STATE OF RHODE ISLAND
RHODE ISLAND ETHICS COMMISSION
40 Fountain Street
Providence, RI 02903
(401) 222-3790 (Voice/TT)
Email: ethics.email@ethics.ri.gov
Website: https://ethics.ri.gov

NOTICE OF OPEN MEETING

DATE:	Tuesday, June 23, 2026
TIME:	9:00 a.m.
PLACE:	Rhode Island Ethics Commission Hearing Room – 8th Floor 40 Fountain Street Providence, RI 02903
LIVESTREAM:	The Open Session portions of this meeting will be livestreamed at: https://us02web.zoom.us/j/88438852069 **This is an in-person meeting held at the physical location listed above. Livestream access is being provided only as a convenience, but it is not an official meeting place and we do not guarantee virtual access to view or participate in the meeting. If the livestream virtual broadcast of the meeting is interrupted or cut off for any reason, the meeting will continue in person.**

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AGENDA

9th Meeting

1. Call to Order.

2. Motion to approve minutes of Open Session held on June 2, 2026.

3. Director's Report: Status report and updates regarding:

   a.) Complaints and investigations pending;
   b.) Advisory opinions pending;
   c.) Access to Public Records Act requests since last meeting;
   d.) Financial disclosure; and
   e.) General office administration;

4. Advisory Opinions:

   a.) Richard Houle, a member of the Coventry Town Council, and who in his private capacity works as an associate real estate broker, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from participating in town council discussions and decision-making relating to whether or not the town should dispose of its inventory of vacant municipal lots and buildings to private parties. [Staff Attorney Radiches]

   b.) Henry F. Lombardi Jr., an advance/courier with the Rhode Island Secretary of State's Office, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from seeking election to the Middletown Town Council. [Staff Attorney Radiches]

c.) Michael Peno Jr., a social caseworker employed by the Rhode Island Department of Children, Youth and Families, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from simultaneously engaging in advocacy work in his private capacity under the circumstances described herein and, if not so prohibited, what limitations, if any, the Code of Ethics would place upon him. [Staff Attorney Papa]

5. Hearing in the matter of In re: K. Joseph Shekarchi, Complaint No. 2026-1 on Respondent's Motion to Dismiss.

6. Motion to go into Executive Session, to wit:

   a.) Motion to approve minutes of Executive Session held on June 2, 2026, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

   b.) In re: K. Joseph Shekarchi, Complaint No. 2026-1, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

   c.) Annual Discussion and review re: Legal Counsel's contract pursuant to R.I. Gen. Laws § 42-46-5(a)(1).

   d.) Motion to return to Open Session.

7. Motion to seal minutes of Executive Session held on June 23, 2026.

8. Report on actions taken in Executive Session.

9. Annual Discussion and potential vote re: Legal Counsel's contract.

10. New Business proposed for future Commission agendas and general comments from the Commission.

11. Motion to adjourn.

ANYONE WISHING TO ATTEND THIS MEETING WHO MAY HAVE SPECIAL NEEDS FOR ACCESS OR SERVICES SUCH AS A SIGN LANGUAGE INTERPRETER, PLEASE CONTACT THE COMMISSION BY TELEPHONE AT 222-3790, 48 HOURS IN ADVANCE OF THE SCHEDULED MEETING. THE

COMMISSION ALSO MAY BE CONTACTED THROUGH RHODE ISLAND RELAY, A TELECOMMUNICATIONS RELAY SERVICE, AT 1-800-RI5-5555.

Posted on June 18, 2026

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 23, 2026

Re: Richard Houle

QUESTION PRESENTED:

The Petitioner, a member of the Coventry Town Council, and who in his private capacity works as an associate real estate broker, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from participating in town council discussions and decision-making relating to whether or not the town should dispose of its inventory of vacant municipal lots and buildings to private parties.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the Coventry Town Council, and who in his private capacity works as an associate real estate broker, is not prohibited by the Code of Ethics from participating in town council discussions and decision-making relating to whether or not the town should dispose of its inventory of vacant municipal lots and buildings to private parties.

The Petitioner is a member of the Coventry Town Council, having been elected to that position during a special election in August 2025 to fill a vacancy. He states that he plans to seek re-election in November 2026. The Petitioner represents that, in his private capacity, he has held a real estate license for seven years, is now an associate broker, and has been working as a real estate agent for RE/MAX Revolution for the past two years. He further represents that he is one of approximately 300 agents currently working for RE/MAX Revolution as contractors. The Petitioner informs that, in his professional capacity, he occasionally lists and sells residential properties located in Coventry. He explains that his private work has never required him to appear before the Coventry Town Council or before any of the town's boards, commissions, or agencies over which the town council has appointing authority.

The Petitioner states that the Town of Coventry has an inventory of approximately 174 vacant parcels of land and buildings which, if sold or otherwise transferred, would place them back on the town's tax rolls and result in revenue for the town. The Petitioner further states that he would like to participate in town council discussions and decision-making relating to whether or not the town should undertake to sell or otherwise transfer these

vacant properties. The Petitioner represents that he would not personally act as a real estate agent or broker for the town; nor would he list any of the subject municipal properties in his private capacity or represent private buyers attempting to purchase them. The Petitioner further represents that, should the town council decide to undertake the transfer of the currently vacant properties in the town, whether through sale, auction, or otherwise, he would not take part in town council discussions and/or decision-making beyond the decision to transfer the vacant properties, given the likelihood that his business associates, namely RE/MAX and his fellow agents, would seek to participate. The Petitioner emphasizes that his question to the Ethics Commission is limited to whether the Code of Ethics prohibits him from participating in town council discussions and decision-making about *whether* to transfer or sell the vacant lots and/or buildings, not the manner in which any decision to dispose of the vacant lots and buildings would be accomplished, or any subsequent actions relating to the transfer or sale of the vacant properties.

A person subject to the Code of Ethics may not participate in any matter in which he has an interest, financial or otherwise, 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 substantial conflict of interest occurs if the public official 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). A business associate is defined as "a person joined together with another person to achieve a common financial objective." R.I. Gen. Laws § 36-14-2(3). A person is defined as "an individual or a business entity." § 36-14-2(7). A public official has reason to believe or expect that a conflict of interest exists when it is "reasonably foreseeable," meaning that the probability is greater than "conceivably," but the conflict of interest is not necessarily certain to occur. 520-RICR-00-00-1.1.5 Reasonable Foreseeability (36-14-7001). Additionally, a public official must recuse himself from participation in a matter when his business associate, or a person authorized by his business associate to act on the business associate's behalf, appears or presents evidence or arguments before the public official's municipal agency, except when the business associate or their authorized representative is before the municipal agency during a period where public comment is allowed, to offer comment on a matter of general public interest, and further provided that the business associate or their authorized representative is not otherwise a party or participant, and has no personal financial interest, in the matter under discussion. 520-RICR-00-00-1.2.1(A)(2)&(3) and (B)(2). Additional Circumstances Warranting Recusal (36-14-5002). Finally, a public official may not use his office for pecuniary gain, other than as provided by law, 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).

In order to determine whether the above provisions of the Code of Ethics are implicated, the Ethics Commission must first ascertain whether the Petitioner or his business associates, specifically, RE/MAX Revolution or one of its agents, would be directly

financially impacted by the official action that is under consideration, which in this case would be the Petitioner's participation in town council discussions and decision-making relating to whether or not to dispose of the town's inventory of vacant municipal lots and buildings to private parties. If a direct financial impact, be it positive or negative, is not reasonably foreseeable as a result of the Petitioner's contemplated official action, then the Petitioner will not be required by these provisions of the Code of Ethics to recuse from participation in the discussions and decision-making relative to that particular issue. For example, in Advisory Opinion 2021-25, a legislator serving as a member of the Rhode Island Senate was allowed to participate in senate discussions and voting relative to proposed legislation that would allow Twin River Casino Hotel to extend its debt leverage ratio limits during the extension of its lottery contract with the State of Rhode Island because, notwithstanding that the petitioner was privately employed by a commercial lending institution that was then servicing Twin River Casino Hotel, the financial impact of the legislation upon the petitioner's employer was both hypothetical and indirect. See also A.O. 2011-1 (opining that a member of the Block Island Housing Board could participate in general housing board discussions and voting concerning construction projects that neither he nor any family member, business associate, or employee would be financially impacted thereby); A.O. 2001-20 (opining that a legislator serving in the House of Representative who was employed as a police officer for the City of Cranston was not prohibited from sponsoring and/or advocating for the passage of legislation that would allow the City of Cranston to finance the unfunded liability in its police and fire pension systems because although the petitioner, upon retirement, would be a pensioner receiving payments from the system, the proposed legislation would not affect whether and to what extent he would receive future pension benefits from the system, and any benefit that would accrue to him would accrue to him as a result of the proposed legislation was at best speculative and remote).

Here, the decision about whether to offer vacant land and buildings in the town through auction and/or sale would not result in any *direct* financial impact on the Petitioner or his business associates, specifically, RE/MAX Revolution and its agents. Accordingly, based upon the facts as represented, 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 Petitioner is not prohibited by the Code of Ethics from participating in town council discussions and decision-making relating to whether or not the town should dispose of the town's inventory of vacant municipal lots and buildings to private parties. However, in the event that the town council decides to dispose of the town's inventory of vacant municipal lots and buildings to private parties, the Petitioner is advised to either recuse from participation in subsequent town council matters relating to the issue or to seek additional guidance from the Ethics Commission. Recusals must be made consistent with the provisions of R.I. Gen. Laws § 36-14-6.

This Draft Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. An advisory opinion rendered by the

Commission, until amended or revoked by a majority vote of the Commission, is binding on the Commission in any subsequent proceedings concerning the person who requested the opinion and who acted in reliance on it in good faith, unless material facts were omitted or misstated by the person in the request for the opinion. 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, agency policy, ordinance, constitutional provision, charter provision, or canon of judicial or professional ethics may have on this situation.

Code Citations:
§ 36-14-2(3)
§ 36-14-2(7)
§ 36-14-5(a)
§ 36-14-5(d)
§ 36-14-6
§ 36-14-7(a)
520-RICR-00-00-1.1.5 Reasonable Foreseeability (36-14-7001)
520-RICR-00-00-1.2.1 Additional Circumstances Warranting Recusal (36-14-5002)

Related Advisory Opinions:
A.O. 2021-25
A.O. 2011-1
A.O. 2001-20

Keywords:
Business Associate
Conflict of Interest

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 23, 2026

Re: Henry F. Lombardi Jr.

QUESTION PRESENTED:

The Petitioner, an advance/courier with the Rhode Island Secretary of State's Office, a state employee position, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from seeking election to the Middletown Town Council.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, an advance/ courier with the Rhode Island Secretary of State's Office, a state employee position, is not prohibited by the Code of Ethics from seeking election to the Middletown Town Council.

The Petitioner is currently employed by the Rhode Island Secretary of State's Office as an advance/courier, a position he has held for more than three years. He states that his advance duties include visiting venues at which the Secretary of State will be attending events prior to the time of each event for purposes of assessing the security of the venue, including parking availability, and finalizing event details with the event coordinator in advance of the event. The Petitioner further states that he will often accompany the Secretary of State to events. The Petitioner informs that his courier duties include picking up and transporting documents to and from the Rhode Island State House and various municipal offices throughout the state. The Petitioner further informs that his public duties also include assisting with the operation of Rhode Island's Address Confidentiality Program which provides vital services to victims of domestic violence.

The Petitioner represents that he works out of the Secretary of State's West River Street office, and that the state's Board of Elections offices are also located there. The Petitioner further represents that the administrative duties conducted by Board of Elections employees include, but are not limited to, the placement of candidate names on ballots, the timely distribution of ballots to polling places, and the oversight of voting and ballots. The Petitioner emphasizes that his duties as an advance/courier for the Secretary of State's Office are separate and distinct from any associated with those of the Board of Elections members or employees, with no overlap between the two.

The Petitioner is currently a member of the Middletown Zoning Board, having been appointed to that position by the Middletown Town Council in 2025. His current term expires in 2030. The Petitioner states that he intends to seek election to the Middletown Town Council in November 2026 and, if elected, will resign from the Zoning Board.[1] The Petitioner represents that it has been suggested to him that, due to his current employment with the Secretary of State's Office, he is prohibited by the Code of Ethics from seeking municipal elected office because of the collaboration among the Secretary of State's Office, the Board of Elections, and local cities and towns during the administration of elections. The Petitioner reiterates that he does work in the same office building where the Board of Election offices are located, but that his public duties are in no way connected to the administration of elections. It is under this set of facts that the Petitioner seeks an advisory opinion regarding whether he is prohibited by the Code of Ethics from seeking election to the Middletown Town Council.

Pursuant to the Code of Ethics, 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 or employment 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 or employment 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 prohibits a public employee from accepting other employment that would impair his independence of judgment as to his official duties or require or induce him to disclose confidential information acquired by him in the course of his official duties. § 36-14-5(b). Additionally, the Code of Ethics provides that a public employee may not use his office, or confidential information received through holding his 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). Finally, the Code of Ethics prohibits a public official from representing himself or any other person, or acting as an expert witness, before a state agency by which he is employed. § 36-14-5(e)(1)-(3). A person "represents" himself or another person before a state 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-

[1] The Petitioner informs that he previously served as an elected member of the Middletown Town Council between November 2014 and late 2020. He adds that, sometime after 2020, he served as a member of the Middletown Zoning Board but left that position in 2022 after accepting his current position with the Secretary of State's Office in order to acclimate to his new employment duties. The Petitioner states that in 2025 he accepted reappointment to the zoning board.

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 has officially severed his position with the subject state agency. § 36-14-5(e)(4).

The Code of Ethics does not create a blanket prohibition against public officials or employees seeking elective office, whether at the state or municipal level. Rather, a matter-by-matter evaluation is required to determine whether substantial conflicts of interest exist with respect to the exercise by a public official or employee of his or her duties in the public interest. For example, in Advisory Opinion 2026-1, the petitioner, a civilian clerk with the Bristol Police Department, was not prohibited by the Code of Ethics from seeking election to and, if elected, serving as a member of the Warren Town Council while maintaining his municipal employment with the police department. There, the petitioner's duties as a civilian clerk for the Bristol Police Department and his potential duties as a member of the Warren Town Council, if elected, would have been separate and distinct, with no overlap. For that reason, and citing the consistency of previously issued advisory opinions included in the draft, the Ethics Commission determined that the petitioner's desired simultaneous public employment in Bristol and public service in Warren did not, in and of itself, present an inherent conflict of interest under the Code of Ethics. See also A.O. 2008-51 (opining that a Burrillville police officer, who was also a candidate for a position on the Pascoag Board of Fire Commissioners, was not prohibited by the Code of Ethics from simultaneously serving in both positions, if elected); A.O. 2008-33 (opining that a custodian employed by the North Providence School Department was not prohibited by the Code of Ethics from seeking election to and, if elected, simultaneously serving as a member of the North Providence City Council); A.O. 2003-48 (opining that a part-time instructional aide at two public schools in Little Compton, who was also a substitute school bus driver in that town, could seek election to and, if elected, serve as a member of the Little Compton Beach Commission while simultaneously holding her municipal employment in the same town).

Here, there is nothing to indicate that a conflict of interest exists between the Petitioner's current state employment as an advance/courier with the Secretary of State's Office and his desired candidacy for election to the Middletown Town Council. The Petitioner would not be taking official action as a public employee of the Secretary of State's Office that would directly financially impact his candidacy for, or potential election to, the town council; nor would the Petitioner's candidacy for, and potential election to, the town council impair his independence of judgment with regard to his official duties as an advance/courier with the Secretary of State's Office or require or induce him to disclose confidential information obtained in the course of those official duties. Further, the Petitioner's candidacy for membership on the town council will be decided by the residents of Middletown. Any related administrative duties performed by the Secretary of State or the Board of Elections associated with that election would not amount to the Petitioner's representation before his own agency. Accordingly, it is the opinion of the Ethics Commission that the Petitioner is not prohibited from seeking elected municipal office to

the Middletown Town Council. The Petitioner is reminded that the Code of Ethics prohibits him from using public time or resources to support his candidacy. All campaign-related activities must be conducted on his own time and without the use of any public resources. The Petitioner is encouraged to seek further guidance from the Ethics Commission if facts not anticipated by this advisory opinion arise that could present a conflict of interest.

This Draft Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. An advisory opinion rendered by the Commission, until amended or revoked by a majority vote of the Commission, is binding on the Commission in any subsequent proceedings concerning the person who requested the opinion and who acted in reliance on it in good faith, unless material facts were omitted or misstated by the person in the request for the opinion. 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, agency policy, ordinance, constitutional provision, charter provision, or canon of judicial or 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)
§ 36-14-7(a)
520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5006)

Related Advisory Opinions:
A.O. 2026-1
A.O. 2008-51
A.O. 2008-33
A.O. 2003-48

Keywords:
Candidate
Dual Public Roles

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 23, 2026

Re: Michael Peno Jr.

QUESTION PRESENTED:

The Petitioner, a social caseworker employed by the Rhode Island Department of Children, Youth and Families, a state employee position, requests an advisory opinion regarding whether he is prohibited by the Code of Ethics from simultaneously engaging in advocacy work in his private capacity under the circumstances described herein and, if not so prohibited, what limitations, if any, the Code of Ethics would place upon him.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a social caseworker employed by the Rhode Island Department of Children, Youth and Families, a state employee position, is not prohibited by the Code of Ethics from simultaneously engaging in advocacy work in his private capacity under the circumstances described herein and provided that he follows the guidance provided in this advisory opinion.

The Petitioner is employed as a social caseworker with the Family Services Unit at the Rhode Island Department of Children, Youth and Families (DCYF). He represents that he has been employed with the DCYF for the past four years and that he works with children and families in the child welfare system. He cites among his duties the following: assessing safety, coordinating services, supporting permanency planning, and providing case status updates to the Family Court and the Office of the Court Appointed Special Advocate.

The Petitioner states that in his private capacity, he has been developing a community-based advocacy initiative focused on family preservation and, among other things, the impact of parent-child no-contact orders on children and families involved in the child welfare system. The Petitioner explains that the purpose of the initiative is to better understand systemic barriers to the success and preservation of families in the welfare system through aggregated data, community engagement, and education, with a goal of initiating broader policy discussions and legislative action. By way of an example, the Petitioner notes that there has been an uptick in parent-child no-contact orders (NCOs) issued outside of Family Court which may hinder the DCYF's provision of services that may be in the best interest of the child or the family should the child or the parent become

open to the DCYF. The Petitioner believes that parent-child NCOs should be issued only in circumstances involving sexual assault, severe physical abuse, and drug exposure, which he notes are ordinarily the bases for the Family Court's issuance of parent-child NCOs. He explains that, in contrast, parent-child NCOs are sometimes issued by other courts for various other reasons, such as when children are left unsupervised at home while a parent is working.

In his private capacity, the Petitioner would like to identify barriers to family preservation and advocate for policy and legislative changes to remove those barriers. He states that in order to do so, he plans to request, utilizing the Access to Public Records Act (APRA), and analyze publicly available data, including such kept by the DCYF, related to system trends. He further states that he would like to use that data to conduct outreach to community members and families in order to better understand lived experiences. The Petitioner adds that he would like to engage in policy discussions and educational efforts related to child welfare and the judicial process with, among others, members of the judiciary, various police departments, the Office of Attorney General, and the General Assembly. The Petitioner explains that he would like to collaborate with community partners and stakeholders, including legal and advocacy organizations, on initiatives that support families. He also plans to collaborate with a fellow community advocate/peer recovery coach who has had personal experience with the DCYF.

The Petitioner represents that some of the families that he may work with in his private capacity could be open or become open to the DCYF, but he notes that he will recuse himself from working with any such families in his public capacity, and that their cases will be assigned to a fellow social caseworker. The Petitioner further represents that in order to maintain clear boundaries between his role as a DCYF employee and his independent advocacy efforts, he will not use any confidential information received through his public position, access restricted data, or represent his views as those of the DCYF. The Petitioner states that he will receive no financial benefit or other remuneration for his private advocacy work. Given this set of facts, the Petitioner seeks guidance regarding whether the Code of Ethics prohibits him from conducting the advocacy work outlined above in his private capacity, while simultaneously engaging in his public employment with the DCYF and, if not so prohibited, what limitations, if any, the Code of Ethics would place upon him.

The Code of Ethics states 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 or employment 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 or employment 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). Further, §§ 36-14-5(c) and 36-14-5(d) prohibit the use and/or disclosure of confidential information acquired by a public employee during the course of or by reason of his official employment, particularly for the purpose of obtaining financial gain. Section 36-14-5(d) also prohibits the use of public office to obtain financial gain. Finally, the Code of Ethics provides that a public employee shall not accept other employment that would impair his independence of judgment as to his official duties or require or induce him to disclose confidential information acquired by him in the course of his official duties. § 36-14-5(b).

The Ethics Commission recently addressed an inquiry by a somewhat similarly situated petitioner in Advisory Opinion 2025-54. There, the Ethics Commission opined that an environmental scientist with the Rhode Island Department of Health, Center for Drinking Water Quality was not prohibited by the Code of Ethics from serving in her private capacity as a co-author for a paper intended to be published in a scientific journal which incorporated the use of data that the petitioner had compiled as part of her public duties and later requested and received in her private capacity through the state's Access to Public Records Act. Although that petitioner intended to make use of certain data that she had compiled as part of her professional duties, the data was a public record that she requested and obtained in her private capacity by submitting an APRA request. Further, that petitioner did not receive any monetary or other compensation for her contribution to the paper; therefore, the Ethics Commission opined that her proposed activity neither constituted secondary employment nor use of her public office or confidential information for financial gain. Similarly, in Advisory Opinion 2019-45, the Ethics Commission opined that a trooper with the Rhode Island State Police was not prohibited by the Code of Ethics from participating, on his own time and without compensation, as a consultant for a Netflix movie based on events in his life, including the rescue of a missing teenage boy by him and his K-9 partner, notwithstanding that the petitioner's wife was to be paid for her recollection of certain events depicted in the movie. The Ethics Commission reasoned that by agreeing to act as a consultant to maintain the accuracy of the events leading to the rescue, on his own time and without compensation, the petitioner would not be using his public position to obtain a direct monetary gain for his wife. Finally, that petitioner represented that the story of the rescue was made public on the internet and by other media sources and that he would not release any confidential information acquired by him in the course of his official duties.

Here, the instant Petitioner also seeks an advisory opinion relating to activity that would not be taken in his official capacity as a state employee. The Petitioner informs that although he would like to make use of certain data maintained by the DCYF, that data would be a public record that he would request under the Access to Public Records Act. He notes that he would not use any confidential information that he acquired through his public office and that, while advocating in his private capacity, he would clearly indicate that the views he expresses are his own and not those of the DCYF. The Petitioner emphasizes that he would not receive any monetary or other compensation for his private

advocacy efforts; thus, his proposed activity neither constitutes secondary employment nor use of his public office or confidential information received through his public office for financial gain under the Code of Ethics. Finally, the Petitioner states he would recuse himself from working in his public capacity with families or individuals that he interacts with while conducting his private advocacy work. Accordingly, given the Petitioner's above representations, and the review of the relevant provisions of the Code of Ethics and prior advisory opinions issued, it is the opinion of the Ethics Commission that the Petitioner is not prohibited by the Code of Ethics from simultaneously conducting his desired advocacy work in his private capacity, provided that these efforts are conducted on his own time, and without use of public resources or confidential information received though his public employment.

This Draft Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. An advisory opinion rendered by the Commission, until amended or revoked by a majority vote of the Commission, is binding on the Commission in any subsequent proceedings concerning the person who requested the opinion and who acted in reliance on it in good faith, unless material facts were omitted or misstated by the person in the request for the opinion. 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, agency policy, ordinance, constitutional provision, charter provision, or canon of judicial or professional ethics may have on this situation.

Code Citations:
§ 36-14-5(a)
§ 36-14-5(b)
§ 36-14-5(c)
§ 36-14-5(d)
§ 36-14-7(a)

Related Advisory Opinions:
A.O. 2025-54
A.O. 2019-45

Keywords:
Compensation
Conflict of Interest
Private Employment
Secondary Employment

HAND DELIVERED

STATE OF RHODE ISLAND
ETHICS COMMISSION
No. 2026-001

In re: K. Joseph Shekarchi

MOTION OF K. JOSEPH SHEKARCHI TO DISMISS FOR FAILURE TO ALLEGE VIOLATION OF CODE OF ETHICS

The complaint in this matter alleges that K. Joseph Shekarchi, a member of the Rhode Island House of Representatives, has applied to the Rhode Island Judicial Nominating Commission for the position of Associate Justice of the Rhode Island Supreme Court. The complainant asserts that this is prohibited by the Code of Ethics unless the applicant has been out of the General Assembly for one year.

The allegations in the complaint do not constitute a violation of the Code.

It is understood that the Commission's role at this stage of the process is similar to the Superior Court's consideration of a motion under R.I. Super. R. Civ. P. 12(b)(6). Focusing solely on the four corners of the complaint, the issue is whether it alleges facts that, if true, would constitute a violation of the Code. Applying that standard here, the complaint should be dismissed.

The so-called "revolving door" provision does not apply when the position sought is a constitutional office.

Although sec. 36-14-5(n) does contain a general prohibition on state elected officials seeking or accepting other state employment until one year after leaving office, there is a specific exemption if the office sought is "any other constitutional office." *Id.*, sec. 36-14-5-(n)(3):

> "Nothing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office."

The initial viability of the complaint, then, turns on the question whether the position sought – here, Justice of the Supreme Court – is a "constitutional office."

And the answer to that is clear.

The Supreme Court was established in Art. X of the Rhode Island Constitution, which provides:

> The judicial power of this state shall be vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish.

R.I. Const., Art. X, sec. 1.

In the venerable landmark decision in *Taylor v. Place*, 4 R.I. 324 (1956), the Rhode Island Supreme Court for the first time addressed the meaning of Article X. The case involved the scope of the judicial power and whether the General Assembly had the authority to exercise some of it under the new Constitution, which had been adopted in 1843 In *Taylor* the Court examined its own

constitutional pedigree, concluding that the Supreme Court established by our constitution possessed the whole judicial power of the state.

> Having thus provided a *supreme* court, as the ultimate state tribunal, stable enough, as against the legislative department, and with jurisdiction enough to enable it to fulfil the proper offices of the judicial department of the state government, the constitution proceeds to vest, by language which had received from the highest judicial authority in the country a settled interpretation to that effect, the *whole judicial power* of the state in *that* court, and in such inferior courts as the general assembly might set up. This important clause is, as we have seen, " *The judicial power of this state* shall be vested in one supreme court, and in such inferior courts as the general assembly, may, from time to time, ordain and establish."

Id. at 353 (emphasis in original).

Thus, the Supreme Court was established as a distinct constitutional body, vested with the whole judicial power of the state, and for that reason the office of Justice of the Supreme Court is a constitutional office.

One helpful analysis of this issue comes from former Representative Jeffrey Teitz who was Chair of the House Judiciary Committee at the time of the enactment of the Code of Ethics. Rep. Teitz's 2020 essay in the *Providence*

Journal (copy appended at App. 1) sets out the General Assembly's contemporaneous understanding that Justice of the Supreme Court is a constitutional office, and the drafters meant to include that office in those exempt from the requirement of a one-year delay. As Rep. Teitz noted, the General Assembly at that time recognized that it could not enact a Code of Ethics that impeded upon a constitutionally specified method of selection for Supreme Court Justices, a point addressed below.

