



STATE OF RHODE ISLAND

RHODE ISLAND ETHICS COMMISSION

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NOTICE OF OPEN MEETING

AGENDA

9th Meeting

DATE: Tuesday, May 18, 2021

TIME: 9:00 a.m.

TO ATTEND: Pursuant to Governor Daniel J. McKee's Executive Order No. 21-40, which extended Executive Order No. 20-46, this meeting will not be conducted in-person at the Rhode Island Ethics Commission. Rather, it will be conducted remotely in Zoom webinar format in order to minimize any possible transmission of COVID-19. Any member of the public who wishes to attend and view this video meeting may do so by:

- Clicking this link to join the webinar:
<https://us02web.zoom.us/j/82988778050>
and using Webinar ID: 829 8877 8050
- Or using iPhone one-tap US:
 - +13126266799,, 82988778050# or
 - +16465588656,,82988778050#
- Or by Telephone, Dial (for higher quality, dial a number based on your current location) US:
 - +1 312 626 6799 or
 - +1 646 558 8656 or
 - +1 301 715 8592 or
 - +1 346 248 7799 or
 - +1 669 900 9128 or
 - +1 253 215 8782
 - 833 548 0276 (Toll Free) or
 - 833 548 0282 (Toll Free) or
 - 877 853 5247 (Toll Free) or
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- International numbers available:
<https://us02web.zoom.us/j/kkqu7CKXC>
Webinar ID: 829 8877 8050

1. Call to Order.
2. Discussion of Remote Meeting Format; Identifying and Troubleshooting any Remote Meeting Issues.
3. Motion to approve minutes of Open Session held on April 27, 2021.
4. Director's Report: Status report and updates regarding:
 - a.) Discussion of impact of COVID-19 crisis on Ethics Commission operations and staffing;
 - b.) Complaints and investigations pending;
 - c.) Advisory opinions pending;
 - d.) Access to Public Records Act requests since last meeting;
 - e.) Financial Disclosure: Update on 2020 filing period.
5. Advisory Opinions (petitioners may participate remotely):
 - a.) Angelica Bovis, a member of the Smithfield Town Council, and a former member of the Smithfield Land Trust, requests an advisory opinion regarding whether the Code of Ethics prohibits her from participating in Town Council discussions and voting on property matters in which she had previously participated and voted as a member of the Land Trust.
 - b.) Robert Jones, a former member of the North Kingstown School Committee, requests an advisory opinion regarding whether he may continue to serve on the North Kingstown Charter Commission and accept an appointment to serve on the North Kingstown Budget Committee, both unpaid municipal appointed positions, prior to the expiration of one year following the Petitioner's severance from his position as a School Committee member.
 - c.) Matthew McGeorge, AIA, LEED AP, 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.
 - d.) Members of the Retirement Board of the Employees' Retirement System of the State of Rhode Island, by a unanimous vote, request an advisory opinion regarding what restrictions, if any, the Code of Ethics places upon certain Retirement Board members with respect to participating in disability adjudications and contested administrative hearings, given that some Retirement Board members are state or municipal elected officials or employees, and others are affiliated with national, state, and local labor or other organizations.

- e.) Mario Carreño, the School Building Authority Finance Officer for the Rhode Island Department of Education, requests an advisory opinion regarding whether the Code of Ethics prohibits him from accepting an appointment to fill a vacancy on the Lincoln School Committee, a municipal appointed position, and from then serving simultaneously in both positions.
- 6. Discussion of historical and current financial disclosure compliance and enforcement efforts, policies and practices.
- 7. New Business proposed for future Commission agendas and general comments from the Commission.
- 8. Motion to go into Executive Session, to wit:
 - a.) Motion to approve minutes of Executive Session held on April 27, 2021, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
 - b.) Motion to return to Open Session.

NOTE ON REPORTING OUT OF ACTIONS TAKEN IN EXECUTIVE SESSION: *After the Commission votes to go into Executive Session, the Open Session Zoom meeting will temporarily close and viewers will not be able to join the Executive Session which is being held in a separate Zoom meeting. At the conclusion of the Executive Session, which has no set duration, the Commission will reconvene in the Open Session meeting solely for the purpose of reporting out any actions taken in Executive Session and sealing the executive session minutes. You may rejoin the Open Session by following the same instructions on Page 1 of this agenda that you followed to join the original Open Session meeting. If you attempt to rejoin the Open Session Zoom meeting while the Executive Session portion is occurring, you will see a message that the meeting host is in another meeting. Eventually, once the Executive Session meeting concludes, the host will reconvene the Open Session meeting and you will be able to view the Commission Chair report out any actions taken in Executive Session. Alternatively, it may be more convenient for you to view a written report of any actions taken in Executive Session by visiting our website (<https://ethics.ri.gov/>) later in the day.*

- 9. Report on actions taken in Executive Session.
- 10. 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 May 13, 2021

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: May 18, 2021

Re: Angelica Bovis

QUESTION PRESENTED:

The Petitioner, a member of the Smithfield Town Council, a municipal elected position, and a former member of the Smithfield Land Trust, a municipal appointed position, requests an advisory opinion regarding whether the Code of Ethics prohibits her from participating in Town Council discussions and voting on property matters in which she had previously participated and voted as a member of the Land Trust.

RESPONSE:

It is the opinion of the Ethics Commission that the Petitioner, a member of the Smithfield Town Council, a municipal elected position, and a former member of the Smithfield Land Trust, a municipal appointed position, is not prohibited by the Code of Ethics from participating in Town Council discussions and voting on property matters in which she had previously participated and voted as a member of the Smithfield Land Trust.

The Petitioner is a member of the Smithfield Town Council ("Town Council"), to which she was elected in November of 2020. Prior to her election to the Town Council, she was a member of the Smithfield Land Trust ("Land Trust"), to which she had been appointed by the Town Council in October of 2019 and on which she served until her election to the Town Council. She explains that the Land Trust serves as an advisory board to the Town Council. The Petitioner states that while serving as Land Trust member, she participated in discussions and votes relative to a piece of property ("property") located in the Town of Smithfield ("Town" or "Smithfield") and owned by the Land Trust, which property has been monitored by a curatorship agreement for the last ten years. The Petitioner notes that the curatorship agreement is set to expire in February of 2022; thus, the Land Trust voted, with the Petitioner's participation, in August of 2020, to recommend to the Town Council that the current curators be given a right of first refusal to purchase the property, and to preserve the property with a conservation easement. The Petitioner represents that these Land Trust recommendations are now scheduled for review and approval before the Town Council. She further represents that many of the current Land Trust members are new and that she is the only person that is able to answer the Town Council's questions regarding the Land Trust's recommendations concerning the right of first refusal, the easement, and the property in general.

