

# RHODE ISLAND ETHICS COMMISSION

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## Advisory Opinion No. 2023-41

Approved: October 17, 2023

**Re: Mark Nimiroski**

### **QUESTION PRESENTED:**

The Petitioner, a member of the Tiverton Wastewater District Board of Directors, a quasi-municipal appointed position, requests an advisory opinion regarding whether he may accept an offer of employment by that Board of Directors to become the Executive Director of the Tiverton Wastewater District.

### **RESPONSE:**

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the Tiverton Wastewater District Board of Directors, a quasi-municipal appointed position, may accept an offer of employment by that Board of Directors to become the Executive Director of the Tiverton Wastewater District, provided that he resigns from the Board of Directors upon accepting the position. This opinion is based upon a finding by the Ethics Commission that the facts as represented indicate that the denial of such employment would create a substantial hardship for the Tiverton Wastewater District.

The Petitioner states that he is a member of the Board of Directors (“Board”) of the Tiverton Wastewater District (“District”), having been appointed to that position in March of 2022 by the other Board members. He informs that the District’s mission is to safeguard public health and protect and improve ground and service water resources by implementing efficient and effective wastewater management within the District territory.

The Petitioner represents that the District’s staff consists of the following four positions: full-time Executive Director; part-time bookkeeper, of which there are now two; part-time engineer who oversees operations; and part-time engineering technical consultant, which is a contract position. He further represents that, since it was assembled in 2014, the Board has hired six Executive Directors. The Petitioner explains that, following the hiring and departure of three Executive Directors between 2014 and 2019, a fourth Executive Director was hired and worked for the District from June 3, 2019 – August 8, 2022.<sup>1</sup> The Petitioner adds that the District’s fifth Executive

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<sup>1</sup> The Petitioner and the Board’s Chair, who sent a letter to the Executive Director of the Ethics Commission in support of the Petitioner’s candidacy for the position of Executive Director, represent that this particular Executive Director’s preference for at-home or hybrid model working arrangements coming out of the COVID-19 pandemic was not conducive to the level of leadership required for the position, which led to her abrupt departure.

Director served from August 25, 2022 – May 5, 2023.<sup>2</sup> The sixth and most recent Executive Director served from May 25, 2023 – July 20, 2023.<sup>3</sup>

The Petitioner states that the Board began its search for its sixth and most recent Executive Director in August of 2022, which is when the Board's fifth Executive Director accepted the position on what was intended to be a short-term basis. The Board Chair represents that, of the 28 candidates who applied for the Executive Director position when it was advertised beginning in August of 2022, only three met the minimum qualifications for the position, two of whom were interviewed.<sup>4</sup> An offer was made to the Executive Director who started the position on May 25, 2023, and left the position on July 20, 2023.

The Board Chair states that following the departure of the last Executive Director on July 20, 2023, the Board contacted the program coordinator of the Rhode Island Department of Environmental Management's Wastewater Leadership Boot Camp ("Boot Camp") and asked him to distribute notice of the Executive Director vacancy to all Boot Camp graduates. This produced only one candidate, who was interviewed by the Board Chair, two other Board members (which did not include the Petitioner), and two District employees. An offer was extended on August 18, 2023; however, the applicant rejected the offer in consideration of the lengthy commute it would entail, notwithstanding a proposal by the Board of a hybrid work schedule. The Board Chair represents that immediately following that candidate's rejection of the Board's offer of employment, the Board advertised the position with the Providence Journal, on Indeed.com, and on the District's website. The Board Chair represents that these job postings resulted in the submission of 15 applications. The Board Chair further represents that, of the 15 applicants, only one candidate warranted a conversation. The Board Chair states that he interviewed that candidate with the assistance of Board members Bill Vanora and Bill Lopes on September 15, 2023. He further states that it appeared that the candidate had done very little to prepare for the interview, was not familiar with the District, and responded with general answers to specific questions. The Board Chair explains that this candidate was deemed by all three of the interviewers as unqualified for the role of Executive Director, adding that the Board would continue to review resumes as they are received.<sup>5</sup>

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<sup>2</sup> The Petitioner represents that this Executive Director had been a long-time municipal government employee who came out of retirement to assist the District with the understanding that his engagement would be short-term.