Neither a Code of Ethics nor any Regulation can impede a "constitutionally authorize procedure" for the selection of Supreme Court Justices.

The Rhode Island Constitution provides a specific method for selection of Supreme Court Justices:

> The governor shall fill any vacancy of any justice of the Rhode Island Supreme Court by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan judicial nominating commission, and by and with the advice and consent of the senate, and by and with the separate advice and consent of the house of representatives, shall appoint said person as a Justice of the Rhode Island Supreme Court.

R.I. Const., Art. X, sec. 4.

In *Inman v. Whitehouse*, R.I. Superior Court (2001) (copy appended at App. 2) a Superior Court case decided by Justice Silverstein, the court recognized that ethics statutes and regulations are not superior to the Rhode Island Constitution's specific provisions for the filling of positions in state government. It is important to note that the Commission participated in that case and took the position that the revolving door provision would be constitutional "when limiting a legislator from accepting general state employment or consulting work, it did not apply to restrict [a legislator] from accepting a position that was offered to him through a constitutionally authorized procedure." Advisory Opinion No. 2010-54 (Costantino) (describing position Commission advocated in *Inman* case) (copy appended at App. 7). In *Costantino*, issued in 2010, the Commission referred back to the position it had taken in 2002 in *Inman*, concluding that "[e]ight years later, our position has not changed."

Here, as in *Inman*, it is clear that the application for Associate Justice of the Supreme Court is not for "general state employment." Rather, the position of Associate Justice of the Supreme Court is filled via a "constitutionally authorized procedure," and a very specific one at that. Article X, sec. 4 requires an applicant to obtain recommendation by the Judicial Nominating Commission, nomination by the Governor, advice and consent of the Senate, and advice and consent of the House.

This Commission's position in *Inman* and *Costantino*, together with the refusal to adopt the staff recommendation regarding the Supreme Court application of then-Senator – now Justice – Erin Lynch Prata, serve to demonstrate that the revolving door provisions do not apply to the constitutional office of Associate Justice of the Supreme Court. (June 2, 2020 Ethics Commissison Minutes, appended at App. 13) Particularly in the case of Justice Lynch Prata, the actions of the Judicial Nominating Commission in recommending her appointment, the decision of Governor Raimondo to appoint, and overwhelming votes of advice and consent in the House and the Senate, together with her years of honorable service on the Supreme Court, all combine to ratify the conclusion that the Code of Ethics and any regulations must yield to the constitutionally authorized procedure for selection of Supreme Court Justices.

The instant complaint, on its four corners, does not allege a violation of the Code of Ethics. The Commission should therefore dismiss it at this stage.

RESPECTFULLY SUBMITTED,
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CERTIFICATION

I hereby certify that I served a copy of this document on counsel as follows:

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STATE OF RHODE ISLAND

ETHICS COMMISSION

No. 2026-001

In re: K. Joseph Shekarchi

ITEMS APPENDED TO MOTION TO DISMISS

MY TURN

'Revolving door' provisions don't apply to naming of justice

By Jeffrey J. Teitz

I have followed with interest the current debate about whether Rhode Island's "revolving door" provisions, which prohibit state legislators from being appointed to most other state positions while in office or for one year thereafter, apply to the appointment of a Supreme Court justice. The reason they would not apply is because there is a widely recognized legal principle that no limitation can be placed on a constitutional office by either legislative act or administrative rule.

I served in the General Assembly from 1973 through 1996, and was chairman of the House Judiciary Committee for 14 years, including the 1992 session when the "revolving door" legislation was enacted. At that time, legislators were aware that we did not have the same authority to place limitations on eligibility for constitutional offices, such as the Supreme Court, that we had to set eligibility criteria for positions created by statute, such as the trial courts. For example, the General Assembly would have no authority to enact legislation requiring a minimum age or a minimum period of legal practice for eligibility to serve as a justice of the Supreme Court because it would be imposing limitations on a constitutional office. In contrast, the legislature could impose such restrictions on eligibility to serve as a judge on one of the state trial courts created by statute.

This issue was discussed during the lengthy legislative debates that took place when the "revolving door" bill was being enacted, and the concern about constitutional offices was reflected in its wording. Section 36-14-5(n)(3) of the Rhode Island General Laws states: "Nothing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office."

The Supreme Court is established by the Rhode Island Constitution, Article 10, Section 1, and the authority to appoint justices to the Supreme Court is set forth in the Constitution, Article 10, Section 4. Originally, the Constitution provided for the election of Supreme Court justices by the General Assembly in grand committee. This is the process that was in effect when the "revolving door" bill was passed in 1992. Several years later, the Constitution was amended to place the power of appointment in the governor, who is directed by the constitutional provision to select the nominee from a list of names submitted to her by an independent judicial nominating commission.

The authority to name justices to the Supreme Court, whether originally vested in the grand committee or currently vested in the governor, is derived directly from the Constitution, and no limitations can be placed on it by either statute or administrative regulation. In an analogous situation, the Rhode Island Superior Court concluded that the "revolving door" prohibition did not prevent a state legislator from being appointed to a constitutional office.

In that case, a vacancy in the office of secretary of state occurred in the middle of a term. Under the Constitution, the General Assembly in grand committee is empowered to elect a successor for the remainder of the term. The grand committee elected a legislator to fill the position, and a case was brought challenging the appointment. The court rejected the challenge, upholding the appointment, stating: "The Commission's constitutional power to create ethics regulations does not allow it to trump this specific constitutional power of the General Assembly simply by creating a new ethics regulation ... It is important to recognize that regulations and statutes, while constitutionally enacted, are not superior to specific constitutional powers granted to the Grand Committee by the Constitution of the State of Rhode Island." Inman v. Whitehouse v. Rhode Island Ethics Commission, 2002 WL 169197.

Because Supreme Court justice is a constitutional office and the process for appointing justices to that court is a constitutionally established process, the Rhode Island Ethics Commission was correct when it rejected the argument that the "revolving door" provisions applied to the appointment of a justice to the Supreme Court.

Jeffrey J. Teitz was a member of the Rhode Island General Assembly for 24 years, and served as chairman of the House Judiciary Committee from 1979 through 1992.

APP 1

Inman v. Whitehouse

Court:	Rhode Island Superior Court
Writing for the Court:	SILVERSTEIN, J.
Decision Date:	17 January 2001
Docket Number:	C.A. 2001-1256
Citation:	Inman v. Whitehouse, C.A. 2001-1256 (R.I. Super. Jan 17, 2001)
Parties:	EDWARD S. INMAN, III in his capacity as Secretary of State of the State of Rhode Island v. SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island v. RHODE ISLAND ETHICS COMMISSION

Id. vLex Fastcase: VLEX-901160965

Link: https://fastcase.vlex.com/vid/inman-v-whitehouse-c-901160965

EDWARD S. INMAN, III in his capacity as Secretary of State of the State of Rhode Island v. SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island v. RHODE ISLAND ETHICS COMMISSION

C.A. No. 2001-1256

Superior Court of Rhode Island

January 17, 2001

DECISION

SILVERSTEIN, J.

Before the Court is the complaint of plaintiff Edward S. Inman, III, in his capacity as Secretary of State, seeking declaratory judgment pursuant to R.I.G.L. § 9-30-1, et seq.

FACTS AND TRAVEL

On November 4, 1986, plaintiff Edward S. Inman ("Inman") was elected a member of the Rhode Island House of Representatives. He served in this capacity until January 9, 2001 when the General Assembly, meeting in Grand Committee pursuant to Article 4, Section 4 of the Rhode Island Constitution, elected him to fill the position of Secretary of State vacated by James Langevin upon his election to the United States Congress. Article 4, Section 4 provides in relevant part "in case of a vacancy in the office of the secretary of state, . . . the general assembly in grand committee shall elect someone to fill the same . . . . " On January 10, 2001, Inman resigned as a member of the House of Representatives and was sworn in as Secretary of State later that day.

On the last mentioned date, Operation Clean Government ("OCG") and Common Cause ("Cause") filed complaints with the Rhode Island Ethics Commission ("Commission") alleging that plaintiff Inman violated Ethics Regulations §§ 36-14-5006 and 36-14-5007 by accepting election as Secretary of State. The Commission previously had adopted Ethics Regulations §§ 36-14-5006 and 5007 in 1991 as modifications to the Rhode Island Code of Ethics in Government. Ethics Regulation § 36-14-5006 specifically states:

> "No elected or appointed official may accept any appointment or election by the body of which he or she is or was a member, to any position which carries with it any financial benefit or remuneration, until the expiration of one year after termination of his or her membership in or on such body, unless the Ethics Commission shall give its approval for such appointment or election, and, further provided, that such approval shall not be granted unless the Ethics Commission is satisfied that denial of such employment or position would create hardship for the body, board, or municipality."

Ethics Regulation § 36-14-5007 states:

> "No member of the General Assembly shall seek or accept state employment as an employee or consultant, not held at the time of the member's election, while serving in the General Assembly and for a period of one year after leaving legislative office."

Cause further asserted that Inman violated Article 3, Section 7 of the Rhode Island Constitution and R.I.G.L. § 36-14-1 when he did not seek an advisory opinion from the Commission before accepting election to the office of Secretary of State.

On January 25, 2001, pursuant to R.I.G.L. § 42-9-6, Inman requested that the Department of the Attorney General defend him in his capacity as Secretary of State against the complaints filed against him with the Commission by OCG and Cause as aforesaid.

On November 17, 1988, long prior to the matters here in controversy, the Commission had issued an advisory opinion ("Opinion") with respect to its interpretation of the Rhode Island Code of Ethics ("Code"), regarding, specifically, how the Code applies to legal counsel for a state board, commission or agency in representing state employees charged with a Code violation. The Opinion is entitled "General Commission Advisory Opinion No. 4" and has not been amended or rescinded in any way since its issue.

The Opinion concluded that representation of a member of a state board, commission or agency by legal counsel to such public body in any matter arising under the Code would be improper because, to the extent that legal counsel represents the interests of a state agency, the Commission considers the legal counsel itself to be subject to the Code in connection with that representation. A possible ethical violation would arise for counsel contesting the same rules he/she is subject to in that instant representation.

On February 5, 2001, the Attorney General informed Inman that he would not be able to represent him pending

the outcome of an action filed by the Attorney General before this Court for declaratory judgment to settle a conflict between the relevant statutes providing for such representation and the Opinion advising against this type of representation.

At a hearing on March 16, 2001 this Court entered an order staying any further proceedings by the Commission on the allegations against Inman by OCG and Cause. This Court further granted the Attorney General's motion to intervene in this case. The parties next appeared before this Court on March 23, 2001 on the Commission's motion for reconsideration of this Court's stay order. This motion was denied conditioned on the tolling of the applicable Commission time frames for proceeding on such complaints. An agreed statement of facts was filed by the parties on March 30, 2001. The Attorney General moved this Court, pursuant to R.I.G.L. § 9-24-47, to certify three questions to the Rhode Island Supreme Court. On April 5, 2001, this Court granted the Attorney General's motion and certified the three following questions to the Rhode Island Supreme Court:

> "1) (a) Whether Ethics Regulations §§ 36-14-5006 and 36-14-5007 restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State?
>
> (b) Whether Ethics Regulations §§ 36-14-5006 and 5007, if construed to restrict the Grand Committee's authority to select one of its own members to fill a vacancy in the office of Secretary of State, are unconstitutional as contravening Article 4, Section 4 of the Rhode Island Constitution and/or the separation of powers doctrine?
>
> 2) Whether Edward S. Inman, III, violated Article 3, Section 7 of the Rhode Island Constitution and R.I.G.L. § 36-14-1 when he did not seek an advisory opinion from the Rhode Island Ethics Commission prior to accepting the election to Secretary of State?
>
> 3) (a) Whether Rhode Island Ethics Commission Advisory Opinion No. 4 precludes the Attorney General from representing Edward S. Inman, III, and other state officials before the Ethics Commission?
>
> (b) Whether Rhode Island Ethics Commission Advisory Opinion No. 4, if construed to preclude the Attorney General from representing Edward S. Inman, III and other state officials before the Ethics Commission, is subordinate and must yield to the powers and statutory duties of the Attorney General under R.I.G.L. §§ 9-31-1 through 13 and/or the power of the Supreme Court to regulate the practice of law?"

On May 4, 2001 the Rhode Island Supreme Court remanded the three certified questions to this Court to "address the issues raised. . . as they might arise in the course of addressing and resolving the merits of the underlying lawsuit." *Inman, et al v. Rhode Island Ethics Commission*, No. 2001-138 (R.I., filed May 24, 2001). Because plaintiff Inman, defendant Commission and intervener Whitehouse all adopted, essentially, the same position with respect to the answers to the certified questions, this Court permitted the appearance of OCG as amicus curiae, allowing OCG to file a memorandum and participate in oral argument on the issues in October, 2001. These three issues are now before this Court for declaratory judgment.

DISCUSSION

Plaintiff first argues that Ethics Regulations §§ 36-14-5006 and 36-14-5007 do not restrict the authority of the General Assembly meeting in Grand Committee pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State. Plaintiff contends that construing the Regulations in such a manner would contravene this section of the Rhode Island Constitution. Article 4, Section 4 of the Rhode Island Constitution states, in relevant part: "In case of a vacancy in the office of the secretary of state. . . from any cause, the general assembly in grand committee shall elect some person to fill the same. . . ." R.I.Const. Article 4, Section 4.

In *In re Advisory Opinion to the Governor*, 612 A.2d 1 (R.I. 1992), the Rhode Island Supreme Court uphe ld the Commission's limited power to enact substantive ethics laws concurrent to the General Assembly's constitutional power to do the same. The Court defined the Commission's specific constitutional grant to enact a code of ethics holding that:

> ". . . Such an affirmative grant of power to the commission necessarily implies a limitation of the same on the part of the General Assembly or any other body. This is not to say however, that the General Assembly is prohibited from enacting ethics laws all together: rather, the General Assembly is merely limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission." *In re Advisory Opinion to the Governor*, 612 A.2d 1, 14 (R.I. 1992).

The Court in *In re Advisory Opinion to the Governor*, 633 A.2d 664 (R.I. 1993) explained that where the Commission and the General Assembly enact ethics laws in the same area, the two regulations should be read together in a way that is consistent with the objectives of both law-making bodies and which "harmonizes" the

goals of both groups. *See id* at 669. Because the Commission and the General Assembly have concurrent power to enact ethics regulation, courts should attempt to read enactments by the two bodies in a manner that treats both enactments as valid and not inconsistent with one another. *Id.*

In this case there is an important distinction between the Commission's constitutional power to enact ethics regulations and the General Assembly's constitutional power to elect an individual to fill a vacant state office. Article 4, Section 4 of the Rhode Island Constitution specifically gives the General Assembly the power to fill vacancies in state offices. The Commission's constitutional power to create ethics regulations does not allow it to trump this specific constitutional power of the General Assembly simply by creating a new ethics regulation.

The language in Article 4, Section 4 is unambiguous. It states that the General Assembly has the authority to elect some person to fill a vacancy in the office of Secretary of State. A violation of the separation-of-powers doctrine results from allowing a state agency through a regulatory provision such as Ethics Regulations §§ 36-14-5006 and 36-14-5007, to constrain the General Assembly's constitutional authority to fill vacancies in state offices such as Secretary of State.

Plaintiff further contends that allowing the Ethics Regulations to prevail over Article 4, Section 4 would violate Article 6, Section 1 of the Rhode Island Constitution, the state's supremacy clause, by placing a regulatory restriction on a constitutional provision. Article 6, Section 1 declares: "This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void." R.I. Const. Article 6, Section 1.

To allow the application of Ethics Regulations §§ 36-14-5006 and 5007 in this case would violate the separation-of-powers doctrine and Article 6, Section 1 of the Rhode Island Constitution. While the enactment of these regulations was indeed a valid exercise of the Commission's constitutional authority pursuant to Article 3, Section 8 of the Rhode Island Constitution, it is important to recognize that regulations and statutes, while constitutionally enacted, are not superior to specific constitutional powers granted to the Grand Committee by the Constitution of the State of Rhode Island.

The use of the word "election" in the language of Article 4, Section 4 may lead the reader to believe, as OCG contends, that it refers to a popular election whereby the people of the State of Rhode Island must vote to fill the vacancy. Webster's Dictionary defines election as "an act or process of electing . . . ." Webster's Collegiate Dictionary 400 (9th ed. 1991). Elect is defined as "to select by vote for an office, position or membership . . . ." *Id.* Just as there is nothing in the Webster's definition of election regarding a popular election, Article 4, Section 4 of the Rhode Island Constitution does not include any reference to a popular election. It is clear from the constitutional language of Article 4, Section 4 that the word election in this context refers to a scenario where the General Assembly meets in Grand Committee and votes to [s]elect an individual to fill a vacant position.

OCG argues in addition that §§ 36-14-5006 and 36-14-5007 are special provisions that apply to a specific area of state government and as such should prevail over the language of the Constitution. The Court in *In Re Advisory Opinion of the Governor*, 732 A.2d 55 (R.I. 1999) ruled that a Commission Regulation which attempted to limit the General Assembly's authority to appoint its own members to state boards, agencies and commissions was invalid because the Commission could not take away the Legislature's constitutional power to appoint its own members to state boards and commissions by virtue of the Commission's own constitutional authority to enact a substantive code of ethics. Here, the Commission's constitutional enactment of the Ethics Regulations, which binds officers of the State of Rhode Island, cannot trump the language of the Rhode Island Constitution because, under the Supremacy Clause, an agency-enacted regulation does not override the Constitution of the State of Rhode Island. The next issue before this Court is whether plaintiff, as asserted by Cause in its complaint to the Commission, violated Article 3, Section 7 of the Rhode Island Constitution when he did not seek an advisory opinion from the Commission before accepting the appointment to Secretary of State.

Article 3, Section 7 of the Rhode Island Constitution states:

> ". . . public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain or advantage. Such persons shall hold their positions during good behavior."

Neither the language of this Section nor the statute requires an appointee to state office to seek an advisory opinion of the Commission regarding his/her appointment. That notion is compounded in this case by the fact that there was no ethics violation as a result of Inman's election to the office of Secretary of State. Thus, there was not even a question regarding his need to seek an advisory opinion from the Commission. Assuming arguendo, however, that an ethics question did materialize from Inman's appointment, use of the advisory process is *permissive* and *not* mandatory. *See* Ethics Regulation § 36-14-1024(a).[1] Thus, Inman had a right but not an obligation to seek an advisory opinion from the Commission regarding the applicability of §§ 36-14-5006 and 36-14-5007 to his appointment to the office of Secretary of State. *See id*. His failure to seek an opinion from the Commission was not in violation of the Rhode Island Constitution.

The final issue before this Court is whether the Attorney General is constitutionally permitted to represent Secretary Inman in the matters before the Commission and this Court. In its Opinion, the Commission concludes that a member of a state board or commission may not be represented by the legal counsel of that state board or commission in any matter arising under the Code. The Opinion states that representation of a member of a state board, commission or agency by legal counsel to such public body in any matter arising under the Code would be improper because, to the extent that legal counsel represents the interests of a state agency, the Commission considers the legal counsel itself to be subject to the Code in connection with that representation. A possible ethical violation would arise for counsel contesting the same rules he/she is subject to in that instant representation.

While the Opinion opposes the representation of a member of a state board or commission by counsel for that board or commission, it does not preclude the Attorney General from representing state officers and employees pursuant to R.I.G.L. § 42-9-6. That section states in relevant part:

> "Except as otherwise in the general laws provided, the attorney general, whenever requested, shall act as the legal adviser of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof, of all commissioners appointed by the general assembly, of all the general officers of the state, and of the director of administration, in all matters pertaining to their official duties, and shall institute and prosecute, whenever necessary, all suits and proceedings which they may be authorized to commence, and shall appear for and defend the above-named individual legislators, boards, divisions, departments, commissions, commissioners, and officers, in all suits and proceedings which may be brought against them in their official capacity."

The Commission does not disagree with this contention. In fact, the Commission agrees that the Attorney General, by law, represents a state official sued in his/her capacity as a state official, and the discretion to represent only arises when an official is sued in an individual capacity in actions brought under 42 U.S.C. § 1983.

R.I.G.L. § 9-31-8 provides: "Except as provided in § 9-31-9, the attorney general shall, upon written request of an employee or former employee of the state of Rhode Island, defend any action brought against the state employee or former state employee, on account of an act or an omission that occurred within the scope of his or her employment with the state." The Attorney General may refuse to defend a state employee only when he or she determines that the defense would not be in the best interest of the State such as, among other things, when the act or omission was not within the scope of the employment or the act or failure to act was the result of actual fraud, willful misconduct, or actual malice. *See* R.I.G.L. §9-31-8. In this case, Inman was brought before the Commission in his official capacity as Secretary of State. Consequently, the Attorney General must represent him in this matter as it is clear that Inman's election to the office of Secretary of State was not the result of actual fraud, willful misconduct, actual malice, or anything else that would render his defense not in the best interest of the State of Rhode Island.

After careful review of the arguments submitted by the parties in this case, as well as the brief of amicus curiae submitted by OCG, this Court finds in response to the three certified questions remanded to this Court by the Rhode Island Supreme Court that: 1) Ethics Regulations §§ 36-14-5006 and 36-14-5006 do not restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State; 2) Inman did not violate either Article 3, Section 7 of the Rhode Island Constitution or R.I.G.L. § 36-14-1 when he did not seek an advisory opinion from the Commission prior to accepting the election to the office of the Secretary of State; and 3) Advisory Opinion No. 4 does not preclude the Attorney General from representing Inman and other state officials before the Commission. This Court grants declaratory judgment consistent with the foregoing in favor of plaintiff Inman.

Counsel for Secretary of State Inman shall present an order and a judgment to enter upon notice to counsel for the other parties hereto and to amicus curiae OCG.

Notes:

[1] Ethics Regulation § 36-14-1024(a) states in relevant part: "A person subject to the Code of Ethics *may* request an advisory opinion relative to the provisions of the Code which may affect him or her . . ." Ethics Regulation § 36-14-1024(a) (emphasis added).

Advisory Opinion No. 2010-54

Rhode Island Ethics Commission

Advisory Opinion No. 2010-54

Re: The Honorable Steven M. Costantino

QUESTION PRESENTED

The Petitioner, a legislator serving in the Rhode Island House of Representatives, a state elected position, requests an advisory opinion regarding whether, upon the expiration of his term of office, he may accept an appointment by the Governor of Rhode Island to serve in the position of Secretary of Health and Human Services.

RESPONSE

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a legislator serving in the Rhode Island House of Representatives, a state elected position, may upon the expiration of his term of office, accept an appointment by the Governor of Rhode Island to serve in the position of Secretary of Health and Human Services.

The Petitioner is a member of the Rhode Island House of Representatives, having been elected in 1994 and serving continuously since. For the past six years he has served as the Chairperson of the House Committee on Finance. The Petitioner did not seek to retain his

seat in the most recent election and his term of office will therefore expire with the qualification of his successor in the first week of January 2011.

The Petitioner represents that the Governor-elect has offered to appoint him to the position of Secretary of Health and Human Services ("Secretary of HHS"). The Secretary of HHS is a cabinet-level position appointed by and serving at the pleasure of the Governor, subject to the advice and consent of the Senate, and has responsibility for administering the Executive Office of Health and Human Services ("EOHHS"). R.I. Gen. Laws § 42-7.2-3. The EOHHS serves "as the principal agency of the executive branch of state government for managing the departments of children, youth and families, elderly affairs, health, human services, and mental health, retardation and hospitals." Section 42-7.2-2.

Cognizant that the Rhode Island Code of Ethics contains certain "revolving door" provisions that apply to state elected officials generally, and to members of the General Assembly more specifically, the Petitioner requests guidance as to whether he is permitted to accept the Governor-elect's appointment.

The Code of Ethics contains both statutory and regulatory revolving door provisions that are applicable to current and former members of the legislature. Section 36-14-5(n) of the Code of Ethics provides:

No state elected official, while holding state office and for a period of one (1) year after leaving state office, shall seek or accept employment with any other state agency . . . other than employment which was held at the time of the official's election . . . except . . . [n]othing contained herein shall prohibit . . . any state elected official from seeking or accepting a senior policy-making, discretionary, or confidential position on any general officer's or the general assembly's staff, or from seeking or accepting appointment as a department director by the governor.

R.I. Gen. Laws § 36-14-5(n)(1) and (2) (hereinafter, "section 5(n)"). Furthermore, section 5(n) clarifies that the Ethics Commission may authorize an exception to this revolving door prohibition "where such exemption would not create an appearance of impropriety." Id.

In addition to the above statutory revolving door provision that is applicable generally to all state elected officials, the Code contains a more specific, regulatory prohibition that applies only to members of the General Assembly. Adopted in 1991 by the Ethics Commission, along with several other regulations aimed at strengthening the Code of Ethics, Regulation 36-14-5007 reads:

No member of the General Assembly shall seek or accept state employment as an employee or consultant, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office.

Regulation 36-14-5007 (hereinafter, "Regulation 5007").

The Ethics Commission has previously applied both of these revolving door provisions to legislators. Most recently, in Advisory Opinion 2009-44 the Commission opined that section 5(n) and Regulation 5007 both prohibited a legislator from providing arbitration or mediation services to a state agency, although he could continue to be listed on the Department of Administration's master price agreement as qualified to provide such services to non-state entities. Similarly, in Advisory Opinion 2006-25, it was determined that Regulation 5007 would apply to prohibit a member of the House of Representatives from providing insurance brokerage services (a consulting relationship) to a quasi-public state agency. In Advisory Opinion 2001-6, the Commission opined that both section 5(n) and Regulation 5007 prohibited a member of the House of Representatives from accepting work as a part-time instructor at Rhode Island College. See also A.O. 93-53 (State Representative may continue to work as paid consultant for Department of Business Regulation, notwithstanding Regulation 5007, since such work pre-dated his election).

The instant Petitioner presents one fact that did not exist in any of these prior advisories, namely, that the state employment under consideration stems from a gubernatorial appointment to a cabinet-level position as a department head. This circumstance fits neatly into section 5(n)'s exception for appointment by the Governor to a position as a department director. Section 36-14-5(n)(2). However, having determined that section 5(n) is not offended, we must also apply the Code's more specific revolving door provision for former legislators, Regulation 5007.

Unlike its statutory counterpart, Regulation 5007 does not contain an exception for senior-level appointments, nor is there an express provision allowing the Commission to authorize an exception in particular instances. Accordingly, on the surface it would appear that Regulation 5007 would prohibit the

Petitioner from accepting any state employment of any nature until the expiration of one (1) year after leaving legislative office. However, in the years since Regulation 5007's adoption there have been certain judicial interpretations of the Commission's revolving door provisions that apply to shape our construction and application of Regulation 5007 to the instant facts.

In 1993, the Rhode Island Supreme Court issued a decision upholding the constitutionality of both Regulation 5007 and section 5(n). That case began when the Governor questioned whether the Code's revolving door provisions "unconstitutionally infringed upon the ability of the members of the executive, legislative, or judicial branches to perform their duties." In

re Advisory from the Governor, 633 A.2d 664, 666 (R.I. 1993) (hereinafter, "1993 Advisory Opinion). In particular, the Governor argued that these provisions violated principles of due process, equal protection and separation of powers. The Commission not only defended the constitutionality of Regulation 5007, but it also questioned whether section 5(n)'s statutory exceptions were valid when applied to legislators in light of the fact that such exceptions were not included in Regulation 5007. Id. at 668. The Supreme Court held that both parties' arguments went too far, and instead opined that both section 5(n) and Regulation 5007 were constitutional, valid and separately enforceable. Id. at 669-673.