The Petitioner states that she has no interest in any real estate that abuts the subject property, and that neither she nor any person within her family, her business associates, or her employer would

otherwise be directly financially impacted by any of the above-cited Town Council decisions relative to the property. She adds that she has no familial, business or employment relationship with the curators of the property. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding whether the Code of Ethics prohibits her participation in Town Council discussions and voting relative to the matters described above and in which she previously participated and voted as a Land Trust member.

Under the Code of Ethics, a public official or employee may not participate in any matter in which she has an interest, financial or otherwise, that is in substantial conflict with the proper discharge of her duties or employment in the public interest. R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest exists if a public official or employee has reason to believe or expect that she, any person within her family, her business associate, or her employer will derive a direct monetary gain or suffer a direct monetary loss by reason of her official activity. Section 36-14-7(a). Additionally, the Code of Ethics prohibits a public official or employee from using her public office or confidential information received through her public office to obtain financial gain for herself, any person within her family, her business associate, or any business by which she is employed or which she represents. Section 36-14-5(d). A business associate is defined as “a person joined together with another person to achieve a common financial objective.” Section 36-14-2(3). A person is defined as “an individual or a business entity.” Section 36-14-2(7). A business is defined as “a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, trust or any other entity recognized in law through which business for profit or not for profit is conducted.” Section 36-14-2(2).

The Ethics Commission has consistently opined that a public official is not prohibited by the Code of Ethics from voting on a matter in one forum and then voting on the same matter in another forum due to holding two public positions, provided that the above-cited provisions of the Code of Ethics are not otherwise implicated, and has considered similar fact patterns in cases where a public official held dual public roles. In Advisory Opinion 2002-1, for example, a member of the Coastal Resources Management Council (“CRMC”), who simultaneously served on the Newport Waterfront Commission (“NWC”), questioned whether he had to recuse from the CRMC’s consideration of matters previously reviewed by the NWC. The Ethics Commission opined that, generally, the petitioner could participate in the CRMC’s review of matters previously reviewed by the NWC, given that he would not receive any personal benefit, financial or otherwise, by or because of any official activity he might take as a CRMC member. The Ethics Commission further advised the petitioner that, in the event that any matters before the CRMC or the NWC might financially impact property owned by the petitioner and/or his family member, or otherwise implicate their financial interests, the Code of Ethics required him to recuse from participation and vote on such matters. Similarly, in Advisory Opinion 2011-29, the Ethics Commission opined that a member of the Portsmouth Planning Board, who was also a civil engineer for the Rhode Island Department of Transportation (“DOT”), could participate in and vote on a development proposal pending before the Portsmouth Planning Board, notwithstanding that in her capacity as a DOT engineer she had reviewed the same property to ensure that the state’s property interests were protected. There, the petitioner represented that neither she nor anyone in her family was associated with the proposal applicant, and that she was not an abutter to the property in question. Therefore, there was no presumption of financial benefit or detriment to the petitioner by or because of any official activity she would be undertaking as a Portsmouth Planning Board member.

In addition to focusing on the absence of a financial impact on a public official or his/her family member, business associate or employer, in circumstances similar to the ones presented in the instant matter, the Ethics Commission had also indicated that the Code of Ethics does not consider a public body to be a “business” or the relationship between a public official and a public body to be that of “business associates.” In Advisory opinion 2007-14, for example, the Ethics Commission opined that a member of the North Kingstown Town Council, who was also a member of the Quonset Development Corporation (“QDC”), both public bodies, could participate in and vote on a development proposal pending before the QDC even though he had previously considered and voted on the same matter when it was before the Town Council. That petitioner was not required to recuse from the QDC review of the development proposal by reason of his status as a member of the North Kingstown Town Council because, while the Code of Ethics would have prohibited the petitioner from making decisions as a member of the QDC that would financially impact any *business associate* or any *business* by which he was employed or which he represented, neither the Town Council nor the QDC were considered “businesses,” nor “business associates” with their members, under the Code of Ethics. See also A.O. 2015-27 (opining that the Interim Town Manager for the Town of Westerly was not prohibited by the Code of Ethics from participating in the Town’s review of a non-profit entity’s development proposal that might involve her public employer, the Community College of Rhode Island); A.O. 2002-55 (opining that the term “business” as used in the Code of Ethics does not include municipal corporations such as the Town of Richmond).

Here, both the Town Council and the Land Trust are public entities and, furthermore, the Petitioner no longer serves on the Land Trust. Additionally, the Petitioner represents that neither she nor her family members, business associates or employer stand to be directly financially impacted by any of the above-cited Town Council decisions relative to the property. Accordingly, based on the Petitioner’s representations, the applicable provisions of the Code of Ethics, and prior advisory opinion 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 matters related to the property, notwithstanding that she had previously participated and voted on those matters as a member of the Land Trust.

This Draft Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.

Code Citations:

- § 36-14-2(2)
- § 36-14-2(3)
- § 36-14-2(7)
- § 36-14-5(a)
- § 36-14-5(d)
- § 36-14-7(a)

Related Advisory Opinions:

A.O. 2015-27

A.O. 2011-29

A.O. 2007-14

A.O. 2002-55

A.O. 2002-1

Keywords:

Dual Public Roles

DRAFT

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: May 18, 2021

Re: Robert Jones

QUESTION PRESENTED:

The Petitioner, a former member of the North Kingstown School Committee, a municipal elected position, requests an advisory opinion regarding whether he may continue to serve on the North Kingstown Charter Commission and accept an appointment to serve on the North Kingstown Budget Committee, both unpaid municipal appointed positions, prior to the expiration of one year following the Petitioner's severance from his position as a School Committee member.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a former member of the North Kingstown School Committee, a municipal elected position, may continue to serve on the North Kingstown Charter Commission and accept appointment to serve on the North Kingstown Budget Committee, both unpaid municipal appointed positions, prior to the expiration of one year following the Petitioner's severance from his position as a School Committee member.

The Petitioner represents that he is a former elected member of the North Kingstown School Committee ("School Committee"), on which he served from December of 2012 to December of 2020. He states that in January of 2021, he was appointed by the North Kingstown Town Council ("Town Council") to a two-year term on the North Kingstown Charter Commission ("Charter Commission"). He explains that the Charter Commission is established by the North Kingstown Charter ("Charter") and functions merely as an advisory panel to the Town Council. The Petitioner notes that, pursuant to the Charter, "[i]t shall be the duty of said commission to convene at the request of the [Town] [C]ouncil to consider and make recommendations concerning any issue or issues relating to the Charter, or provisions thereof, which the [Town] [C]ouncil shall lay before it, and report thereon to the [Town] [C]ouncil." The Petitioner represents that the members of the Charter Commission receive no compensation, stipend, gifts, or honoraria for their services performed and serve at the pleasure of, and report only to, the Town Council. He further represents that the Charter Commission, while open to receiving input on agenda items from the School Committee or the School Department, just as it would from any other citizen or organization, does not appear nor is it required to appear before the School Committee.