<sup>3</sup> The Petitioner and the Board Chair represent that this Executive Director was hastily chosen from a limited pool of qualified candidates given the direness of the situation. They add that, after less than two months on the job, issues surfaced concerning her ability to effectively manage District staff and maintain a positive office environment. After a discussion with the Board members, she resigned on July 17, 2023, and left her position four days later on July 20, 2023.

<sup>4</sup> The Board Chair explains that the third candidate declined the Board's invitation to interview.

<sup>5</sup> The Board Chair states that the Board has investigated, but since abandoned, the prospect of using the services of an executive search firm to fill the vacant Executive Director position, describing that option as extremely prohibitive in cost and timeline. He adds that it could take four to six months to complete the search efforts for a new Executive Director, that the quoted prices for this service ranged from \$30,000 to \$50,000, and that the District's net operating income for the current fiscal year is budgeted at less than \$5,000.

The Board's attorney informs Ethics Commission Staff that in September 2023, the Board also reached out to the following organizations to request assistance with publicizing the Executive Director vacancy: the Rhode Island League of Cities and Towns ("League of Cities and Towns"); the New England Water Environment Association ("NEWEA"); the Rhode Island Clean Water Association ("RICWA"); and the New England Interstate Water Pollution Control Commission ("NEIWPCC"). He explains that these efforts produced no applications.

In his letter requesting that the Petitioner be allowed to accept the position of Executive Director, the Board Chair identifies the responsibilities of that position as follows: (1) Manage the day-to-day operations, providing overall direction, supervision, and leadership to the support staff; (2) Prepare and manage the financial budgets and operational plans in accordance with the strategic direction approved by the Board of Directors;<sup>6</sup> (3) Establish a collaborative relationship with the District's customers, community groups, contractors, and funding agencies in order to achieve operational and strategic goals; and (4) In conjunction with the District Engineer, provide the leadership, financial management, and technical direction for the operation, maintenance, repair, and expansion of the District's infrastructure.<sup>7</sup> The Petitioner states that the current salary for the Executive Director position is \$95,000 per year, which he admits is probably lower than that of similarly employed Executive Directors in larger Rhode Island wastewater districts. He explains that larger wastewater districts in Rhode Island have an infrastructure component that Tiverton currently does not, because Tiverton sends its wastewater to Fall River for treatment at its facility.

The Petitioner represents that he has, in his current role as a Board member, recently assisted with a number of activities which would ordinarily have been exercised by the Executive Director. He cites as one example his discovery through a conversation with the District's part-time bookkeeper of the District's additional staffing needs. The Petitioner further represents that, upon determining that the situation could be addressed by the hiring of an additional part-time bookkeeper, the Petitioner helped select candidates, conduct interviews, and eventually fill that position. Additionally, the Petitioner states that he has fielded a number of questions from the Board Chair and staff engineer relative to RIDOT permitting procedures with which the Petitioner is familiar because of his current employment as a scientist with that agency. By way of a third example of how the Petitioner has assisted with an activity which ordinarily would have been exercised by the Executive Director, he states that he met with multiple subcontractors relative to the District's latest sewer expansion project ("Riverside Drive Project") which is being funded by a grant from the United States Department of Agriculture. He adds that, following several extensions, the final sewer connections related to the Riverside Drive Project are now scheduled for this November.

The Petitioner states that, at a recent meeting where Board members were discussing how to fill the position of Executive Director, he expressed an interest in the position. The Petitioner, who has been employed full-time by the State of Rhode Island as a scientist with the RIDOT for the last seven years, added that he would resign from the Board if he became Executive Director. The

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<sup>6</sup> The Board Chair adds that the District's operational budget currently exceeds \$1 million annually, and is growing with on-going expansion projects having a scope of several million dollars.

<sup>7</sup> The Board Chair explains that the District is in the final stages of its first major infrastructure buildout project to expand sewer access and use in the more densely populated areas of Tiverton.

Chair describes the Petitioner's interest in the Executive Director role as unexpected. He explains that he and the other members of the Board have since explored the Petitioner's interest and qualifications, resulting in a determination that the Petitioner is an excellent candidate for the position of Executive Director. In support of this determination, the Board Chair cites the Petitioner's background as a water quality scientist, his program and budget management experience, and his successful grant writing ability. The Chair also references the institutional knowledge amassed by the Petitioner during his tenure as a member of the Board and the respect that the Petitioner has garnered from the District staff in support of the Petitioner's candidacy. The Chair states that without an experienced executive managing the District's on-going operations and its expansion projects, the risk of business failure has become acute. It is in the context of all of the foregoing representations that the Petitioner seeks an opinion from the Ethics Commission regarding whether he is prohibited by the Code of Ethics from accepting the position of Executive Director of the District, provided that he resigns from the Board of Directors.<sup>8</sup>