The Court's 1993 Advisory Opinion stood undisturbed for several years until it was modified by another Supreme Court advisory opinion concerning the impact of an ethics regulation on a longstanding constitutional grant of appointment power. In 1999, the Supreme Court declared unconstitutional a Commission Regulation which attempted to limit the General Assembly's constitutional authority to appoint its own members to state boards, agencies and commissions.[1] In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999) (hereinafter, "1999 Advisory Opinion"). Such a regulation was, Commission opponents argued, in direct contravention of the Rhode Island legislature's longstanding constitutional powers of appointment. The Court agreed, writing:

[T]he commission may not act inconsistently with the constitution. "[T]he commission, like any other governmental body, is subject to many of the usual checks and balances associated with our tripartite form of government . . . ." The commission, for example, may not create regulations that seriously impinge upon the executive or the legislative branch's ability to perform their duties, or "assume powers that are central or essential to the operation of the Governor's office. . . ."

732 A.2d at 68-69 (quoting In re Advisory Opinion to the Governor, 612 A.2d 1, 18-19 (R.I. 1992); In re Advisory from the Governor, 633 A.2d 664, 675 (R.I. 1993)). In summary, the 1999 Advisory Opinion held that the Ethics Commission may not, by enacting ethics laws authorized generally by the Ethics Amendments of 1986, amend other parts of the Constitution by diminishing the express powers granted to any branch of government. Id.

Then, in 2001, the Superior Court issued a decision that addressed, and in some ways reconciled, the holdings of the 1993 Advisory Opinion (the Code's revolving door provisions are constitutional) and the 1999 Advisory Opinion (the Code's provisions cannot be inconsistent with the Constitution's grant of appointment powers).

The case of Inman v. Whitehouse, No. 01-1256, 2002 WL 169197 (R.I. Super. Jan. 17, 2002), began with a vacancy in the office of Rhode Island Secretary of State after James Langevin was elected to Congress in 2000. Pursuant to the Rhode Island Constitution, "in case of a vacancy in the office of the secretary of state, . . . the general assembly in grand committee shall elect someone to fill the same." R.I.

Const. art. IV, sec. 4. Pursuant to that authority, the General Assembly met in Grand Committee and elected Edward S. Inman, III ("Inman"), a sitting member of the House of Representatives, to finish Langevin's term. Thereafter, complaints were filed with the Ethics Commission alleging that Inman violated the revolving door provisions of the Code of Ethics, including Regulation 5007.

Inman brought an action in the Superior Court to stay proceedings before the Ethics Commission, and to obtain a declaration that, among other things, the Code's revolving door provisions cannot restrict the Grand Committee's constitutional authority to fill a vacancy in the office of Secretary of State. The Attorney General intervened and sought to have the case certified to the Supreme Court, however the Court denied the certification and instructed the Superior Court to hear the case and issue a decision. The case was heard before Justice Silverstein and, ultimately, the Ethics Commission joined with Inman and the Attorney General to agree that Regulation 5007, while valid, could not impinge upon the Grand Committee's constitutional authority to elect Inman to fill the vacancy.

The Superior Court issued its written decision on January 17, 2002. Therein, the court first recognized the Ethics Commission's constitutional authority to enact substantive ethics laws. Inman, at *3. However, the court noted an "important distinction between the Commission's general constitutional power to enact ethics regulations and the General Assembly's specific constitutional power [under art. IX, sec. 4] to elect an individual to fill a vacant state office." Id. To allow the Commission to enact a regulation that limited the unambiguous constitutional appointment power of the General Assembly would, according to the court, violate principals of separation of powers discussed by the Supreme Court in the 1999 Advisory Opinion and be contrary to the Constitution's Supremacy Clause, art. VI, sec. 1, which declares: "This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void." Id. (quoting R.I. Const. art. VI, sec. 1).

The facts presented by this Petitioner in the instant request for an advisory opinion require careful consideration of the legal analyses set forth by the Supreme Court in the 1999 Advisory Opinion and applied by the Superior Court in Inman. As in Inman, the Petitioner's prospective position with the state comes via an appointment that is expressly authorized by the Rhode Island Constitution. The Governor's power to appoint executive branch officers,

such as the Secretary of HHS, is expressly set forth in article IX of the Rhode Island Constitution, relating to the Executive Power:

Powers of appointment. -- The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers, as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments.

R.I. Const. art. IX, sec. 5.

In Inman, the Ethics Commission took the position that although Regulation 5007 was valid and constitutional when limiting a legislator from accepting general state employment or consulting work, it did not apply to restrict Inman from accepting a position that was offered to him through a constitutionally authorized procedure. Eight years later, our position has not changed. In the instant matter, the

Governor's appointment of the Petitioner to the position of Secretary of HHS is expressly authorized in article IX, section 5, and it is not our prerogative to amend that constitutional provision through the enactment of a contrary regulation.

For these reasons, it is the opinion of the Ethics Commission that while both section 5(n) and Regulation 5007 continue to be valid and enforceable revolving door prohibitions of the Code of Ethics, neither they nor any other provision of the Code of Ethics prohibits the Petitioner from accepting the Governor's appointment to the position of Secretary of HHS.

Code Citations:

R.I. Gen. Laws § 36-14-5(n)

Regulation 36-14-5007

Other Constitutional and Statutory Authority:

R.I. Const. art. III, sec. 7 and 8.

R.I. Const. art. IV, sec. 4

R.I. Const. art. VI, sec. 1

R.I. Const. art. IX, sec. 5

R.I. Gen. Laws § 42-7.2-2

R.I. Gen. Laws § 42-7.2-3

Other Authority Cited:

In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999).

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

In re Advisory Opinion to the Governor, 612 A.2d 1 (R.I. 1992).

Inman v. Whitehouse, No. 01-1256, 2002 WL 169197 (R.I. Super. Jan. 17, 2002).

Related Advisory Opinions:

A.O. 2009-44

A.O. 2006-25

A.O. 2001-6

A.O. 93-53

Keywords:

Revolving door

Prospective employment

STATE OF RHODE ISLAND
Ethics Commission

Minutes June 2, 2020

MINUTES OF THE OPEN SESSION OF THE RHODE ISLAND ETHICS COMMISSION

June 2, 2020

The Rhode Island Ethics Commission remotely conducted its 7th meeting of 2020 in Zoom webinar format at 9:00 a.m. on Tuesday, June 2, 2020, pursuant to the notice published at the Commission offices, the State House Library, and electronically with the Rhode Island Secretary of State.[1]

The following Commissioners were present:

Marisa A. Quinn, Chair
Arianne Corrente, Vice Chair
Kyle P. Palumbo, Secretary
M. Therese Antone
J. Douglas Bennett
Timothy Murphy
Emili B. Vaziri

The following Commissioner was not present: Robert A. Salk.

Also present were Herbert F. DeSimone, Jr., Commission Legal Counsel; Jason Gramitt, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Lynne Radiches, Staff Attorney/Education Coordinator; Staff Attorneys Teresa Giusti and Teodora Popova Papa; and Commission Investigators Steven T. Cross and Gary V. Petrarca.

At 9:17 a.m., the Chairopened the meeting.

The first order of business was:

Discussion of Remote Meeting Format; Identifying and Troubleshooting any Remote Meeting Issues.

Executive Director Gramitt explained that, after Open Session adjourns, the Commission will convene Executive Session in a separate webinar meeting, after which the Commission will return to Open Session to provide a live report on all actions taken in Executive Session. He noted that a written report of all actions taken in Executive Session will be published and available on the Commission's website after the meeting ends. Copies of the written report can be also requested by calling the Commission at (401) 222-3790 or emailing ethics.email@ethics.ri.gov.

APP 13

Executive Director Gramitt informed that the Governor extended the executive order suspending the Open Meetings Act requirements for public bodies through June 14, 2020. He stated that the Commission's next meeting will be held on June 16, 2020, and that there may be an additional extension of the executive order before then. Executive Director Gramitt informed the public that anyone may call the Commission or use the "Q & A" feature during the Zoom webinar for any technical questions or issues during the meeting. Chair Quinn thanked the Commission staff for its efficient operation of business during these difficult times.

The next order of business was:

Approval of minutes of the Open Session held on April 28, 2020.

Upon motion made by Commissioner Antone and duly seconded by Commissioner Corrente, it was unanimously

VOTED: To approve the minutes of the Open Session held on April 28, 2020.

The next order of business was:

Motion to seal minutes of Executive Session held on April 28, 2020.

Upon motion made by Commissioner Corrente and duly seconded by Commissioner Murphy, it was unanimously

VOTED: To seal the minutes of the Executive Session held on April 28, 2020.

The next order of business was:

Director's Report: Status report and updates.

a.) Discussion of impact of COVID-19 crisis on Ethics Commission operations and staffing

Executive Director Gramitt informed that there was no damage to the Commission's office due to the rioting that occurred the previous night in the city. He explained that a majority of the staff has been teleworking and a small number of staff members has been present in the office daily.

b.) Complaints and investigations pending

There are eight complaints pending, all but one of which are conflict of interest matters.

c.) Advisory opinions pending

There are five advisory opinions pending.

d.) Access to Public Records Act requests since last meeting

There were 23 APRA requests received since the last meeting, most of which related to the Raimondo Complaint, all of which were granted within one business day.

e.) Financial Disclosure

Executive Director Gramitt stated that the May 26, 2020 deadline for filing the 2019 Financial Statement has expired but some filers timely requested a full 60-day extension through June.

The next order of business was:

Advisory Opinions.

The advisory opinions were based on draft advisory opinions prepared by Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date.

The first advisory opinion was that of:

The Honorable Erin Lynch Prata, a legislator serving in the Rhode Island Senate, a state elected position, requests an advisory opinion regarding her ability, in compliance with the Code of Ethics, to apply for and, if selected, be appointed to a prospective vacancy on the Rhode Island Supreme Court.

Senior Staff Attorney D'Arezzo presented the Commission Staff recommendation. The Petitioner was present via video link along with her attorneys, Francis J. Flanagan, Esq. and John D. Lynch, Jr., Esq. Senior Staff Attorney D'Arezzo explained that the instant draft was a consensus opinion prepared by her and Staff Attorney Popova Papa and approved by Executive Director Gramitt. The Petitioner addressed the Commission, thanking the members for their service and time. She stated that she requested the advisory opinion to ensure that the public's trust and confidence are maintained. Attorney Flanagan addressed the Commission and stated his disagreement with the Staff's recommendation. He represented that the draft did not answer the Petitioner's question as to whether a position on the Supreme Court is a "constitutional office." He argued that the Code of Ethics' revolving door provisions cannot prohibit a person from seeking a seat on the Supreme Court, which he stated is a "constitutional office." Attorney Flanagan further argued that the Rhode Island Constitution, Art. X, section 4, sets forth the Governor's authority to select a person to fill a vacancy on the Supreme Court and that the Ethics Commission may not infringe upon the Governor's authority to do so, nor on a candidate's constitutional right to seek a position on that Court. Attorney Lynch queried whether the language "seek or be elected" is prohibitive if there is no election.

Commissioner Corrente noted a typographical correction to the citation to "§ 36-14-2(8)(i)" on page 3 of the draft. She inquired why the Commission would not consider the question of whether a position on the Supreme Court is a "constitutional office." In response, Senior Staff Attorney D'Arezzo explained that, irrespective of the definition of "constitutional office," which is not a defined term in the Code of Ethics, § 36-14-5(n)(3)'s exception applies to elected offices and, therefore, is inapplicable to the Petitioner. She further stated that if the General Assembly had intended to permit the gubernatorial appointment of judges under that exception it would have utilized the "seeking or accepting appointment" language it employed in § 5(n)(2). Commissioner Corrente noted that the disjunctive "or" is used in § 5(n)(3) and expressed concern with interpreting legislative intent. Senior Staff Attorney D'Arezzo explained that, in the 1993 Advisory Opinion, the Supreme Court noted that § 5(n)'s prohibitions apply to appointed positions and not to positions elected by the general electorate, and it further stated that § 5(n) temporarily limits appointments to the judiciary.

Attorney Lynch noted that in Inman the Superior Court addressed a legislator's ability to accept appointment to a constitutional office. He stated that the exception applies only to the 10 constitutional offices, including the five Supreme Court Justices. Attorney Lynch indicated that, here, the way one

seeks such a constitutional office is through the application process. Chair Quinn noted that the interpretation is not that straightforward. In response to Chair Quinn, Attorney Lynch informed that 1994 amendment changed the process from the election of judges by the Grand Committee to the current selection of candidates by the Judicial Nominating Commission ("JNC").

In response to Commissioner Bennett, Legal Counsel DeSimone stated his belief that that § 5(n)(3)'s exception for constitutional offices applies here. He further stated that the position of a Supreme Court justice is a constitutional office. Legal Counsel DeSimone indicated that the issue is how to reconcile the regulatory prohibitions with § 5(n)(3)'s exception and advised that the regulations should be read in harmony with the statute. He emphasized the use of the disjunctive "or" in § 5(n)(3) and stated his legal view that the Petitioner is immediately eligible for appointment to the Supreme Court or election as a general officer. In response to Chair Quinn and Commissioner Antone, Legal Counsel DeSimone explained that the Petitioner would not be immediately eligible for a position on an inferior court created by statute. In response to Commissioner Bennett, Legal Counsel DeSimone stated that the Petitioner's current position as Chair of the Senate Committee on Judiciary did not affect his opinion, adding that the Petitioner would be required to recuse if her nomination made it to the Senate.

Commissioner Murphy expressed concern regarding the Petitioner's ability to "accept" an appointment under § 5(n)(1), which would render the issue moot. In response to Commissioner Corrente, Attorney Flanagan informed that the JNC considers whether there are issues that would prevent the Governor from selecting a candidate. Executive Director Gramitt addressed the Commission and informed that it is the task of the Ethics Commission, not the JNC, to determine whether a conflict exists under the Code of Ethics. In response to Commissioner Palumbo and Chair Quinn, Legal Counsel DeSimone stated that § 5(n)(3) is an exception to § 5(n)(1)'s prohibition and the use of the disjunctive "or" supports its application here. Commissioner Murphy inquired where language in the Constitution or the Code of Ethics permits the Petitioner to accept this appointment. Legal Counsel DeSimone stated that the exceptions are narrow and the language used is not artful, but it would so state if a person were required to be elected in order to fall under the exception. Attorney Flanagan commented that the statute cannot be construed so as to produce an absurd result, allowing a person to seek a position but not permitting its acceptance. Commissioner Murphy responded that he interpreted that to mean that § 5(n)(3)'s exception did not apply in this case. In response to Commissioner Palumbo, Attorney Lynch stated that the regulatory restrictions are an impingement upon the Governor's appointment power.

In response to Commissioner Bennett, the Petitioner explained that the Senate Committee on Judiciary has no function in the process until it is forwarded a name by the Governor, at which time it vets the candidate by requesting background information and conducting interviews. She noted that Supreme Court candidates must be approved by both the House and Senate, with the House Committee on Judiciary vetting and voting on the candidate first. The Petitioner represented that she would recuse if her name were submitted to the Senate. Upon motion made by Commissioner Murphy and duly seconded by Commissioner Antone, it was

VOTED: To issue an advisory opinion, attached hereto, to **The Honorable Erin Lynch Prata**, a legislator serving in the Rhode Island Senate, a state elected position.

AYES: Marisa A. Quinn and Timothy Murphy.

NOES: Kyle P. Palumbo; M. Therese Antone; J. Douglas Bennett; Arianne Corrente; and Emili B. Vaziri.

Chair Quinn explained that the draft advisory opinion was not approved due to a lack of five affirmative votes.

The next advisory opinion was that of:

Richard Thomsen, a member of the Dunn's Corners Fire District Operating Committee, who is also a volunteer firefighter on the Dunn's Corners Fire Department, requests an advisory opinion regarding whether the Code of Ethics prohibits him from simultaneously serving in both positions.

Staff Attorney Radiches presented the Commission Staff recommendation. The Petitioner was present via audio link. The Petitioner stated that he requested the advisory opinion to be clear and transparent because he intends to run for reelection. In response to Commissioner Bennett, the Petitioner stated that volunteer firefighters receive stipends based on a formula for the number of calls to which they respond. In further response to Commissioner Bennett, the Petitioner informed that he has a cousin on the Operating Committee. In response to Commissioner Palumbo, the Petitioner explained that the budget is compiled by the Treasurer and then submitted to the Operating Committee and, finally, to the taxpayers at a public meeting in July. Staff Attorney Radiches stated that the citizens vote on the budget as a whole. Executive Director Gramitt explained that conflicts of interest might arise in the budgetary process where the Operating Committee may discuss line items that could impact the Fire Department. Staff Attorney Radiches noted that the draft advisory opinion cautions that, as issues arise, the Petitioner may need to recuse or seek further direction from the Commission. Commissioner Bennett advised the Petitioner to be aware of any issues that could result in remuneration to the Fire Department and or himself. Upon motion made by Commissioner Murphy and duly seconded by Commissioner Antone, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to **Richard Thomsen**, a member of the Dunn's Corners Fire District Operating Committee, who is also a volunteer firefighter on the Dunn's Corners Fire Department.

Commissioner Murphy left the meeting at 10:55 a.m.

The final advisory opinion was that of:

Gregory Maxwell, AIA, a member of the East Greenwich Historic District Commission, who in his private capacity is an architect, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition on representing himself before his own board.

Staff Attorney Popova Papa presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Corrente and duly seconded by Commissioner Vaziri, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to **Gregory Maxwell, AIA**, a member of the East Greenwich Historic District Commission, who in his private capacity is an architect.

The final order of business was:

New Business Proposed for future Commission agendas and general comments from the Commission.

There was no new business proposed.

APP 17

At 11:00 a.m., upon motion made by Commissioner Antone and duly seconded by Commissioner Palumbo, it was unanimously

VOTED: To adjourn Open Session and go into Executive Session, to wit:

a.) Motion to approve minutes of Executive Session held on April 28, 2020, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

b.) **In re: Raymond Stewart, Jr.**, Complaint No. 2020-1, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

c.) **In re: Janice McClanaghan**, Complaint No. 2019-15, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

d.) **In re: Michael Vendetti**, Complaint No. 2019-16, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

e.) **In re: Chris Mannix**, Complaint No. 2019-17, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

f.) **In re: Natalie McDonald**, Complaint No. 2019-18, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

g.) Annual discussion and review re: Legal Counsel's contract, pursuant to R.I. Gen. Laws § 42-46-5(a)(1). Voting will occur during Open Session of the next Commission meeting.

h.) Litigation update re: **Francis X. Flaherty v. Rhode Island Ethics Commission et al.**, Superior Court C.A. No. PC-2019-5088, pursuant to R.I. Gen. Laws § 42-46-5(a)(2).

i.) Motion to return to Open Session.

Commissioner Corrente left the meeting as the Commission convened in Executive Session.

At 12:16 p.m., the Commission reconvened in Open Session, with Commissioner Murphy present. Commissioner Palumbo was not present.

The next order of business was:

Report on actions taken in Executive Session.

Chair Quinn reported that the Commission took the following actions in Executive Session:

1. Unanimously voted (5-0) to approve the minutes of the Executive Session held on April 28, 2020.

2. Unanimously voted (6-0) to consolidate the matters of **In re: Janice McClanaghan**, Complaint No. 2019-15, **In re: Michael Vendetti**, Complaint No. 2019-16, **In re: Chris Mannix**, Complaint No. 2019-17, and **In re: Natalie McDonald**, Complaint No. 2019-18, for hearing on a Motion to Enlarge Time for Investigation, Second Extension.

Unanimously voted (6-0) in the matters of **In re: Janice McClanaghan**, Complaint No. 2019-15, **In re: Michael Vendetti**, Complaint No. 2019-16, **In re: Chris Mannix**, Complaint No. 2019-17, and **In re: Natalie McDonald**, Complaint No. 2019-18, to enlarge time for investigation for 60 days.

3. Voted (0-5) in the matter of **In re: Raymond Stewart, Jr.**, Complaint No. 2020-1, that there exists probable cause to believe that the Respondent committed a knowing and willful violation of the Code of Ethics. Upon failure of the motion, the Complaint was dismissed. Commissioner Palumbo recused on this matter and was not present for its consideration.

A written Decision and Order, explaining the basis for the Commission's vote, is being prepared by the Commission's Legal Counsel and will be released along with a copy of the prosecutor's Investigative Report.

4. Deferred its annual discussion of Legal Counsel's contract to the next meeting.

5. Received a litigation update in **Francis X. Flaherty v. Rhode Island Ethics Commission et al.**, Superior Court C.A. No. PC-2019-5088.

6. Unanimously voted (5-0) to return to Open Session.

The next order of business was:

Motion to seal minutes of Executive Session held on June 2, 2020.

Upon motion made by Commissioner Antone and duly seconded by Commissioner Murphy, it was unanimously

VOTED: To seal the minutes of the Executive Session held on June 2, 2020.

At 12:21 p.m., upon motion made by Commissioner Antone and duly seconded by Commissioner Murphy, it was unanimously

VOTED: To adjourn the meeting.

Respectfully submitted,

_____

Kyle P. Palumbo

Secretary

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[1] On March 9, 2020, Governor Gina Raimondo declared a state of emergency due to the dangers to health and life posed by COVID-19. In furtherance thereof, the Governor issued Executive Order 20-25 on April 15, 2020, which, in part, relieved public bodies from the prohibitions regarding the use of telephonic or electronic communication to conduct meetings set forth under the Rhode Island Open Meetings Act. On May 15, 2020, the Governor issued Executive Order 20-34 which, in part, extended Order 20-25 through June 14, 2020.

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STATE OF RHODE ISLAND

ETHICS COMMISSION
No. 2026-001

In re: K. Joseph Shekarchi

MEMORANDUM IN SUPPORT OF MOTION OF K. JOSEPH SHEKARCHI TO DISMISS FOR FAILURE TO ALLEGE VIOLATION OF CODE OF ETHICS

The complaint in this matter alleges that K. Joseph Shekarchi, a member of the Rhode Island House of Representatives, has applied to the Rhode Island Judicial Nominating Commission for the position of Associate Justice of the Rhode Island Supreme Court. The complainant asserts that this is prohibited by the Code of Ethics unless the applicant has been out of the General Assembly for one year.

The allegations in the complaint do not constitute a violation of the Code, and the complaint must be dismissed.

Mr. Shekarchi raised this issue in advance of the Ethics Commission's initial determination, pointing out that the complaint, on its four corners, alleged conduct that is not in violation of the Code[1]. The Commission, in closed session at which neither Mr. Shekarchi nor his attorney were permitted to be present[2], declined to address the motion to dismiss and voted to proceed with the complaint.

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[1] This memorandum supplements and expands on the motion to dismiss already on file in this matter.

[2] *Compare* R.I. Ethics Comm. Regulation 3.21 ("the Commission may privately deliberate on the matter under consideration without the presence of any other

Mr. Shekarchi now once more moves to dismiss the complaint, with the understanding that the Commission will hear the motion in open session, permitting Mr. Shekarchi, through counsel, to be heard on the matter.

For purposes of this motion there is no dispute that Mr. Shekarchi is currently a member of the Rhode Island House of Representatives and that he has applied, and is seeking pursuant to Article X, sec. 4 of the Rhode Island Constitution, the position of Justice of the Supreme Court.

The complaint alleges that this is a violation of the so-called "revolving door" language of the Rhode Island Code of Ethics. For reasons discussed *infra*, this allegation is without merit. The complaint must therefore now be dismissed.

This memorandum sets out several reasons why Mr. Shekarchi's application is not subject to the revolving door provision.

First, the office of Supreme Court Justice is a constitutional office, and therefore specifically exempted by law from the application of the revolving door provision.

Second, the selection process for Justices of the Supreme Court is specifically laid out in the Rhode Island Constitution. Case law establishes that the

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person or party") *with* R.I. Gen. L. sec. 42-46-5(a)(1), providing specific limitations on public body's authority to discuss "the job performance, character, or physical or mental health or persons provided that the person affected shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting."

Code of Ethics cannot impede a "constitutionally authorized procedure" for the filling of an office.

Third, the Commission has previously adopted the proposition that it cannot override a "constitutionally authorized procedure" for the filling of an office, both in an advisory opinion, and in a judicial proceeding in 2001. Having litigated the issue in the past, having agreed to that court's decision of the matter, and having failed to pursue appellate review, the Commission cannot now act in a manner inconsistent with the judgment in that case. The Ethics Commission reaffirmed that position in an advisory opinion in 2010.

Fourth, the authority for selecting Supreme Court Justices is set forth in a specific section of the Constitution, R.I. Const., Art. X, sec. 4. The Constitution in that section delegates specific authority to four separate actors: the Judicial Nominating Commission to screen applicants, the Governor to nominate, the House of Representatives to give advice and consent, and the Senate to give advice and consent. Just as the Ethics Commission was created and assigned duties pursuant to the Constitution, the Judicial Nominating Commission is likewise a creature of the Constitution with specific powers and duties derived therefrom. The Ethics Commission is without authority to impede the Judicial Nominating Commission and these other constitutional actors in performance of their duties under Art. X, sec. 4.

Finally, there is precedent – with tacit approval from the Ethics Commission – for a member of the General Assembly to seek and to be appointed to the Supreme Court. The Commission must not deviate from that precedent.

For these reasons and any others presented at the hearing of this matter, the Commission should dismiss the complaint forthwith.

The so-called "revolving door" provision does not apply when the position sought is a constitutional office.

Although sec. 36-14-5(n) does contain a general prohibition on state elected officials seeking or accepting other state employment until one year after leaving office, there is a specific exemption if the office sought is "any other constitutional office." *Id.*, sec. 36-14-5-(n)(3):

> "Nothing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office."

The related ethics regulation does not contain the language exempting constitutional offices:

> 1.5.2 Prohibition on State Employment (36-14-5007)
>
> No member of the General Assembly shall seek or accept state employment, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office. For purposes of this regulation,

"employment" shall include service as defined in R.I. Gen. Laws § 36-14-2(4) and shall also include service as an independent contractor or consultant to the state or any state agency, whether as an individual or a principal of an entity performing such service.

The initial viability of the complaint, then, turns on the question whether the position sought – here, Justice of the Supreme Court – is a "constitutional office," and whether the exemption in sec. 36-15-5(n)(3) applies.

And the answer to that is clear for two reasons. First, the office of Justice of the Supreme Court is a constitutional office, and second, as the Commission successfully argued in the case of *Inman v. Whitehouse*, No. 2001-1256 (R.I. Super. 2001) (copy appended at App. 2) the statutory exemption applies notwithstanding its absence from the regulation.

The office of Supreme Court Justice is a constitutional office. The Supreme Court was established in Art. X of the Rhode Island Constitution, which provides:

> The judicial power of this state shall be vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish.

R.I. Const., Art. X, sec. 1.

In the venerable landmark decision in *Taylor v. Place*, 4 R.I. 324 (1956), the Rhode Island Supreme Court for the first time addressed the meaning of Article X.

The case involved the scope of the judicial power and whether the General Assembly had the authority to exercise some of it under the new Constitution, which had been adopted in 1843 In *Taylor* the Court examined its own constitutional pedigree, concluding that the Supreme Court established by our constitution possessed the whole judicial power of the state.