The Petitioner explains that he is not employed by the Town of North Kingstown ("Town") nor by any other public agency and that, to the best of his knowledge, his private employer, Bryant University, has no contracts with the Town or the School Department. The Petitioner further explains that the work of the Charter Commission does not involve decisions relative to spending

of local funds and does not include review or advice on requests for proposals, current bids or spending. He represents that he has no family members employed by the Town, nor is he aware of any potential conflicts of interest regarding the work he performs for the Charter Commission. The Petitioner notes that he has no familial or business relationship with any member of the Town Council, the Town Clerk, or the Town Manager. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding whether he may continue to serve on the Charter Commission.

The Petitioner also seek guidance regarding whether he may accept appointment by the Town Council to fill a vacancy on the North Kingstown Audit Committee ("Audit Committee"), on which he had once served prior to his election to the School Committee. The Petitioner represents that he has been approached by the School District Superintendent who inquired regarding whether the Petitioner might be interested in filling the vacancy. The Petitioner states that the Town Council makes the appointment to fill the current vacancy from a list of up to three candidates recommended by the School Committee. The Petitioner further states that the members of the Audit Committee do not receive any compensation, stipend, gifts, or honoraria for the services they perform. He explains that, unlike the Charter Commission, the Audit Committee has some oversight functions which the Petitioner describes as "direct responsibility for the oversight of the independent auditor." The Petitioner further explains that the current audit firm employed by the Town is still under a multi-year contract. The Petitioner states that he had no input in the selection of the audit firm nor does he have any financial connection to it, either personally or through his private employer. He represents that the School Committee does not vote or select the audit firm, although the firm does audit both the Town and the School financial records.

Under Commission Regulation 520-RICR-00-00-1.5.4 Municipal Official Revolving Door (36-14-5014) ("Regulation 1.5.4"), municipal elected officials and school committee members are prohibited from seeking or accepting employment in the same municipality, including service as an independent contractor or consultant, while serving in office and for a period of one year after leaving office. Furthermore, Commission Regulation 520-RICR-00-00-1.5.1 Employment from Own Board (36-14-5006) ("Regulation 1.5.1") prohibits any elected or appointed official from accepting any appointment or election that requires approval by the body of which he is or was a member, to any position which carries with it any financial benefit or remuneration, until the expiration of one (1) year after termination of his membership in or on such body.

Notably, the Ethics Commission has determined that the receipt of compensation for services rendered is a necessary element in the application of Regulation 1.5.4. as well as 1.5.1. See A.O. 2013-11 (opining that an elected member of the Pascoag Fire District Board of Commissioners could not seek or accept a position as a volunteer firefighter in the same district while holding office as a Commissioner, and for one year thereafter, because volunteer firefighters were paid for their services as independent contractors); A.O. 2004-36 (opining that a state employee sitting on the Rhode Island Water Resources Board as the designee of the Director of Administration could not accept, if offered, employment as the General Manager of the Water Resources Board). Thus, the Ethics Commission has permitted a public official to accept an appointment that otherwise fell within the provisions of Regulations 1.5.4 and 1.5.1, provided that the appointment was to a volunteer position. See, e.g., A.O. 2016-46 (opining that a member of Pawtucket City Council

could accept appointment to the Pawtucket Water Supply Board, an unpaid position, within one year of the petitioner's official severance from his position as City Councilor).

Here, the Petitioner states that the Town Council is the public body vested with the authority to appoint both the members of the Charter Commission and the Audit Committee, notwithstanding that the School Committee, the public body of which the Petitioner was a member, makes the recommendation for appointment to the Audit Committee for the current vacancy. Further, the Petitioner expressly represents that the Charter Commission and the Audit Committee's members do not receive any financial benefit or other compensation for their services. Accordingly, it is the opinion of the Ethics Commission that the Code of Ethics does not prohibit the Petitioner from continuing to serve on the Charter Commission and from accepting an appointment to, and serving on, the Audit Committee, both without compensation, before the expiration of one year following the Petitioner's official severance from his position as a School Committee member.

This Draft Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.

Code Citations:

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

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

Related Advisory Opinions:

A.O. 2018-7

A.O. 2016-46

A.O. 2013-11

A.O. 2004-36

Keywords:

Revolving Door

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: May 18, 2021

Re: Matthew McGeorge, AIA, LEED AP

QUESTION PRESENTED:

The Petitioner, a member of the East Greenwich Historic District Commission, a municipal appointed position, 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.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the East Greenwich Historic District Commission, a municipal appointed position, who in his private capacity is an architect, qualifies for a hardship exception to the Code of Ethics' prohibition on representing himself before his own board.

The Petitioner is the chairperson of the East Greenwich Historic District Commission ("HDC"), having served continuously since his appointment in 2011 by the East Greenwich Town Council. He represents that this is an unpaid, volunteer position. The Petitioner states that in his private capacity he has been a registered architect in Rhode Island since 2007 and is presently also registered in Massachusetts, Connecticut, Pennsylvania, Maine, and New Hampshire. He represents that he earned a Bachelor of Environmental Design from the University of Tasmania, Tasmania, Australia, and a Master of Architecture from the Illinois Institute of Technology. The Petitioner states that he specializes in historic preservation, adaptive reuse, and the design of new structures with historic character allusions and, in the past five years, his firm and he have completed more than fifteen historic adaptive reuse projects, including a 25-million-dollar adaptive reuse of the Elizabeth Mill in Warwick, and several historic renovation projects, including the Edward Bannister House for Brown University, the Caleb Greene House in Warwick for AAA New England, and the Saw Tooth Mill in Warwick. He further states that over thirty percent (30%) of his work involves historic structures.

The Petitioner represents that he has been advising a client regarding a possible addition, new garage with deed-restricted affordable housing, and renovation of the client's late 19th century Victorian home located in the Historic District of the Town of East Greenwich. The Petitioner explains that given the home's location within the Historic District, the home is subject to the jurisdiction of the HDC. The Petitioner states that, because the project includes deed-restricted affordable housing and will require dimensional and lot coverage relief, the client must seek approval from the East Greenwich Planning Board ("Planning Board") through a Master Plan

Approval process. The Petitioner further states that under these circumstances the HDC is not required to vote to approve or deny a Certificate of Appropriateness. However, it is required to provide an advisory opinion to the Planning Board regarding the appropriateness of the project. The Petitioner represents that he has, thus far, consulted the client on the local design and permitting procedures, including possible zoning relief, and the HDC conceptual and final approval process. The Petitioner adds that he has informed the client of his service as the chairperson of the HDC and the requirement that he receive permission from the Ethics Commission to represent the client before the HDC. Although the Petitioner does not expect to represent the client personally before the Planning Board, over which he does not have appointing authority, he does expect to prepare and sign the required documents. The Petitioner hopes to have a conceptual design ready to submit to the HDC for its June hearing. He states that he will recuse from HDC discussions and voting relative to this matter. At this time, the Petitioner requests a hardship exception to represent the home owner before the HDC, pursuant to General Commission Advisory ("GCA") 2010-1.

