The contracts on which the Respondent and/or EMP bid were awarded through an open and public process that included prior public notice and subsequent public disclosure of all proposals considered and contracts awarded.

24. The Respondent and/or EMP never entered into a contract for the Roger Wheeler, Scarborough North & South, or Misquamicut State Beach concessions in the year 2013.

25. If the contracts had been awarded to the Respondent and/or EMP, the Respondent and/or EMP would not have received any compensation from the State during the term of the contracts.

26. If the contracts had been awarded to the Respondent and/or EMP, the Respondent and/or EMP would not have received a W-2 tax form and/or a 1099 tax form from the State.

27. If the contracts had been awarded to the Respondent and/or EMP, the State would not have purchased workers' compensation insurance on behalf of the Respondent or EMP, nor would it have been obligated to do so.

28. The Respondent and/or EMP would have been required to purchase workers' compensation insurance on behalf of the Respondent and his employees.

29. The Respondent and/or EMP would have been required to pay the State \$77,777 each and every year for five (5) years for the Roger Wheeler contract, regardless of how much net revenue he had in that year, if it had been awarded.

30. The Respondent and/or EMP would have been required to pay the State \$145,777 each and every year for five (5) years for the Scarborough Beach North & South pavilions contract, regardless of how much net revenue he had in that year, if it had been awarded.

31. The Respondent and/or EMP would have been required to pay the State \$131,777 each and every year for five (5) years for the Misquamicut contract, regardless of how much net revenue he had in that year, if it had been awarded.

32. If the Respondent and/or EMP did not have net revenue of \$77,777 from the Roger Wheeler contract, he or EMP would still have been obligated to pay the State \$77,777 for each year regardless of his net revenue and the loss, if any, in any year would be absorbed by the Respondent and/or EMP for that particular year, if the contract had been awarded.

33. If the Respondent and/or EMP did not have net revenue of \$131,777 from the Misquamicut Beach contract, he or EMP would still have been obligated to pay the State \$131,777 for each year regardless of his net revenue and the loss, if any, in any year would be absorbed by the Respondent and/or EMP for that particular year, if the contract had been awarded.

34. If the Respondent and/or EMP did not have net revenue of \$145,777 from the Scarborough Beach North & South pavilions contract, he or EMP would still have been obligated to pay the State \$145,777 for each year regardless of his net revenue and the loss, if any, in any year would be absorbed by the Respondent and/or EMP for that particular year, if the contract had been awarded.

35. The contracts that would have been awarded to the Respondent and/or EMP would have been identical to those that were awarded to the next highest bidder, as set forth in Exhibit H, which is part of the record of this case.

### ***The Prosecution's Contentions***

The Prosecution contends that the Respondent's bid submission violated Regulation 5007 which reads as follows:

No member of the General Assembly shall seek or accept state employment, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office. For purposes of this regulation, "employment" shall include service as defined in R.I. Gen. Laws § 36-14-2(4) and shall also include service as an independent contractor or consultant to the state or any state agency, whether as an individual or a principal of an entity performing such service.

Regulation 5007 was amended by the Ethics Commission effective February 1, 2007 to expressly include service as an independent contractor within its prohibition. It is the position of the Prosecution that Respondent would have become an independent contractor of the state if he had been awarded the beach concession contract. He therefore was subject to the prohibitions of Regulation 5007 when he bid on that contract.

The Commission accepts and adopts the contentions of the Prosecution for the reasons stated below.

### ***The Respondent's Contentions***

The Respondent makes the following contentions:

1. He did not violate R.I. Gen. Laws § 36-14-5(h) since the concession contract was awarded through an open and public process.
2. He did not violate Regulation 5007 since, if he had been awarded the contract, he would have been a lessee, not an independent contractor.

3. The Commission is without the authority to expand the scope of R.I. Gen. Laws § 36-14-5(n) to prohibit service as an independent contractor.

4. Since the Code of Ethics does not define the term "independent contractor", Regulation 5007 is void for vagueness.

5. Any violation of Regulation 5007 was not knowing and willful.

For the reasons stated below, the Commission rejects each of the Respondent's contentions.

### *Legal Discussion*

#### **The Open and Public Process Defense**

Respondent contends that he did not violate the provisions of R.I. Gen. Laws § 36-14-5(h) since he only bid on the contract and did not enter into it, and since the contract was awarded through an open and public process. These contentions are correct, but they are unavailing to Respondent since there is no allegation that he violated Section 36-14-5(h). The Complaint is premised on Regulation 5007, and Section 36-14-5(h) has no applicability to these proceedings.

#### **The Independent Contractor Issue**

The Respondent argues that, if awarded the state concession contract, he would have been a lessee, not an independent contractor, and therefore, beyond the reach of Regulation 5007. He maintains that as a concessionaire, he would have been required to pay money to the state and would have received none. He contends that a person cannot be an independent contractor unless he or she receives monetary compensation which is reflected on a W-2 or 1099 tax form.

