

# RHODE ISLAND ETHICS COMMISSION

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## Advisory Opinion No. 2023-27

Approved: July 25, 2023

**Re: The Honorable Michael B. Forte, Jr.**

### **QUESTION PRESENTED:**

The Petitioner, the Municipal Court Judge for the Town of Tiverton, a municipal appointed position, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from presiding over and adjudicating a complaint alleging violations of the Tiverton Home Rule Charter by members of the Tiverton Town Council, given that he was appointed to his current position by the Town Council.

### **RESPONSE:**

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the Municipal Court Judge for the Town of Tiverton, a municipal appointed position, is not prohibited by the Code of Ethics from presiding over and adjudicating a complaint alleging violations of the Tiverton Home Rule Charter by members of the Tiverton Town Council, notwithstanding that he was appointed to his current position by the Town Council.

The Petitioner was appointed to the position of Municipal Court Judge for the Town of Tiverton (“Town” or “Tiverton”) by a majority vote of the Tiverton Town Council (“Town Council”) in October 2022. A Tiverton Municipal Court Judge generally serves a two-year term; however, because the Petitioner was appointed mid-term, his reappointment will be considered by the Town Council in November 2023.

The Petitioner states that a complaint was filed with the Town Clerk in April 2023 by a Tiverton resident alleging violations of Tiverton’s Home Rule Charter (“Charter”) by four of the seven members of the Town Council and a number of other Town officials.<sup>1</sup> The Petitioner explains that complaints alleging Charter violations are ordinarily reviewed by the Town Council, which sits as a Charter Monitoring and Complaint Review Board. He adds that, in the event that a complaint is made against a majority of Town Council members, upon determination by the Town Clerk that the complaint has been sufficiently set forth, the Town Clerk then files the complaint in the Municipal Court.

The Petitioner represents that the subject complaint was filed by the Town Clerk in the Municipal Court and that on May 18, 2023, the Petitioner issued an order staying the complaint until such

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<sup>1</sup> The other Town officials named in the complaint include the Zoning Enforcement Officer, the Building/Zoning Official, the Director of Public Works, the Town Administrator, and the Solicitor.

time as the Ethics Commission issues an advisory opinion regarding whether the Petitioner may hear the matter without violating the Code of Ethics.<sup>2</sup> The Petitioner informs that, in the event of a conflict of interest under the Code of Ethics, or with some other relevant rules and regulations to which he is subject, the complaint will be heard by Tiverton's Probate Judge.<sup>3</sup> Cognizant of the Code of Ethics, and desirous of acting in conformance therewith, the Petitioner seeks advice from the Ethics Commission regarding whether he may preside over and adjudicate the subject complaint which names among the defendants a majority of the members of his appointing authority.

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 public official will have an interest that is in substantial conflict with the proper discharge of his official duties if it is reasonably foreseeable that a direct monetary gain or loss will accrue by virtue of the public official's activity to the public official, his family member, his business associate, or any business by which he is employed or which he represents. Section 36-14-7(a). Additionally, section 36-14-5(d) prohibits a public official from using his position or confidential information received through his position to obtain financial gain, other than that provided by law, for himself, any person within his family, his business associate, or any business by which he is employed or represents. Further, Commission Regulation 520-RICR-00-00-1.2.1(A)(2) Additional Circumstances Warranting Recusal (36-14-5002) states that a public official must recuse himself from participation in his official capacity when his business associate or employer appears or presents evidence or arguments before his municipal agency. A business associate is defined as "a person joined together with another person to achieve a common financial objective." Section 36-14-2(3). A person is defined as "an individual or a business entity." Section 36-14-2(7). A business is defined as "a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, trust or any other entity recognized in law through which business for profit or not for profit is conducted." Section 36-14-2(2).

In order to determine whether the above provisions of the Code of Ethics are implicated, the Ethics Commission must first ascertain whether the Petitioner, his family member, his business associate, or any business by which he is employed or represents will be financially impacted by the official action that is under consideration. If a financial impact upon someone in any of the aforementioned categories is not reasonably foreseeable, then the Petitioner is not required by these provisions of the Code of Ethics to recuse from presiding over and adjudicating the subject complaint.

In prior advisory opinions, the Ethics Commission has consistently concluded that the Code of Ethics does not consider the relationship between a public official and a public body, such as a state or municipal agency, to be that of business associates. See, e.g., A.O. 2011-29 (opining that the petitioner was not a business associate of either the Rhode Island Department of Transportation (RIDOT) or the Town of Portsmouth, notwithstanding his employment by RIDOT and his service on the Portsmouth Planning Board); A.O. 2015-27 (opining that the petitioner was not a business

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<sup>2</sup> The Petitioner states that he made a similar request of the Judicial Advisory Committee relative to the application of the Code of Judicial Conduct to the circumstances described herein.

<sup>3</sup> Pursuant to the Tiverton Town Charter, the Probate Judge is an elected municipal official.

associate of either the Town of Westerly or the Community College of Rhode Island, notwithstanding his simultaneous employment by both public entities).

Here, the Town is not a business by which the Petitioner is employed; nor is it the Petitioner's business associate. Therefore, the above-cited provisions of the Code of Ethics are inapplicable. Accordingly, it is the opinion of the Ethics Commission that the Petitioner is not prohibited from presiding over and adjudicating the subject complaint.

Public officials and employees are encouraged by the Rhode Island Constitution to hold themselves to ethical principles that go beyond the legal requirements of the Code of Ethics by "adher[ing] to the highest standards of ethical conduct, respect[ing] the public trust and . . . avoid[ing] the appearance of impropriety[.]" R.I. Const. art. III, sec. 7. The Code of Ethics does not prohibit the creation of an appearance of impropriety; however, like the Rhode Island Constitution, it advises public officials and employees to voluntarily avoid conduct that creates such an appearance. The Ethics Commission leaves to the Petitioner the decision of whether his presiding over and adjudicating a complaint alleging Town Charter violations by his appointing authority carries with it an appearance of impropriety such that he chooses to recuse from doing so.

**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 judicial ethics may have on this situation.**

Code Citations:

§ 36-14-2(2)

§ 36-14-2(3)

§ 36-14-2(7)

§ 36-14-5(a)

§ 36-14-5(d)

§ 36-14-7(a)

520-RICR-00-00-1.2.1 Additional Circumstances Warranting Recusal (36-14-5002)

Constitutional Authority:

R.I. Const., art III, sec. 7

Related Advisory Opinions:

A.O. 2015-27

A.O. 2011-29

Keywords:

Conflict of Interest

Appearance of Impropriety