

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2022-5

Approved: February 15, 2022

Re: Millicent McGinnes

QUESTION PRESENTED:

The Petitioner, the Town Clerk for the Town of New Shoreham, a municipal employee position, who in her private capacity is the owner and operator of Ballard's Oil Company, Inc., requests an advisory opinion regarding whether the Code of Ethics prohibits her from bidding in her private capacity on a contract, through an open and public bidding process, to provide heating oil services to the Town.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the Town Clerk for the Town of New Shoreham, a municipal employee position, who in her private capacity is the owner and operator of Ballard's Oil Company, Inc., is not prohibited by the Code of Ethics from bidding in her private capacity on a contract, through an open and public bidding process, to provide heating oil services to the Town.

The Petitioner is currently employed by the Town of New Shoreham ("Town" or "New Shoreham") as its Town Clerk ("Clerk"), a position she has held since January 1, 2022. Immediately prior thereto, the Petitioner served as the Deputy Clerk for the Town. The Petitioner states that, consistent with the Town Charter, she was hired for the position of Clerk by the Town Manager with the advice and consent of the Town Council. She adds that a new Deputy Clerk has also been hired by the Town. The Petitioner represents that, in her role as Clerk, she typically works Monday through Friday between the hours of 8:30 am and 4:30 pm. She further represents that she also attends Town Council meetings during the evening and occasionally fills in for staff who might be unavailable to attend a meeting for any of the ten municipal sub-committees that might convene on a particular evening. The Petitioner describes her role as Clerk as administrative in nature, adding that she is primarily responsible for recordkeeping.

In her private capacity, the Petitioner owns and operates Ballard's Oil Company, Inc. ("Ballard's Oil"), one of two home heating oil companies located in New Shoreham. The Petitioner states that she employs two people to deliver heating oil to clients in New Shoreham. She further states that her duties as the owner of Ballard's Oil mainly involve paperwork, and that she performs those duties outside of her work hours as the Town Clerk, typically on weekends and/or evenings. The Petitioner states that Ballard's Oil currently provides automatic oil delivery to approximately eight to ten municipal buildings in New Shoreham pursuant to a two-year contract with the Town that

will expire on June 30, 2022. The Petitioner states that Ballard's Oil submits its invoices for services provided to the Town to the Town's Finance Department, which is responsible for the issuance of checks for which the Town Finance Director is the signatory. The Petitioner further states that, in her capacity as Clerk, she has no role in the review and payment of invoices submitted to the Finance Department, nor does she exercise supervisory authority over the Finance Director.

The Petitioner represents that, during the month of February in alternating years, the Town solicits bids for services such as the provision of heating oil, so that providers can be selected in anticipation of a two-year contract that begins on July 1st. The Petitioner explains that the bid specifications are drafted and advertised through the Town Manager's office, and that the Town Manager accepts and reviews the bids before making recommendations to the Town Council for advice and consent on the award of a contract by the Town Manager. The Petitioner states that all bids are sealed and that she has no knowledge of what is contained in them. She further states that, typically, the lowest bid is accepted. The Petitioner represents that, in her capacity as Clerk, she has no role whatsoever in the bid process. She explains that, in the absence of the Town Manager's administrative assistant, the Clerk might be asked to step in and take minutes at a bid opening but that, were this to happen, the Clerk would exercise no discretion or decision-making authority during the process.

The Petitioner states that, in her private capacity as the owner and operator of Ballard's Oil, she would like to submit a bid in February of 2022 for the opportunity to provide heating oil services to the Town for the next two years beginning July 1, 2022. She seeks guidance from the Ethics Commission regarding whether the Code of Ethics prohibits her from doing so.

Under the Code of Ethics, no public employee shall participate in any matter in which she has an interest, nor shall she engage in any business, employment, transaction, or professional activity, that is in substantial conflict with the proper discharge of her duties or employment in the public interest. R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest exists if a public employee has reason to believe or expect that she, her family member, her business associate, or any business by which she is employed or which she represents will derive a direct monetary gain or suffer a direct monetary loss by reason of her official activity. Section 36-14-7(a). The Code of Ethics further prohibits a public employee from using her public office, or confidential information received through her public office, to obtain financial gain for herself, her family member, her business associate, or any business by which she is employed or which she represents. Section 36-14-5(d).

The Code of Ethics also provides that no person subject to the Code of Ethics, or any person within her family or her business associate, or any business entity in which the person or her family member or her business associate has a ten percent (10%) or greater equity interest or five thousand dollar (\$5,000) or greater cash value interest, shall enter into a contract with a state or municipal agency unless the contract has been awarded through an open and public process, including prior public notice and subsequent public disclosure of all proposals considered and contracts awarded.¹ Section 36-14-5(h) ("section 5(h)"). Finally, the Code of Ethics prohibits a public employee from

¹ Contracts for professional services which have been customarily awarded without competitive bidding shall not be subject to competitive bidding if awarded through a process of public notice and disclosure of financial details. Section 36-14-(h).

accepting other employment that would impair her independence of judgment as to her official duties or require or induce her to disclose confidential information acquired by her in the course of and by reason of her official duties. Section 36-14-5(b) (“section 5(b)”).