The Commission must reject these contentions since they are contrary to the holding of the Rhode Island Supreme Court in Markham v. State, 99 R.I. 650 (1965). In Markham, Erwin

Bowers operated the bridle trail concession at Goddard Memorial State Park under a contract with the state wherein he agreed to pay the state \$751 per year for five years. Id. at 650-51. Under the contract, Bowers operated a riding academy using his own horses and equipment and hiring his own employees. Id. at 654. The state maintained some control over the operation including the fixing of rates, requiring attendants for inexperienced riders, and the maintenance of a log. On these facts, the Supreme Court upheld the conclusion of the Superior Court that Mr. Bowers was an independent contractor in relation to the state. Id. at 655.

The concession contract the Respondent would have entered into (Exhibit H) does not differ in any material respect from the Bowers contract discussed in Markham. The Respondent would have paid the state the stipulated amounts, would have provided the food and sundries, would have performed the required services with his own employees, and would have been subject to some regulation by DEM. Under the controlling precedent of Markham, Respondent would have been an independent contractor under Rhode Island law.

To advance his position that he would have been a lessee under the contract, not an independent contractor, the Respondent presented the testimony of Dennis DeSantis, CPA. The Commission accepted Mr. DeSantis as an expert witness in the field of accounting. Mr. DeSantis testified that, in his opinion, a person cannot be an independent contractor within the meaning of the tax and labor codes unless he or she is paid compensation. He opined that Exhibit H would have created a lessor/lessee relationship, not that of an independent contractor.<sup>1</sup>

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<sup>1</sup> The Commission takes administrative notice of Financial Accounting Standards Board (FASB) Topic 853 which provides that service concession arrangements do not meet the definition of a lease. Mr. DeSantis testified that he was unaware of FASB Topic 853. Since the Commission rejects Mr. DeSantis' opinion as it is limited to the tax and labor fields, and does not extend to ethics regulation, and since Markham is controlling here, the Commission need not and does not rely on FASB Topic 853 in order to reject Mr. DeSantis' conclusions.

The Commission may reject expert testimony,<sup>2</sup> and it does so here. Mr. DeSantis' testimony may have some relevance in the tax and labor fields which are governed by distinct statutes and regulations, but it is not persuasive in the field of ethics. His conclusion that a person cannot be an independent contractor unless he or she receives compensation is directly contrary to the Markham decision which controls the Commission's decision on this issue. His conclusion also ignores the fact that the concession bid was made with the expectation of receiving a financial benefit which is at the heart of ethics regulation.

Based on Markham, the Commission finds that the Respondent would have been an independent contractor if he had accepted this bid and, therefore, he was subject to the prohibitions of Regulation 5007.

**The Ethics Commission Has Substantive Rule-Making Authority**

The Respondent contends that R.I. Gen. Laws § 36-14-5(n)(1) applies to his situation and not Regulation 5007. That statute prohibits a state elected official from seeking or accepting employment with another state agency while holding state office and for one year after leaving state office. The prohibition of Section 36-14-5(n)(1) is confined to state employment and does not extend to independent contractor work. The Commission by regulation extended the reach of the statute to include independent contractors. Respondent contends that only the General Assembly is empowered to broaden the prohibition, and that the Ethics Commission is without the authority to do so.

In support of his position, Respondent cites to the Superior Court's decision in Gemma v. Rhode Island Ethics Commission, 1994 R.I. Super. LEXIS 105. In that case, the Commission argued that the term "any other employment" as used in R.I. Gen. Laws 36-14-5(o) was broad

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<sup>2</sup> See, Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998).

enough to include service as an independent contractor. The Court disagreed and applied a strict construction to the phrase. The Court noted that "[i]t is the legislature's role, if it so chooses, to add more inclusive or definitive language to R.I. Gen. Laws § 36-14-5... ". Id. at \*5. The issue of the Commission's independent authority to expand the scope of the statute was not before the Court in Gemma and was not addressed.

The Supreme Court, however, has stated in an advisory opinion that the Ethics Commission has the power to enact substantive ethics laws independent of the General Assembly. In re Advisory Opinion to the Governor (Ethics Commission), 612 A.2d 1 (R.I. 1992). The terms of Article 3, Section 8 of the Rhode Island Constitution expressly confer upon the Commission the limited concurrent power to enact substantive ethics laws. Id. at 13. As a result, "the General Assembly is ... limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the Commission." Id. at 14.

Regulation 5007 is such a substantive ethics regulation that lawfully applies to the conduct of the Respondent. His challenge to the validity of the scope of the regulation must therefore fail.

#### **Regulation 5007 Is Not Void For Vagueness**

Respondent contends that since the Code of Ethics does not include a definition of the term "independent contractor", Regulation 5007 is void for vagueness. This claim is unfounded. A legislative enactment is unconstitutionally vague if it compels "a person of average intelligence to guess and to resort to conjecture as to its meaning and/or its supposed mandated application." (citations omitted). Kaveny v. Town of Cumberland Zoning Board of Review, 875 A.2d 1, 10 (R.I. 2005). An enactment is unconstitutionally vague if it delegates power that

enables enforcement officials to act arbitrarily with unchecked discretion. (citations omitted). Moreau v. Flanders, 15 A.3d 565, 582-83 (R.I. 2011).