Section 36-14-5(e) ("Section 5(e)") of the Code of Ethics prohibits public officials and employees from representing themselves, representing another person, or acting as an expert witness before a state or municipal agency of which they are a member or by which they are employed. Section 5(e)(1)-(3); see also Commission Regulation 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016) ("Regulation 1.1.4"). Section 5(e)'s prohibitions continue while the official remains in office and for a period of one (1) year thereafter. Section 5(e)(4). In contrast to most other Code of Ethics provisions, declining to participate in related discussions and votes is insufficient to avoid section 5(e) conflicts, absent an express finding by the Ethics Commission in the form of an advisory opinion that a hardship exists. Upon receipt of a hardship exception, the public official must also advise the state or municipal agency in writing of the existence and the nature of his interest in the matter at issue; recuse himself from voting on or otherwise participating in the agency's consideration and disposition of the matter at issue; and follow any other recommendations the Ethics Commission may make to avoid any appearance of impropriety in the matter. Section 5(e)(1). See, e.g., A.O. 2014-26 (granting a hardship exception to a member of the Barrington Zoning Board of Review ("BZB") and permitting him to appear before the BZB to request a dimensional variance for his personal residence, but requiring that he recuse himself from participating and voting in the BZB's consideration of his request for relief).

The Petitioner's proposed conduct falls within section 5(e)'s prohibition on representing his client before a board of which the Petitioner is a member. However, the Ethics Commission has carved out a specific hardship exception outlined in GCA 2010-1 for "Historic Architects Who Are Members of Historic District Commissions."¹ This exception is based upon the Ethics Commission's finding that "municipal historic district commissions within the state of Rhode Island are best served if they are able to have a sitting member who specializes in historic architecture and preservation." GCA 2010-1. The Ethics Commission has concluded that, given

¹ On November 30, 1989, the Ethics Commission issued GCA No. 8, "Architect Members of State and Local Historic Preservation Commissions Appearing Before Their Respective Agencies," allowing architects who specialize in historic preservation and who serve on historic district commissions to represent clients before their respective commissions without violating the Code of Ethics. In 2010, after considering public comment, and in response to overwhelming support for continuing the use of the exception, the Ethics Commission replaced GCA No. 8 with GCA 2010-1 entitled "Historic Architects Who Are Members of Historic District Commissions."

the limited number of historic architects in the state, recruiting qualified persons to serve on historic district commissions would be difficult and would reduce the ability of historic district commissions to effectively function if those architects were thereafter prohibited from representing private clients before the commissions on which they serve.

However, pursuant to GCA 2010-1, members of historic district commissions may not presume that the exception is applicable to their specific set of circumstances, but are required to seek an advisory opinion each time they consider accepting a client whose project would require them to appear before their own board. Additionally, GCA 2010-1's narrow exception only applies to historic architects and does not apply to other architectural specialties. See A.O. 99-120 (declining to grant a hardship exception to a member of the New Shoreham Historic District Commission, who was a landscape architect and the owner of a landscape architecture business on the island, because his qualifications did not fall within the guidelines of a historic architect).

For GCA 2010-1 to apply to his particular situation, the Petitioner must make representations to establish that he is a qualified historic architect. For example, the Commission granted six GCA 2010-1 hardship exceptions to an architect on Block Island, one for each client, after concluding that it was satisfied that his representations regarding his extensive education and work experience in historic preservation established that he was a qualified historic architect. See A.O. 2017-38; A.O. 2015-44; A.O. 2014-15; A.O. 2013-42; A.O. 2013-29; and A.O. 2010-7.

In the present matter, the Petitioner is an architect who specializes in historic preservation. He represents that his work experience and education exceed the United States Secretary of the Interior's minimum professional qualifications for a historic architect.² It is significant to note that the Ethics Commission has previously issued three similar advisory opinions to this Petitioner in which hardship exceptions were granted based upon the Petitioner's status as a historic architect. See A.O. 2021-35; A.O. 2019-43; A.O. 2017-27.

Accordingly, it is the opinion of the Ethics Commission that the Petitioner qualifies for a hardship exception to the Code of Ethics' prohibition on representing his client before his own board, in accordance with GCA 2010-1, provided that he recuses from participating in all HDC matters

² In order to ascertain whether someone is a historic architect, GCA 2010-1 incorporated the minimum professional qualifications for historic architecture set forth by the U.S. Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. The minimum professional qualifications are:

A professional degree in architecture or a State license to practice architecture, plus one of the following:

1. At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or
2. At least one year of full-time professional experience on historic preservation projects.

Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specifications for preservation projects.

involving his client. Pursuant to section 5(e)(1), and concurrent with his recusal, the Petitioner must inform the HDC and its members of his receipt of the instant advisory opinion and of his recusal in accord therewith. Notice of recusal shall be filed with the Ethics Commission consistent with section 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. Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.

Code Citations:

§ 36-14-5(e)

§ 36-14-6

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

Related Advisory Opinions:

G.C.A. 2010-1

A.O. 2021-35

A.O. 2019-43

A.O. 2017-38

A.O. 2017-27

A.O. 2015-44

A.O. 2014-26

A.O. 2014-15

A.O. 2013-42

A.O. 2013-29

A.O. 2010-7

A.O. 99-120

Keywords:

Hardship Exception

Historic Architect

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: May 18, 2021

Re: Members of the Retirement Board of the Employees' Retirement System of the State of Rhode Island

QUESTION PRESENTED:

The Petitioners, members of the Retirement Board of the Employees' Retirement System of the State of Rhode Island, by a unanimous vote, request an advisory opinion regarding what restrictions, if any, the Code of Ethics places upon certain Retirement Board members with respect to participating in disability adjudications and contested administrative hearings, given that some Retirement Board members are state or municipal elected officials or employees, and others are affiliated with national, state, and local labor or other organizations, under circumstances where the participants at said disability adjudications and contested administrative hearings might include individuals who elected certain Retirement Board members, are state or municipal employees, or are members of the same national, state, or local labor or other organizations as those with which certain Retirement Board members are affiliated.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that a Retirement Board member is prohibited by the Code of Ethics from participating in disability adjudications and contested administrative hearings if he or she has reason to believe or expect that a direct monetary gain or a direct monetary loss will accrue, by virtue of his or her official activity, to himself or herself, any person within his or her family, his or her business associate, or his or her employer. Also, a Retirement Board member shall not use his or her public position, or confidential information received through his or her public position, to obtain financial gain, other than that provided by law, for himself or herself, any person within his or her family, his or her business associate, or his or her employer. A Retirement Board member is further prohibited by the Code of Ethics from participating in disability adjudications and contested administrative hearings if any person within his or her family or household, his or her business associate, his or her employer, or anyone authorized to appear on behalf of any person within his or her family or household, his or her business associate, or his or her employer, appears to present evidence or arguments before the Retirement Board.