The Code of Ethics prohibits an elected or appointed official from accepting any appointment or election that requires approval by the body of which he is or was a member, to any position which carries with it any financial benefit or remuneration, until the expiration of one year following the termination of that person's membership in or on that body. Commission Regulation 520-RICR-00-00-1.5.1 Employment from Own Board (36-14-5006) ("Regulation 1.5.1"). Under Regulation 1.5.1, the Ethics Commission may approve an exception to the prohibitions outlined therein, provided that the Ethics Commission is satisfied that denial of such appointment or election would create a substantial hardship for the body, board, or municipality.

The legislative aim of the "revolving door" provisions of the Code of Ethics is to ensure that public officials and employees "adhere to the highest standard of ethical conduct, \* \* \* avoid the appearance of impropriety and not use their position for private gain or advantage." See R.I. Const., art. III, sec. 7. "The integrity of our government officials is quintessential to our system of representation." In re Advisory Opinion From the Governor, 633 A.2d 664, 671 (R.I. 1993). In general, "the purpose of revolving-door provisions is to prevent 'government employees from unfairly profiting from or otherwise trading upon the contacts, associations and special knowledge that they acquired'" during their tenure as public servants. Id. (quoting Forti v. New York State Ethics Commission, 75 N.Y.2d 596, 605, 554 N.E.2d 876, 878, 555 N.Y.S.2d 235, 237 (1990)).

There is no definition of "substantial hardship" in the Code of Ethics. Therefore, the Ethics Commission will determine whether a substantial hardship exists on a case-by-case basis considering the totality of the circumstances presented. The Ethics Commission has previously

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<sup>8</sup> The Petitioner was last before the Ethics Commission on September 12, 2023, at which time he sought an advisory opinion on this issue. The Staff's recommendation at that time was that the Petitioner be prohibited from accepting the Executive Director position for a period of one year following his departure from the Board. This was based in large part on the fact that, following the extension and rejection of an offer of employment to one candidate, the advertisement which ultimately yielded 15 candidates and resulted in one interview had only been running for about two weeks. Following a split vote of 3-3 by the Ethics Commission that day, no advisory opinion issued. The decision was made to allow the Petitioner to return on October 17, 2023, without submitting a new request for an advisory opinion, so that his request could be reconsidered in anticipation of additional facts regarding the Board's continued efforts to search for a new Executive Director, and any other developments which might assist the Ethics Commission with its determination.

considered the following factors in determining whether a substantial hardship existed: whether, after publicly advertising the position, there was a complete absence of applicants or a lack of qualified candidates to fill the position; whether the position required very specific and unique skills and qualifications; whether the board member had been involved in the hiring process or in the drafting of the request for proposals; whether the position had been vacant for a substantial period of time; and whether the employment was a temporary measure or was intended to be permanent. The key issue, however, in determining whether a hardship to a government body exists is not whether the subject candidate is the most qualified candidate among all applicants but, rather, whether other qualified candidates are currently available or may become available through additional advertisement of the posting.

In Advisory Opinion 2014-18, the Ethics Commission opined that a member of the Rhode Island Fire Safety Code Board of Appeal and Review (“Fire Safety Code Board”) was not prohibited by the Code of Ethics from accepting an appointment to serve as the Executive Director of the Fire Safety Code Board, based upon a finding of substantial hardship to the Fire Safety Code Board, because: (1) the petitioner was the only qualified candidate<sup>9</sup>; (2) the Fire Safety Code Board had a three-person staff and the Executive Director position had been vacant for six months and the Deputy Director position would have been vacant by the end of the month; (3) the petitioner was uniquely familiar with the responsibilities of the Executive Director which would ensure the continued functioning of the Fire Safety Code Board given the timing of the vacancies; (4) the petitioner had no involvement in the hiring process, which was conducted through an open and public process; (5) the petitioner would resign from his position on the Fire Safety Code Board; (6) the Fire Safety Code Board was required to hire someone who met the qualifications set forth in the job specification for the classified position of Executive Director; and (7) the Fire Code was a particularly complex and voluminous set of statutes, rules and regulations that since 2003 had been expanded to apply to both new construction and pre-existing structures.

