

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2023-38

Approved: October 17, 2023

Re: David M. D'Agostino

QUESTION PRESENTED:

The Petitioner, the Scituate Town Moderator, a municipal elected position, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from accepting, if offered, appointment by the Scituate Town Council to serve the remainder of his late father's term as a member of the Town Council, provided that the Petitioner resigns as the Town Moderator, effective concurrent to that appointment.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the Scituate Town Moderator, a municipal elected position, is not prohibited by the Code of Ethics from accepting, if offered, appointment by the Scituate Town Council to serve the remainder of his late father's term as a member of the Town Council, provided that the Petitioner resigns as the Town Moderator, effective concurrent to that appointment.

The Petitioner has held the position of Town Moderator ("Moderator") for the Town of Scituate ("Town" or "Scituate") continuously since January of 1999. Having first been appointed to fill the vacancy created by the departure of the previously elected Town Moderator, he has since been elected every two years. His current term expires in November 2024. The Petitioner states that the Town Moderator is responsible for maintaining order during Scituate's Annual and Special Financial Town Meetings.¹ The Petitioner is paid a stipend of \$100 per meeting.

The Petitioner's father ("Mr. D'Agostino") served continuously as a member of the Scituate Town Council ("Town Council") from 2006 until his passing in July of this year. Mr. D'Agostino was last elected in November 2022, and his unexpired two-year term runs through December 31, 2024. The Petitioner states that he was recently asked by a current member of the Town Council whether the Petitioner would be interested in serving the remainder of his late father's term. The Petitioner further states that his response was that it would be his honor to do so, provided that his appointment be specifically conditioned on the Town Council's acceptance of the Petitioner's resignation as the Town Moderator, effective concurrent with his appointment to the Town Council. Cognizant of the Code of Ethics, and desirous of acting in conformance therewith, the Petitioner requests an advisory opinion regarding whether he is prohibited by the Code of Ethics

¹ The Petitioner explains that Special Financial Town Meetings are seldom held. He states that the last one took place in 2017 and, prior to that, two or three were held in 2007.

from accepting, if offered, appointment by the Town Council to serve the remainder of his late father's term as a member of the Town Council.

Under Commission Regulation 520-RICR-00-00-1.5.4 Municipal Official Revolving Door (36-14-5014) ("Regulation 1.5.4"), no municipal elected official, while holding office and for a period of one (1) year after leaving municipal office, shall seek or accept employment with any municipal agency in the municipality in which the official serves. The Code of Ethics specifically includes as "employment" service by an individual "in any appointed state or municipal position." R.I. Gen. Laws § 36-14-2(4) ("section 2(4)"). Regulation 1.5.4(C) allows the Ethics Commission to authorize exceptions under circumstances where doing so would not create an appearance of impropriety.

Here, an initial issue is whether the Petitioner's service on the Town Council for the remainder of his late father's term constitutes "employment" under the Code of Ethics. If it does, Regulation 1.5.4 would prohibit the Petitioner's acceptance of the appointment, absent the authorization of an exception by the Ethics Commission. Section 2(4) specifically includes the service by an individual in any *appointed* municipal position as employment. Here, in this unusual situation, the Petitioner would be *appointed* by the Town Council to what is normally an *elected* position. To the extent that the Petitioner would then be considered an appointed official, the Municipal Official Revolving Door regulation would apply; but, to the extent that he would be considered an elected official, it would not apply. Ultimately, we do not need to decide whether to treat the Petitioner's potential Town Council seat as an appointed or elected position, because the facts as represented support the authorization of an exception under Regulation 1.5.4(C).

The Ethics Commission has granted exceptions under Regulation 1.5.4(C) on a number of occasions during the past decade upon a finding that public employment would not create an appearance of impropriety. For example, in Advisory Opinion 2015-43, the Ethics Commission allowed a North Kingstown School Committee ("NKSC") member to apply for and accept, if offered, the position of North Kingstown Town Manager. The circumstances were such that the petitioner had not run for election to the NKSC but, rather, had volunteered to be appointed to the NKSC to fill an unexpected vacancy. The petitioner represented that she did not intend to seek election to the NKSC once her appointed term expired and that, if hired as the Town Manager, she would resign from the NKSC. In that case, the NKSC had no role or authority relative to the hiring process for the Town Manager position. Also, the Town Manager was not a subordinate position to the NKSC and operated separate and apart from the School Department. See also A.O. 2015-22 (permitting a former Charlestown Town Council member to apply for the position of Charlestown Director of Parks & Recreation, a position which she previously held for twenty-two years until she was terminated, given that she immediately challenged her termination as wrongful, filed a lawsuit and favorably settled the case, but at the time of settlement reinstatement was problematic because the position had already been filled by another person); A.O. 2014-5 (permitting a former New Shoreham Town Council member to bid on new contracts through an open and public bidding process for services that his business then performed, given that his business had been providing those municipal services for at least ten years and the business was his primary source of income, his representation that he would not have sought election to the Town Council had he anticipated this problem, and his immediate resignation when he learned of the conflict).

Here, the Petitioner's current elective position is not on the Town Council or School Committee, which are the common elective positions to which the Municipal Official Revolving Door applies, but is as the Town Moderator, a position with narrow duties that are limited to maintaining order during infrequent Town meetings. Further, the Petitioner plans to resign from his position as the Town Moderator if selected to fill the vacancy on the Town Council. Also, the Petitioner has no role or authority in the selection of someone to fulfill the remainder of his late father's term on the Town Council. Finally, the members of the Scituate Town Council are not subordinates of the Town Moderator and their duties are separate and apart from those of the Town Moderator. Under these unique circumstances, we find that it would not create an appearance of impropriety to authorize an exception to this particular revolving door regulation.

In summary, it is the opinion of the Rhode Island Ethics Commission that the Petitioner is not prohibited by the Code of Ethics from accepting, if offered, appointment by the Scituate Town Council to serve the remainder of his late father's term as a member of the Town Council, provided that the Petitioner resigns as Town Moderator, effective concurrent to that appointment.

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:

§ 36-14-2(4)

520-RICR-00-00-1.5.4 Municipal Official Revolving Door (36-14-5014)

Related Advisory Opinions:

A.O. 2015-43

A.O. 2015-22

A.O. 2014-5

Keywords:

Revolving Door