

RHODE ISLAND ETHICS COMMISSION

Advisory Opinion No. 2024-34

Approved: October 29, 2024

Re: Andrew D. Kettle, NRP, I/C

QUESTION PRESENTED:

The Petitioner requests an advisory opinion regarding whether the Code of Ethics precludes him from accepting the position of Emergency Management director for the Town of Charlestown, a municipal appointed position, given that the Petitioner is privately employed, and intends to remain privately employed, as chief of Charlestown Ambulance-Rescue Service, a nonprofit corporation that currently contracts with the town to provide emergency medical services.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Code of Ethics precludes the Petitioner from accepting the position of Emergency Management director for the Town of Charlestown, a municipal appointed position, given that the Petitioner is privately employed, and intends to remain privately employed, as chief of Charlestown Ambulance-Rescue Service, a nonprofit corporation that currently contracts with the town to provide emergency medical services.

The Petitioner, who is currently not subject to the Code of Ethics, represents that he is employed as chief of Charlestown Ambulance-Rescue Service (CARS), a private, non-profit corporation that is governed by a board of directors and which currently contracts with the Town of Charlestown to provide emergency medical and rescue services. He adds that, in this role, he oversees emergency medical service operations for CARS, and advises the town concerning matters in which CARS has expertise including, but not limited to, emergency preparedness, air-medical resources, and community safety. The Petitioner states that his work hours are Monday through Friday from 9:00 a.m. – 5:00 p.m., and that he is on call twenty-four hours per day, seven days per week. He informs that the current contract between CARS and the town runs for the period of July 1, 2024, through June 30, 2027. He adds that the contract bears his signature in his capacity as chief, and that of the president of the CARS board of directors. The Petitioner states that the contract was signed on behalf of the town by the town council president and the town administrator. The Petitioner represents that he participated in the negotiation of the contract between CARS and the town, but that the town's current Emergency Management (EM) director did not. The Petitioner further represents that he reports directly to the CARS board of directors, and that his subordinates include a deputy chief, two captains, three lieutenants, and 30 active providers which include emergency medical technicians and paramedics.

The Petitioner states that he has been approached by Charlestown's town administrator and offered the position of EM director for the town. He explains that the town charter mandates the establishment of a Department of Emergency Management and the appointment of an EM director by the town administrator. He adds that the charter also mandates the establishment of the Charlestown Emergency Management Agency (CEMA), comprised of the EM director and other personnel qualified in emergency service and approved by the EM director. The Petitioner states that, in the current absence of a deputy director of emergency management which is mandated by the town charter, there are three assistant directors who work part-time, as needed.

The Petitioner explains that the town administrator has proposed appointing the Petitioner to the position of EM director on a part-time, contractual basis for a period of two years. The Petitioner further explains that his work hours would be flexible and vary from week to week, but that he anticipates working an average of 8-12 hours each week during the evenings and/or on the weekends. The EM director's duties as identified by the town charter include the following: (1) preparing a comprehensive plan for the utilization of town facilities, equipment, and personnel during any emergency; (2) equipping and maintaining an emergency communications center; (3) assisting the council president in any declared emergency as recognized under the "Unified Command"¹ principle; (4) acting as liaison with the Rhode Island Emergency Management Agency; (5) acting as liaison between the local full-time and/or part-time public, private and volunteer public safety agencies; (6) submitting to the budget commission a request for funds to be used in the event of an emergency within the town, and then maintaining those funds in a separate reserve account to be used for the sole purpose of assisting to cover the costs to procure resources during the emergency situation; and (7) performing any other duties or functions as provided in federal law, state law, or as the town council may direct by ordinance.

The Petitioner offers the following information about how a number of his public duties as EM director would involve or impact CARS as his private employer. First, as to the duty of the EM director to prepare a comprehensive plan for the utilization of town facilities, equipment, and personnel during an emergency, the Petitioner states that CARS would be expected to respond to an emergency in town, but that he is unsure at this time of how the comprehensive plan would incorporate CARS. Regarding the EM director's duty to assist the town council president in any declared emergency, the Petitioner explains that while this could involve CARS, the responsibilities of CARS and the compensation it receives for meeting those responsibilities are outlined in the contract between the town and CARS. With regard to the EM director's responsibility to act as a liaison for the town with various public service agencies, the Petitioner affirms that CARS is one such agency. He adds that the EM director would be expected to host the chief of CARS at monthly meetings during the exercise of this particular responsibility. The Petitioner offers that, in the event he is able to accept the EM director position, he will either recuse from participating in these monthly meetings in his public capacity and the town administrator will take his place, or recuse from participating in his private capacity and a member of the CARS board of directors will take his place.