The Petitioners are members of the Retirement Board of the Employees' Retirement System of the State of Rhode Island ("Retirement Board"). The Employees' Retirement System of the State of Rhode Island ("ERSRI") was statutorily established "for the purpose of providing retirement allowances for employees of the State of Rhode Island" R.I. Gen. Laws § 36-8-2. The

Municipal Employees' Retirement System of the State of Rhode Island ("MERS") was similarly established "for the purpose of providing retirement allowances for employees of participating municipalities . . . and benefits to the survivors of those employees." Section 45-21-32. Together, the ERSRI and the MERS are commonly referred to as the "retirement system," which is managed by the Retirement Board. The Retirement Board is an independent board, created and established in the Rhode Island Office of the General Treasurer, to "hold and administer, in trust, the funds of the retirement system . . . [and] shall perform such functions as authorized by law." Section 36-8-4. The "general administration and the responsibility for the proper operation of the retirement system . . . are . . . vested in [the] [R]etirement [B]oard." 36-8-3.

The Retirement Board has fifteen (15) members and is statutorily constituted as follows:

- (1) The General Treasurer or designee;
- (2) The Director of Administration or designee;
- (3) A representative of the Budget Office (or designee), appointed by the Director of Administration;
- (4) The President of the League of Cities and Towns or designee;
- (5) & (6) Two active state employee members of the retirement system, or officials from a state employee union, elected by active state employees;
- (7) & (8) Two active teacher members of the retirement system or officials from a teachers union, elected by active teachers;
- (9) An active municipal employee member of the retirement system or an official from a municipal employees union, elected by active municipal employees;
- (10) & (11) Two retired members of the retirement system, elected by retired members of the system;
- (12) & (13) Two public members skilled in finance, accounting or pensions, appointed by the Governor; and
- (14) & (15) Two public members skilled in finance, accounting or pensions, appointed by the General Treasurer.

Section 36-8-4.

The Retirement Board has established certain standing subcommittees in order to facilitate its operations. For example, and relative to the instant request, the Disability Subcommittee, composed of five Retirement Board members, meets each month to review an average of twelve applications for ordinary and accidental disability allowances ("applications") that are first screened by a team of three medical examiners. The Disability Subcommittee then makes its recommendations to the Retirement Board which then votes as a whole concerning the disposition of the applications.¹ The Retirement Board also affords an administrative hearing process to members of the system aggrieved by administrative actions other than disability decisions. The grievance is reviewed by the Retirement Board's Executive Director, who then issues a decision. In the event that the aggrieved member wishes to appeal the decision of the Executive Director, an independent hearing officer is appointed to hear the matter, find facts, and offer conclusions of law to the Retirement Board. The aggrieved member may make exceptions, file briefs, and make oral

¹ If an application is denied, the applicant may file an appeal before the Retirement Board.

arguments before the Retirement Board in response to the hearing officer's recommendation. The Retirement Board then votes as a whole on the hearing officer's recommendation, and adjudicates the underlying administrative action appealed by the aggrieved member. The Retirement Board adjudicates approximately three to five contested administrative hearings per year.

Members of the Retirement Board include a state elected official, several state and municipal employees, and at least one employee of a private entity. Other Retirement Board members currently hold leadership positions as officers and/or executive board members with national, state, and local labor organizations, including the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"); the American Federation of State, County and Municipal Employees ("AFSCME"), RI Council 94; and the AFSCME, Council 94, Local 2872 (collectively, "labor unions"). Some of the same Retirement Board members, and a number of other Retirement Board members, currently hold leadership positions as officers and/or executive board members with other national, state, and local labor organizations, including the National Education Association of Rhode Island ("NEARI"); the NEARI Retired Local; the Rhode Island Federation of Teachers and Health Professionals ("RIFTHP"), and the RI AFT/R Local 8037 (collectively, "teacher unions"). The Retirement Board members who are affiliated with labor unions and teacher unions have each represented that, to the best of their knowledge, the granting or denial of a person's disability pension application or the adjudication of a person's contested administrative hearing has no specific financial impact upon their respective labor organizations.

Cognizant of the Code of Ethics, and desirous of conducting themselves in conformance therewith, the members of the Retirement Board seek general guidance from the Ethics Commission concerning potential conflicts of interest resulting from their various state, municipal, union, or other private affiliations. Specifically, the members of the Retirement Board are concerned about whether or not the Code of Ethics prohibits them from participating in discussions and voting relative to disability adjudications and contested administrative hearings involving members of the class that elected or appointed them; their constituents; employees of the same state agency or municipality; members of labor unions and teacher unions within which Retirement Board members hold leadership positions; and their private employers. Finally, the members of the Retirement Board request general guidance regarding what options are available to continue to carry out their statutory and fiduciary duties in the event that required recusals by members of the Disability Subcommittee or the Full Retirement Board jeopardize the ability to attain and maintain a quorum.

Under the Code of Ethics, a public official may not participate in any matter in which he or she has an interest that is in substantial conflict with the proper discharge of his or her duties or employment in the public interest. Section 36-14-5(a). A public official will have an interest that is in substantial conflict with the proper discharge of his or her duties or employment in the public interest if he or she has reason to believe or expect that a direct monetary gain or a direct monetary loss will accrue, by virtue of his or her official activity, to the official himself or herself, any person within his or her family, his or her business associate, his or her employer, or any business which he or she represents. Section 36-14-7(a). Additionally, section 36-14-5(d) of the Code of Ethics prohibits a public official from using his or her public position, or confidential information received through his or her public position, to obtain financial gain, other than that provided by

law, for himself or herself, any person within his or her family, his or her business associate, or his or her employer.

Further, under Commission Regulation 520-RICR-00-00-1.2.1 Additional Circumstances Warranting Recusal (36-14-5002) (“Regulation 1.2.1”), a public official must generally recuse from participation in any matter if any person within his or her family or household, his or her business associate, his or her employer, or any person authorized by any person within his family or household, his or her business associate, or his or her employer to appear on behalf of said family or household member, business associate, or employer, appears or presents evidence or arguments before the public official’s state or municipal agency, unless one of the two exceptions found at Regulation 1.2.1(b) applies. A business associate is defined as “a person joined together with another person to achieve a common financial objective.” Section 36-14-2(3). A person is defined as “an individual or a business entity.” Section 36-14-2(7).