> Having thus provided a *supreme* court, as the ultimate state tribunal, stable enough, as against the legislative department, and with jurisdiction enough to enable it to fulfil the proper offices of the judicial department of the state government, the constitution proceeds to vest, by language which had received from the highest judicial authority in the country a settled interpretation to that effect, the *whole judicial power* of the state in *that* court, and in such inferior courts as the general assembly might set up. This important clause is, as we have seen, " *The judicial power of this state* shall be vested in one supreme court, and in such inferior courts as the general assembly, may, from time to time, ordain and establish."

Id. at 353 (emphasis in original).

Thus, the Supreme Court was established as a distinct constitutional body, vested with the whole judicial power of the state, and for that reason the office of Justice of the Supreme Court is a constitutional office.

One helpful analysis of this issue comes from former Representative Jeffrey Teitz who was Chair of the House Judiciary Committee at the time of the enactment of the Code of Ethics. Rep. Teitz's 2020 essay in the *Providence Journal* (copy appended at App. 1) sets out the General Assembly's contemporaneous understanding that Justice of the Supreme Court is a constitutional office, and the drafters meant to include that office in those exempt from the requirement of a one-year delay. As Rep. Teitz noted, the General Assembly at that time recognized that it could not enact a Code of Ethics that impeded upon a constitutionally specified method of selection for Supreme Court Justices, a point addressed below.

The statutory exemption governs, as the Ethics Commission acknowledged in the *Inman* case. The Commission was a party to the 2001 *Inman* litigation and filed an extensive memorandum addressing, in part, the interplay between the statutory exemption contained in sec. 36-14-15(n)(3) and the Commission's own regulations. (copy of Ethics Commission memorandum appended at App. 20). The Commission acknowledged the Supreme Court's *Advisory Opinion to the Governor*, 633 A.2d 664 (R.I. 1993), where the Court stated that any apparent inconsistency between the statute and the regulation should be reconciled by attempting to harmonize them. Recognizing that the Ethics Commission does not have the authority to impinge upon another branch's constitutional mandate, the

Commission in *Inman* acknowledged that the Constitution's specific grant of power to fill the position of Secretary of State took precedence over any regulation adopted by the Commission. Accordingly, the Ethics Commission itself agreed that Rep. Inman could accept the position of Secretary of State without waiting the one-year period set out in the regulation.

The Superior Court agreed, entered judgment for Secretary Inman, and no party appealed.

Neither a Statute, the Code of Ethics, nor any Regulation can impede a "constitutionally authorize procedure" for the selection of Supreme Court Justices.

The Rhode Island Constitution provides a specific method for selection of Supreme Court Justices:

> The governor shall fill any vacancy of any justice of the Rhode Island Supreme Court by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan judicial nominating commission, and by and with the advice and consent of the senate, and by and with the separate advice and consent of the house of representatives, shall appoint said person as a Justice of the Rhode Island Supreme Court.

R.I. Const., Art. X, sec. 4. This provision was added to the Constitution by referendum in 1994, replacing the earlier process of election of Justices in Grand

Committee.[3] *See* Secretary of State, *Voter Information State Referenda,* (1994). Voters approved the amendment by a two-to-one margin. 1994 General Election Referenda Question #1, available at Board of Elections website https://elections.ri.gov/elections/results/1994/ref1.php.

In *Inman v. Whitehouse*, *supra* Superior Court Justice Silverstein, recognized that ethics statutes and regulations are not superior to the Rhode Island Constitution's specific provisions for the filling of positions in state government. As noted *supra* the Commission was a named party in the case and took the position that ethics regulations could not override specific constitutional methods for filling a position in state government. As the Commission later reiterated in an Advisory Opinion, its position in *Inman* was based upon a careful reading of the revolving door provision in order to preserve its general constitutionality. Thus, the Commission opined that the revolving door regulation would be constitutional "when limiting a legislator from accepting general state employment or consulting work, *it did not apply to restrict [a legislator] from accepting a position that was offered to him through a constitutionally authorized procedure.*" Advisory Opinion No. 2010-54 (Costantino) (describing position Commission advocated in *Inman* case) (emphasis added) (copy appended at App. 7). In *Costantino*, issued in

[3] It is manifest, of course, that the voters' approval of the new Art. X, sec. 4, would override any inconsistent statutes or regulations enacted or adopted *before* November 1994 referendum.

2010, the Commission referred back to the position it had taken in 2002 in *Inman*, concluding that "[e]ight years later, our position has not changed."

Here, as in *Inman*, it is clear that the application for Associate Justice of the Supreme Court is not for "general state employment." Rather, the position of Associate Justice of the Supreme Court is filled via a "constitutionally authorized procedure," and a very specific one at that. The voters were clear in adopting Article X, sec. 4. The Constitution requires an applicant to obtain recommendation by the Judicial Nominating Commission, nomination by the Governor, advice and consent of the Senate, and advice and consent of the House.

The Commission's recognition in *Inman* of its lack of authority to override a constitutionally authorized procedure for filling an office was adopted by the superior court in that case and ultimately subsumed into a final judgment. Neither the Commission, nor any other party, appealed the judgment in *Inman*. The Commission is bound by the *Inman* decision and cannot now retreat from that position. To do so would be an affront to the superior court's ruling, and contrary to the doctrines of stare decisis and collateral estoppel.

The Ethics Commission cannot intrude into the appointment powers specifically conferred upon coordinate constitutional actors in Art. X, sec. 4.

No doubt the Commission is itself provided for in the Constitution, Art. III, sec. 8, and granted certain powers there. But the constitutional appointment

provision here, Art. X, sec. 4, was adopted *after* Art. III, sec. 8. And the new Art. X, sec. 4 provided for a new constitutional body – the Judicial Nominating Commission – with a specific and defined role in the selection of Supreme Court Justices. Indeed, Art. X, sec. 4 of the Constitution delegates selection power the four separate constitutional entities: the Judicial Nominating Commission, the Governor, the House, and the Senate.

Similar to the constitutional process described in *Inman*, the Ethics Commission cannot impede, modify, or negate the "constitutionally authorized procedure" for filling the office of Supreme Court Justice. The Commission agreed in *Inman* and in the Costantino advisory opinion. To proceed otherwise here would be an affront to the voters' very specific chosen method of judicial selection. It would likewise conflict with the decision and judgment in the *Inman* case, to which the Commission is bound, having been a party there.

The Ethics Commission should not act in a manner inconsistent with its refusal to adopt the staff's recommendation when Justice Erin Lynch-Prata requested an advisory opinion.

This Commission's position in *Inman* and *Costantino*, together with the refusal to adopt the staff recommendation regarding the Supreme Court application of then-Senator – now Justice – Erin Lynch Prata, serve to demonstrate that the

revolving door provisions do not apply to the constitutional office of Associate Justice of the Supreme Court. (June 2, 2020 Ethics Commissison Minutes, appended at App. 13)

In 2000 when Justice Lynch Prata requested an advisory opinion, Commission staff recommended advising that as a sitting Senator she was barred from applying for a seat on the Rhode Island Supreme Court. During extensive deliberation on the matter, Commission Counsel expressed the view that the Supreme Court is a constitutional office and Justice Lynch Prata was therefore protected by the sec. 36-14-5(n) exemption. As set out in the Commission's minutes appended hereto, the Commission declined to accept the staff's proposal. Justice Lynch Prata applied for the position. The Judicial Nominating Commission performed its constitutional function and included her in a list of candidates recommended for appointment. Governor Raimondo nominated her and, with the separate (overwhelming) advice and consent of the House and Senate, appointed her to the position of Associate Justice of the Supreme Court. These constitutional actors all performed the functions specifically delegated to them under Art. X, sec. 4. Justice Lynch Prata's years of honorable service on the Supreme Court, combine to ratify the conclusion that the Code of Ethics and any regulations must yield to the constitutionally authorized procedure that voters approved for selection of Supreme Court Justices.

Conclusion. The Constitution, laws, and judicial precedent are clear: the so-called revolving door provisions do not bar a sitting member of the General Assembly from seeking a constitutional office via the "constitutionally authorized procedure." Thus, the instant complaint, on its four corners, does not allege a violation of the Code of Ethics. The Commission should therefore dismiss it without further delay.

RESPECTFULLY SUBMITTED,
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CERTIFICATION

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STATE OF RHODE ISLAND

ETHICS COMMISSION
No. 2026-001

In re: K. Joseph Shekarchi

ITEMS APPENDED TO MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MY TURN

'Revolving door' provisions don't apply to naming of justice

By Jeffrey J. Teitz

I have followed with interest the current debate about whether Rhode Island's "revolving door" provisions, which prohibit state legislators from being appointed to most other state positions while in office or for one year thereafter, apply to the appointment of a Supreme Court justice. The reason they would not apply is because there is a widely recognized legal principle that no limitation can be placed on a constitutional office by either legislative act or administrative rule.

I served in the General Assembly from 1973 through 1996, and was chairman of the House Judiciary Committee for 14 years, including the 1992 session when the "revolving door" legislation was enacted. At that time, legislators were aware that we did not have the same authority to place limitations on eligibility for constitutional offices, such as the Supreme Court, that we had to set eligibility criteria for positions created by statute, such as the trial courts. For example, the General Assembly would have no authority to enact legislation requiring a minimum age or a minimum period of legal practice for eligibility to serve as a justice of the Supreme Court because it would be imposing limitations on a constitutional office. In contrast, the legislature could impose such restrictions on eligibility to serve as a judge on one of the state trial courts created by statute.

This issue was discussed during the lengthy legislative debates that took place when the "revolving door" bill was being enacted, and the concern about constitutional offices was reflected in its wording. Section 36-14-5(n)(3) of the Rhode Island General Laws states: "Nothing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office."

The Supreme Court is established by the Rhode Island Constitution, Article 10, Section 1, and the authority to appoint justices to the Supreme Court is set forth in the Constitution, Article 10, Section 4. Originally, the Constitution provided for the election of Supreme Court justices by the General Assembly in grand committee. This is the process that was in effect when the "revolving door" bill was passed in 1992. Several years later, the Constitution was amended to place the power of appointment in the governor, who is directed by the constitutional provision to select the nominee from a list of names submitted to her by an independent judicial nominating commission.

The authority to name justices to the Supreme Court, whether originally vested in the grand committee or currently vested in the governor, is derived directly from the Constitution, and no limitations can be placed on it by either statute or administrative regulation. In an analogous situation, the Rhode Island Superior Court concluded that the "revolving door" prohibition did not prevent a state legislator from being appointed to a constitutional office.

In that case, a vacancy in the office of secretary of state occurred in the middle of a term. Under the Constitution, the General Assembly in grand committee is empowered to elect a successor for the remainder of the term. The grand committee elected a legislator to fill the position, and a case was brought challenging the appointment. The court rejected the challenge, upholding the appointment, stating: "The Commission's constitutional power to create ethics regulations does not allow it to trump this specific constitutional power of the General Assembly simply by creating a new ethics regulation ... It is important to recognize that regulations and statutes, while constitutionally enacted, are not superior to specific constitutional powers granted to the Grand Committee by the Constitution of the State of Rhode Island." Inman v. Whitehouse v. Rhode Island Ethics Commission, 2002 WL 169197.

Because Supreme Court justice is a constitutional office and the process for appointing justices to that court is a constitutionally established process, the Rhode Island Ethics Commission was correct when it rejected the argument that the "revolving door" provisions applied to the appointment of a justice to the Supreme Court.

Jeffrey J. Teitz was a member of the Rhode Island General Assembly for 24 years, and served as chairman of the House Judiciary Committee from 1979 through 1992.

APP 1

Inman v. Whitehouse

Court:	Rhode Island Superior Court
Writing for the Court:	SILVERSTEIN, J.
Decision Date:	17 January 2001
Docket Number:	C.A. 2001-1256
Citation:	Inman v. Whitehouse, C.A. 2001-1256 (R.I. Super. Jan 17, 2001)
Parties:	EDWARD S. INMAN, III in his capacity as Secretary of State of the State of Rhode Island v. SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island v. RHODE ISLAND ETHICS COMMISSION

Id. vLex Fastcase: VLEX-901160965

Link: https://fastcase.vlex.com/vid/inman-v-whitehouse-c-901160965

EDWARD S. INMAN, III in his capacity as Secretary of State of the State of Rhode Island v. SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island v. RHODE ISLAND ETHICS COMMISSION

C.A. No. 2001-1256

Superior Court of Rhode Island

January 17, 2001

DECISION

SILVERSTEIN, J.

Before the Court is the complaint of plaintiff Edward S. Inman, III, in his capacity as Secretary of State, seeking declaratory judgment pursuant to R.I.G.L. § 9-30-1, et seq.

FACTS AND TRAVEL

On November 4, 1986, plaintiff Edward S. Inman ("Inman") was elected a member of the Rhode Island House of Representatives. He served in this capacity until January 9, 2001 when the General Assembly, meeting in Grand Committee pursuant to Article 4, Section 4 of the Rhode Island Constitution, elected him to fill the position of Secretary of State vacated by James Langevin upon his election to the United States Congress. Article 4, Section 4 provides in relevant part "in case of a vacancy in the office of the secretary of state, . . . the general assembly in grand committee shall elect someone to fill the same . . . . " On January 10, 2001, Inman resigned as a member of the House of Representatives and was sworn in as Secretary of State later that day.

On the last mentioned date, Operation Clean Government ("OCG") and Common Cause ("Cause") filed complaints with the Rhode Island Ethics Commission ("Commission") alleging that plaintiff Inman violated Ethics Regulations §§ 36-14-5006 and 36-14-5007 by accepting election as Secretary of State. The Commission previously had adopted Ethics Regulations §§ 36-14-5006 and 5007 in 1991 as modifications to the Rhode Island Code of Ethics in Government. Ethics Regulation § 36-14-5006 specifically states:

> "No elected or appointed official may accept any appointment or election by the body of which he or she is or was a member, to any position which carries with it any financial benefit or remuneration, until the expiration of one year after termination of his or her membership in or on such body, unless the Ethics Commission shall give its approval for such appointment or election, and, further provided, that such approval shall not be granted unless the Ethics Commission is satisfied that denial of such employment or position would create hardship for the body, board, or municipality."

Ethics Regulation § 36-14-5007 states:

> "No member of the General Assembly shall seek or accept state employment as an employee or consultant, not held at the time of the member's election, while serving in the General Assembly and for a period of one year after leaving legislative office."

Cause further asserted that Inman violated Article 3, Section 7 of the Rhode Island Constitution and R.I.G.L. § 36-14-1 when he did not seek an advisory opinion from the Commission before accepting election to the office of Secretary of State.

On January 25, 2001, pursuant to R.I.G.L. § 42-9-6, Inman requested that the Department of the Attorney General defend him in his capacity as Secretary of State against the complaints filed against him with the Commission by OCG and Cause as aforesaid.

On November 17, 1988, long prior to the matters here in controversy, the Commission had issued an advisory opinion ("Opinion") with respect to its interpretation of the Rhode Island Code of Ethics ("Code"), regarding, specifically, how the Code applies to legal counsel for a state board, commission or agency in representing state employees charged with a Code violation. The Opinion is entitled "General Commission Advisory Opinion No. 4" and has not been amended or rescinded in any way since its issue.

The Opinion concluded that representation of a member of a state board, commission or agency by legal counsel to such public body in any matter arising under the Code would be improper because, to the extent that legal counsel represents the interests of a state agency, the Commission considers the legal counsel itself to be subject to the Code in connection with that representation. A possible ethical violation would arise for counsel contesting the same rules he/she is subject to in that instant representation.

On February 5, 2001, the Attorney General informed Inman that he would not be able to represent him pending

the outcome of an action filed by the Attorney General before this Court for declaratory judgment to settle a conflict between the relevant statutes providing for such representation and the Opinion advising against this type of representation.

At a hearing on March 16, 2001 this Court entered an order staying any further proceedings by the Commission on the allegations against Inman by OCG and Cause. This Court further granted the Attorney General's motion to intervene in this case. The parties next appeared before this Court on March 23, 2001 on the Commission's motion for reconsideration of this Court's stay order. This motion was denied conditioned on the tolling of the applicable Commission time frames for proceeding on such complaints. An agreed statement of facts was filed by the parties on March 30, 2001. The Attorney General moved this Court, pursuant to R.I.G.L. § 9-24-47, to certify three questions to the Rhode Island Supreme Court. On April 5, 2001, this Court granted the Attorney General's motion and certified the three following questions to the Rhode Island Supreme Court:

> "1) (a) Whether Ethics Regulations §§ 36-14-5006 and 36-14-5007 restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State?
>
> (b) Whether Ethics Regulations §§ 36-14-5006 and 5007, if construed to restrict the Grand Committee's authority to select one of its own members to fill a vacancy in the office of Secretary of State, are unconstitutional as contravening Article 4, Section 4 of the Rhode Island Constitution and/or the separation of powers doctrine?
>
> 2) Whether Edward S. Inman, III, violated Article 3, Section 7 of the Rhode Island Constitution and R.I.G.L. § 36-14-1 when he did not seek an advisory opinion from the Rhode Island Ethics Commission prior to accepting the election to Secretary of State?
>
> 3) (a) Whether Rhode Island Ethics Commission Advisory Opinion No. 4 precludes the Attorney General from representing Edward S. Inman, III, and other state officials before the Ethics Commission?
>
> (b) Whether Rhode Island Ethics Commission Advisory Opinion No. 4, if construed to preclude the Attorney General from representing Edward S. Inman, III and other state officials before the Ethics Commission, is subordinate and must yield to the powers and statutory duties of the Attorney General under R.I.G.L. §§ 9-31-1 through 13 and/or the power of the Supreme Court to regulate the practice of law?"

On May 4, 2001 the Rhode Island Supreme Court remanded the three certified questions to this Court to "address the issues raised. . . as they might arise in the course of addressing and resolving the merits of the underlying lawsuit." *Inman, et al v. Rhode Island Ethics Commission*, No. 2001-138 (R.I., filed May 24, 2001). Because plaintiff Inman, defendant Commission and intervener Whitehouse all adopted, essentially, the same position with respect to the answers to the certified questions, this Court permitted the appearance of OCG as amicus curiae, allowing OCG to file a memorandum and participate in oral argument on the issues in October, 2001. These three issues are now before this Court for declaratory judgment.

DISCUSSION

Plaintiff first argues that Ethics Regulations §§ 36-14-5006 and 36-14-5007 do not restrict the authority of the General Assembly meeting in Grand Committee pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State. Plaintiff contends that construing the Regulations in such a manner would contravene this section of the Rhode Island Constitution. Article 4, Section 4 of the Rhode Island Constitution states, in relevant part: "In case of a vacancy in the office of the secretary of state. . . from any cause, the general assembly in grand committee shall elect some person to fill the same. . . ." R.I.Const. Article 4, Section 4.

In *In re Advisory Opinion to the Governor*, 612 A.2d 1 (R.I. 1992), the Rhode Island Supreme Court uphe ld the Commission's limited power to enact substantive ethics laws concurrent to the General Assembly's constitutional power to do the same. The Court defined the Commission's specific constitutional grant to enact a code of ethics holding that:

> ". . . Such an affirmative grant of power to the commission necessarily implies a limitation of the same on the part of the General Assembly or any other body. This is not to say however, that the General Assembly is prohibited from enacting ethics laws all together: rather, the General Assembly is merely limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission." *In re Advisory Opinion to the Governor*, 612 A.2d 1, 14 (R.I. 1992).

The Court in *In re Advisory Opinion to the Governor*, 633 A.2d 664 (R.I. 1993) explained that where the Commission and the General Assembly enact ethics laws in the same area, the two regulations should be read together in a way that is consistent with the objectives of both law-making bodies and which "harmonizes" the

goals of both groups. *See id* at 669. Because the Commission and the General Assembly have concurrent power to enact ethics regulation, courts should attempt to read enactments by the two bodies in a manner that treats both enactments as valid and not inconsistent with one another. *Id.*

In this case there is an important distinction between the Commission's constitutional power to enact ethics regulations and the General Assembly's constitutional power to elect an individual to fill a vacant state office. Article 4, Section 4 of the Rhode Island Constitution specifically gives the General Assembly the power to fill vacancies in state offices. The Commission's constitutional power to create ethics regulations does not allow it to trump this specific constitutional power of the General Assembly simply by creating a new ethics regulation.

The language in Article 4, Section 4 is unambiguous. It states that the General Assembly has the authority to elect some person to fill a vacancy in the office of Secretary of State. A violation of the separation-of-powers doctrine results from allowing a state agency through a regulatory provision such as Ethics Regulations §§ 36-14-5006 and 36-14-5007, to constrain the General Assembly's constitutional authority to fill vacancies in state offices such as Secretary of State.

Plaintiff further contends that allowing the Ethics Regulations to prevail over Article 4, Section 4 would violate Article 6, Section 1 of the Rhode Island Constitution, the state's supremacy clause, by placing a regulatory restriction on a constitutional provision. Article 6, Section 1 declares: "This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void." R.I. Const. Article 6, Section 1.

To allow the application of Ethics Regulations §§ 36-14-5006 and 5007 in this case would violate the separation-of-powers doctrine and Article 6, Section 1 of the Rhode Island Constitution. While the enactment of these regulations was indeed a valid exercise of the Commission's constitutional authority pursuant to Article 3, Section 8 of the Rhode Island Constitution, it is important to recognize that regulations and statutes, while constitutionally enacted, are not superior to specific constitutional powers granted to the Grand Committee by the Constitution of the State of Rhode Island.

The use of the word "election" in the language of Article 4, Section 4 may lead the reader to believe, as OCG contends, that it refers to a popular election whereby the people of the State of Rhode Island must vote to fill the vacancy. Webster's Dictionary defines election as "an act or process of electing . . . ." Webster's Collegiate Dictionary 400 (9th ed. 1991). Elect is defined as "to select by vote for an office, position or membership . . . ." *Id.* Just as there is nothing in the Webster's definition of election regarding a popular election, Article 4, Section 4 of the Rhode Island Constitution does not include any reference to a popular election. It is clear from the constitutional language of Article 4, Section 4 that the word election in this context refers to a scenario where the General Assembly meets in Grand Committee and votes to [s]elect an individual to fill a vacant position.

OCG argues in addition that §§ 36-14-5006 and 36-14-5007 are special provisions that apply to a specific area of state government and as such should prevail over the language of the Constitution. The Court in *In Re Advisory Opinion of the Governor*, 732 A.2d 55 (R.I. 1999) ruled that a Commission Regulation which attempted to limit the General Assembly's authority to appoint its own members to state boards, agencies and commissions was invalid because the Commission could not take away the Legislature's constitutional power to appoint its own members to state boards and commissions by virtue of the Commission's own constitutional authority to enact a substantive code of ethics. Here, the Commission's constitutional enactment of the Ethics Regulations, which binds officers of the State of Rhode Island, cannot trump the language of the Rhode Island Constitution because, under the Supremacy Clause, an agency-enacted regulation does not override the Constitution of the State of Rhode Island. The next issue before this Court is whether plaintiff, as asserted by Cause in its complaint to the Commission, violated Article 3, Section 7 of the Rhode Island Constitution when he did not seek an advisory opinion from the Commission before accepting the appointment to Secretary of State.

Article 3, Section 7 of the Rhode Island Constitution states:

> ". . . public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain or advantage. Such persons shall hold their positions during good behavior."

Neither the language of this Section nor the statute requires an appointee to state office to seek an advisory opinion of the Commission regarding his/her appointment. That notion is compounded in this case by the fact that there was no ethics violation as a result of Inman's election to the office of Secretary of State. Thus, there was not even a question regarding his need to seek an advisory opinion from the Commission. Assuming arguendo, however, that an ethics question did materialize from Inman's appointment, use of the advisory process is *permissive* and *not* mandatory. *See* Ethics Regulation § 36-14-1024(a).[1] Thus, Inman had a right but not an obligation to seek an advisory opinion from the Commission regarding the applicability of §§ 36-14-5006 and 36-14-5007 to his appointment to the office of Secretary of State. *See id* . His failure to seek an opinion from the Commission was not in violation of the Rhode Island Constitution.

The final issue before this Court is whether the Attorney General is constitutionally permitted to represent Secretary Inman in the matters before the Commission and this Court. In its Opinion, the Commission concludes that a member of a state board or commission may not be represented by the legal counsel of that state board or commission in any matter arising under the Code. The Opinion states that representation of a member of a state board, commission or agency by legal counsel to such public body in any matter arising under the Code would be improper because, to the extent that legal counsel represents the interests of a state agency, the Commission considers the legal counsel itself to be subject to the Code in connection with that representation. A possible ethical violation would arise for counsel contesting the same rules he/she is subject to in that instant representation.

While the Opinion opposes the representation of a member of a state board or commission by counsel for that board or commission, it does not preclude the Attorney General from representing state officers and employees pursuant to R.I.G.L. § 42-9-6. That section states in relevant part:

> "Except as otherwise in the general laws provided, the attorney general, whenever requested, shall act as the legal adviser of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof, of all commissioners appointed by the general assembly, of all the general officers of the state, and of the director of administration, in all matters pertaining to their official duties, and shall institute and prosecute, whenever necessary, all suits and proceedings which they may be authorized to commence, and shall appear for and defend the above-named individual legislators, boards, divisions, departments, commissions, commissioners, and officers, in all suits and proceedings which may be brought against them in their official capacity."

The Commission does not disagree with this contention. In fact, the Commission agrees that the Attorney General, by law, represents a state official sued in his/her capacity as a state official, and the discretion to represent only arises when an official is sued in an individual capacity in actions brought under 42 U.S.C. § 1983.

R.I.G.L. § 9-31-8 provides: "Except as provided in § 9-31-9, the attorney general shall, upon written request of an employee or former employee of the state of Rhode Island, defend any action brought against the state employee or former state employee, on account of an act or an omission that occurred within the scope of his or her employment with the state." The Attorney General may refuse to defend a state employee only when he or she determines that the defense would not be in the best interest of the State such as, among other things, when the act or omission was not within the scope of the employment or the act or failure to act was the result of actual fraud, willful misconduct, or actual malice. *See* R.I.G.L. §9-31-8. In this case, Inman was brought before the Commission in his official capacity as Secretary of State. Consequently, the Attorney General must represent him in this matter as it is clear that Inman's election to the office of Secretary of State was not the result of actual fraud, willful misconduct, actual malice, or anything else that would render his defense not in the best interest of the State of Rhode Island.

After careful review of the arguments submitted by the parties in this case, as well as the brief of amicus curiae submitted by OCG, this Court finds in response to the three certified questions remanded to this Court by the Rhode Island Supreme Court that: 1) Ethics Regulations §§ 36-14-5006 and 36-14-5006 do not restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State; 2) Inman did not violate either Article 3, Section 7 of the Rhode Island Constitution or R.I.G.L. § 36-14-1 when he did not seek an advisory opinion from the Commission prior to accepting the election to the office of the Secretary of State; and 3) Advisory Opinion No. 4 does not preclude the Attorney General from representing Inman and other state officials before the Commission. This Court grants declaratory judgment consistent with the foregoing in favor of plaintiff Inman.

Counsel for Secretary of State Inman shall present an order and a judgment to enter upon notice to counsel for the other parties hereto and to amicus curiae OCG.

Notes:

[1] Ethics Regulation § 36-14-1024(a) states in relevant part: "A person subject to the Code of Ethics *may* request an advisory opinion relative to the provisions of the Code which may affect him or her . . ." Ethics Regulation § 36-14-1024(a) (emphasis added).

