

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2024-31

Hearing Date: September 24, 2024

Re: Joshua Berry

QUESTION PRESENTED:

The Petitioner, the Chief of Municipal Planning and Programming at the Rhode Island Department of Housing, a state employee position, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from accepting other employment providing part-time town planner services on a contractual basis to the Town of New Shoreham.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the Chief of Municipal Planning and Programming at the Rhode Island Department of Housing, a state employee position, is not prohibited by the Code of Ethics from accepting other employment providing part-time town planner services on a contractual basis to the Town of New Shoreham, consistent with the conditions set forth herein.

The Petitioner was hired by the Rhode Island Department of Housing in May 2024 and currently serves as that agency's Chief of Municipal Planning and Programming. He identifies among his duties the following: (1) to plan, organize, and direct the work of the strategic planning unit and to integrate statewide strategic planning activities with budgetary master plans; (2) to serve as a senior liaison with municipal officials involved in planning, zoning and development roles to promote housing development and preservation; and (3) to provide assistance to municipalities in order to leverage opportunities for housing development enabled by statutory and regulatory changes (collectively, essential duties). He states that he reports directly to the Deputy Secretary of Housing and that his regular work hours are Monday through Friday, from 7:30 a.m. to 3:00 p.m.¹

The Petitioner represents that his responsibilities also include managing the following Housing Department programs: the Municipal Fellows Program; the Transit Oriented Development Technical Assistance Program; the Transit Oriented Development Pilot Program; the Municipal Capacity Building Training Program; and the Municipal Infrastructure Grant Program (collectively, the programs). He further represents that all but the Municipal Fellows Program are technical assistance and training programs that utilize consultant services which the Petitioner oversees. The Petitioner states that he also contributes to the following other Housing Department projects: the statewide housing planning process; the Vacant Schools Program; the Adaptive Reuse

¹ The Petitioner states that these hours are flexible and that he has the option to work remotely. He adds that he intends to eventually exercise that option one to two days per week.

Feasibility Study Initiative; and legislation and policy direction/recommendations. He adds that he represents the Housing Department on the Metro Connector Technical Working Group (collectively, other projects).

The Petitioner states that, prior to joining the Housing Department, he learned of an opportunity through his work in municipal planning which would involve assisting the New Shoreham town planner on a part-time, contractual basis. He outlines the scope of work involved as follows: providing professional planning expertise and support to New Shoreham's town council, planning board, and other municipal departments, as required; reviewing development proposals, zoning regulations, and land use applications for compliance with local ordinances and regulations; and reviewing and evaluating all site plans and subdivision applications to determine conformance and compliance with established regulations and their overall impact on the town's municipal services (collectively, contractual duties).

The Petitioner informs that he has been offered, and would like to accept, this part-time consultant position with the town. He represents that the position would require him to work 20-25 hours per month, or approximately four to five hours per week. The Petitioner further represents that all of the work would be completed remotely, outside of his normal work hours for the state, with the occasional requirement that he attend important New Shoreham planning board meetings in-person after 4:00 p.m. He adds that his secondary employment would be completed without the use of Housing Department resources.

The Petitioner represents that, due to its geographic location, the fact that it is an island, and its limited growth capacity, New Shoreham is somewhat of an outlier when compared to the other 38 Rhode Island municipalities impacted by the Petitioner's performance of his essential duties for the Housing Department. He further represents that, to the extent that New Shoreham's town planner were to communicate with the Housing Department relative to one of the essential duties with which the Petitioner is tasked in his official capacity as a state employee, the Petitioner would recuse from participation in the matter.

Similarly, the Petitioner explains that, practically speaking, only the Municipal Capacity Building Training Program with which he is involved for the Housing Department would even apply to New Shoreham, and to no greater extent than it does to any other Rhode Island municipality. Regarding the other projects for which the Petitioner is responsible as a Housing Department employee, the Petitioner states that those other projects either do not apply to New Shoreham or apply to New Shoreham to no greater extent than any other Rhode Island municipality.

As to what his contractual duties to the town would be, the Petitioner represents that his planning expertise would be put to use by his review of local development proposals, zoning regulations, and land use applications. He further represents that he would perform technical site plan reviews, draft reports and provide analysis, and present his findings of fact to the planning board in an effort to guide its members through projects and navigate the permitting process with developers on behalf of the town. The Petitioner emphasizes that his contractual duties to the town would not involve the Housing Department. He clarifies that, to the extent that he is at a town planning board meeting at which the topic of Housing Department policies or resources is raised, the matter would properly be addressed by the town planner and not the Petitioner. It is in the context of the

representations that the Petitioner seeks guidance from the Ethics Commission regarding whether he is prohibited by the Code of Ethics from accepting secondary employment providing part-time town planner services on a contractual basis to the Town of New Shoreham.

The Code of Ethics provides that a public employee shall not have any interest, financial or otherwise, direct or indirect, or engage in any business, employment, transaction or professional activity which is in substantial conflict with the proper discharge of his duties in the public interest. R.I. Gen. Laws § 36-14-5(a). A public employee has an interest which is in substantial conflict with the proper discharge of his duties in the public interest if he 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 his official activity. R.I. Gen. Laws § 36-14-7(a). Additionally, the Code of Ethics provides that a public employee shall not use his public office or confidential information received through his holding 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. § 36-14-5(d). The Code of Ethics also provides that a public employee shall not accept other employment which will either impair his independence of judgment as to his official duties or employment, or require or induce him to disclose confidential information acquired by him in the course of, and by reason of, his official duties or employment. § 36-14-5(b).

