

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2023-3

Approved: January 24, 2023

Re: Mark H. Trimmer

QUESTION PRESENTED:

The Petitioner, the President of the Richmond Town Council, a municipal elected position, who in his private capacity is a customer of the Town of Richmond's water supply system, requests an advisory opinion regarding whether he may participate in the Town Council's discussions and voting regarding whether the Town should use funds made available to the Town under the American Rescue Plan Act to offset some of the cost associated with the installation of a chlorination system to the Town's water supply system or, alternatively, whether such cost should be borne entirely by the Town's water customers.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the President of the Richmond Town Council, a municipal elected position, who in his private capacity is a customer of the Town of Richmond's water supply system, may participate in the Town Council's discussions and voting regarding whether the Town should use funds made available to the Town under the American Rescue Plan Act to offset some of the cost associated with the installation of a chlorination system to the Town's water supply system or, alternatively, whether such cost should be borne entirely by the Town's water customers. In accordance with the Code of Ethics' class exception, the Petitioner would be affected by the Town Council's discussions and voting on the matter to no greater extent than the significant and definable class of all water customers.

The Petitioner was elected to the Richmond Town Council ("Town Council") in November of 2022, and currently serves as its president. He represents that the Rhode Island Department of Health requires that the Town of Richmond ("Town" or "Richmond") install a chlorination system to the Town's water supply system ("water system"). He further represents that the Town Administrator had asked the Town Council for permission to use funds available to the Town through the American Rescue Plan Act ("ARPA") in order to offset some of the cost of the chlorination system and its installation ("cost"). The Petitioner states that, therefore, the Town Council will consider whether to grant the Town Administrator's request or, alternatively, whether the cost should be absorbed entirely by the water system customers. The Petitioner further states that either decision of the Town Council would result in an increase in the water usage rate; however, the rate will be substantially higher if the cost is absorbed entirely by the water system customers.

The Petitioner explains that while some of the Town's residents utilize water wells and are not connected to the water system, there are approximately 280 customers, including the Petitioner,

who are connected to the water system and who will be financially impacted by the Town Council's decision on the matter. The Petitioner represents that the 280 customers include approximately 100 commercial users and 180 residential users, one of whom is the Petitioner. The Petitioner states that all of the water system customers will be impacted the same way in the form of an equal increase of the water rate, regardless of whether the customer is a commercial or residential user. The Petitioner further states that, of the five Town Council members, he is the only one who is connected to the water system and, therefore, the only one who will be financially impacted by the decision. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding whether he may participate in the Town Council's discussions and voting relative to the cost of the chlorination system.

Under the Code of Ethics, a public official may not participate in any matter in which he has an interest, financial or otherwise, that is in substantial conflict with the proper discharge of his duties or employment in the public interest. R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest exists if a public official has reason to believe or expect that he, any person within his family, his business associate, or any business by which he is employed or which he represents, will derive a direct monetary gain or suffer a direct monetary loss by reason of the public official's official activity. Section 36-14-7(a). Additionally, the Code of Ethics prohibits a public official from using his public office, or confidential information received through his public office, to obtain financial gain for himself, any person within his family, his business associate, or any business by which he is employed or which he represents. Section 36-14-5(d).

Here, the Petitioner is one of the customers connected to and utilizing the water system, and represents that he will be financially impacted by the Town Council's decision regarding the cost associated with the installation of the chlorination system. Because the above representations include that the financial impact will be the same among all of the water system customers, the Ethics Commission will consider whether the "class exception" applies to this unique set of circumstances, in which case the Petitioner would be allowed to participate.

Section 36-14-7(b) of the Code of Ethics, referred to as the "class exception," states that a public official will not have an interest which is in substantial conflict with the proper discharge of his official duties if any benefit or detriment accrues to him, or any person within his family, or any business associate, or any business by which he is employed or which he represents, "as a member of a business, profession, occupation or group, or of any significant and definable class of persons within the business, profession, occupation or group, to no greater extent than any other similarly situated member of the business, profession, occupation or group, or of the significant and definable class of persons within the business, profession, occupation or group." When determining whether the class exception applies, the Ethics Commission considers the totality of the circumstances. Among the important factors considered are: 1) the description of the class; 2) the size of the class; 3) the function or official action being contemplated by the public official; and 4) the nature and degree of foreseeable impact upon the class and its individual members as a result of the official action.

The Ethics Commission has previously applied the class exception in a variety of circumstances involving municipal officials and their real estate holdings. In Advisory Opinion 2005-39, for example, the Ethics Commission applied the class exception, allowing a member of the Bristol County Water Authority to participate and vote on a Discount Program which permitted a person

over 65 years of age to receive a discount on water rates otherwise charged to a residential customer, notwithstanding that the petitioner was 65 years old and he would immediately benefit from the program, reasoning that he would be affected to no greater extent than any of the other 3,117 water customers who would benefit from the program. See also A.O. 2015-4 (applying the class exception and permitting a Charlestown Town Council member to participate in the Town Council's discussions and decision-making relative to remediating ground water pollution, given that it was reasonably foreseeable that the financial impact upon the entire class would be substantially similar in the form of equal or proportional assessments to connect to community water and/or wastewater systems, or, alternatively, a Town-wide tax increase to subsidize improvements to the water and sewer infrastructure to prevent pollution and salt water intrusion); A.O. 2005-22 (applying the class exception and permitting an Exeter Town Council member to participate in a proposed tax freeze ordinance for all property owners aged 65 and over, notwithstanding that his spouse was over 65 and could benefit from the tax freeze, because 250 to 300 other property owners would be similarly impacted by the ordinance).

In the instant matter, the Petitioner is one of approximately 280 water system customers who will be impacted by any increase in the water rate associated with the installation of the chlorination system. Although the Petitioner will be financially impacted by a change in the amount of the water rate, he represents that he will be impacted to no greater extent than any other of the approximately 280 water system customers. Therefore, it is the opinion of the Ethics Commission that the circumstances justify the application of the class exception set forth in section 36-14-7(b), and the Petitioner may participate in the Town Council's discussions and voting relative to the cost associated with the Town's installation of a chlorination system to its water system.

However, in the event that the Town Council's discussions veer in a way that would impact the Petitioner individually, or as a member of a much smaller class or subclass of water system customers, the Petitioner is advised that he must either recuse from participation or seek additional guidance from the Ethics Commission. Upon recusal, a statement of conflict of interest must be filed with the Town Council and the Ethics Commission pursuant to section 36-14-6.

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(d)

§ 36-14-6

§ 36-14-7(a)

§ 36-14-7(b)

Related Advisory Opinions:

A.O. 2015-4

A.O. 2005-39

A.O. 2005-22

Keywords:
Class Exception