The Ethics Commission has consistently concluded that persons are “business associates” of the entities for which they serve as either officers or members of the Board of Directors, or in some other leadership position that permits them to direct and affect the financial objectives of the organization. Consistent therewith, the Ethics Commission has previously noted that members of the Retirement Board who held leadership positions in labor unions were business associates of those organizations. See A.O. 2013-14. See also A.O. 2014-14 (opining that the Director of the Rhode Island Department of Environmental Management (“RIDEM”), who was also a Director of the Rhode Island Boy Scouts (“Boy Scouts”), was a business associate of the Boy Scouts and, therefore, was required to recuse from participating in any RIDEM decisions that would financially impact the Boy Scouts, as well as from any matters in which a Boy Scout representative appeared to represent the organization’s interests).

The Ethics Commission has also consistently concluded that the Code of Ethics does not consider the relationship between a public official and a public body, such as a state or municipal agency, to be that of “business associates.” See, e.g., A.O. 2011-29 (opining that a member of the Portsmouth Planning Board, who was also employed as a civil engineer for the Rhode Island Department of Transportation (“RIDOT”), could participate in the Planning Board’s consideration of a development proposal, notwithstanding that in her capacity as a RIDOT-employed engineer the petitioner had been reviewing the same property to ensure that the state’s property interests were protected, because neither the RIDOT nor the Planning Board were considered “businesses” and, therefore, the “business associate” prohibitions that would have otherwise constrained the petitioner while carrying out her public duties did not apply).

While it is clear that a Retirement Board member who serves in a leadership capacity for a labor organization is considered a business associate of the organization itself, the question of whether he is or she is also a business associate of each of the organization’s individual members has undergone a shifting analysis and understanding over the years. More than twenty years ago, the Ethics Commission took the position that a public official was prohibited from participating in matters concerning members of the same private organization within which the public official served in a leadership position. For example, in Advisory Opinion 98-156, the Ethics Commission opined, among other things, that a Retirement Board member was prohibited from participating in matters concerning members of the North Providence Federation of Teachers (“NPFT”) and RIFT

because, at the time, the petitioner held leadership positions in both of those organizations.² At that time, recognition by the Ethics Commission of a business associate relationship among the leaders of an organization, and between the leaders of the organization and the organization itself, extended to all other members of the organization who had no leadership role. See, e.g., A.O. 98-44 (opining that a Commissioner of the Fire Safety Code Board of Appeal and Review must not only recuse from participation in appeals involving property owned by Local 799, but must also recuse from appeals involving property owned by any individual member of Local 799, given that the petitioner was a business associate of Local 799 by virtue of his leadership position of President of the organization).

The petitioners from Advisory Opinions 98-156 and 98-44 above were considered business associates not only of the organizations for which they served in leadership positions, and the other leaders with whom they served within those organizations, but also with the rank and file members of those organizations. As such, the petitioners were prohibited from participating in matters that would impact their respective organizations, fellow leaders, and the rank and file members of their respective organizations. The ability to direct and affect the financial objectives of an organization is the tie that binds the leaders of that organization as business associates and is a tie that extends to the relationship between those leaders and the organization itself. However, in more recent years, the Ethics Commission has recognized that rank and file members of an organization are situated differently than are the organization's leadership, without the same ability to direct and affect the financial objectives of the organization.

In Advisory Opinion 2013-14, the Ethics Commission noted that a Retirement Board member's "mere membership" in a labor union, as opposed to holding a leadership position, "would not necessarily create a business association." However, those members holding such leadership positions were required to recuse from a discussion of litigation that involved and would financially impact their organization as an entity. In Advisory Opinion 2019-3, the Ethics Commission opined that a member of the South Kingstown School Committee ("SKSC"), who was also employed by NEARI, was prohibited by the Code of Ethics from participating in SKSC matters relating to the negotiation and approval of school department contracts with NEARI local bargaining units, and also from participating in grievance hearings involving school district employees who were NEARI members when such members were represented by a NEARI employee or representative. Such recusal was required in these instances pursuant to Regulation 1.2.1, because NEARI employees or representatives were appearing to represent school district employees, present evidence, or make arguments before the SKSC. Inherent in this advisory opinion was a determination that the petitioner would not be required to recuse from matters involving NEARI members who were not represented by a NEARI employee or representative.

It was also in 2019 that the Ethics Commission issued a Decision and Order dismissing with prejudice an ethics complaint against a Rhode Island State Senator who worked as a municipal high school teacher and who served as an officer for NEARI. See In re: Valarie Lawson,

² The Ethics Commission also opined that the Retirement Board member was prohibited from participating in matters concerning the spouse or dependent child of a member of the NPFT and the RIFT, given the reasonable expectation that such participation would affect not only the financial status of the spouse or dependent child, but also the financial status of the member himself or herself.

Complaint No. 2019-7. The complaint alleged, in pertinent part, that the respondent had co-sponsored legislation which required that all contractual provisions contained in an otherwise expired collective bargaining agreement with certified schoolteachers and municipal employees would continue until such time as a successor agreement was reached between the parties, excluding contractual provisions that limited layoffs. The complaint further alleged that the respondent advocated for passage on the Senate floor and cast her vote in favor of passage.³ The investigation revealed that the financial impact of the legislation was not on NEARI itself, as an entity, but rather on the terms and conditions of employment for municipal employees and teachers, some of whom happened to be NEARI members. That there was no probable cause to believe that the respondent had used her public office to obtain financial gain to benefit NEARI itself, as an entity, contributed in large part to the complaint's dismissal.⁴

There is currently no actual pending matter before the Retirement Board for which its members have a specific inquiry. Nonetheless, the Ethics Commission recognizes the importance of addressing issues which can reasonably be expected to be faced by members of the Retirement Board going forward and will, therefore, provide general guidance only at this time. Accordingly, it is the opinion of the Ethics Commission that a Retirement Board member is prohibited by the Code of Ethics from participating in disability adjudications and contested administrative hearings if he or she has reason to believe or expect that a direct monetary gain or a direct monetary loss will accrue, by virtue of his or her official activity, to himself or herself, any person within his or her family, his or her business associate, or his or her employer. Specifically, a Retirement Board member is prohibited from participating in disability adjudications and contested administrative hearings which are likely to result in a financial impact upon himself or herself or upon any individual who serves in a leadership position within a private organization for which the Retirement Board member also serves in a leadership position, or upon the organization itself. Also, a Retirement Board member shall not use confidential information received through his or her public position to obtain financial gain, other than that provided by law, for himself or herself, any person within his or her family, his or her business associate, or his or her employer.

A Retirement Board member is further prohibited by the Code of Ethics from participating in disability adjudications and contested administrative hearings if any person within his or her family or household, his or her business associate, his or her employer, or anyone authorized to appear on behalf of any person within his or her family or household, his or her business associate, or his or her employer, appears to present evidence or arguments before the Retirement Board. A Retirement Board member is not required to recuse from participation in disability adjudications or contested administrative hearings if the applicant is a rank and file member of a private organization within which the Retirement Board member has a leadership position, provided that

³ The complaint also alleged that the respondent had participated in a Senate committee hearing at which a NEARI lobbyist had testified. However, the investigation revealed that the respondent recused from participating in the committee's discussion relative to the legislation and left the committee table during all testimony, including that of the NEARI lobbyist.

