

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2023-45

Approved: November 14, 2023

Re: Gordon McNally

QUESTION PRESENTED:

The Petitioner, who is one of two candidates to become the next Resident Commissioner on the Scituate Housing Authority Board of Commissioners, a municipal appointed position, requests an advisory opinion regarding whether, if appointed, he may continue to clear entrances and sidewalks of snow and ice during snowstorms where he lives at Rockland Oaks, given that he is compensated for that activity by the Scituate Housing Authority, which owns Rockland Oaks.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, who is one of two candidates to become the Resident Commissioner on the Scituate Housing Authority Board of Commissioners, a municipal appointed position may, if appointed, continue to clear entrances and sidewalks of snow and ice during snowstorms where he lives at Rockland Oaks, notwithstanding that he is compensated for that activity by the Scituate Housing Authority, which owns Rockland Oaks, consistent with the provisions herein.

The Petitioner states that for the last eight years he has resided at Rockland Oaks, a 24-unit housing complex located in Scituate that is owned by the Scituate Housing Authority (“Housing Authority”) and subsidized by the U.S. Department of Housing and Urban Development (“HUD”). He represents that he has recently been asked by a number of other tenants at Rockland Oaks to run for the position of Resident Commissioner on the Housing Authority Board of Commissioners (“Board of Commissioners”), for which he would receive no financial compensation. The Petitioner explains that the next election for Resident Commissioner will be held in mid-November 2023, and the name of the person who gets the most votes by the Rockland Oaks tenants will then be submitted to the Scituate Town Council for appointment to a five-year term as Resident Commissioner. The Petitioner represents that the term of the current Resident Commissioner will expire on December 31, 2023, and the current Resident Commissioner and the Petitioner are the only two candidates running for appointment to the position. He adds that the term of the new Resident Commissioner will begin on January 1, 2024.

The Petitioner states that, for the past five years, he has removed snow and ice from the sidewalks and entrances to Rockland Oaks during snowstorms. He further states that there are four entrances to the building: one at both the front and back that are at street level, and one on either side of the building to which four stairs lead up. The Petitioner informs that, when there is a snowstorm, he

begins clearing the sidewalks and building entrances as early as 4:00 a.m., explaining that he does this as a safety precaution for the other residents, all of whom are either elderly, disabled, or both. The Petitioner states that he is paid \$150 per snowstorm for these services and that, over the last five years, there have been approximately three to four snowstorms per year between the months of January and April. The Executive Director for Rockland Oaks, who telephoned and spoke to Ethics Commission staff with the knowledge and permission of the Petitioner, clarifies that the stipend paid to the Petitioner falls under the category of maintenance for the Housing Authority and is capped at \$200 per month by the federal government.

The Executive Director requests that the Petitioner be allowed to continue providing snow cleanup services at Rockland Oaks during snowstorms for compensation, citing the importance of maintaining clear paths on sidewalks and at doorways for both the tenants and rescue vehicles. The Executive Director explains that the Town of Scituate arranges for the general plowing and cleanup of just the parking lot at Rockland Oaks. She further explains that, about a year ago, when she arranged for a young man who lived only a mile away from Rockland Oaks to clear the sidewalks and walkways during snowstorms, that person would either arrive well after the cleanup was required, or not at all. The Executive Director adds that similar attempts by the Chair of the Board of Commissioners to secure someone to perform these duties failed due to the early hour at which the work needs to be performed. The Executive Director highlights the importance of having someone on site perform this important service, especially because many residents will not wait until someone has arrived to clear the snow and ice before venturing out at a risk to their own safety. The Executive Director added that the Petitioner is one of four male residents at Rockland Oaks, and that the other three are elderly and/or otherwise physically disabled.

The Executive Director advises that she is starting the second year of a five-year employment contract with the Housing Authority and that, while her contract renewal and/or any disciplinary issues that may arise involving her would be within the purview of the Housing Authority, her salary is regulated by HUD. The Petitioner represents that, if he is appointed by the Town Council to become the Resident Commissioner following his election to that position by his fellow residents at Rockland Oaks, he would recuse from any and all matters in that capacity in which the Executive Director appears other than in an official capacity and/or in which the Executive Director has a personal financial interest. Based on these facts, the Petitioner seeks advice from the Ethics Commission regarding whether he may continue to clear entrances and sidewalks at Rockland Oaks as necessary during snowstorms and be compensated by the Housing Authority to do so.

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 determines whether a substantial hardship exists on a case-by-case basis by considering the totality of the circumstances presented. The Ethics Commission has previously 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.