Advisory Opinion No. 2010-54

Rhode Island Ethics Commission

Advisory Opinion No. 2010-54

Re: The Honorable Steven M. Costantino

QUESTION PRESENTED

The Petitioner, a legislator serving in the Rhode Island House of Representatives, a state elected position, requests an advisory opinion regarding whether, upon the expiration of his term of office, he may accept an appointment by the Governor of Rhode Island to serve in the position of Secretary of Health and Human Services.

RESPONSE

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a legislator serving in the Rhode Island House of Representatives, a state elected position, may upon the expiration of his term of office, accept an appointment by the Governor of Rhode Island to serve in the position of Secretary of Health and Human Services.

The Petitioner is a member of the Rhode Island House of Representatives, having been elected in 1994 and serving continuously since. For the past six years he has served as the Chairperson of the House Committee on Finance. The Petitioner did not seek to retain his

seat in the most recent election and his term of office will therefore expire with the qualification of his successor in the first week of January 2011.

The Petitioner represents that the Governor-elect has offered to appoint him to the position of Secretary of Health and Human Services ("Secretary of HHS"). The Secretary of HHS is a cabinet-level position appointed by and serving at the pleasure of the Governor, subject to the advice and consent of the Senate, and has responsibility for administering the Executive Office of Health and Human Services ("EOHHS"). R.I. Gen. Laws § 42-7.2-3. The EOHHS serves "as the principal agency of the executive branch of state government for managing the departments of children, youth and families, elderly affairs, health, human services, and mental health, retardation and hospitals." Section 42-7.2-2.

Cognizant that the Rhode Island Code of Ethics contains certain "revolving door" provisions that apply to state elected officials generally, and to members of the General Assembly more specifically, the Petitioner requests guidance as to whether he is permitted to accept the Governor-elect's appointment.

The Code of Ethics contains both statutory and regulatory revolving door provisions that are applicable to current and former members of the legislature. Section 36-14-5(n) of the Code of Ethics provides:

No state elected official, while holding state office and for a period of one (1) year after leaving state office, shall seek or accept employment with any other state agency . . . other than employment which was held at the time of the official's election . . . except . . . [n]othing contained herein shall prohibit . . . any state elected official from seeking or accepting a senior policy-making, discretionary, or confidential position on any general officer's or the general assembly's staff, or from seeking or accepting appointment as a department director by the governor.

R.I. Gen. Laws § 36-14-5(n)(1) and (2) (hereinafter, "section 5(n)"). Furthermore, section 5(n) clarifies that the Ethics Commission may authorize an exception to this revolving door prohibition "where such exemption would not create an appearance of impropriety." Id.

In addition to the above statutory revolving door provision that is applicable generally to all state elected officials, the Code contains a more specific, regulatory prohibition that applies only to members of the General Assembly. Adopted in 1991 by the Ethics Commission, along with several other regulations aimed at strengthening the Code of Ethics, Regulation 36-14-5007 reads:

No member of the General Assembly shall seek or accept state employment as an employee or consultant, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office.

Regulation 36-14-5007 (hereinafter, "Regulation 5007").

The Ethics Commission has previously applied both of these revolving door provisions to legislators. Most recently, in Advisory Opinion 2009-44 the Commission opined that section 5(n) and Regulation 5007 both prohibited a legislator from providing arbitration or mediation services to a state agency, although he could continue to be listed on the Department of Administration's master price agreement as qualified to provide such services to non-state entities. Similarly, in Advisory Opinion 2006-25, it was determined that Regulation 5007 would apply to prohibit a member of the House of Representatives from providing insurance brokerage services (a consulting relationship) to a quasi-public state agency. In Advisory Opinion 2001-6, the Commission opined that both section 5(n) and Regulation 5007 prohibited a member of the House of Representatives from accepting work as a part-time instructor at Rhode Island College. See also A.O. 93-53 (State Representative may continue to work as paid consultant for Department of Business Regulation, notwithstanding Regulation 5007, since such work pre-dated his election).

The instant Petitioner presents one fact that did not exist in any of these prior advisories, namely, that the state employment under consideration stems from a gubernatorial appointment to a cabinet-level position as a department head. This circumstance fits neatly into section 5(n)'s exception for appointment by the Governor to a position as a department director. Section 36-14-5(n)(2). However, having determined that section 5(n) is not offended, we must also apply the Code's more specific revolving door provision for former legislators, Regulation 5007.

Unlike its statutory counterpart, Regulation 5007 does not contain an exception for senior-level appointments, nor is there an express provision allowing the Commission to authorize an exception in particular instances. Accordingly, on the surface it would appear that Regulation 5007 would prohibit the

Petitioner from accepting any state employment of any nature until the expiration of one (1) year after leaving legislative office. However, in the years since Regulation 5007's adoption there have been certain judicial interpretations of the Commission's revolving door provisions that apply to shape our construction and application of Regulation 5007 to the instant facts.

In 1993, the Rhode Island Supreme Court issued a decision upholding the constitutionality of both Regulation 5007 and section 5(n). That case began when the Governor questioned whether the Code's revolving door provisions "unconstitutionally infringed upon the ability of the members of the executive, legislative, or judicial branches to perform their duties." In

re Advisory from the Governor, 633 A.2d 664, 666 (R.I. 1993) (hereinafter, "1993 Advisory Opinion). In particular, the Governor argued that these provisions violated principles of due process, equal protection and separation of powers. The Commission not only defended the constitutionality of Regulation 5007, but it also questioned whether section 5(n)'s statutory exceptions were valid when applied to legislators in light of the fact that such exceptions were not included in Regulation 5007. Id. at 668. The Supreme Court held that both parties' arguments went too far, and instead opined that both section 5(n) and Regulation 5007 were constitutional, valid and separately enforceable. Id. at 669-673.

The Court's 1993 Advisory Opinion stood undisturbed for several years until it was modified by another Supreme Court advisory opinion concerning the impact of an ethics regulation on a longstanding constitutional grant of appointment power. In 1999, the Supreme Court declared unconstitutional a Commission Regulation which attempted to limit the General Assembly's constitutional authority to appoint its own members to state boards, agencies and commissions.[1] In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999) (hereinafter, "1999 Advisory Opinion"). Such a regulation was, Commission opponents argued, in direct contravention of the Rhode Island legislature's longstanding constitutional powers of appointment. The Court agreed, writing:

[T]he commission may not act inconsistently with the constitution. "[T]he commission, like any other governmental body, is subject to many of the usual checks and balances associated with our tripartite form of government . . . ." The commission, for example, may not create regulations that seriously impinge upon the executive or the legislative branch's ability to perform their duties, or "assume powers that are central or essential to the operation of the Governor's office. . . ."

732 A.2d at 68-69 (quoting In re Advisory Opinion to the Governor, 612 A.2d 1, 18-19 (R.I. 1992); In re Advisory from the Governor, 633 A.2d 664, 675 (R.I. 1993)). In summary, the 1999 Advisory Opinion held that the Ethics Commission may not, by enacting ethics laws authorized generally by the Ethics Amendments of 1986, amend other parts of the Constitution by diminishing the express powers granted to any branch of government. Id.

Then, in 2001, the Superior Court issued a decision that addressed, and in some ways reconciled, the holdings of the 1993 Advisory Opinion (the Code's revolving door provisions are constitutional) and the 1999 Advisory Opinion (the Code's provisions cannot be inconsistent with the Constitution's grant of appointment powers).

The case of Inman v. Whitehouse, No. 01-1256, 2002 WL 169197 (R.I. Super. Jan. 17, 2002), began with a vacancy in the office of Rhode Island Secretary of State after James Langevin was elected to Congress in 2000. Pursuant to the Rhode Island Constitution, "in case of a vacancy in the office of the secretary of state, . . . the general assembly in grand committee shall elect someone to fill the same . . ." R.I.

Const. art. IV, sec. 4. Pursuant to that authority, the General Assembly met in Grand Committee and elected Edward S. Inman, III ("Inman"), a sitting member of the House of Representatives, to finish Langevin's term. Thereafter, complaints were filed with the Ethics Commission alleging that Inman violated the revolving door provisions of the Code of Ethics, including Regulation 5007.

Inman brought an action in the Superior Court to stay proceedings before the Ethics Commission, and to obtain a declaration that, among other things, the Code's revolving door provisions cannot restrict the Grand Committee's constitutional authority to fill a vacancy in the office of Secretary of State. The Attorney General intervened and sought to have the case certified to the Supreme Court, however the Court denied the certification and instructed the Superior Court to hear the case and issue a decision. The case was heard before Justice Silverstein and, ultimately, the Ethics Commission joined with Inman and the Attorney General to agree that Regulation 5007, while valid, could not impinge upon the Grand Committee's constitutional authority to elect Inman to fill the vacancy.

The Superior Court issued its written decision on January 17, 2002. Therein, the court first recognized the Ethics Commission's constitutional authority to enact substantive ethics laws. Inman, at *3. However, the court noted an "important distinction between the Commission's general constitutional power to enact ethics regulations and the General Assembly's specific constitutional power [under art. IX, sec. 4] to elect an individual to fill a vacant state office." Id. To allow the Commission to enact a regulation that limited the unambiguous constitutional appointment power of the General Assembly would, according to the court, violate principals of separation of powers discussed by the Supreme Court in the 1999 Advisory Opinion and be contrary to the Constitution's Supremacy Clause, art. VI, sec. 1, which declares: "This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void." Id. (quoting R.I. Const. art. VI, sec. 1).

The facts presented by this Petitioner in the instant request for an advisory opinion require careful consideration of the legal analyses set forth by the Supreme Court in the 1999 Advisory Opinion and applied by the Superior Court in Inman. As in Inman, the Petitioner's prospective position with the state comes via an appointment that is expressly authorized by the Rhode Island Constitution. The Governor's power to appoint executive branch officers,

such as the Secretary of HHS, is expressly set forth in article IX of the Rhode Island Constitution, relating to the Executive Power:

Powers of appointment. -- The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers, as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments.

R.I. Const. art. IX, sec. 5.

In Inman, the Ethics Commission took the position that although Regulation 5007 was valid and constitutional when limiting a legislator from accepting general state employment or consulting work, it did not apply to restrict Inman from accepting a position that was offered to him through a constitutionally authorized procedure. Eight years later, our position has not changed. In the instant matter, the

Governor's appointment of the Petitioner to the position of Secretary of HHS is expressly authorized in article IX, section 5, and it is not our prerogative to amend that constitutional provision through the enactment of a contrary regulation.

For these reasons, it is the opinion of the Ethics Commission that while both section 5(n) and Regulation 5007 continue to be valid and enforceable revolving door prohibitions of the Code of Ethics, neither they nor any other provision of the Code of Ethics prohibits the Petitioner from accepting the Governor's appointment to the position of Secretary of HHS.

Code Citations:

R.I. Gen. Laws § 36-14-5(n)

Regulation 36-14-5007

Other Constitutional and Statutory Authority:

R.I. Const. art. III, sec. 7 and 8.

R.I. Const. art. IV, sec. 4

R.I. Const. art. VI, sec. 1

R.I. Const. art. IX, sec. 5

R.I. Gen. Laws § 42-7.2-2

R.I. Gen. Laws § 42-7.2-3

Other Authority Cited:

In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999).

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

In re Advisory Opinion to the Governor, 612 A.2d 1 (R.I. 1992).

Inman v. Whitehouse, No. 01-1256, 2002 WL 169197 (R.I. Super. Jan. 17, 2002).

Related Advisory Opinions:

A.O. 2009-44

A.O. 2006-25

A.O. 2001-6

A.O. 93-53

Keywords:

Revolving door

Prospective employment

APP12

STATE OF RHODE ISLAND
Ethics Commission

Minutes June 2, 2020

MINUTES OF THE OPEN SESSION OF THE RHODE ISLAND ETHICS COMMISSION

June 2, 2020

The Rhode Island Ethics Commission remotely conducted its 7th meeting of 2020 in Zoom webinar format at 9:00 a.m. on Tuesday, June 2, 2020, pursuant to the notice published at the Commission offices, the State House Library, and electronically with the Rhode Island Secretary of State.[1]

The following Commissioners were present:

Marisa A. Quinn, Chair

Arianne Corrente, Vice Chair

Kyle P. Palumbo, Secretary

M. Therese Antone

J. Douglas Bennett

Timothy Murphy

Emili B. Vaziri

The following Commissioner was not present: Robert A. Salk.

Also present were Herbert F. DeSimone, Jr., Commission Legal Counsel; Jason Gramitt, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Lynne Radiches, Staff Attorney/Education Coordinator; Staff Attorneys Teresa Giusti and Teodora Popova Papa; and Commission Investigators Steven T. Cross and Gary V. Petrarca.

At 9:17 a.m., the Chairopened the meeting.

The first order of business was:

Discussion of Remote Meeting Format; Identifying and Troubleshooting any Remote Meeting Issues.

Executive Director Gramitt explained that, after Open Session adjourns, the Commission will convene Executive Session in a separate webinar meeting, after which the Commission will return to Open Session to provide a live report on all actions taken in Executive Session. He noted that a written report of all actions taken in Executive Session will be published and available on the Commission's website after the meeting ends. Copies of the written report can be also requested by calling the Commission at (401) 222-3790 or emailing ethics.email@ethics.ri.gov.

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Executive Director Gramitt informed that the Governor extended the executive order suspending the Open Meetings Act requirements for public bodies through June 14, 2020. He stated that the Commission's next meeting will be held on June 16, 2020, and that there may be an additional extension of the executive order before then. Executive Director Gramitt informed the public that anyone may call the Commission or use the "Q & A" feature during the Zoom webinar for any technical questions or issues during the meeting. Chair Quinn thanked the Commission staff for its efficient operation of business during these difficult times.

The next order of business was:

Approval of minutes of the Open Session held on April 28, 2020.

Upon motion made by Commissioner Antone and duly seconded by Commissioner Corrente, it was unanimously

VOTED: To approve the minutes of the Open Session held on April 28, 2020.

The next order of business was:

Motion to seal minutes of Executive Session held on April 28, 2020.

Upon motion made by Commissioner Corrente and duly seconded by Commissioner Murphy, it was unanimously

VOTED: To seal the minutes of the Executive Session held on April 28, 2020.

The next order of business was:

Director's Report: Status report and updates.

a.) Discussion of impact of COVID-19 crisis on Ethics Commission operations and staffing

Executive Director Gramitt informed that there was no damage to the Commission's office due to the rioting that occurred the previous night in the city. He explained that a majority of the staff has been teleworking and a small number of staff members has been present in the office daily.

b.) Complaints and investigations pending

There are eight complaints pending, all but one of which are conflict of interest matters.

c.) Advisory opinions pending

There are five advisory opinions pending.

d.) Access to Public Records Act requests since last meeting

There were 23 APRA requests received since the last meeting, most of which related to the Raimondo Complaint, all of which were granted within one business day.

e.) Financial Disclosure

Executive Director Gramitt stated that the May 26, 2020 deadline for filing the 2019 Financial Statement has expired but some filers timely requested a full 60-day extension through June.

The next order of business was:

Advisory Opinions.

The advisory opinions were based on draft advisory opinions prepared by Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date.

The first advisory opinion was that of:

The Honorable Erin Lynch Prata, a legislator serving in the Rhode Island Senate, a state elected position, requests an advisory opinion regarding her ability, in compliance with the Code of Ethics, to apply for and, if selected, be appointed to a prospective vacancy on the Rhode Island Supreme Court.

Senior Staff Attorney D'Arezzo presented the Commission Staff recommendation. The Petitioner was present via video link along with her attorneys, Francis J. Flanagan, Esq. and John D. Lynch, Jr., Esq. Senior Staff Attorney D'Arezzo explained that the instant draft was a consensus opinion prepared by her and Staff Attorney Popova Papa and approved by Executive Director Gramitt. The Petitioner addressed the Commission, thanking the members for their service and time. She stated that she requested the advisory opinion to ensure that the public's trust and confidence are maintained. Attorney Flanagan addressed the Commission and stated his disagreement with the Staff's recommendation. He represented that the draft did not answer the Petitioner's question as to whether a position on the Supreme Court is a "constitutional office." He argued that the Code of Ethics' revolving door provisions cannot prohibit a person from seeking a seat on the Supreme Court, which he stated is a "constitutional office." Attorney Flanagan further argued that the Rhode Island Constitution, Art. X, section 4, sets forth the Governor's authority to select a person to fill a vacancy on the Supreme Court and that the Ethics Commission may not infringe upon the Governor's authority to do so, nor on a candidate's constitutional right to seek a position on that Court. Attorney Lynch queried whether the language "seek or be elected" is prohibitive if there is no election.

Commissioner Corrente noted a typographical correction to the citation to "§ 36-14-2(8)(i)" on page 3 of the draft. She inquired why the Commission would not consider the question of whether a position on the Supreme Court is a "constitutional office." In response, Senior Staff Attorney D'Arezzo explained that, irrespective of the definition of "constitutional office," which is not a defined term in the Code of Ethics, § 36-14-5(n)(3)'s exception applies to elected offices and, therefore, is inapplicable to the Petitioner. She further stated that if the General Assembly had intended to permit the gubernatorial appointment of judges under that exception it would have utilized the "seeking or accepting appointment" language it employed in § 5(n)(2). Commissioner Corrente noted that the disjunctive "or" is used in § 5(n)(3) and expressed concern with interpreting legislative intent. Senior Staff Attorney D'Arezzo explained that, in the 1993 Advisory Opinion, the Supreme Court noted that § 5(n)'s prohibitions apply to appointed positions and not to positions elected by the general electorate, and it further stated that § 5(n) temporarily limits appointments to the judiciary.

Attorney Lynch noted that in Inman the Superior Court addressed a legislator's ability to accept appointment to a constitutional office. He stated that the exception applies only to the 10 constitutional offices, including the five Supreme Court Justices. Attorney Lynch indicated that, here, the way one

seeks such a constitutional office is through the application process. Chair Quinn noted that the interpretation is not that straightforward. In response to Chair Quinn, Attorney Lynch informed that 1994 amendment changed the process from the election of judges by the Grand Committee to the current selection of candidates by the Judicial Nominating Commission ("JNC").

In response to Commissioner Bennett, Legal Counsel DeSimone stated his belief that that § 5(n)(3)'s exception for constitutional offices applies here. He further stated that the position of a Supreme Court justice is a constitutional office. Legal Counsel DeSimone indicated that the issue is how to reconcile the regulatory prohibitions with § 5(n)(3)'s exception and advised that the regulations should be read in harmony with the statute. He emphasized the use of the disjunctive "or" in § 5(n)(3) and stated his legal view that the Petitioner is immediately eligible for appointment to the Supreme Court or election as a general officer. In response to Chair Quinn and Commissioner Antone, Legal Counsel DeSimone explained that the Petitioner would not be immediately eligible for a position on an inferior court created by statute. In response to Commissioner Bennett, Legal Counsel DeSimone stated that the Petitioner's current position as Chair of the Senate Committee on Judiciary did not affect his opinion, adding that the Petitioner would be required to recuse if her nomination made it to the Senate.

Commissioner Murphy expressed concern regarding the Petitioner's ability to "accept" an appointment under § 5(n)(1), which would render the issue moot. In response to Commissioner Corrente, Attorney Flanagan informed that the JNC considers whether there are issues that would prevent the Governor from selecting a candidate. Executive Director Gramitt addressed the Commission and informed that it is the task of the Ethics Commission, not the JNC, to determine whether a conflict exists under the Code of Ethics. In response to Commissioner Palumbo and Chair Quinn, Legal Counsel DeSimone stated that § 5(n)(3) is an exception to § 5(n)(1)'s prohibition and the use of the disjunctive "or" supports its application here. Commissioner Murphy inquired where language in the Constitution or the Code of Ethics permits the Petitioner to accept this appointment. Legal Counsel DeSimone stated that the exceptions are narrow and the language used is not artful, but it would so state if a person were required to be elected in order to fall under the exception. Attorney Flanagan commented that the statute cannot be construed so as to produce an absurd result, allowing a person to seek a position but not permitting its acceptance. Commissioner Murphy responded that he interpreted that to mean that § 5(n)(3)'s exception did not apply in this case. In response to Commissioner Palumbo, Attorney Lynch stated that the regulatory restrictions are an impingement upon the Governor's appointment power.

In response to Commissioner Bennett, the Petitioner explained that the Senate Committee on Judiciary has no function in the process until it is forwarded a name by the Governor, at which time it vets the candidate by requesting background information and conducting interviews. She noted that Supreme Court candidates must be approved by both the House and Senate, with the House Committee on Judiciary vetting and voting on the candidate first. The Petitioner represented that she would recuse if her name were submitted to the Senate. Upon motion made by Commissioner Murphy and duly seconded by Commissioner Antone, it was

VOTED: To issue an advisory opinion, attached hereto, to **The Honorable Erin Lynch Prata**, a legislator serving in the Rhode Island Senate, a state elected position.

AYES: Marisa A. Quinn and Timothy Murphy.

NOES: Kyle P. Palumbo; M. Therese Antone; J. Douglas Bennett; Arianne Corrente; and Emili B. Vaziri.

Chair Quinn explained that the draft advisory opinion was not approved due to a lack of five affirmative votes.

The next advisory opinion was that of:

Richard Thomsen, a member of the Dunn's Corners Fire District Operating Committee, who is also a volunteer firefighter on the Dunn's Corners Fire Department, requests an advisory opinion regarding whether the Code of Ethics prohibits him from simultaneously serving in both positions.

Staff Attorney Radiches presented the Commission Staff recommendation. The Petitioner was present via audio link. The Petitioner stated that he requested the advisory opinion to be clear and transparent because he intends to run for reelection. In response to Commissioner Bennett, the Petitioner stated that volunteer firefighters receive stipends based on a formula for the number of calls to which they respond. In further response to Commissioner Bennett, the Petitioner informed that he has a cousin on the Operating Committee. In response to Commissioner Palumbo, the Petitioner explained that the budget is compiled by the Treasurer and then submitted to the Operating Committee and, finally, to the taxpayers at a public meeting in July. Staff Attorney Radiches stated that the citizens vote on the budget as a whole. Executive Director Gramitt explained that conflicts of interest might arise in the budgetary process where the Operating Committee may discuss line items that could impact the Fire Department. Staff Attorney Radiches noted that the draft advisory opinion cautions that, as issues arise, the Petitioner may need to recuse or seek further direction from the Commission. Commissioner Bennett advised the Petitioner to be aware of any issues that could result in remuneration to the Fire Department and or himself. Upon motion made by Commissioner Murphy and duly seconded by Commissioner Antone, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to **Richard Thomsen**, a member of the Dunn's Corners Fire District Operating Committee, who is also a volunteer firefighter on the Dunn's Corners Fire Department.

Commissioner Murphy left the meeting at 10:55 a.m.

The final advisory opinion was that of:

Gregory Maxwell, AIA, a member of the East Greenwich Historic District Commission, who in his private capacity is an architect, requests an advisory opinion regarding whether he qualifies for a hardship exception to the Code of Ethics' prohibition on representing himself before his own board.

Staff Attorney Popova Papa presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Corrente and duly seconded by Commissioner Vaziri, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to **Gregory Maxwell, AIA**, a member of the East Greenwich Historic District Commission, who in his private capacity is an architect.

The final order of business was:

New Business Proposed for future Commission agendas and general comments from the Commission.

There was no new business proposed.

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At 11:00 a.m., upon motion made by Commissioner Antone and duly seconded by Commissioner Palumbo, it was unanimously

VOTED: To adjourn Open Session and go into Executive Session, to wit:

a.) Motion to approve minutes of Executive Session held on April 28, 2020, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

b.) **In re: Raymond Stewart, Jr.**, Complaint No. 2020-1, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

c.) **In re: Janice McClanaghan**, Complaint No. 2019-15, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

d.) **In re: Michael Vendetti**, Complaint No. 2019-16, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

e.) **In re: Chris Mannix**, Complaint No. 2019-17, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

f.) **In re: Natalie McDonald**, Complaint No. 2019-18, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

g.) Annual discussion and review re: Legal Counsel's contract, pursuant to R.I. Gen. Laws § 42-46-5(a)(1). Voting will occur during Open Session of the next Commission meeting.

h.) Litigation update re: **Francis X. Flaherty v. Rhode Island Ethics Commission et al.**, Superior Court C.A. No. PC-2019-5088, pursuant to R.I. Gen. Laws § 42-46-5(a)(2).

i.) Motion to return to Open Session.

Commissioner Corrente left the meeting as the Commission convened in Executive Session.

At 12:16 p.m., the Commission reconvened in Open Session, with Commissioner Murphy present. Commissioner Palumbo was not present.

The next order of business was:

Report on actions taken in Executive Session.

Chair Quinn reported that the Commission took the following actions in Executive Session:

1. Unanimously voted (5-0) to approve the minutes of the Executive Session held on April 28, 2020.

2. Unanimously voted (6-0) to consolidate the matters of **In re: Janice McClanaghan**, Complaint No. 2019-15, **In re: Michael Vendetti**, Complaint No. 2019-16, **In re: Chris Mannix**, Complaint No. 2019-17, and **In re: Natalie McDonald**, Complaint No. 2019-18, for hearing on a Motion to Enlarge Time for Investigation, Second Extension.

Unanimously voted (6-0) in the matters of **In re: Janice McClanaghan**, Complaint No. 2019-15, **In re: Michael Vendetti**, Complaint No. 2019-16, **In re: Chris Mannix**, Complaint No. 2019-17, and **In re: Natalie McDonald**, Complaint No. 2019-18, to enlarge time for investigation for 60 days.

3. Voted (0-5) in the matter of **In re: Raymond Stewart, Jr.**, Complaint No. 2020-1, that there exists probable cause to believe that the Respondent committed a knowing and willful violation of the Code of Ethics. Upon failure of the motion, the Complaint was dismissed. Commissioner Palumbo recused on this matter and was not present for its consideration.

A written Decision and Order, explaining the basis for the Commission's vote, is being prepared by the Commission's Legal Counsel and will be released along with a copy of the prosecutor's Investigative Report.

4. Deferred its annual discussion of Legal Counsel's contract to the next meeting.

5. Received a litigation update in **Francis X. Flaherty v. Rhode Island Ethics Commission et al.**, Superior Court C.A. No. PC-2019-5088.

6. Unanimously voted (5-0) to return to Open Session.

The next order of business was:

Motion to seal minutes of Executive Session held on June 2, 2020.

Upon motion made by Commissioner Antone and duly seconded by Commissioner Murphy, it was unanimously

VOTED: To seal the minutes of the Executive Session held on June 2, 2020.

At 12:21 p.m., upon motion made by Commissioner Antone and duly seconded by Commissioner Murphy, it was unanimously

VOTED: To adjourn the meeting.

Respectfully submitted,

_____

Kyle P. Palumbo

Secretary

[1] On March 9, 2020, Governor Gina Raimondo declared a state of emergency due to the dangers to health and life posed by COVID-19. In furtherance thereof, the Governor issued Executive Order 20-25 on April 15, 2020, which, in part, relieved public bodies from the prohibitions regarding the use of telephonic or electronic communication to conduct meetings set forth under the Rhode Island Open Meetings Act. On May 15, 2020, the Governor issued Executive Order 20-34 which, in part, extended Order 20-25 through June 14, 2020.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

EDWARD S. INMAN, III, in his capacity as Secretary of State for the State of Rhode Island,
Petitioner

SHELDON WHITEHOUSE, in his capacity as Attorney General for the State of Rhode Island,
Intervenor

C.A. No. 2001-1256

Vs.