Also, in Advisory Opinion 2012-31, the Ethics Commission opined that a South Kingstown Historic District Commission (“HDC”) member could be hired by the Town of South Kingstown (“Town”) to create a guide-book for homeowners in the Town’s historic districts, based upon a finding of substantial hardship to the Town and the HDC, because: (1) the Town had publicly advertised the position through its normal public bid procedures, in addition to specifically contacting five local qualified historic preservation planners identified by the Rhode Island Historical Preservation and Heritage Commission; (2) the petitioner was the only applicant; (3) only a small number of firms and individuals in the region possessed the qualifications required to complete this project; (4) the contract was limited to a six-month duration; and (5) the project was funded by grant money, which was only available until August 2013, leaving no time to re-issue the request for proposals.

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<sup>9</sup> The job specifications for this classified position required the Executive Director to possess the following qualifications: a thorough knowledge of the pertinent provisions of the State Fire Safety Code and the ability to interpret those provisions; a thorough knowledge of the Administrative Procedures Act; a working knowledge of state and local legislative matters pertaining to codes and ordinances; the ability to represent the Fire Safety Code Board before various courts; the ability to moderate administrative hearings and to examine and cross-examine witnesses within appropriate legal boundaries; related capacities and abilities; and membership in the Rhode Island Bar.

There have also been occasions where the Ethics Commission determined that circumstances were such that a hardship was not justified. For example, in Advisory Opinion 2016-43, the Ethics Commission opined that a member of the North Smithfield Planning Board was prohibited from accepting, if offered, employment as the Town Planner while he sat on the North Smithfield Planning Board, and for one year thereafter. There, the petitioner presented no evidence that the Town of North Smithfield would suffer a substantial hardship if unable to hire the petitioner for the position of Town Planner. See also A.O. 2010-24 (opining that a member of the Coventry Housing Authority Board of Commissioners was prohibited from accepting employment from the Housing Authority as its Maintenance Director while serving on the Housing Authority Board of Commissioners and for one year thereafter); A.O. 2004-36 (opining that, absent some evidence of a dearth of other qualified individuals interested in the position, a state employee sitting on the Water Resources Board as the designee of the Director of Administration was prohibited from accepting employment with the Water Resources Board while he sat on the Board and for one year thereafter).

The facts as represented by the instant Petitioner, the Board Chair, and the Board's attorney clearly implicate the provisions of Regulation 1.5.1. At issue is whether prohibiting the Petitioner from accepting the position of Executive Director of the TWWD following his resignation from the Board would result in a substantial hardship to the District. Since the departure of the last Executive Director on July 20, 2023, and the subsequent rejection of an offer of employment in mid-August by the sole candidate produced after the Board's outreach to the Boot Camp program coordinator at the RIDEM, the Board's advertisement of the Executive Director position with the Providence Journal, on Indeed.com, and on the District's website has produced fifteen applicants, only one of whom met the minimum requirements for an interview. Following that interview, the three interviewers unanimously concluded that the candidate was unqualified for the role of Executive Director. Additionally, the Board's efforts to fill the Executive Director position with the assistance of the League of Cities and Towns, the NEWEA, the RICWA, and the NEIWPPC produced not a single applicant. The Executive Director position has now been vacant for three months which, in consideration of the looming November deadline for the completion of the Riverside Drive Project, is substantial. Also, following a three-month search, the Petitioner is the only qualified candidate for the Executive Director position and, by necessity, has become uniquely familiar with the responsibilities of the Executive Director, having stepped in on a number of occasions to exercise those responsibilities.

Accordingly, based on the facts as represented, the applicable provisions of the Code of Ethics, related authorities, and prior advisory opinions issued, it is the opinion of the Rhode Island Ethics Commission that the Petitioner may accept an offer of employment by the Board of Directors to become the Executive Director of the Tiverton Wastewater District, provided that he resigns from the Board of Directors upon accepting the position. This opinion is based upon a finding by the Ethics Commission that the facts as represented indicate that the denial of such employment would create a substantial hardship for the Tiverton Wastewater District.

**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:

520-RICR-00-00-1.5.1 Employment from Own Board (36-14-5006)

Constitutional Authority:

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

Other Related Authorities:

In re Advisory Opinion From the Governor, 633 A.2d 664 (R.I. 1993)

Related Advisory Opinions:

A.O. 2016-43

A.O. 2014-18

A.O. 2012-31

A.O. 2010-24

A.O. 2004-36

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