Last month, in Advisory Opinion 2023-41, the Ethics Commission opined that a member of the Tiverton Wastewater District Board of Directors could 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. That opinion was based upon a finding by the Ethics Commission that the denial of such employment would have created a substantial hardship for the Tiverton Wastewater District. There, the Executive Director position had been vacant for three months which, in consideration of a looming deadline for the completion of an important local project, was substantial. Also, following a three-month search, the petitioner was the only qualified candidate for the Executive Director position and, by necessity, had become uniquely familiar with the responsibilities of the Executive Director, having stepped in on a number of occasions to exercise those responsibilities.

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 2010-24, the Ethics Commission opined 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.

The facts as represented by the instant Petitioner and the Housing Authority’s Executive Director implicate the provisions of Regulation 1.5.1. At issue is whether prohibiting the Petitioner from being allowed to continue to remove snow and ice from sidewalks and entrances at Rockland Oaks

during snowstorms, if appointed to the position of Resident Commissioner, would result in a substantial hardship to the Board of Commissioners.

Most of the usual factors considered when determining whether a hardship exists are not particularly applicable here. For example, one would not expect a publicly advertised request for a person to be consistently available to clear snow and ice from a sidewalk in Scituate for a nominal amount prior to dawn if and when there is a snowstorm. The Executive Director states that, about a year ago, when she arranged for a young man who lived only a mile away from Rockland Oaks to clear the sidewalks and walkways during snowstorms, that person would either arrive well after the cleanup was required, or not at all. The Executive Director adds that similar attempts by the Chair of the Board of Commissioners to secure someone to perform these duties failed due to the early hour at which the work needs to be performed. Based on the Executive Director's statement about the importance of having someone on site perform these duties, coupled with the limited availability of people to do so and the safety risks resulting from residents who are not inclined to let the delay of snow and ice removal deter their decision to try and leave the premises, that the Petitioner is a resident who is willing to continue to do this work appears to make him uniquely qualified to perform this service. Further, the service provided by the Petitioner is not so much even temporary as it is weather-dependent. Additionally, the stipend for performance of this service is set by the federal government and capped at \$200 per month. It is unlikely that the Petitioner, who has been performing this service for the Housing Authority during snowstorms for the last five years for a nominal fee set by the federal government because there has been no one else willing or able to do so, would be seeking an appointment as Resident Commissioner so that he could continue to do so.¹

Accordingly, based on the totality of circumstances presented, including the Petitioner's representation that he will recuse as Resident Commissioner from any and all matters involving the Housing Authority's Executive Director in which the Executive Director appears other than in an official capacity and/or in which the Executive Director has a personal financial interest, it is the opinion of the Rhode Island Ethics Commission that the Petitioner may, if appointed Resident Commissioner, continue to clear entrances and sidewalks where he lives at Rockland Oaks as necessary during snowstorms. All recusals shall be filed consistent with the provisions of R.I. Gen. Laws § 36-14-6. This opinion is based upon a finding by the Ethics Commission that the facts as represented indicate that the denial of the Petitioner's would create a substantial hardship for the Housing Authority.

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

¹ The Code of Ethics provides that municipal elected officials and school committee members, whether elected or appointed, are not required to leave employment with a municipal agency in the municipality in which the official serves if that employment was held at the time of the official's election or appointment to office. Commission Regulation 520-RICR-00-00-1.5.4 Municipal Official Revolving Door (36-14-5014) ("Regulation 1.5.4"). While the instant Petitioner would not be a municipal elected official if appointed to become the Resident Commissioner, the recognition of Regulation 1.5.4 is appropriate under the circumstances.

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:

§ 36-14-6

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

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

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. 2023-41

A.O. 2010-24

Keywords:

Employment from Own Board

Hardship Exception

Dear Sir or Madam,

I am writing to request an advisory opinion and a hardship waiver from the Ethics Commission.

I have lived at Rockland Oaks, a HUD subsidized Housing unit in Scituate for eight years. I am seeking a position on the Board of Directors as the Resident Commissioner, a non-paid volunteer position.

During the winter I do snow removal on the sidewalks. The Town of Scituate does the main plowing and clean up. I am compensated for cleaning the sidewalk when it snows. The Board does not determine my compensation, that is done by the Executive Director, Paulene Galbreath, under HUD regulations.

I request the Commission allow me to take the position as Resident Commissioner, if elected

I can be reached either by phone 401-378-5414, e-mail harly72@aol.com
or mail 104 Rockland Rd Apt 205 Scituate, RI 02857

Thank you for your consideration,


Gordon D McNally

Elections for Resident Commissioner will be held in mid-November.

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ETHICS COMMISSION
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