RHODE ISLAND ETHICS COMMISSION,
Respondent

MEMORANDUM

I. TRAVEL OF THE CASE

This matter comes before the Court as a result of a Complaint for Declaratory and Injunctive Relief filed by Edward S. Inman, III, in his capacity as Secretary of State of the State of Rhode Island. The Plaintiff's Complaint seeks a declaration that the Rhode Island legislature, sitting in Grand Committee duly elected him to fill the vacancy in the Office of the Secretary of State according to Article 4, Section 4 of the Rhode Island Constitution and that he did not violate any Rhode Island law or regulation purporting to be to the contrary and did not seek an Advisory Opinion from the Rhode Island Ethics Commission. Plaintiff seeks a further declaration that Ethics Regulations 36-14-5006 and 5007, *if construed to limit the General Assembly's authority to fill the vacancy from its own membership*, would contravene Article 4, Section 4 of the Rhode Island Constitution, which is the supreme law in Rhode Island pursuant to Article 6, Section 1, and would violate the separation of powers doctrine.

Plaintiff also seeks a declaration that Defendant, Rhode Island Ethics Commission's, interpretation of Advisory Opinion No. 4 infringes upon the powers and duties of the Attorney General under the Rhode Island Constitution and prescribed by Rhode Island law, the powers of the Rhode Island Supreme Court to regulate the practice of law and his rights to legal representation by the Department of Attorney General pursuant to R.I.G.L. §42-9-6.

The matter proceeded before the Court on March 16, 2001 and this Court entered an Order staying any further proceedings in the Rhode Island Ethics Commission on the Complaints that Operation Clean Government and Common Cause filed against Plaintiff, Edward S. Inman, III, and granted the Attorney General's Motion to Intervene. The matter came before the Court again on March 23, 2001 on the Rhode Island Ethics Commission's Motion for Reconsideration of the Court's Stay Order. The Court denied the Motion for Reconsideration conditioned on the tolling of the applicable Commission time frames for proceeding on such Complaints. The parties filed an Agreed Statement of Facts with the Court on March 30, 2001. The Office of the Attorney General then filed a Motion to Certify Questions [to the Rhode Island Supreme Court] pursuant to R.I.G.L. §9-24-47, consisting of three (3) questions with two subparts to questions 1 and 3. On April 5, 2001, by Order of this Court, the following questions were certified to the Rhode Island Supreme Court:

1. (a) Whether Ethics Regulations 36-14-5006 and 5007 restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State.

(b) Whether Ethics Regulations 36-14-5006 and 5007, if construed to restrict the Grand Committee's authority to select one of its own members to fill a vacancy in the office of Secretary of State, are unconstitutional as contravening Article 4, Section 4 of the Rhode Island Constitution and/or the separation of powers doctrine.

2. Whether Edward S. Inman, III, violated Article 3, Section 7 of the Rhode Island Constitution and R.I. Gen. L. §36-14-1 when he did not seek an advisory opinion from the Rhode Island Ethics Commission prior to accepting appointment as Secretary of State.

3. (a) Whether Rhode Island Ethics Commission Advisory Opinion No. 4 precludes the Attorney General from representing Edward S. Inman, III, and other state officials before the Ethics Commission.

(b) Whether Rhode Island Ethics Commission Advisory Opinion No. 4, if construed to preclude the Attorney General from representing Edward S. Inman, III and other state officials before the Ethics Commission, is subordinate and must yield to the powers and statutory duties of the Attorney General under R.I. Gen. Laws §§9-31-1 through 13 and/or the power of the Supreme Court to regulate the practice of law.

On May 4, 2001 the Rhode Island Supreme Court remanded this matter to the Superior Court "to address the issues raised by the certified questions as they might arise in the course of addressing and resolving the merits of the underlying lawsuit".

Therefore, based on the facts and the travel of the case, each of the above enumerated questions are now presented to this Court.

II. STATEMENT OF FACTS

The following statement of facts has been agreed upon by the parties:

Plaintiff Edward S. Inman, III resides at 27 Maplewood Drive, Coventry, Rhode Island and is the Secretary of State for the State of Rhode Island.

2. Defendant Rhode Island Ethics Commission ("Commission") is a commission and agency of the State of Rhode Island established pursuant to R.I. Gen. L. §36-14-8 and R.I. Const. Art. III, §8.

3. Intervenor Sheldon Whitehouse is the duly elected Attorney General for the State of Rhode Island.

4. Plaintiff was elected a member of the House of Representatives on November, 4, 1986.

5. On or about November 17, 1988, the Commission rendered an advisory opinion, entitled "General Commission Advisory Opinion No. 4" ("Advisory Opinion No. 4"), a copy of which is attached hereto as Exh. 1. That Opinion has not been rescinded or amended in any way.

6. Advisory Opinion No. 4 was issued to publicize the Commission's views and interpretation of the Rhode Island Code of Ethics, as they apply to legal counsel for a state board, commission or agency in representing individual members charged with an Ethics Code violation.

7. Pursuant to Advisory Opinion No. 4, the Commission concluded that representation of a member of a state board, commission or agency by legal counsel to such public body in any matter arising under the Rhode Island Code of Ethics would be improper. In its consideration, the Commission found that, to the extent legal counsel represents the interests of the state agency, the Commission considers the legal counsel

ject to the Code of Ethics in connection with those activities. Therefore, this situation would present a possible ethical violation for legal counsel.

8. On January 9, 2001, the Grand Committee of the General Assembly met to fill the vacancy in the office of Secretary of State pursuant to Article 4, Section 4 of the Rhode Island Constitution.

9. Article 4, Section 4 provides in pertinent part: "In case of a vacancy in the office of the secretary of state, . . .the general assembly in grand committee shall elect some person to fill the same . . . ."

10. On January 9, 2001, the Grand Committee of the General Assembly elected Plaintiff to fill the vacancy in the office of Secretary of State pursuant to Article 4, Section 4 of the Rhode Island Constitution.

11. On January 10, 2001, Plaintiff resigned as a member of the House of Representatives and, later that day, he took the oath of office and became Secretary of State.

12. On or about January 10, 2001, Operation Clean Government and Common Cause filed complaints (Nos. 2001-3 and 2001-4) with the Commission alleging that Plaintiff violated Ethics Regulations 36-14-5006 and 5007 by accepting appointment as Secretary of State. Common Cause also asserted that Plaintiff violated Article 3, Section 7 of the Rhode Island Constitution and R.I. Gen. L. §36-14-1 when he did not seek an advisory opinion from the Commission in connection with his acceptance of the position of Secretary of State.

13. By letter dated January 25, 2001, Plaintiff formally requested pursuant to R.I. Gen. L. §42-9-6 that the Department of Attorney General defend him in his official

capacity as the duly elected Secretary of State against the complaints that Operation Clean Government and Common Cause had filed with the Commission.

14. By letter dated February 5, 2001, Attorney General Whitehouse responded that, because of an apparent conflict between the relevant state statutes providing for representation and Advisory Opinion No. 4, the Attorney General could not represent Plaintiff pending the outcome of an action filed by the Attorney General in the Rhode Island Superior Court for a declaratory judgment to settle that question of law. That action, Sheldon Whitehouse, in his capacity as Attorney General of the State of Rhode Island vs. Rhode Island Ethics Commission, No. 00-4988, is pending in the Superior Court for Providence County. Because of that tension, Attorney General Whitehouse informed Plaintiff that he could retain private counsel to represent him at state expense, subject to the risk that the declaratory judgment action could come back adverse to the statutes authorizing representation.

III. ISSUES PRESENTED

1. (a) Whether Ethics Regulations 36-14-5006 and 5007 restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State.

A. The Rhode Island Ethics Commission has constitutional authority to enact substantive ethics laws for all government officials and employees.

In November of 1986, the people of Rhode Island voted in favor of an Ethics Amendment to the Rhode Island Constitution proposed by the Constitutional Convention of 1986. Article 3, Section 7 of the Rhode Island Constitution provides:

> Ethical Conduct – The people of the State of Rhode Island believe that public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be

> open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain or advantage. Such persons shall hold their positions during good behavior.
>
> The Rhode Island Constitution, Article III, Section 8 provides:
>
> Ethics Commission – Code of Ethics – The general assembly shall establish an independent non-partisan ethics commission which shall adopt a code of ethics including, but not limited to, provisions on conflicts of interest, confidential information, use of position, contracts with government agencies and financial disclosure. All elected and appointed officials and employees of state and local government, of boards, commissions and agencies shall be subject to the code of ethics. The ethics commission shall have the authority to investigate violations of the code of ethics and to impose penalties, as provided by law; and the commission shall have the power to remove from office officials who are not subject to impeachment.

In 1987 the Rhode Island General Assembly enacted the enabling legislation for the Rhode Island Ethics Commission and established the first Rhode Island Code of Ethics in Government.

In 1991 the Governor requested an advisory opinion of the Supreme Court as to whether the Ethics Commission had the constitutional authority "independent of the legislature to enact substantive ethics laws governing all elected and appointed officials and employees of state and local government, boards, commissions and agencies" and whether the Rhode Island General Assembly was divested of legislative power to enact ethics laws governing public officials and employees. In Re: Advisory Opinion to the Governor, 612 A.2d 1, at 2 (R.I. 1992). This Court held that the Rhode Island Ethics Commission had the constitutional authority to promulgate a Code of Ethics and to enact substantive ethics laws for government officials and employees. Id at 13-14. The Court wrote that this constitutional power necessarily prohibits the General Assembly

from enacting ethics laws that are inconsistent with or contradictory to the Code of Ethics adopted by the Rhode Island Ethics Commission. Id at 14.

In answering the question regarding the Ethics Commission's constitutional power to enact an ethics code, this Court held that the Constitutional Amendment mandating the Ethics Commission, "shifted the legislative power regarding ethics away from the General Assembly. It did not however divest the General Assembly of its 'whole' legislative power or the power to enact ethics laws that are not in conflict with those enacted by the Commission." In Re Advisory Opinion to the Governor, 612 A.2d at 19.

The Rhode Island constitution requires the Ethics Commission to adopt a code of ethics for "all elected and appointed officials of state and local government" and Article III, Sections 7 and 8, directs the Ethics Commission to adopt a code of ethics establishing substantive standards of ethical conduct for all elected or appointed officers and employees. In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999) The Ethics Commission does this through its rule making process, promulgating regulations establishing substantive standards of ethical conduct.

Such regulations may not "seriously impinge" upon the judiciary's duties and may not "assume powers that are central to the operation of the judiciary." See In re Advisory Opinion from the Governor, 633 A.2d 664, at 674-675 (R.I. 1993). Actions "seriously impinge" on a government branch's power when powers are assumed that are "essential to the operation" of that branch, and disrupt the branch's ability to perform its duties. See Chadha v. Immigration & Naturalization Serv., 634 F.2d 408 (9th Cir. 1980), aff'd, 462 U.S. 919 (1983).

The legislature has concurrent jurisdiction to enact statutes establishing substantive standards of ethical conduct. In re Advisory Opinion to the Governor, 633 A.2d 664 (R.I. 1993) For example, the Rhode Island Supreme Court found that passage of the so-called revolving door legislation [RIGL §36-14-5(n)(1)], which limits the Governor's ability to appoint certain individuals to the judiciary, state commissions and agencies within one year after their leaving public office was constitutional.

B. The core responsibility of the Rhode Island Ethics Commission is to regulate conflicts of interest of public officials.

As already stated, the Ethics Commission was established by Constitutional mandate, pursuant to Article 3, Section 8 of the Rhode Island Constitution. The Rhode Island Ethics Commission has constitutional primacy in the area of ethics for all elected and appointed officials and employees of state and local government. Article 3, Section 8 grants the Rhode Island Ethics Commission constitutional authority to enact substantive ethics laws for all government officials.

Article 4, Section 4 of the Rhode Island Constitution provides the Grand Committee of the Rhode Island legislature with authority to fill a vacancy in the office of the Secretary of State, as follows:

> "**Section 4. Temporary appointment to fill vacancies in in office of secretary of state, attorney-general, or general treasurer.** – In case of a vacancy in the office of the secretary of state, attorney-general, or general treasurer from any cause, the general assembly in grand committee shall elect some person to fill the same; provided, that if such vacancy occurs when the general assembly is not in session the governor shall appoint some person to fill such vacancy until a successor elected by the general assembly is qualified to act."

These two constitutional provisions are hardly irreconcilable and should be construed to strike a harmonious balance between these two important functions of government.

The legislature has enacted a statutory provision within the Rhode Island Code of Ethics related to the election of state elected officials to a constitutional office.

RIGL §36-14-5 provides in part as follows:

> (n) (3) Nothing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office.

The Rhode Island Ethics Commission has promulgated Regulations 36-14-5006 and 5007 which provide as follows:

> **Regulation 36-14-5006 Employment From own Board.**
>
> No elected or appointed official may accept any appointment or election by the body of which he or she is or was a member, to any position which carries with it any financial benefit or remuneration, until the expiration of one (1) year after termination of his or her membership in or on such body, unless the Ethics Commission shall give its approval for such appointment or election, and, further provided, that such approval shall not be granted unless the Ethics Commission is satisfied that denial of such employment or position would create a substantial hardship for the body, board, or municipality.
>
> **Regulation 36-14-5007 Prohibition on State Employment**
>
> No member of the General Assembly shall see or accept state employment as an employee or consultant, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office.

The Rhode Island Supreme Court has already had an opportunity to analyze the interaction between RIGL §36-14-5(n) and Ethics Commission Regulations 36-14-5006 and 5007. See In Re Advisory Opinion to the Governor, 633 A.2d 664 (R.I. 1993). This

is particularly noteworthy since RIGL §36-14-5(n)(3) specifically exempts a state elected official who seeks or is elected to any other constitutional office from the so-called revolving door legislation. . In the situation presented to the Court in this case the Plaintiff as a member of the Rhode Island House of Representatives sought and was elected to the constitutional office of the Secretary of State. The Ethics Commission already argued that subsection (n) of the statute was unconstitutional because it was inconsistent with Ethics Commission Regulations 36-14-5006 and 36-14-5007 because it created exceptions to those Regulations. Id at 668. In response to that argument, the Court wrote, "{S}tatutes that relate to the same subject matter should be considered together so that they will harmonize with each other and be consistent with their general objective scope. . . . This rule of construction applies even though the statutes in question contain no reference to each other and are passed at different times." Rhode Island Higher Education Assistance Authority v. Rhode Island Conflict of Interest Commission, 505 A.2d 427, 428 (R.I. 1986). The Court concluded that subsection (n) of the statute and the regulations are not inconsistent but are compatible and the General Assembly had properly enacted the statute under its concurrent jurisdiction in the ethics arena. Id at 668, 669.

Having already recognized that Section n(3) of RIGL §36-14-5 is constitutional and a proper exercise under the General Assembly's concurrent jurisdiction with the Commission in the ethics arena, and mindful that Ethics Regulations 36-14-5006 and 5007 constitute a valid exercise of the Ethics Commission's constitutional authority, it is incumbent upon the Court and the Ethics Commission to pay heed to the precedent of the Rhode Island Supreme Court and strive to reconcile the regulation and the statutes in

accordance with each of the respective constitutional mandates of the legislature and the Ethics Commission.

The substantive Ethics laws established by the Commission regulations apply to "all elected and appointed officials and employees of state and local government, of boards, commissions and agencies . . ." Article 3, Section 8 of the Rhode Island Constitution. RIGL §36-14-5(n)(3) has a much narrower scope applying only to a state elected official seeking or being elected to any other constitutional office.

When a general provision of the law is in conflict with a special provision relating to the same or a similar subject, the two provisions shall be construed, if possible, so that effect may be given to both; and in those cases, if effect cannot be given to both, a special provision shall prevail and shall be construed as an exception to the general provision. RIGL §43-3-26. See also Lopes v. Phillips, 680 A.2d 65, 69 (R.I. 1996). The Ethics Regulations are general provisions applying to all state and local elected and appointed officials, while RIGL §36-14-5(n)(3) is a special provision applying only to a state elected official, elected to a constitutional office. As a special provision, it must prevail as an exception too the general provision.

The constitutional primacy of the Ethics Commission in the area of government ethics must not and need not be compromised when balanced against the General Assembly's constitutional mandate to fill a vacancy in the office of Secretary of State. However, that the Ethics Commission cannot seriously impinge upon the legislative branch's power to fulfill its constitutional mandate. See In re Advisory Opinion to the Governor, supra and Chadha v. Immigration and Naturalization Service, supra. Accordingly, consistent with the previous interpretation by the Rhode Island Supreme

Court of the very same statute and regulations (RIGL §36-14-5(n)(3) and Ethics Regulations 36-14-5006 and 36-14-5007) at issue in this case, the General Assembly may elect one of its members in Grand Committee to fill the vacancy in the office of the Secretary of State, pursuant to Article 4, Section 4 of the Rhode Island Constitution.

Such a result is also required by the Rhode Island Supreme Court's opinion, In Re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999). In that case the Supreme Court invalidated an Ethics Commission Regulation which attempted to limit the General Assembly's authority to appoint its own members to state boards, agencies and commissions. The Court concluded that the Rhode Island Ethics Commission did not have the ability to abrogate the General Assembly's authority to appoint individuals from its membership to state governmental public boards, commissions or agencies. The Court reasoned that the Ethics Commission could not take away the legislature's ability to appoint its own members to state boards and commissions by virtue of its constitutional authority to enact a substantive code of ethics. It is difficult to conclude that if the Ethics Commission cannot prohibit the General Assembly from appointing its own members to state boards, agencies and commissions, it can nevertheless restrict the General Assembly's constitutional authority to fill a vacancy in the office of Secretary of State, pursuant to Article 4, Section 4 of the Rhode Island Constitution.[1]

[1] This does not mean that the General Assembly cannot add reasonable requirements for the holding of public office to those set forth in the Constitution. See Gelch v. State Board of Elections, 482 A.2d 1204(R.I. 1984). Relative to the issues in this case, the General Assembly has spoken through the enactment of RIGL 36-14-5(n)(3).

1.(b) Whether Ethics Regulations 36-14-5006 and 5007, if construed to restrict the Grand Committee's authority to select one of its own members to fill a vacancy in the office of Secretary of State, are unconstitutional as contravening Article 4, Section 4 of the Rhode Island Constitution and/or the separation of powers doctrine.

Since Regulations 36-14-5006 and 5007 do not restrict the Grand Committee's authority to select one of its own members to fill a vacancy in the office of Secretary of State, the Regulations are not unconstitutional as contravening Article 4, Section 4 of the Rhode Island Constitution and/or the separation of powers doctrine. The Rhode Island Ethics Commission has constitutional primacy in the area of ethics for all elected and appointed officials and employees of state and local government pursuant to Article 3, Sections 7 and 8 of the Rhode Island Constitution. The regulations constitute a valid and legitimate exercise of the Rhode Island Ethics Commissions' constitutional authority to enact substantive ethics laws.

2. Whether Edward S. Inman, III, violated Article 3, Section 7 of the Rhode Island Constitution and R.I. Gen. L. §36-14-1 when he did not seek an advisory opinion from the Rhode Island Ethics Commission prior to accepting appointment as Secretary of State.

Edward S. Inman, III did not violate Article 3, Section 7 of the Rhode Island Constitution and R.I. Gen. L. §36-14-1 when he did not seek an advisory opinion from the Rhode Island Ethics Commission prior to accepting appointment as Secretary of State, since such action was not violative of the Rhode Island Code of Ethics.

3. (a) Whether Rhode Island Ethics Commission Advisory Opinion No. 4 precludes the Attorney General from representing Edward S. Inman, III, and other state officials before the Ethics Commission.

The conclusion of Rhode Island Ethics Commission Advisory Opinion No. 4 states:

CONCLUSION

> The Commission therefore advises that representation of a member of a state board, commission or agency by legal counsel to such public body in any matter arising under the Rhode Island Code of Ethics would be improper, whether the attorney is being paid by the public body or is hired privately. This would not and could not prevent the public body from electing to reimburse any individual for his or her legal expenses if the Commission finds that no violation has been committed.

On its face, the language of the conclusion does not preclude the Attorney General from representing Edward S. Inman, III, or other state officials before the Ethics Commission. The essence of the General Advisory Opinion No. 4. is that a member of a state board or commission may not be represented by the legal counsel of that state board or commission in any matter arising under the Rhode Island Code of Ethics. The general advisory opinion does not conclude that the office of Attorney General may not represent members of state boards, commissions or agencies in matters arising under the Rhode Island Code of Ethics. A fair reading of the general advisory opinion demonstrates that its conclusion is based on the logic that there is a natural conflict between a lawyer representing a state board or commission and a member who is accused of violating his responsibilities to that state board or commission. The general advisory opinion does not, however, attempt to abrogate the responsibilities of the Attorney General under RIGL §42-9-6, which provides:

> Except as otherwise in the general laws provided, the attorney general, whenever requested, shall act as the legal adviser of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof, of all commissioners appointed by the general assembly, of all the general officers of the state, and of the director of administration, in all matters pertaining to their official duties, and shall institute and prosecute, whenever necessary, all suits and proceedings which they may be authorized to commence, and shall

> appear for and defend the above-named individual legislators, boards, divisions, departments, commissions, commissioners, and officers, in all suits and proceedings which may be brought against them in their official capacity.

The Ethics Commission agrees that the statute mandates that the Attorney General represent state officials in any proceedings brought against them in their capacities.

RIGL §9-31-6 provides, "In any action pursuant to this chapter against the state of Rhode Island, the attorney general, or any assistant attorney general authorized by him or her, shall represent the state in such action." The Ethics Commission agrees that the Attorney General, by law, represents a state official sued in his or her official capacity and the discretion to represent arises only when an official is sued in an individual capacity in actions brought under 42 U.S.C. §1983.

RIGL §9-31-8 provides: "Except as provided in §9-31-9, the attorney general shall, upon a written request of an employee or former employee of the state of Rhode Island, defend any action brought against the state employee or former state employee, on account of an act or omission that occurred within the scope of his or her employment with the State."

RIGL §9-31-11 states, in pertinent part, "In the event there is a conflict of interest or the attorney general determines it is not in the best interest of the state . . . to {provide representation}, the state shall pay for reasonable counsel fees . . ."

And finally RIGL §9-31-9 provides:

> "The attorney general may refuse to defend an action referred to in §9-31-8 if he or she determines that:
>
> (1) The act or omission was not within the scope of employment;
> (2) The act or the failure to act was because of actual fraud, willful misconduct, or actual malice;

(3) The defense of the action or proceeding by the attorney general would create a conflict of interest between the state of Rhode Island and the employee or former employee;
(4) Within ten (10) days of the time he or she is served with any summons, complaint, process, notice, demand, or pleading, the employee or former employee fails to deliver the original or a copy thereof to the attorney general or his or her designee; or
(5) The state employee or former state employee refuses to cooperate fully with the attorney general's defense."

The Ethics Commission agrees with the Intervenor's position that, ". . .in the event an official is sued in a purely official capacity, the Attorney General must represent. If an official is sued in an individual capacity, the Attorney General has the discretion to decide to represent the official, to hire conflict counsel, or to refuse to provide a defense altogether." However, the Commission does not agree that General Advisory Opinion No. 4 contradicts the above cited statutory framework, because it does not assume that in all matters pending before the Commission, representation by the Attorney General would be improper. It does conclude that representation by legal counsel to the state board or commission of which the accused is a member would be improper as an inherent conflict exists between counsel to a state agency, board or commission and a member who is accused of violating his or her duties and responsibilities to that state board or commission. The Attorney General may fulfill its statutory duties outlined above and represent members of state boards, commissions or agencies in matters arising under the Rhode Island Code of Ethics and not be in conflict. with Ethics Commission General Advisory Opinion No. 4.

3. (b)Whether Rhode Island Ethics Commission Advisory Opinion No. 4, if construed to preclude the Attorney General from representing Edward S. Inman, III and other state officials before the Ethics Commission, is subordinate and must yield to the powers and statutory duties of the Attorney General under R.I. Gen. Laws §§9-31-1 through 13 and/or the power of the Supreme Court to regulate the practice of law.

Since Rhode Island Ethics Commission Advisory Opinion No. 4, should not be construed to preclude the Attorney General from representing Edward S. Inman, III and other state officials before the Ethics Commission, the Court need not address the issues raised in question 3(b). The long established principle of judicial restraint requires courts to refrain from addressing issues when it is not necessary to the resolution of the matter before the court. There is no compelling reason for this court to depart from that well accepted principle in this matter, since all issues before the court can be resolved without addressing question 3.(b).

CONCLUSION

Therefore, the Defendant, Rhode Island Ethics Commission, requests that this Honorable Court declare as follows:

1.(a) Ethics Regulations §36-14-5006 and 50907 do not restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of the Secretary of State.

1.(b) The Rhode Island Ethics Commission has constitutional primacy in the area of ethics for all elected, appointed officials and employees of state and local government, pursuant to Article 3, Sections 7 and 8 of the Rhode Island Constitution. Ethics Regulations 36-14-5006 and 5007 constitute a valid exercise of the Rhode Island Ethics

Commissions' constitutional authority to enact substantive ethics laws for all state and local government officials.

2. Plaintiff, Edward S. Inman, III, did not violate Article 3, Section 7 of the Rhode Island Constitution and Rhode Island General Law §36-14-1 when he did not seek an advisory opinion from the Rhode Island Ethics Commission prior to accepting the appointment as Secretary of State.

3.(a) The Rhode Island Ethics Commission Advisory Opinion No. 4 does not preclude the Attorney General from representing Edward S. Inman, III and other state officials before the Rhode Island Ethics Commission.

3.(b) The Court must decline to address issue with 3.(b) in accordance with the well settled doctrine of judicial restraint, as it is not necessary to the resolution of the matter before the Court.

Defendant
By its attorney,

William J. Conley, Jr., Bar 2149
670 Willett Avenue
East Providence, RI 02903
4370905

CERTIFICATION

I hereby certify that I mailed a true copy of the within Memorandum to John A. Tarantino, Esquire, David A. Wollin, Esquire, Adler Pollock & Sheehan, 2300 Financial Plaza, Providence, RI 02903 and to Rebecca Partington, Department of Attorney General, 150 South Main Street, Providence, RI 02903 on the 18th day of June, 2001.

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RHODE ISLAND
ETHICS COMMISSION
26 JUN 16 AM 10:01

STATE OF RHODE ISLAND
RHODE ISLAND ETHICS COMMISSION

In re: K. Joseph Shekarchi **Complaint No. 2026-1**
Respondent

PROSECUTION'S MEMORANDUM OF LAW IN SUPPORT OF ITS OBJECTION TO RESPONDENT'S MOTION TO DISMISS

Table of Contents

I. Introduction

The Respondent's conduct in applying to the Judicial Nominating Commission (JNC), his continuing participation in the JNC interview and decision-making process, and his acceptance of any appointment to the Rhode Island Supreme Court, results in three separate violations of the Code of Ethics' revolving door prohibitions: Commission Regulation 1.5.1, Commission Regulation 1.5.2, and R.I. Gen. Laws § 36-14-5(n).

In his Motion to Dismiss, the Respondent offers two primary legal arguments to support his claim that the revolving door laws cannot prevent him from seeking appointment to the Supreme Court while actively serving in the General Assembly: (1) that because the position of Supreme Court Justice is a "constitutional office," his application arguably falls within one of the statutory exceptions to § 36-14-5(n), an exception that is not included in the Ethics Commission's own regulations, Regulations 1.5.1 and 1.5.2; and (2) that because the JNC process is a "constitutionally authorized procedure," the Ethics Commission cannot enforce the Code of Ethics' revolving door laws that impede the judicial selection process.