The Petitioner represents that his submission to the town budget commission of a request for funds to be used in the event of an emergency would be limited to use by CEMA only, explaining that

¹ The Petitioner states that, in its simplest form, the "Unified Command" principle is a team effort that allows multiple agencies to work together to manage an incident.

the funds used to compensate CARS under the contract are a line item in the town's annual budget as approved by the taxpayers. He further represents that CARS is paid by the town's finance director by way of direct deposit each month and that, as EM director, he would not be involved in compensating CARS under its contract with the town. The Petitioner states that in the event that CARS were to seek reimbursement from the Federal Emergency Management Agency following an emergency, the Petitioner would recuse from any involvement in his role as EM director in the processing of that reimbursement. He further states that, to the extent that extraordinary expenses are incurred by CARS in the delivery of services to the town, the CARS board of directors would negotiate with the town council and the town administrator with input from the Petitioner in his capacity as chief. The Petitioner offers that, in the event he is appointed EM director for the town, he would recuse from providing input in his role as chief. The Petitioner represents that his performance of any other duties or functions with which he might be tasked by the town council would not include the evaluation of CARS' performance under the contract. The Petitioner notes that the town is CARS' sole client, and that the CARS board of directors supports the Petitioner's appointment to the position of EM director.

Regarding the Petitioner's responsibility in his private capacity as chief of CARS to counsel and advise the town on matters such as emergency preparedness, air-medical resources, and community safety, the Petitioner states that he would recuse from doing so and that the president of the CARS board of directors would act in the Petitioner's place. The Petitioner informs that, in the event of an emergency in town, he would be expected to be present at the emergency site in his private capacity as chief of CARS and be present at the emergency operations center at the town's police station in his public capacity as EM director. It is under this set of facts that the Petitioner seeks guidance regarding whether the Code of Ethics precludes his acceptance of an appointment to the position of EM director for the Town of Charlestown.

Under the Code of Ethics, a "municipal appointed official" includes any officer or member of a municipal agency who is appointed to an office specified by the constitution or a statute of this state, or a charter or ordinance of any city or town, or who is appointed by or through the governing body or highest official of municipal government. R.I. Gen. Laws § 36-14-2(9); 520-RICR-00-00-1.1.3 (B) Additional Definitions (36-14-2002) ("Regulation 1.1.3") The Code of Ethics defines "municipal agency" to include any department, division, agency, commission, board, office, bureau, authority, corporation or subsidiary, quasi-public authority, or school, fire or water district within Rhode Island, other than a state agency, and whether comprised of officials and employees from a single or multiple municipalities, and any other agency that is in any branch of municipal government and which exercises governmental functions other than in a purely advisory nature. § 36-14-2(8)(ii); Regulation 1.1.3(E).

The Code of Ethics provides that a public official 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 official 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). The Code of Ethics also provides that a

public official 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 further provides that a public official 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).

Additionally, the Code of Ethics 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. § 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 official 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).

When considering potential conflicts regarding other employment, the Ethics Commission examines several factors. 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.

The Ethics Commission has also 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. For example, in Advisory Opinion A.O. 2004-34, the Ethics Commission opined that the coordinator of community planning and development for the Rhode Island Department of Elderly Affairs (RIDEA) could continue her private employment as the executive director of the New England Gerontology Academy (NEGA), given that her RIDEA duties and NEGA duties were separate and distinct. The Ethics Commission further opined that, unless some issue came before one of the forums in which the petitioner served that directly impacted the other, no conflicts of interest under the Code of Ethics appeared to be present. See also A.O. 2003-45 (opining that a recipient of a conditional offer of employment for the position of town engineer/public works director for the Town of Burrillville, should he accept such employment, could continue to operate his private practice of consultant engineering outside of the town).