⁴ The Ethics Commission also found that there was no direct financial impact upon the respondent aside from that which impacted more than 11,500 public schoolteachers in Rhode Island and, therefore, fell under the class exception found at section 36-14-7(b). Nor was there evidence of any relationship between the passage of the legislation and the respondent's predetermined salary from NEARI. Therefore, there was also no probable cause to believe that the respondent had used her public office to obtain financial gain for herself.

said rank and file member is not represented by an employee or agent of that organization. A Retirement Board member who is a state or municipal elected or appointed official is not required to recuse from participation in disability adjudications or contested administrative hearings just because the applicant elected or appointed the Retirement Board member, is a constituent of that Retirement Board member, or is a state or municipal employee, provided that participation is not otherwise prohibited by the Code of Ethics pursuant to a secondary relationship between the Retirement Board member and the applicant. Upon recusal by any Retirement Board member, he or she is required to complete a statement of conflict of interest consistent with section 36-14-6.

Finally, the Ethics Commission has recognized and permitted a Rule of Necessity exception in matters where recusals inhibit governmental process, such as where the majority of public body members must recuse themselves and a resulting failure of a quorum renders the entity unable to act. Under the Rule of Necessity, the official or officials determined to have the least conflict may be permitted to participate so that an important governmental function can be accomplished. See, e.g., A.O. 2008-9 (opining that the Town of Smithfield Zoning Board of Review could utilize the Rule of Necessity to achieve a quorum of five members to hear and decide an appeal from a decision of the Planning Board, given that three of the seven Zoning Board members had conflicts of interest requiring their recusals). Public bodies may not, on their own, invoke the Rule of Necessity. Rather, public bodies are required to seek an advisory opinion from the Ethics Commission permitting the use of the Rule of Necessity each time conflicts of interest would inhibit their necessary governmental processes.

This Draft Opinion is strictly limited to the facts stated herein and relates only to the application of the Rhode Island Code of Ethics. Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.

Code Citations:

§ 36-14-2(3)

§ 36-14-2(7)

§ 36-14-5(a)

§ 36-14-5(d)

§ 36-14-6

§ 36-14-7(a)

§ 36-14-7(b)

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

Other R.I. Gen. Laws:

§ 36-8-2

§ 36-8-3

§ 36-8-4

§ 45-21-32

Other Related Authority:

In re: Valarie Lawson, Complaint No. 2019-7

Related Advisory Opinions:

A.O. 2019-3

A.O. 2014-14

A.O. 2013-14

A.O. 2011-29

A.O. 2008-9

A.O. 98-156

A.O. 98-44

Keywords:

Business Associates

Union/Bargaining Unit

DRAFT

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: May 18, 2021

Re: Mario Carreño

QUESTION PRESENTED:

The Petitioner, the School Building Authority Finance Officer for the Rhode Island Department of Education, a state employee position, requests an advisory opinion regarding whether the Code of Ethics prohibits him from accepting an appointment to fill a vacancy on the Lincoln School Committee, a municipal appointed position, and from then serving simultaneously in both positions.

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the School Building Authority Finance Officer for the Rhode Island Department of Education, a state employee position, is not prohibited by the Code of Ethics from accepting an appointment to fill a vacancy on the Town of Lincoln School Committee, a municipal appointed position, and from then serving simultaneously in both positions.

The Petitioner is currently employed by the State of Rhode Island as the School Building Authority Finance Officer for the Rhode Island Department of Education ("RIDE"). He states that the School Building Authority ("SBA") is tasked with reviewing Necessity of School Construction applications ("applications") submitted by school districts throughout the state to determine their eligibility for state aid. He adds that, at any given time, the SBA is actively reviewing multiple applications for compliance with RIDE School Construction Regulations and the relevant state statutes. The Petitioner represents that a combination of RIDE and SBA staff members and, in some cases, external consultants, review the applications and consult with the school districts as necessary during the process. The Petitioner further represents that the SBA recommends the approval of applications to the Commissioner of Education who, in turn, recommends approval of the applications to the Council on Elementary and Secondary Education, which is the final decision-making authority relative to the approval of the applications. He states that school districts typically apply for state aid once every five years, and that not every SBA staff member reviews every application.

The Petitioner explains that, as the SBA's Finance Officer, he administers payments to eligible school districts based on the districts' invoices, which are also reviewed by the Statewide Bond Manager, who is a RIDE consultant; RIDE's School Construction Coordinator; and members of the Rhode Island Health and Education Building Corporation. He further states that payments are

also reviewed by the respective superintendents, the owner's project manager, the municipal finance officer, and RIDE's Senior Finance Officer for Resource Allocation. The Petitioner explains that each school district's reimbursement rate is determined on an annual basis pursuant to state statutory requirements. Upon completion of a district's school construction project, the Petitioner and either RIDE's Senior Finance Officer or Educational Facility Planner review the documentation submitted by the district in order to determine the district's eligibility for reimbursement. The Petitioner states that the applicants for reimbursement of school construction projects are not in competition with one another, adding that, if a town complies with all of the statutory requirements, the funds will be advanced to the town, regardless of whether three or thirty schools have applied for reimbursement, and that the applications are not prioritized by RIDE.

The Petitioner states that he was recently approached by the Town of Lincoln Town Council ("Town Council") and the Town of Lincoln School Committee ("School Committee") and asked whether he might be interested in accepting an appointment to fill a vacancy on the School Committee.¹ He adds that the position on the School Committee, for which there is a stipend, is expected to be filled by the Town Council on May 18, 2021. He informs that the School Committee is the agency that approves the submission of Necessity of School Construction applications to RIDE, and that the process involves the organization of a School Building Committee consisting of eight members, including the District Administrator, one to two School Committee members, the Town Financial Manager or Administrator, and several parents. The School Building Committee meets with representatives from RIDE who then tour the school prior to the submission of the application to RIDE by the School Committee.

The Petitioner states that he has received permission from RIDE to accept the appointment to the School Committee, subject to an advisory opinion from the Ethics Commission. He informs that the Town of Lincoln last applied to RIDE for funding in 2017, at which time the application was approved. He adds that the Town of Lincoln is presently working an application to RIDE. The Petitioner states that his service on the School Committee would not impair his independence of judgment as to his official duties at RIDE or require or induce him to disclose confidential information acquired by him in the course of those official duties. He adds that the reverse is true regarding his prospective official duties as a member of the School Committee as to RIDE. The Petitioner also states that, in the event that he is permitted by the Code of Ethics to accept appointment to the School Committee while he continues his employment with RIDE, out of a desire to avoid even the appearance of impropriety, he will recuse from participation in his capacity as RIDE's SBA Finance Officer from any matters involving or concerning the Town of Lincoln, and such matters will instead be addressed by the colleagues with whom he would have otherwise collaborated on such matters. It is in the context of these facts that the Petitioner seeks guidance from the Ethics Commission regarding whether, given his current employment as the SBA Finance Officer for RIDE, the Code of Ethics prohibits him from accepting an appointment to fill a vacancy on the School Committee, and from then serving simultaneously in both positions.