As discussed below, the Respondent's arguments are in direct opposition to the Rhode Island Supreme Court's reported, still valid, and controlling opinions involving these very revolving door prohibitions, which addressed both the proper interpretation of the elections exception to § 36-14-5(n) and the constitutionality of all three revolving door provisions relative to the subject issue of judicial appointments. The Motion to Dismiss should be denied.

II. The Three Applicable "Revolving Door" Provisions of the Code of Ethics

As originally enacted in 1987 by the General Assembly, the Code of Ethics did not contain any "revolving door" provisions to prohibit a state elected official from seeking or

accepting a judgeship. That changed in 1991, when the Ethics Commission adopted two distinct revolving door prohibitions. A year later, in 1992, the General Assembly adopted a third, separate, revolving door prohibition for inclusion in the Code of Ethics. Each of these three revolving door laws, separately and independently, prohibits the Respondent from seeking or accepting a judgeship on any court in the state judiciary, including the Supreme Court.

A. Regulation 1.5.1 – Employment from Own Board

Adopted as part of the Code of Ethics in 1991 by the Ethics Commission, along with several other new provisions aimed at strengthening the Code of Ethics, 520-RICR-00-00-1.5.1 Employment from Own Board (36-14-5006) (Regulation 1.5.1) reads:

> No elected or appointed official may accept <u>any appointment</u> or election that requires approval by the body of which he or she is or was a member, <u>to any position</u> which carries with it any financial benefit or remuneration, until the expiration of one (1) year after termination of his or her membership in or on such body, unless the Ethics Commission shall give its approval for such appointment or election, and, further provided, that such approval shall not be granted unless the Ethics Commission is satisfied that denial of such employment or position would create a substantial hardship for the body, board, or municipality.

Regulation 1.5.1 (emphasis added).

Under the Rhode Island Constitution, all appointments to the Supreme Court require the approval of the House of Representatives, of which the Respondent is a member. R.I. Const. art. 10, sec. 4. This required advice and consent of the House of Representatives has proven to be no rubber stamp. In 1997, for example, the House of Representatives voted to reject Governor Almond's selection of Margaret Curran for appointment to the Supreme Court. She later went on to serve as Rhode Island's U.S. Attorney from 1998 to 2003,

spearheading the successful "Thunder Dome" prosecution of Providence mayor Buddy Cianci. As our Supreme Court has noted, "[t]he mobilization of legislative opposition during the nominating process can create a powerful weapon in the defeat of a nominee." In re Advisory to the Governor (Judicial Nominating Commission), 668 A.2d 1246, 1250 (R.I. 1996). Therefore, because the Respondent is the recently resigned Speaker, and a current member, of the House of Representatives, whose advice and consent is a necessary prerequisite to his appointment to the judiciary, and absent the expiration of a temporary one-year waiting period, Regulation 1.5.1 very clearly prohibits the Respondent from accepting an appointment to the Supreme Court.

There is a single, limited exception built into Regulation 1.5.1, allowable only if the Ethics Commission is satisfied that denying the appointment would create a "substantial hardship for the body," which in this case likely refers to a substantial hardship for the Supreme Court and the State of Rhode Island if the Respondent is prohibited from moving directly from his recently-resigned Speakership to the Supreme Court. This exception is almost certainly not applicable here, and the Respondent does not allege in his Motion to Dismiss that it applies.[1]

[1] For a "substantial hardship for the body" to exist there must be some evidence that there are no other qualified candidates willing or able to serve on the court. See A.O. 2014-18 (opining that in determining if a substantial hardship to the government body existed, the key issue was not whether the petitioner was the most qualified candidate but whether other qualified candidates were currently available or might become available through a second posting of the position); A.O. 2006-1 ("The Ethics Commission could assume arguendo that the petitioner is the most qualified candidate for the job, but still find that no substantial hardship exists if other, less but suitably qualified individuals . . . are available to fill the vacancy."). See also A.O. 2016-43; A.O. 2004-36; A.O. 2000-32; A.O. 99-76.

Accordingly, on its face and standing alone, Regulation 1.5.1 prohibits the Respondent from accepting appointment as a Supreme Court Justice.

B. Regulation 1.5.2 – Prohibition on State Employment

Concurrent with its adoption of Regulation 1.5.1 in 1991, the Ethics Commission also adopted 520-RICR-00-00-1.5.2 Prohibition on State Employment (36-14-5007) (Regulation 1.5.2), which is only applicable to members of the General Assembly. It reads:

> No member of the General Assembly shall seek or accept state employment, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office. For purposes of this regulation, "employment" shall include service as defined in R.I. Gen Laws § 36-14-2(4) and shall also include service as an independent contractor or consultant to the state or any state agency, whether as an individual or a principal of an entity performing such service.

Regulation 1.5.2 (emphasis added).

The term "employment" as used in Regulation 1.5.2 is defined in the Code of Ethics to include both "any full time or part time employees in the classified, nonclassified and unclassified service of the state" as well as "individuals serving in any appointed state or municipal position[.]" § 36-14-2(4) (emphasis added). The position of Supreme Court Justice satisfies both of those definitions since Supreme Court Justices are appointed to their positions, then becoming full-time, unclassified state employees. Unlike Regulation 1.5.1, there are no exceptions to Regulation 1.5.2. Therefore, its clear terms absolutely prohibit the Respondent from seeking or accepting appointment as a Supreme Court Justice until one year after leaving office as a state representative.

Accordingly, on its face and standing alone, Regulation 1.5.2 prohibits the Respondent's application to the JNC for appointment as a Supreme Court Justice.

C. § 36-14-5(n) – State Elected Official Revolving Door

In 1992, the year after the Ethics Commission adopted Regulations 1.5.1 and 1.5.2, the General Assembly added a third revolving door statute for inclusion in the Code of Ethics, R.I. Gen. Laws § 36-14-5(n), that generally mirrored Regulation 1.5.2 but expanded the revolving door's application from applying only to legislators to restrict any "state elected official." It reads:

> No state elected official, while holding state office and for a period of one year after leaving state office, shall seek or accept employment with any other state agency, as defined in § 36-14-2(8)(i), other than employment which was held at the time of the official's election or at the time of enactment of this subsection, except as provided herein.

§ 36-14-5(n) (emphasis added). The term "state agency" as used in §36-14-5(n) is expressly defined in the Code of Ethics to include "**the judiciary**" without limitation to any particular court.[2]

Unlike Regulation 1.5.2, § 36-14-5(n) allowed for certain, limited exceptions for seeking certain non-judicial appointments, or seeking elective office. Importantly, in comparing § 36-14-5(n) with Regulations 1.5.1 and 1.5.2, the Rhode Island Supreme Court has recognized that "[a]n individual could be found to have violated the regulations while being in compliance with the statute." In re Advisory From the Governor, 633 A.2d 664, 669

[2] "'State agency' means any department, division, agency, commission, board, office, bureau, authority, or quasi-public authority within Rhode Island, either branch of the Rhode Island general assembly, or an agency or committee thereof, the judiciary, or any other agency that is in any branch of Rhode Island state government and which exercises governmental functions other than in an advisory nature." R.I. Gen. Laws § 36-14-2(8)(i)(emphasis added).

(R.I. 1993)(1993 Advisory Opinion). Nevertheless, in the instant case the Respondent has violated both the regulations and the statute because none of § 36-14-5(n)'s exceptions apply.

1. The *Appointments* Exception to § 36-14-5(n)

The first exception contained in subsection 36-14-5(n)(2) allows an elected official to seek or accept certain, non-judicial *appointments*, providing:

> Nothing contained herein shall prohibit any state elected official from seeking or accepting a senior policy-making, discretionary, or confidential position on the general officer's or the general assembly's staff, or from seeking or accepting appointment as a department director by the governor.

Significantly, in reference to this exception, the Rhode Island Supreme Court has specifically noted that while this exception allowed for some appointments, there was no exception applicable to judicial appointments:

> The Governor is unlimited in his choices of appointments to important policy-making, confidential, and discretionary positions. The subsections temporarily limit the Governor's choices for other appointments to the judiciary, various commissions, and state agencies.

1993 Advisory Opinion, 633 A.2d at 675 (emphasis added).

Since the Respondent is seeking an appointment to "the judiciary," and is neither seeking a department director position nor a senior staff position with a state elected official, this exception does not apply and need not be considered further. The Respondent, similarly, does not argue that this exception applies.

2. The *Elections* Exception to § 36-14-5(n)

The second exception contained only in subsection 36-14-5(n)(3), but not in the Ethics Commission's Regulations 1.5.1 or 1.5.2, allows an elected official to seek or accept *election* to a constitutional office, reading: "Nothing contained herein shall prohibit a state elected

official from seeking or being elected for any other constitutional office." That this exception applies to seeking *elective* constitutional office, and not to seeking appointed constitutional office, was made clear in the 1993 Advisory Opinion where our Supreme Court stated:

> Subsections (n) and (o) of § 36-14-5 have a specific exclusion for seeking election to state constitutional office. Regulation [1.5.2] has been interpreted by the commission as also allowing a public official to seek elective office.
> * * *
> The public positions to which the revolving door legislation applies are appointed positions or are positions elected from a state or municipal governing body. They are not positions that are elected by the general electorate.
> * * *
> The revolving door legislation does not directly interfere with an individual's right to be a candidate for public office. The revolving door legislation simply limits one employment option, for a one-year period, available to the covered class of individuals.

1993 Advisory Opinion, 633 A.2d at 670 (emphasis added).

Consistent with the Supreme Court's longstanding interpretation of § 36-14-5(n), the elections exception in subsection 36-14-5(n)(3) applies to allow an elected official to both *seek election*, and to *become elected*, to some other elective, constitutional office, not to seek or accept a *gubernatorial appointment* to the judiciary. For this exception to apply, it is not sufficient for the Respondent to simply exclaim that the Supreme Court is a "constitutional office," because Supreme Court Justices are not *elected* to that office; they are appointed by the Governor.[3] Pursuant to subsection 36-14-5(n)(3)'s election exception, the Respondent is

[3] Until amendments to the Rhode Island Constitution in 1994 created a merit selection system and gubernatorial appointment process for all judges, Supreme Court Justices were *elected* by both the House and Senate sitting in "grand committee." While there may be an argument that subsection 36-14-5(n)(3)'s exception for election to a constitutional office would have applied to an *election* by the General Assembly in grand committee, as opposed to an election by the public, the exception clearly stopped being applicable after the 1994 constitutional amendment which ended the practice of grand committee *elections* to the judiciary.

free to seek election to the Senate or to any of the constitution's "general officer" positions (Governor, Lieutenant Governor, Secretary of State, General Treasurer, or Attorney General).

Accordingly, on its face and standing alone, § 36-14-5(n) prohibits the Respondent's application to the JNC.

D. Harmonizing the Three Revolving Door Provisions

While the 1993 Advisory Opinion makes it evident that subsection 36-14-5(n)(3)'s elections exception does not apply to an *appointment* to the judiciary, as is explained below, in this section the Prosecution will assume for the sake of argument that the elections exception is somehow applicable. If so, then the situation becomes one already examined by the Supreme Court when it compared § 36-14-5(n)'s exceptions with the more narrow and restrictive prohibitions of Regulation 1.5.1 and 1.5.2 and determined that "[a]n individual could be found to have violated the regulations while being in compliance with the statute." 1993 Advisory Opinion, 633 A.2d at 669. The roadmap provided by the Supreme Court in 1993 applies today, which is to harmonize the statute and the regulations by enforcing both the regulations' and the statute's basic prohibition against judicial appointments, but allow that the statute "broadens their application to larger group of individuals" because § 36-14-5(n) applies to *all* elected officials while Regulation 1.5.2 applies only to members of the General Assembly. Id.

The Respondent would have the Ethics Commission "harmonize" the three provisions by utterly disregarding its own enactment of Regulations 1.5.1 and 1.5.2 pursuant to its primary constitutional authority to enact substantive ethics laws. Far from "harmonizing" all three revolving door laws, this is a total disregard and invalidation of the Ethics Commission's

minimal, temporary, and hard-won revolving door regulations in favor of a separate statute's exception that is only applicable to Representative Shekarchi through a tortured interpretation.

Instead, assuming for the sake of argument that harmonization is required, the approved and logical way to respect all three revolving door laws is to read § 36-14-5(n) as broadening 1.5.2's restrictions to all elected officials, and properly interpreting subsection 36-14-5(n)(3)'s exception as only applicable to a person seeking *elective* office, consistent with the Ethics Commission's long-standing interpretation. In that way, all three of the revolving door laws are validated and enforceable, consistent with the Supreme Court's advisory opinions in 1992, 1993, and 1999.[4] This result is also in harmony with the Superior Court's decision in Inman v. Whitehouse where the Superior Court applied subsection 36-14-5(n)(3)'s elections exception to an election,[5] and the Stephen Costantino advisory opinion,[6] where the Ethics Commission applied subsection 36-14-5(n)(2)'s appointments exception to an appointment.

III. Revolving Door Laws Do Not Unconstitutionally Impede the Judicial Selection Process

The Rhode Island Supreme Court has discussed the intent, application, and constitutionality of Regulations 1.5.1 and 1.5.2, and § 36-14-5(n), in three separate opinions published in 1992, 1993, and 1999, all discussed in detail below. The 1992 Advisory Opinion

[4] These three advisory opinions issued by the Rhode Island Supreme Court are discussed in detail below.

[5] The Inman v. Whitehouse decision is discussed in detail below.

[6] The Costantino advisory opinion is discussed in detail below.

affirmed the Ethics Commission's primary authority, over the General Assembly, to enact substantive ethics laws, including revolving door provisions. The 1993 Advisory Opinion found that these revolving door provisions were constitutional and imposed only minimal, temporary restrictions on the Governor's power to appoint persons to the judiciary and state boards, which promoted integrity and public confidence in government. The 1999 Advisory Opinion contrasted these constitutionally valid revolving door laws with a completely different ethics regulation that would have fundamentally altered the structure of Rhode Island government and was, therefore, struck down. The 2002 Superior Court case of Inman v. Whitehouse, and the Ethics Commission's 2010 advisory opinion issued to Steven Costantino, A.O. 2010-54, both involved determinations that the revolving door laws could not impede specific constitutional grants of *unfettered* election and appointment power, which is not at issue in the present case where the constitution's judicial selection clause expressly provides that the JNC's powers, duties, and procedures be defined by the legislature.

A. The 1992 Advisory Opinion by the Rhode Island Supreme Court

In 1991, when the Ethics Commission adopted Regulations 1.5.1 and 1.5.2,[7] among other new provisions of the Code of Ethics, it was not settled law that the 1986 ethics amendment to the Rhode Island Constitution had vested the Ethics Commission with authority

[7] At the time of their enactment in 1991, Regulations 1.5.1 and 1.5.2 were known as Regulations 36-14-5006 and 36-14-5007, respectively. In May 2018, the Ethics Commission codified the Code of Ethics into the Rhode Island Code of Regulations (RICR), a uniform state code containing the rules and regulations of the various Rhode Island agencies. In order to do so, the Ethics Commission reformatted and renumbered the Code of Ethics. As a result, Regulation 36-14-5006 now corresponds to Regulation 1.5.1 and Regulation 36-14-5007 corresponds to Regulation 1.5.2.

to enact substantive ethics laws independent of the General Assembly. After the Ethics Commission gave notice of its intent to adopt new provisions to strengthen the Code of Ethics, including Regulations 1.5.1 and 1.5.2, Governor Bruce G. Sundlun asked the Supreme Court for an advisory opinion as to whether the 1986 ethics amendment conferred authority upon the Ethics Commission, independent of the General Assembly, to enact substantive ethics laws and, if so, whether such a grant of legislative power is constitutional. See In re Advisory Opinion to the Governor, 612 A.2d 1, 4-5 (R.I. 1992) (1992 Advisory Opinion). Of "particular concern" to the Governor were the two revolving door regulations at issue today, Regulations 1.5.1 and 1.5.2. Id. at 5, FN7.

The Supreme Court in the 1992 Advisory Opinion first held that the 1986 ethics amendment clearly and unambiguously conferred upon the Ethics Commission substantive legislative power regarding ethics. Id. at 8-9. Examining the transcripts of the 1986 Constitutional Convention, the Supreme Court determined that it was the clear intent of the convention delegates "to limit the General Assembly's power to enact substantive legislation regarding ethics" and instead "to empower the commission with the authority to develop a code of ethics[.]" Id. at 10-11. The Supreme Court remarked upon the scandals and corruption that plagued Rhode Island in the years prior to the 1986 Constitutional Convention: "Indeed, widespread breaches of trust, cronyism, impropriety, and other violations of ethical standards decimated the public's trust in government." Id. at 11.

The Supreme Court declared that the constitution's 1986 ethics amendment's conferral upon the Ethics Commission of legislative power to enact substantive ethics laws necessarily implied a *limitation* of the General Assembly's legislative power in the field of ethics. Id. at

14. The Court unambiguously clarified that while the Ethics Commission and the General Assembly both enjoyed legislative authority in the area of ethics, the General Assembly is "limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission." Id. (Emphasis added).

B. The 1993 Advisory Opinion by the Rhode Island Supreme Court

With the issue of the Ethics Commission's authority to adopt Regulations 1.5.1 and 1.5.2 settled, Governor Sundlun next challenged the constitutionality of applying those revolving door regulations, and that of § 36-14-5(n), to limit his constitutional powers of appointment. In re Advisory From the Governor, 633 A.2d 664 (R.I. 1993)(1993 Advisory Opinion). In the 1993 Advisory Opinion, the Supreme Court considered Governor Sundlun's claim that all of these revolving door prohibitions violated equal protection, due process, and the separation of powers doctrine by impinging upon his constitutional appointment power through the curtailment of the pool of candidates from which the Governor can choose appointees.[8] Id. at 666, 674.

In addressing the Governor's constitutional claims, the Supreme Court applied a rational-basis scrutiny in which it presumed the revolving door laws to be valid if their

[8] The Governor's appointment power is set forth in the Rhode Island Constitution at Article 9, Section 5: "**Powers of appointment**. The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers, as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments."

restrictions were rationally related to a legitimate state interest. Id. at 669. The Court began by noting that appointment to public office is not a fundamental right. Id. at 670. Significant to the instant complaint, the Court also noted that § 36-14-5(n) did not restrict a person from being *elected* to office since it contained a "specific exclusion for *seeking election* to state constitutional office."[9] Id. (Emphasis added).

The Supreme Court then found that revolving door restrictions were rationally related to legitimate state interests of ensuring that public officials adhere to the highest standards of conduct, avoid the appearance of impropriety, not use their positions for private gain or advantage, and preventing government employees from unfairly profiting from or otherwise trading upon the contacts, associations and special knowledge that they acquired through public service. Id. at 671.

> **The drafters of the revolving door legislation could have reasonably concluded that the possibility of one's unjustly entrenching oneself in a public position, by moving from one state or municipal position to another, could be greatest for those positions to which the one-year waiting period was made applicable.** This court imposes similar one-year waiting periods on former law clerks wishing to practice before this court . . . and on any former government attorney wishing to represent a private client before the agency in which he or she was once employed.

[9] This is certainly a reference to the election exception at subsection 36-14-5(n)(3), and an acknowledgement that this exception relates only to *elective* office, not appointive office. If there were any doubt, the Court went on to write: "The public positions to which the revolving-door legislation applies are appointed positions or are positions elected from a state or a municipal governing body. They are not positions that are elected by the general electorate. * * * The revolving-door legislation does not directly interfere with an individual's right to be a candidate for public office." In re Advisory From the Governor, 633 A.2d 664, 670 (R.I. 1993).

Id. at 671 (citing R.I. Supreme Court Rules Article II, Rule 11, and R.I. Rules of Professional Conduct 1.11(b) (emphasis added).

As to the Governor's claim that the revolving door provisions violated due process by relying on an irrebuttable presumption that certain public officials are not appropriate candidates for state employment, the Supreme Court found this argument "flawed" because the revolving door restrictions imposed are not permanent but are limited to one year.

Under a separation of powers analysis of § 36-14-5(n), the Supreme Court declared that in adopting the revolving door statute, the legislature has assumed no powers that are essential to the operation of the executive branch. Id. at 675. Instead, "[t]he Legislature has imposed certain minimal temporary restrictions on the pool of available applicants." Id. The Supreme Court held that this "minimal impact . . . does not disrupt [the Governor's] ability to carry out his duties." Id. Referencing the appointments exception set forth in subsection 36-14-5(n)(2), the Supreme Court wrote:

> The Governor is unlimited in his choices of appointments to important policy-making, confidential, and discretionary positions. **The subsections temporarily limit the Governor's choices for other appointments to the judiciary**, various commissions, and state agencies.

Id. (Emphasis added).

Regarding Regulation 1.5.1 and 1.5.2, the Supreme Court wrote:

> As we have stated, the de minimis restriction that is placed on the power to make appointments is temporary and is not seriously intrusive of either the executive or the legislative branch's power. For the same reasons stated in the previous section in which we analyzed [§ 36-14-5(n)], we believe that the regulations do not violate separation-of-powers doctrine.

Id. at 675-676.

In summary, the Supreme Court's holding in the 1993 Advisory Opinion was that the revolving door prohibitions of Regulations 1.5.1 and 1.5.2, and of § 36-14-5(n), are constitutional, valid, and enforceable as reasonable, temporary, and minimal limits on the ability of elected officials to seek or accept gubernatorial appointments "to the judiciary, various commissions, and state agencies." Id. at 675-676. This Supreme Court holding is directly on point and controlling today.

C. The 1999 Advisory Opinion by the Rhode Island Supreme Court

Having determined in the 1992 Advisory Opinion that the Ethics Commission had the constitutional authority to enact these revolving door laws, and in the 1993 Advisory Opinion that these revolving door laws are constitutional as a minimal and temporary limit on the Governor's choices for appointments to the judiciary and state boards, the Supreme Court was next asked whether the Ethics Commission exceeded its constitutional authority when it enacted an entirely different prohibition, Regulation 5014, that is not at issue in the instant complaint. As drafted, Regulation 5014 would have prohibited members of the General Assembly from serving on, and appointing people to, executive branch boards and commissions.[10] In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999)(1999 Advisory Opinion).

[10] In 1999, Rhode Island had not yet passed its 2004 "Separation of Powers Amendment" to the state constitution, which adopted the federal model of separation of powers in the state, removed the historical plenary powers of the General Assembly, and barred legislators from serving on executive branch boards and commissions. See In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council), 961 A.2d 930, 933 (R.I. 2008).

The Supreme Court found that the constitution's 1986 amendments reenacted the General Assembly's historical, plenary powers and parliamentary supremacy in the state, which is very different than the federal separation of powers model of "separate but equal" branches of government. Id. at 62-65. Regulation 5014, the Court found, would take away from Rhode Island's historic parliamentary supremacy to "restructure and reorganize the constitutional framework of our state government." Id. at 68.

The Supreme Court stated that both the 1992 Advisory Opinion and the 1993 Advisory Opinion embraced the requirement that the Ethics Commission "may not create regulations that seriously impinge upon the executive or the legislative branch's ability to perform their duties, or 'assume powers that are central or essential to the operation of the Governor's office or of the General Assembly.'" Id. at 68-69 (quoting 1993 Advisory Opinion, 633 A.2d at 675). Comparing its holding in the 1993 Advisory Opinion, which found the revolving door laws to be constitutional, the Supreme Court wrote:

> Moreover, in [the 1993 Advisory Opinion], we upheld the ethics commission Regulations . . . requiring elected and appointed state officials to wait one year after leaving their position before seeking or accepting certain categories of public employment. But in so holding, we pointed out that "[w]e do not view the revolving-door legislation as [a] per se restrict[ion]," because the waiting period was a temporary, *de minimis* impediment, id. at 670, and the regulations allowed the ethics commission to grant case-by-case exceptions.

Id. at 70.

In contrast to the 1993 Advisory Opinion's determination that Regulation 1.5.1 and 1.5.2's requirements were temporary and minimal, the Supreme Court found in the 1999 Advisory Opinion that Regulation 5014 would fundamentally alter the constitutional structure of the state. Id. at 71. Accordingly, the Supreme Court opined that the adoption of Regulation

5014 by the Ethics Commission was not authorized under the Rhode Island Constitution. Id. at 72.

While the 1999 Advisory Opinion offers an example of an ethics regulation (Regulation 5014) that went too far, it reiterated the 1993 Advisory Opinion's conclusion that all three revolving door prohibitions were valid and constitutional.

D. The 2002 Unpublished Superior Court Opinion in Inman v. Whitehouse

Following the reasoning of the Supreme Court in the 1999 Advisory Opinion, in 2002 the Superior Court issued a decision where it held that the revolving door regulations could not constrain the General Assembly's *specific* constitutional grant of authority to fill a vacancy in the office of Secretary of State by *electing* a replacement. Inman v. Whitehouse, 2002 WL 169197 (R.I. Super. Ct. Jan. 17, 2002).[11]

In late 2000, Rhode Island's sitting Secretary of State, James Langevin, was elected to the United States Congress, requiring him to resign as Secretary of State prior to the expiration

[11] The Ethics Commission should be mindful that that this case is an "Unpublished Opinion" of the Superior Court available only on Westlaw and other digital platforms. Pursuant to Rule 18(l) of the Rhode Island Rules of Appellate Procedure, unpublished Superior Court decisions such as the one in Inman "**shall have no precedential effect**" and "will not be cited in papers filed with the Court." Supreme Court Rules of Appellate Procedure, Art. I, Rule 18(l)(emphasis added). See Mendez v. Brites, 849 A.2d 329, FN4 (R.I. 2004) (citing Rules of Appellate Procedure, Supreme Court refused to consider unpublished Superior Court order cited by appellants). Furthermore, under Rule 18(l), citation to a case contained in an electronic service such as Westlaw "is permissible only when the case which is set to be published in the national reporter is not yet published in book form." The Inman case is not published in book form in a national reporter and, therefore, is subject to Rule 18(l)'s exclusion. See Josephson, LLC v. Affiliated FM Insurance Co., 314 A.3d 954, 962 (R.I. 2024) (citing Rule 18(l) to note that the Supreme Court prohibits citation to unpublished trial court decisions, even if available through digital services such as Westlaw or Lexis). The Prosecution includes discussion of this case only because it was extensively discussed by the Respondent in his Motion to Dismiss.

of his term. The Rhode Island Constitution establishes that upon such a vacancy, "the general assembly in grand committee shall *elect* someone to fill the same . . . ." R.I. Const. art. 4, sec. 4 (emphasis added). In January 2001, the House and Senate met in grand committee to cast their votes, and elected a member of the House of Representatives, Edward S. Inman, to serve the remainder of Langevin's term as Secretary of State.

Two good government groups filed complaints with the Ethics Commission, alleging that Inman's election by the grand committee violated Regulations 1.5.1 and 1.5.2. Inman filed suit in Superior Court, seeking a declaratory judgment that he was duly elected as Secretary of State by the grand committee pursuant to Article 4, Section 4 of the Rhode Island Constitution and that Regulations 1.5.1 and 1.5.2, if construed to limit the General Assembly's specific constitutional authority to fill the vacancy, would therefore contravene that specific constitutionally provided-for election and violate the separation of powers doctrine.

Significantly, the Ethics Commission agreed with Inman's position that Regulations 1.5.1 and 1.5.2 should not be construed to prevent him from accepting *election* to fill the vacancy, consistent with Article 4, Section 4's specific authorization of the practice. The Ethics Commission's position in Inman, involving a specific constitutional grant of unfettered election authority, in no way conflicts with the Prosecution's position that the instant Respondent violated the revolving door laws by applying for an appointment to the judiciary through the JNC, whose powers, duties, and procedures not set in the constitution but are instead left to later statutory enactments.[12]

[12] "The powers, duties, and compensation of the judicial nominating commission shall be defined by statute." R.I. Const. art. 10, sec. 4.