The Ethics Commission has specifically permitted public officials and employees to engage in other employment that was outside of their official public jurisdiction. For example, in Advisory Opinion 2001-27, a captain in the Cranston Fire Department was not prohibited from accepting employment with an architect to review plans for submission to another municipality for fire code compliance, provided that he had no involvement with those plans subject to his official jurisdiction; he performed such work on his own time and without the use of public resources; and that he did not use his position with the fire department to recruit potential clients. The Ethics Commission reasoned that, because the petitioner would not be acting in matters in his private capacity where he exercised authority in his public capacity, he would not be in substantial conflict with the performance of his duties in the public interest, nor would his judgment be impaired as to his public duties. That petitioner was advised of his obligation to recuse himself from participating in the review of plans submitted by his private employer and that, when his recusal was required, he could not delegate to a subordinate within his department to handle his private employer's plan review. The Ethics Commission then acknowledged the lack of representation or indication that the petitioner's involvement with a private employer would have an adverse impact on his public employer owing to the need for frequent recusals, adding that if the petitioner's private employer ever began a large volume of work in Cranston, it might be necessary to revisit the situation.

Here, were the Petitioner to become the town's EM director, even on a part-time, contractual basis, he would be a municipal appointed official as that term is defined by the Code of Ethics and, therefore, be subject to its provisions. The Petitioner states that CARS would be expected to respond to an emergency in town, but that he is unsure at this time of how the comprehensive plan for which he would be responsible in his role as EM director would incorporate CARS. Thus, it is impossible to determine the extent to which any official activity on the part of the Petitioner would directly financially impact his private employer. Although the Petitioner states that he would not be tasked with evaluating CARS' performance under the contract, it is difficult to conceive that the EM director would be completely excluded by the town administrator and the town council when making such a determination.

The Petitioner further states that the monthly report with which the chief is tasked to distribute to the town council would not also be sent to the EM director; however, it is again difficult to conceive that the monthly report from CARS would not ultimately be forwarded by another town official to the EM director to assist him with the exercise of his public duties. That the EM director would be expected to host the chief of CARS at monthly meetings is particularly troubling, given that the Petitioner would be expected to run those meetings in his public capacity and attend them in his private capacity. The Petitioner offers to recuse from participating in these monthly meetings in his public capacity, in which case the town administrator would take his place. Alternatively, the Petitioner offers to recuse from participating in these monthly meetings in his private capacity, in which case a member of the CARS board of directors would take his place. Either option does little to convince the Ethics Commission that the Petitioner could perform both roles simultaneously without confusing everyone in attendance at these meetings, and without an impaired independence of judgment as to the performance of his public duties.

Unlike the petitioner in Advisory Opinion 2001-27 who sought to engage in private employment outside of the municipality by which he was employed, or the petitioner in Advisory Opinion 2004-34 whose public and private duties were separate and distinct, the instant Petitioner's situation is

such that, were he to accept appointment to the EM director position, the nexus between his public duties and those associated with his private employment as chief of CARS would overlap to such a degree as to impair his independence of judgment and create a substantial conflict of interest. Additionally, the Petitioner could not realistically complete his other employment for CARS outside of his working hours for the town, despite their flexibility, given that he is on call 24/7 for CARS. Further, in an emergency situation, the Petitioner would be expected to be present at the emergency operations center at the town's police station in his public capacity and at the site of the emergency in his private capacity. Even if the Petitioner were to recuse from performing his private role as chief during an emergency, someone else from CARS would be responding to an emergency for which the Petitioner in his public role as EM director would be responsible.

Here, the Petitioner would risk significant impairment to his independence of judgment as a public official by holding these dual roles. The Petitioner seeks to serve both publicly as the EM director for the town who oversees emergencies, and privately as the chief of the contractor that provides medical and rescue services to the town during those emergencies. The Petitioner's multiple proposed recusals from performing essential duties in both his public and private positions serve only to highlight the inherent conflicts of interest embedded in serving in both capacities. It seems impossible that the Petitioner could provide counsel to the administrator and town council in his role as chief of CARS relative to town emergencies and then report to the town administrator and town council in his public capacity as EM director relative to those emergencies without impairment to his independence of judgment as to his public duties. Accordingly, in consideration of the Petitioner's representations, the applicable provisions of the Code of Ethics, and consistent with prior advisory opinions issued, it is the opinion of the Ethics Commission that the Code of Ethics precludes the Petitioner's acceptance of the position of EM director for the Town of Charlestown.

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(8)

§ 36-14-2(9)

§ 36-14-2(12)

§ 36-14-2(13)

§ 36-14-5(a)

§ 36-14-5(b)

§ 36-14-5(d)

§ 36-14-5(e)

§ 36-14-7(a)

520-RICR-00-00-1.1.3 Additional Definitions (36-14-2002)

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:

GCA 2009-4

A.O. 2004-34

A.O. 2003-45

A.O. 2001-27

Keywords:

Secondary Employment