The Code of Ethics further prohibits a public official or employee from representing himself or any other person, or acting as an expert, before a state or municipal agency of which he is a member or by which he is employed. § 36-14-5(e)(1)-(3). A person “represents” himself before a state or municipal agency if he participates in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in his favor or in favor of another person. R.I. Gen. Laws § 36-14-2(12) & (13); 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016). These prohibitions extend for a period of one year after the public official or employee has officially severed his position with the subject state or municipal agency. § 36-14-5(e)(4). Finally, a public employee must recuse from participation in any matter in which his business associate or employer appears or presents evidence or arguments before his state or municipal agency. 520-RICR-00-00-1.2.1(A)(2) Additional Circumstances Warranting Recusal (36-14-5002).

The Ethics Commission has consistently opined that public officials and employees are not inherently prohibited from holding other employment that is secondary to their primary public positions, provided that the other employment would neither impair their independence of judgment nor create an interest in substantial conflict with their public duties, and subject to certain other restrictions. The Ethics Commission examines several factors when considering potential conflicts regarding other employment. These factors include, but are not limited to, the nexus between the official’s public duties and other employment; whether the employee completes such other work outside of his normal working hours and without the use of public resources; whether the employee is required to appear before his own agency as part of his other employment; whether such other work is to be conducted outside of the areas over which the person has decision-making jurisdiction; and whether the employee uses his public position to solicit business or customers. See General Commission Advisory No. 2009-4.

In Advisory Opinion 2024-13, the Ethics Commission opined that a social caseworker with the Rhode Island Department of Children, Youth, and Families (DCYF) was not prohibited by the Code of Ethics from accepting other employment as a clinician with The Inner You Counseling Center, a private entity, where she would perform therapeutic services to adolescents, provided that all of the work was performed on her own time and without the use of public resources or confidential information obtained as part of her state employment and, further provided, that the petitioner did not use her public employment to advertise or promote her private work or to recruit or obtain potential clients for Inner You. Additionally, the petitioner could not appear before the DCYF in her capacity as a clinician for Inner You including, but not limited to, reporting to the DCYF on an Inner You client who became open to DCYF services following the start of therapy with the petitioner. The petitioner was further prohibited from representing the interests of Inner You and/or acting as an expert witness on behalf of Inner You before the DCYF. This included submission to the DCYF of documentation from Inner You that contained the petitioner's name, or which was identifiable as the petitioner's work product. Finally, for the duration of the petitioner's fee for service arrangement with Inner You, she was required to recuse from all DCYF matters in which Inner You or its authorized representative appeared or presented evidence or arguments and from all matters that would directly financially impact Inner You. See also A.O. 2019-27 (opining that a motor vehicle operator examiner for the Division of Motor Vehicles (DMV) could accept employment as a course administrator for the Driver Retraining Program at the Community College of Rhode Island, given that the petitioner's proposed private undertaking would neither impair his independence of judgement nor create an interest in substantial conflict with his public duties at the DMV; however, the petitioner was required to perform all of the work for the Driver Retraining Program on his own time and without the use of public resources or confidential information obtained as part of his state employment at the DMV).

Here, the Petitioner states he would complete his consulting work for New Shoreham outside of his normal working hours for the state and without the use of Housing Department resources. He also states that his performance of this part-time contractual work for the town would not require him to represent the town before the Housing Department. He clarifies that any town matters before the Housing Department, such as those relating to grant management, long-range planning, and policy work, would be handled by New Shoreham's town planner and not the Petitioner. The Petitioner states that any services that he would provide for the town as an independent contractor would be conducted outside of areas over which he has decision-making jurisdiction in his role with the Housing Department. He offers that, to date, the town has not applied for any program that the Petitioner manages or with which he is involved within the context of his state employment. The Petitioner represents that has not, nor would he ever, use his public position with the state to solicit business as a planning contractor. Finally, the Petitioner states that his contractual employment with the town would not impair his independence of judgment with regard to his Housing Department duties, nor would it require or induce him to disclose confidential state government information.

Based on the facts as represented by the Petitioner, there is no evidence to suggest that his performance of part-time town planner services on a contractual basis to the Town of New Shoreham would impair his independence of judgment or create an interest that is in substantial conflict with his public duties at the Housing Department. Accordingly, the Petitioner is not prohibited by the Code of Ethics from accepting other employment providing part-time town

planner services on a contractual basis for the town, consistent with his representations set forth herein, and provided that all of the work is performed on his own time and without the use of Housing Department resources or confidential information obtained as part of his state employment and, further provided, that the Petitioner does not use his state employment to advertise or promote his private work or to recruit or obtain potential clients. Additionally, the Petitioner may not appear before the Housing Department in his capacity as an assistant to the town planner including, but not limited to, reporting to the Housing Department on matters involving the town; representing the interests of the town; or acting as an expert witness on behalf of the town. This would also include the submission to the Housing Department of documentation from the town that contains the Petitioner's name, or which is identifiable as the Petitioner's work product. Further, for the duration of his contractual arrangement with New Shoreham, the Petitioner must recuse from all Housing Department matters in which the town or its authorized representative appears or presents evidence or arguments and from all matters that will directly financially impact the town to any greater extent than every other state municipality. All recusals must be made consistent with the provisions of R.I. Gen. Laws § 36-14-6.

This advisory opinion cannot anticipate every possible situation in which a conflict of interest might arise for the Petitioner and, thus, provides only general guidance as to the application of the Code of Ethics based upon the facts represented herein. The Petitioner is encouraged to seek additional advice from the Ethics Commission in the future as more specific questions regarding potential conflicts of interest might arise.

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(12)

§ 36-14-2(13)

§ 36-14-5(a)

§ 36-14-5(b)

§ 36-14-5(d)

§ 36-14-5(e)

§ 36-14-6

§ 36-14-7(a)

520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016)

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

Related Advisory Opinions:

G.C.A. 2009-4

A.O. 2024-14

A.O. 2019-27

Keywords:

Secondary Employment