Here, the fact that a concessionaire is an independent contractor has been definitively established in Rhode Island jurisprudence since the Supreme Court issued the Markham decision in 1965. There is no need to resort to conjecture on this issue. There is no opportunity for enforcement officials to act arbitrarily with unchecked discretion when deciding if a concessionaire is an independent contractor. Markham provides a clear answer to the question of Respondent's status in this matter. As a result, it is beyond dispute that the prohibitions of Regulation 5007 extend to concessionaires who are independent contractors under Rhode Island law. Accordingly, Regulation 5007 is not unconstitutionally vague and this contention of Respondent must be rejected.

### **The Knowing and Willful Defense**

Respondent also argues that his violation was not knowing and willful since he had served without issue as a beach concessionaire prior to the 2007 amendment of Regulation 5007, and since he did not consider himself an independent contractor. It is the Commission's conclusion that, as a member of the General Assembly, the Respondent should have clarified his ethical position prior to submitting his bid by seeking an advisory opinion from the Ethics Commission.

The knowing and willful standard is defined in DiPrete v. Morsilli, 635 A.2d 1155, 1163-1164 (R.I. 1994) as follows:

This Court has held that when a violation of the statute is reasonable and made in good faith, it must be shown that the official either knew or showed reckless disregard for the question of whether the conduct was prohibited by the statute. Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is difficult to conceive of a violation that could be reasonable and in good faith. In contrast, when the violative conduct is not

reasonable, it must be shown that the official was cognizant of an appreciable possibility that he might be subject to the statutory requirements and he failed to take steps reasonably calculated to resolve the doubt. (Citations omitted).

Here, a member of the General Assembly bid on a state contract. This was not reasonable conduct. As the Supreme Court noted in DiPrete, it is “difficult to conceive of a violation that would be reasonable and in good faith.” Id. at 1164. Since the violative conduct was not reasonable, it must be shown that the public official was “cognizant of an appreciable possibility that he might be subject to the statutory requirements and he failed to take steps reasonably calculated to resolve the doubt,” such as delivery of a statement of potential conflict of interest to the Commission. Id.

In this case, the Respondent was admittedly aware that his actions as a General Assembly member were subject to the Rhode Island Code of Ethics since he annually filed financial disclosure statements with the Commission. However, he did not seek an advisory opinion from the Commission when he first considered submitting a bid for the state contract. In bidding on the concession contract, Respondent simply acted on his own interpretation of the Ethics Code. Under these circumstances, Respondent did not take steps reasonably calculated to resolve the ethical doubt – doubt which should have arisen in his mind when he first considered submitting a bid for the state contract. Respondent’s actions in this case were not reasonably calculated to resolve a situation fraught with ethical doubt. As a result, the Commission finds that Respondent’s violation of Regulation 5007 was knowing and willful.

### ***Conclusions of Law***

1. Based on the foregoing Findings of Fact and Legal Discussion, the Commission by a vote of 6-3 (Commissioners Murray, Lynch, and Heffner dissenting) finds that the


Respondent violated Regulation 5007 on September 6, 2013 when he bid on State beach concessions while serving as a member of the Rhode Island House of Representatives.

2. The Commission by a vote of 6-3 finds that the Respondent's said violation of Regulation 5007 on September 6, 2013 was knowing and willful.

***Civil Penalty***

In light of certain mitigating factors which include the amendment to Regulation 5007 after Respondent's prior service as a beach concessionaire and the Respondent's apparent confusion as to his status as an independent contractor, the Commission by a vote of 9-0 imposes on the Respondent a civil penalty of One Thousand Dollars (\$1,000) pursuant to R.I. Gen. Laws § 36-14-13(d)(3), an amount less than the Commission normally imposes for a first offense of this nature.

6/13/2017  
Date

  
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Ross E. Cheit, Chair  
Rhode Island Ethics Commission

PURSUANT TO THE PROVISIONS OF R.I. GEN. LAWS § 42-35-15 ANY PERSON WHO IS AGGRIEVED BY THIS DECISION AND ORDER IS ENTITLED TO JUDICIAL REVIEW. PROCEEDINGS FOR SUCH REVIEW ARE INSTITUTED BY FILING A COMPLAINT IN THE SUPERIOR COURT FOR PROVIDENCE COUNTY WITHIN THIRTY DAYS AFTER THE ETHICS COMMISSION HAS MAILED NOTICE OF THIS DECISION AND ORDER. A COPY OF THE COMPLAINT MUST BE SERVED UPON THE ETHICS COMMISSION WITHIN TEN DAYS AFTER IT IS FILED IN COURT, PROVIDED HOWEVER THAT THE TIME FOR SERVICE OF THE COMPLAINT MAY BE EXTENDED BY ORDER OF THE COURT FOR GOOD CAUSE.