As an initial matter, the Ethics Commission finds that sections 5(a), 5(d), and 7(a) of the Code of Ethics are not implicated here because the Petitioner’s proposed conduct of submitting a bid in her private capacity to provide heating oil services to the Town would not require her to take action in her official capacity as Clerk that would financially impact her or her business. The Petitioner states that her role as Clerk is administrative in nature, adding that she is primarily responsible for recordkeeping. The Petitioner further states that she has no role whatsoever in the bid process, that the bids are sealed, and that she has no knowledge of what is contained in them. Additionally, the Petitioner represents that, if Ballard’s Oil is selected to provide heating oil services to the Town, she would have no role in the review and payment of invoices submitted to the Finance Director. For each of these reasons, it is the opinion of the Ethics Commission that the Petitioner is not prohibited by sections 5(a), 5(d), or 7(a) of the Code of Ethics from submitting a bid.

Turning now to section 5(h) of the Code of Ethics, the Ethics Commission has previously, and with certain conditions attached, allowed municipal public officials to enter into service contracts with the towns in which they served. For example, in Advisory Opinion 2018-42, a member of the North Smithfield Town Council, who in her private capacity was the President and co-owner of North Smithfield Fence, Inc., was not prohibited from providing estimates and submitting bids to perform work for the town and/or its various departments, provided that the contracts for such work were awarded through an open and public process, including prior public notice and subsequent public disclosure of all proposals considered and contracts awarded. The Ethics Commission further conditioned its opinion on the petitioner not participating in the bid development or selection process. See also A.O. 2008-14 (opining that the Chairperson of the Coventry Planning Commission could respond to a Request for Qualifications to perform municipal engineering services for the town, provided that he did not participate in the bid specification process and that any contract awarded was pursuant to an open and public bidding process); A.O. 2003-5 (opining that a Cumberland School Committee member could provide fundraising services to the Cumberland School District, provided that the contract was awarded through an open and public bidding process).

Here, the Petitioner’s representations indicate that the Town’s solicitation of bids meets the requirements of section 5(h).² Accordingly, based on the facts as represented herein, the relevant provisions of the Code of Ethics, and prior advisory opinions issued, it is the opinion of the Ethics Commission that the Petitioner is not prohibited from bidding in her private capacity on a contract with the Town to provide heating oil services to the Town. To the extent that the Petitioner is awarded a contract to supply heating oil services to the Town, through an open and public bidding process including prior public notice and subsequent public disclosure of all proposals considered

² The Ethics Commission has previously found that public officials who participate in the bid development process for a public entity place themselves, their family members, and their business associates in a privileged position with respect to other bidders and, thus, violate the “open and public process” required under section 5(h). Given the Petitioner’s representation that in her capacity as Clerk she has no role whatsoever in the bid process, there appears to be no such risk of violation at the present time.

and contracts awarded, the Code of Ethics does not inherently prohibit her from doing so, provided that such private activity would neither impair her independence of judgment nor create an interest in substantial conflict with her public duties.³ Here, the Petitioner's representations do not indicate that Ballard Oil's provision of heating oil services to the Town would either impair her independence of judgment or create an interest in substantial conflict with her public duties as the Clerk as prohibited by section 5(b). The Petitioner is advised, however, that her bid, and all of her work for Ballard's Oil, must be performed on her own time and without the use of public resources or confidential information obtained as part of her municipal employment as the Town Clerk. Additionally, the Petitioner may not use her public position to promote or advertise her business.

This Advisory Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.

Code Citations:

§ 36-14-5(a)

§ 36-14-5(b)

§ 36-14-5(d)

§ 36-14-5(h)

§ 36-14-7(a)

Related Advisory Opinions:

A.O. 2018-42

A.O. 2008-14

A.O. 2003-5

GCA 2009-4

Keywords:

Conflict of Interest

Contracts

Secondary Employment

³ The Ethics Commission examines several factors when considering potential conflicts of interest regarding secondary employment. These factors include, but are not limited to, the nexus between the official's public duties and private employment; whether the employee completes such work outside his or her normal working hours and without the use of public resources; whether the employee is to appear before, or his or her work product is to be presented to, his or her own agency; whether such work is to be conducted outside of the areas over which the person has decision-making jurisdiction; and whether the employee uses his or her position to solicit business or customers. See General Commission Advisory No. 2009-4.