In its Inman decision, the Superior Court found that the language of Article 4, Section 4 is unambiguous. "It states that the General Assembly has the authority to elect some person to fill a vacancy in the office of Secretary of State." Inman, 2002 WL 169197 at *4. Therefore, the Superior Court reasoned: "A violation of the separation-of-powers doctrine results from allowing a state agency through a regulatory provision such as Ethics Regulations [1.5.1 and 1.5.2], to constrain the General Assembly's constitutional authority to fill vacancies in state offices such as Secretary of State." Id. The Inman court also held that while enactment of Regulations 1.5.1 and 1.5.2 was a valid exercise of the Ethics Commission's constitutional authority, applying them to prevail over Article 4, Section 4's specific grant of election authority would violate the constitution's supremacy clause. Id.

Based on all of the above, the Superior Court declared: "Ethics Regulations [1.5.1 and 1.5.2] do not restrict the Grand Committee's authority pursuant to Article 4, Section 4 of the Rhode Island Constitution to select one of its own members to fill a vacancy in the office of Secretary of State[.]" Id. at *6. As is explained below, the instant appointment to the judiciary does not implicate any similar express grant of specific authority.

E. The Steven M. Costantino Advisory Opinion, A.O. 2010-54

On December 21, 2010, the Ethics Commission issued Advisory Opinion 2010-54 to Steven M. Costantino, a legislator serving in the Rhode Island House of Representatives who asked whether the revolving door provisions of the Code of Ethics prohibited him from accepting an appointment by the Governor to serve as the Rhode Island Secretary of Health and Human Services, a cabinet-level position in the executive branch. The Ethics Commission opined that the revolving door provisions did not act to prohibit Costantino's appointment.

Initially, the Ethics Commission determined that Costantino's appointment as Secretary of Human Services "fits neatly into section 5(n)'s exception for appointment by the Governor to a position as a department director." A.O. 2010-54 (citing the exception at subsection 36-14-5(n)(2)). Beyond this applicable exception, the Ethics Commission found that the facts presented by Costantino closely mirrored the facts of the Inman case, which involved a clear grant of constitutional authority to the grand committee to elect any person to fill a vacant Secretary of State position. Similar to Inman, the Costantino advisory opinion involved a clear grant of authority under the appointments clause of the Rhode Island Constitution, which specifically authorizes, without restriction, the Governor to "appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state[.]" R.I. Const. art. 9, sec. 5.

In the instant matter, unlike the Inman case or the Costantino advisory opinion, application of the revolving door laws to the Respondent's application to the JNC would not contravene any specific constitutional grants of unfettered appointment power. That is because, as is shown below, the Rhode Island Constitution does not authorize the Governor to appoint any person of his choosing to the Supreme Court, but instead only requires that such Justices be selected through a merit selection process involving a judicial nominating commission, whose powers, duties, and procedures are constitutionally undefined but are instead to be established by statute.

IV. The JNC Process – Distinguishing Inman and Costantino

The Inman case involved a specific constitutional grant of authority (Article 4, Section 4) that unambiguously conferred unfettered authority to the General Assembly to meet in grand committee to elect anyone they chose as Secretary of State. The Costantino advisory opinion similarly involved a specific constitutional grant of authority (Article 9, Section 5) that unambiguously conferred unfettered discretion upon the Governor to appoint his cabinet-level, executive branch officers. The instant case involves no such specific grant of unfettered appointment or election power, but instead invokes Article 10, Section 4's "judicial selection" clause which requires that a statutory process be established regarding judicial selection to all court. It reads:

> The governor shall fill any vacancy of any justice of the Rhode Island Supreme Court by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan judicial nominating commission, and by and with the advice and consent of the senate, and by and with the separate advice and consent of the house of representatives, shall appoint said person as a justice of the Rhode Island Supreme Court. The governor shall fill any vacancy of any judge of the Rhode Island Superior Court, Family Court, District, Workers' Compensation Court, Administrative Adjudication Court, or any other state court which the general assembly may from time to time establish by nominating on the basis of merit, a person from a list submitted by the aforesaid judicial nominating commission, and by and with the advice and consent of the senate, shall appoint said person to the court where the vacancy occurs. The powers, duties, and compensation of the judicial nominating commission shall be defined by statute.

R.I. Const. art. 10, sec. 4 (emphasis added).

Significantly, and unlike Article 4, Section 4, the judicial selection clause leaves the matter of the JNC's "powers, duties, and composition," including the required criteria for evaluating applicants, to be "defined by statute." Id. Thus, it is the JNC's enabling legislation,

not the Constitution, that creates restrictive and mandatory criteria that the JNC "shall consider" in preparing its list of potential nominees to the Supreme Court from its pool of candidates including: "intellect, ability, temperament, impartiality, diligence, experience, maturity, education, publications, and record of public, community, and government service." R.I. Gen. Laws § 8-16.1-4(a). Applicants are also statutorily, though not constitutionally, required to be attorneys licensed to practice law in Rhode Island and be a current member of the Rhode Island Bar Association in good standing. Id. Additionally, the JNC "shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the judiciary of this state." § 8-16.1-4(b).

Significantly, the JNC's enabling statute imposes its own "revolving door" on JNC members, who are themselves ineligible, while serving and for one year thereafter, to seek or accept a nomination to become a judge in any court: "No members shall be eligible for appointment to a state judicial office during the period of time he or she is a commission member and for a period of one year thereafter." R.I. Gen. Laws § 8-16.1-2(c). Respondent's argument, if accepted by the Ethics Commission, would invalidate this entirely reasonable restriction.

The most substantial restriction imposed by the JNC's enabling statute, but found nowhere in the Constitution, is the requirement that the JNC may only send three to five names to the Governor for consideration. R.I. Gen. Laws § 8-16.1-5(a). Again, this is a statutory restriction on judicial selection, not set forth in the Constitution, which limits the Governor's choices for appointments to the judiciary to as few as three candidates.

By imposing mandatory selection criteria on the JNC, disqualifying JNC Commissioners from being eligible for judicial appointments, and constraining the Governor's options for appointment to as few as three people, the General Assembly has already established substantial restrictions on the JNC and the judicial selection process. Yet it has never been argued that these other legislative restrictions, most of which are substantially more restrictive than the revolving door's temporary cooling-off period, violate separation of powers, the supremacy clause, or any other constitutional doctrine. The Code of Ethics' minimal and temporary revolving door constraints are consistent with those imposed by the General Assembly on JNC members and, as the Supreme Court has already determined, have a "minimal impact" and "do[] not disrupt [the Governor's] ability to carry out his duties." 1993 Advisory Opinion, 633 A.2d at 675.

V. The 2020 Advisory Opinion Request from Senator Erin Lynch Prata

On April 29, 2020, then-Senator Erin Lynch Prata requested an advisory opinion from the Ethics Commission as to whether the Code of Ethics' revolving door provisions would apply to prohibit her application to the JNC to seek appointment to the position of Supreme Court Justice"[13] The draft opinion prepared by the Ethics Commission's staff concluded that all three of the Code of Ethics' revolving door provisions applied to prohibit Senator Lynch Prata's judicial application. The draft opinion concluded: "The Petitioner is advised to

[13] Letter from Senator Erin Lynch Prata to Jason M. Gramitt, dated April 28, 2020, on file at the Ethics Commission. In discussions between Senator Lynch Prata and Executive Director Gramitt, it was agreed that in order to meet the JNC's application deadline, Senator Lynch Prata could submit her application to the JNC prior to the Ethics Commission's June 2, 2020, meeting date with the understanding that the Ethics Commission could opine that she would be required to withdraw the application.

withdraw her application to the JNC seeking consideration for the subject vacancy." Draft Advisory Opinion to The Honorable Erin Lynch Prata, at 8.

Following argument, a motion to adopt the draft advisory opinion failed on a vote of 2 (in favor) to 5 (opposed). There was no countermotion to issue an amended opinion stating that the Code of Ethics did *not* prohibit Senator Lynch Prata from applying to the JNC or from accepting an appointment by the Governor. As a result, no decision or opinion issued. The hearing concluded with no safe harbor granted to Senator Lynch Prata and the draft opinion became a nullity. Therefore, there is no legal basis for the Respondent to claim any "reliance" on the Senator Lynch Prata matter, since its "outcome" was merely a divided vote resulting in no action taken and no explanation provided.

In the wake of this uncertain result, there is no "precedent" and the Respondent cannot claim reliance on the Ethics Commission's action, or inaction, regarding another person's conduct. Even if the Ethics Commission had issued Senator Lynch Prata an advisory opinion, that opinion is only binding on the Ethics Commission relative to the person who requested the opinion.[14] It is for this very reason that the Ethics Commission regularly issues similar advisory opinions to numerous different people, all of which pose factually similar questions and undertake the same legal analyses previously applied.

The instant Respondent had the opportunity to seek his own advisory opinion, and he was certainly aware of that avenue since in *numerous other situations* he sought and received

[14] "Any advisory opinion rendered by the commission, until amended or revoked by a majority vote of the commission, shall be binding on the commission in any subsequent proceedings concerning the person who requested the opinion . . . ." R.I. Gen. Laws § 36-14-11(c) (emphasis added).

formal guidance from the Ethics Commission prior to acting. See Re: K. Joseph Shekarchi, A.O. 2025-33 (opining that Speaker Shekarchi may discuss and vote on legislation that would establish procedures that would make certain larger parcels of land available for subdivision); Re: K. Joseph Shekarchi, A.O. 2017-8 (opining that Representative Shekarchi may receive an award and plaque from an "interested person," but is prohibited from accepting complimentary airfare, hotel accommodations, awards dinner tickets, or reimbursement for his *per diem* expenses relating to awards ceremony); Re: K. Joseph Shekarchi, A.O. 2008-67 (opining that CRMC member Shekarchi need not recuse from CRMC matters involving a former law client); Re: K. Joseph Shekarchi, A.O. 2005-51 (opining that Candidate Shekarchi may not appear before the Warwick Zoning Board in his practice of law if elected to the Warwick City Council).

The Respondent has substantial experience and familiarity with the advisory opinion process but, in this case, he made a calculated decision to apply to the JNC without the guidance and protection that was available to him. In similar circumstances, where a public official was found to have violated the Code of Ethics after failing to seek an advisory opinion despite being familiar with the process, our Supreme Court remarked, "'he [was] cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt.'" Carmody v. Conflict of Interest Commission, 509 A.2d 453, 461 (R.I. 1986) (brackets in original) (quoting Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 462 (D.C. Cir. 1976)).

VI. Conclusion

In his Motion to Dismiss, the Respondent does not dispute that Regulations 1.5.1 and 1.5.2, if enforced, would clearly prohibit his application to the JNC and appointment to the Supreme Court. There is also no dispute that § 36-14-5(n) prohibits his application unless one of its exceptions applies. The Respondent's claimed exception on the basis of the Supreme Court being a "constitutional office" fails because that exception applies to those who seek elective constitutional office, not appointments to the judiciary, as our Supreme Court explained in its 1993 Advisory Opinion. Even if the Ethics Commission were inclined to credit this exception as arguably applicable, then the proper way to harmonize the statute with the regulations is to read the exception as only applying to elective office, thereby giving effect to all three revolving door provisions rather than invalidating two of the three in their entirety. An interpretation favoring the Ethics Commission's enactments over inconsistent ethics rules enacted by the General Assembly is the only outcome consistent with the Supreme Court's opinion that "the General Assembly is limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission." 1992 Advisory Opinion, 612 A.2d at 14. Accordingly, the Respondent's application to the JNC is a violation of § 36-14-5(n).

Application of the three revolving door laws to the Respondent here does not impermissibly interfere with any constitutionally authorized procedure, as was the case in Inman involving the General Assembly's absolute constitutional authority to *elect* any person to fill a vacancy in the office of Secretary of State. Instead, as set forth in the 1993 Advisory Opinion, as applied to judicial appointments the revolving door laws are rational, temporary,

and minimal restrictions. They are consistent with other judicial selection requirements set forth by statute, as expressly authorized in the constitution's judicial selection clause.

The Respondent's Motion to Dismiss should be denied.

Dated: June 15, 2026

Respectfully submitted,

/s/ Jason Gramitt
Jason Gramitt (Bar No. 5636)
Executive Director/Chief Prosecutor

CERTIFICATION

I, Jason Gramitt, hereby certify that on June 15, 2026, I served a true copy of this document via email to: Thomas More Dickinson, Esq., Law Office of Thomas M. Dickinson, 1312 Atwood Ave., Johnston, RI 02919, appealRI@yahoo.com; and Albert E. Medici Jr., Esq., Medici & Sciacca, PC, 1312 Atwood Ave., Johnston, RI 02919, am@mslaw-pc.com.

/s/ Jason Gramitt

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STATE OF RHODE ISLAND

ETHICS COMMISSION
No. 2026-001

In re: K. Joseph Shekarchi

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

This memorandum replies to some of the points in the memorandum that the prosecution filed on June 15, 2026, and supplements Mr. Shekarchi's original motion to dismiss and memorandum in support thereof.[1]

The Justices' 1992 and 1993 Advisory Opinion predated the 1994 judicial selection amendments to Art. X and the 2004 separation of powers amendment to Art. IX and must be viewed in that light.

Not surprisingly, the prosecution relies heavily on the language of the 1993 Advisory Opinion of the Justices regarding application of revolving door legislation and regulations. The Justices generally acknowledge that such regulations can limit the Governor's ability to appoint individuals who fall within the revolving door limitation. But the prosecution overlooks the point that the 1993 Advisory never confronts the conflict between Ethics Commission's constitutional authority to draft an ethics code and the *constitutional* appointment

[1] Citations herein to "App. ___" refer to the appendix filed with Mr. Shekarchi's original memorandum filed on June 9, 2026.

powers of the Governor. That is because the Governor had *no* constitutional role in Supreme Court appointments until 1994, and the version of Article IX, sec. 5 in place in 1993 gave the Governor *no* general enumerated constitutional appointment powers. As the Justices in 1993 noted:

> Although many of our laws creating state agencies, commissions, and boards require the Governor to appoint some of the members of those bodies, that power is *not a general per se enumerated constitutional duty of the Governor*.

633 A.2d 664, 666 (R.I. 1993) (emphasis added). At the time that was a correct statement of the law because the version of Article IX, sec. 5 read as follows:

> Article IX, sec. 5. The governor may fill vacancies in office not otherwise provided for by this constitution or by law, until the same shall have been filled by the general assembly, or by the people.

1986 Constitution, Art. IX, sec. 5.

But the voters changed the landscape dramatically in 2004 when they approved – by nearly a two-to-one vote – the Separation of Powers amendment to our Constitution. Article IX, sec. 5 now confers general appointment power upon the Governor. In its current form it reads:

Section 5. Powers of appointment.

The governor shall, by and with the advice and consent of the senate, appoint all officers of the state whose appointment is not herein otherwise provided for and all members of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state; but the general assembly may by law vest the appointment of such inferior officers, as they deem proper, in the governor, or within their respective departments in the other general officers, the judiciary or in the heads of departments.

R.I. Const., Art. IX, sec. 5.

Based on the pre-2004 language, the Justices' 1993 Advisory reasoned that the Governor had "no present constitutional duty awaiting performance." 633 A.2d at 667. Any such appointment authority derived not from the Constitution, but from legislation that the general assembly might enact creating an agency and empowering the Governor to make appointments to it.

But now, after both the 1994 judicial selection amendment and the 2004 separation of powers amendments, the Governor's constitutional appointment powers are very much *both* general and specific enumerated constitutional duties.

Even before the 2004 Separation of Powers amendment, the 1994 amendments to Art. X[2] had already established a clear *constitutional* role for the Governor in judicial nominations, as discussed in Mr. Shekarchi's memorandum in support of dismissal. Art. X, which previously excluded the Governor from any role in appointing the Supreme Court, now contains a specific constitutionally defined process for appointment of Supreme Court Justices, involving the Judicial Nominating Commission, the Governor, and the General Assembly.

The Justices in 1993, naturally, did not address these important later revisions to the Constitution, nor could they have. Although the 1993 Advisory may provide some useful background to the issue presented here, intervening and superseding amendments to the Constitution have worked changes that dramatically alter the constitution's balance between the Ethics Commission's authority to adopt ethics regulations and the authority of other constitutional actors to perform their designated functions. The stark reality remains: today – four decades after the 1986 adoption of the Ethics Amendment – the Constitution assigns judicial selection with great specificity to other constitutional actors, *not*

[2] Notably, the 1994 judicial selection amendments followed closely on the Justices' 1993 Advisory Opinion that balanced the Ethics Commission's regulatory authority against the Constitution's omission of general appointment powers in the Governor. That the voters decided so soon after the Advisory to confer very specific judicial appointment powers on the Governor should not be disregarded as to how the new version of Art. X for judicial appointments intentionally recast the balance struck only months earlier in the 1993 Advisory Opinion.

the Ethics Commission. And the Governor today – in contrast to 1993 – has *both* general and specific constitutional appointment powers that outweigh the Ethics Commission's general authority to draft ethics regulations.

Simply put, as Justice Silverstein wrote in the *Inman* decision, under the Constitution's supremacy clause – Art. VI, sec.1 – the Constitution is the "supreme law of the state and any law inconsistent therewith *shall be void*." *Id*. (emphasis added). The Constitution "trumps" any statute or regulation that conflicts with it. Thus, the Commission must not intrude into the well-constructed sphere where the Constitution has assigned specific roles to other constitutional actors[3]. As Justice Silverstein concluded in *Inman*, and as the Ethics Commission advised in *Costantino*, revolving door provisions may limit the ability of a sitting legislator to accept general employment in state government, they do not bar one from "accepting a position that was offered to him through a constitutionally authorized procedure." *Costantino*, App. at 10.

As noted in the Justices 1999 Advisory Opinion addressing the Ethics Commission's authority to adopt ethics regulations:

[3] And, as the Justices noted in their 1999 Advisory Opinion, the Ethics Commission may not intrude into the judicial interpretive functions of the courts: "Nor may the commission interpret the constitution and enforce its interpretation via regulation. The judicial branch, not the ethics commission, is the 'ultimate interpreter of the Constitution.'" 732 A.2d at 69 (citations omitted).

> Moreover, the commission may not act inconsistently with the constitution. *See* R.I. Const. art. 1, sec. 1. "The commission, like any other governmental body, is subject to many of the usual checks and balances associated with our tripartite form of government * * *." In re *Advisory Opinion to the Governor*, 612 A.2d at 18. The commission, for example, may not create regulations that seriously impinge upon the executive or the legislative branch's ability to perform their duties, *id.* at 19, or "assume powers that are central or essential to the operation of the Governor's office or of the General Assembly." *In re Advisory from the Governor,* 633 A.2d at 675.

732 A.2d at 68-69.

By following the Constitution's specifically designed process for the selection of Supreme Court Justices, Mr. Shekarchi has complied fully with what the Constitution permits and requires. This constitutional process represents "the supreme law of the state." Art. VI, sec. 1. The prosecution's attempt to override those procedures is "inconsistent therewith," *id.*, and the Commission must reject it.

Inman is legal authority binding on the Ethics Commission in this proceeding.

As noted in Mr. Shekarchi's initial referendum, Justice Silverstein's decision in *Inman v. Whitehouse* reaches the proper balance between the Ethics Commission's regulatory powers and the Constitution's assignment of duties to other constitutional bodies. The prosecution argues that the Commission should disregard Justice Silverstein's decision in *Inman*, describing it as "unpublished" and therefore not controlling. But the Commission should not take this suggestion seriously, for the Commission has already relied heavily on *Inman*'s precedential authority in issuing the Advisory Opinion to Representative Costantino. App. 7. And such reliance is well-founded, for in matters of constitutional interpretation the Commission owes complete deference to the judiciary. As pointed out in the Justices' 1999 Advisory Opinion, the Commission has *no* role in interpreting the Constitution, much less in elevating its own regulations over the Constitution:

> "Nor may the commission interpret the constitution and enforce its interpretation via regulation. The judicial branch, not the ethics commission, is the 'ultimate interpreter of the Constitution.' Accordingly, it has been our long-standing and consistent opinion that questions concerning the governmental structure of this state are constitutional issues that may be determined only by the judiciary. *See G. & D. Taylor & Co.,* 4 R.I. at 361; *see also In re Advisory from the Governor,* 633 A.2d at 675 ("This court has

> reserved the power to decide, on a case-by-case basis, whether the actions of the [ethics] commission have violated the separation-of-powers doctrine.").

1999 Advisory Opinion, 732 A.2d at 69 (citations omitted). Published or not, Justice Silverstein's *Inman* decision comes from a judge, and it addresses "constitutional issues that may be determined *only by the* judiciary." *Id*. The prosecution cannot wish it away here.

And the prosecution's reliance on one of the Supreme Court's appellate rules to minimize *Inman* is likewise without merit.

Supreme Court Rule of Appellate Procedure 18(l) addresses the use of unpublished *orders* in Supreme Court briefs and other filings:

> (l) *Unpublished Orders and Electronic Case Citations*. Unpublished *orders* will not be cited by the Supreme Court in its opinions and such orders will not be cited in papers filed with the Court. Unpublished orders shall have no precedential effect.

R.I. S. Ct. R. App. P. 18(l).

The prosecution relies on this rule to imply that the Commission should not bother itself with consideration of an applicable superior court decision that did not find its way into a national reporter. That suggestion is misleading and wrong.

It is misleading because R.I. Super. R. App. P. 18(l) addresses unpublished *orders*, not decisions. Most cases decided by the Supreme Court result in published decisions that ultimately appear in the Atlantic Reports. But, as any experienced appellate attorney or even a casual visitor to the Supreme Court's website would see, there are also some argued cases that are disposed merely by unpublished *order*.

https://www.courts.ri.gov/Courts/SupremeCourt/Pages/default.aspx

The purpose of Rule 18(l) is to advise parties not to rely upon these unpublished *orders* in their briefs and filings in *Supreme Court* cases.

Inman was a Superior Court *decision* not simply an order. In any civil case in Superior Court a trial justice may enter myriad orders dealing with discovery disputes, scheduling matters, pretrial motions, etc. Often these are drafted by the parties and submitted for execution by the judge pursuant to regular practice in the superior and family courts. Justice Silverstein's *decision* in the *Inman* case was clearly not simply an order; it was a well-reasoned opinion that the court issued after extensive briefing and argument by the parties. It is clear that the Ethics Commission concurred with the decision and elected not to appeal it. Justice Silverstein titled his decision "Decision." And confusion regarding what species it belonged to – it was a decision, not an order – becomes unmistakably clear in the *decision's* final paragraph, where Justice Silverstein directs one of the parties to

"submit an *order* and a judgment to enter upon notice to counsel for the other parties . . . " App. 7 (emphasis added).

The prosecution also cites the Supreme Court's decision in *Mendez v. Brites*, 849 A.2d 329 (R.I. 2004), to minimize the significance of the *Inman* decision. But the Court makes clear there that the party in *Mendez* was relying on an unpublished *order* – not a decision like the one in *Inman*. And, not surprisingly, the Supreme Court noted in *Mendez* noted that orders of the superior court – it's a lower court – do not bind the Supreme Court. *Id*. at 333 n.4.

The decision in *Inman* is binding upon the Commission.

A. Precedential value of Inman. Because *Inman* was a decision by the Superior Court in a case specifically reviewing the Ethics Commission it is therefore binding precedent on the Commission. The doctrine of stare decisis generally requires a tribunal to follow the law as decided by a higher tribunal. Thus, there can be no question that the Commission in its adjudicative function is bound by decisions of the Supreme and Superior Courts, because they are higher tribunals with the authority to review Commission decisions for, *inter alia,* errors of law. *See* R.I. Gen. L. sec. 36-14-15 (Commission actions subject to judicial review pursuant to Administrative Procedures Act); sec. 42-35-15(g) (superior court reviews decisions of agencies for violation of constitutional provisions and

other errors of law); sec. 42-35-16 (supreme court reviews administrative decisions on statutory writ of certiorari).

B. The Commission was a named party in Inman. The cause of action in *Inman* was a declaratory judgment under R.I. Gen. L. sec. 9-30-1 *et seq*. The Commission was named as a defendant, participated in the litigation, agreed with the result, never appealed the judgment, and the matter is therefore final as to the Commission. Assuming *arguendo* that the case might somehow not be binding on other parties litigating in a different tribunal, the Commission itself is undoubtedly bound under the doctrines of stare decisis, comity, and collateral estoppel. Thus, should the Commission decide against Mr. Shekarchi here, and should the matter proceed to Superior Court at some future point, the Commission would not be free to ignore or argue against the decision in *Inman*.

The prosecution's desire to elude the import of *Inman* is perhaps understandable, but it simply cannot do. The case clearly holds that the Ethics Commission cannot by language "trump" the Constitution. And, as noted *supra*, the Justices' 1999 Advisory Opinion made clear that the Commission is precluded from usurping the judicial role of interpreting the Constitution as applied to any regulations adopted by the Commission. 1999 Advisory Opinion, 732 A.2d at 69. *Inman* is binding on the Commission, notwithstanding the prosecution's attempt to claim otherwise. Justice Silverstein's decision in *Inman* makes clear that the

revolving door provisions do not apply to a state elected official seeking appointment via a "constitutionally authorized procedure."

The prosecution ignores the statute's use of the disjunctive "or," thus encouraging the Commission to misinterprets the statutory exemption.

As noted in Mr. Shekarchi's memorandum, the revolving door statute contains an exemption for an elected official who is "seeking or being elected for any other constitutional office." R.I. Gen. L. sec. 36-14-5(n)(3) provides:

> "Nothing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office."

There should be no dispute that the Supreme Court is a "constitutional office." The prosecution, however, reads this subsection to cover only cases where the "other constitutional office" is an *elective* one. But that ignores the statute's use of the disjunctive "or" and the prosecution instead reads it to mean the conjunctive "and" in place of the disjunctive "or." In the prosecution's view, the exemption applies only for a state elected official who is seeking *and* being elected to another constitutional office.

The prosecution's interpretation is contrary to Supreme Court precedent. In *In re Abby D.*, 839 A.2d 1222 (R.I. 1994), the Court addressed the meaning of the word "or" in interpreting a statute. "Or," the Court stated, is "[a]

disjunctive particle used to express an alternative or to give a choice of one among two or more things." *Id*. at 1224. When used in legislative language, the words "or" and "and" are not interchangeable and the difference must be acknowledged in application. *Earl v. Zoning Board of Review*, 191 A.2d 161 (R.I. 1963).

Here the use of the word "or" is clear: the exemption from the revolving door applies to an elected official who seeks "any other constitutional office" *or* to an elected official who is elected to "any other constitutional office."

By following the established constitutional process for appointment to the Supreme Court, Mr. Shekarchi is "seeking" the constitutional office of Supreme Court Justice. The revolving door exception plainly applies to him, and the prosecution's magical and wishful attempt to replace the word "or" with the entirely different word "and" must be rejected.

Conclusion

For reasons set forth in Mr. Shekarchi's motion and memoranda memoranda, and for such other reasons as may appear at the hearing of this motion, the complaint fails to allege a violation of the Code of Ethics. It must be dismissed forthwith.

RESPECTFULLY SUBMITTED,
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CERTIFICATION

I hereby certify that I served a copy of this document on counsel as follows:

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