Under the Code of Ethics, a public official may not participate in any matter in which he has an interest, financial or otherwise, that 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 official will have an

¹ The Petitioner explains that members of the School Committee are ordinarily elected but that, in the event of a vacancy, the Town Council has appointing authority.

interest in substantial conflict with his official duties if it is reasonably foreseeable that a direct monetary gain or a direct monetary loss will accrue, by virtue of the public official's activity, to the public official, his family member, his business associate, or any business by which he is employed or which he represents. Section 36-14-7(a). A business is defined as "a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, trust or any other entity recognized in law through which business for profit or not for profit is conducted." Section 36-14-2(2). A business associate is defined as "a person joined together with another person to achieve a common financial objective." Section 36-14-2(3). A person is defined as "an individual or a business entity." Section 36-14-2(7).

Further, a public official is prohibited from using his public office or confidential information received through his public office to obtain financial gain for himself, any person within his family, his business associate, or any business by which he is employed or which he represents. Section 36-14-5(d). Finally, a public official may 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. Section 36-14-5(b).

The Ethics Commission has consistently determined that the Code of Ethics does not create an absolute bar against simultaneous service for two different governmental entities. Rather, the Ethics Commission has opined that determination must be made on a case-by-case basis regarding whether a substantial conflict of interest exists, in either public role, with respect to a petitioner carrying out his duties in the public interest.

As an initial matter, the Ethics Commission has consistently concluded that the Code of Ethics does not consider public entities "businesses" or the relationship between a public official and a public body, such as a state or municipal agency, to be that of "business associates." See, e.g., A.O. 2014-23 (opining that neither the Rhode Island Board of Education Council on Elementary and Secondary Education ("CESE") nor Trinity Academy for the Performing Arts ("TAPA") was considered a "business" under the Code of Ethics and, therefore, the petitioner's memberships on CESE and TAPA did not constitute business associations with those bodies).

Additionally, the Ethics Commission has consistently opined that a public official is not prohibited by the Code of Ethics from participating in the matters being addressed in two different forums as a result of holding two public positions, even when a particular matter under consideration during the exercise of the individual's duties in one public position might impact the other public entity for which the individual also serves. For example, in Advisory Opinion 2011-29, the Ethics Commission opined that a member of the Portsmouth Planning Board, who was also employed as a civil engineer for the Rhode Island Department of Transportation ("RIDOT"), could participate in the Planning Board's consideration of a development proposal, notwithstanding that in her capacity as a RIDOT-employed engineer the petitioner had been reviewing the same property to ensure that the state's property interests were protected. The Ethics Commission reasoned that, because neither the RIDOT nor the Planning Board were considered "businesses" under the Code of Ethics, the "business associate" prohibitions that would have otherwise constrained the petitioner while carrying out her public duties did not apply. See also A.O. 2015-48 (opining that a member of the Providence School Board was not prohibited by the Code of Ethics from simultaneously serving as the Chief Operating Officer of the Rhode Island Nurses Institute Middle

College Charter School ("RINIMC"), nor was he prohibited from participating in School Board actions that directly impacted the charter school because neither the School Board nor the RINIMC was considered to be a "business" under the Code of Ethics and, therefore, neither the petitioner's membership on the School Board nor his employment with RINIMC constituted a "business association" under the Code of Ethics); A.O. 2015-27 (opining that the Director of Planning, Code Enforcement and Grants Administration for the Town of Westerly, who was also temporarily serving as Interim Town Manager, was not prohibited by the Code of Ethics from participating in the Town's review of a non-profit entity's development proposal that might involve the Community College of Rhode Island ("CCRI"), notwithstanding that the petitioner was an online adjunct faculty member of CCRI, because neither the Town of Westerly nor CCRI were considered "businesses" and, therefore, the petitioner could not be considered a "business associate" of either the Town of Westerly or CCRI).

Similarly, here, there is no substantial conflict of interest apparent in the Petitioner simultaneously holding the positions of SBA Finance Officer for RIDE and School Committee member, notwithstanding some potential overlap in those public roles. Neither RIDE (a state agency) nor the School Committee (a municipal agency) is considered a "business entity" under the Code of Ethics. Therefore, neither the Petitioner's employment by RIDE, nor his prospective membership on the School Committee, constitutes a "business association" with either of those public bodies under the Code of Ethics. Accordingly, any impact upon the School Committee by virtue of the Petitioner's activity as the SBA Finance Officer for RIDE would not be considered impact upon a "business associate" under the Code of Ethics. The reverse is also true. Absent some direct financial impact upon himself, any person within his family, his business associate or a private employer as a result of the Petitioner's actions in either public role, no inherent conflict of interest would preclude such simultaneous service.

Further, based on the facts as represented by the Petitioner, there is no indication that serving as both the SBA Finance Officer for RIDE and as a member of the Lincoln School Committee would impair his independence of judgment as to his public responsibilities in either position or require him to disclose confidential information acquired by him in the course of his official duties in either role. The Ethics Commission recognizes and supports the Petitioner's choice to recuse from participation in the review of Necessity of School Construction Applications submitted by the Town of Lincoln to RIDE, given that such participation, while not precluded by the Code of Ethics, might convey a potential appearance of impropriety.

Absent any other relevant fact that would implicate the Code of Ethics, it is the opinion of the Ethics Commission that the Petitioner is not prohibited by the Code of Ethics from simultaneously serving as the SBA Finance Officer for RIDE and as a member of the Town of Lincoln School Committee. The Petitioner is advised that, if any matters should come before him as he is carrying out his duties in either of his public roles that may present any other potential conflict of interest that is not otherwise contemplated in this advisory opinion, or circumstances in which it is reasonably foreseeable that there will be a financial impact upon the Petitioner personally, any person within his family, his business associate, or a private employer, he should either request further advice from the Ethics Commission or exercise the recusal provision found at section 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. Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.

Code Citations:

§ 36-14-2(2)
§ 36-14-2(3)
§ 36-14-2(7)
§ 36-14-5(a)
§ 36-14-5(b)
§ 36-14-5(d)
§ 36-14-6
§ 36-14-7(a)

Related Advisory Opinions:

A.O. 2015-48
A.O. 2015-27
A.O. 2014-23
A.O. 2011-29

Keywords:

Dual Public Roles