



STATE OF RHODE ISLAND

**RHODE ISLAND ETHICS COMMISSION**

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**NOTICE OF OPEN MEETING**

**AGENDA**

**15<sup>th</sup> Meeting**

**DATE:** Tuesday, November 16, 2021

**TIME:** 9:00 a.m.

**PLACE:** Rhode Island Ethics Commission  
Hearing Room - 8<sup>th</sup> Floor  
40 Fountain Street  
Providence, RI 02903

1. Call to Order.
2. Motion to approve minutes of Open Session held on October 5, 2021.
3. 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.) Administration/Office Updates.
4. Advisory Opinions.
  - a.) Robert R. Moreau, the Executive Director of the Housing Authority of the City of Woonsocket, requests an advisory opinion regarding what restrictions, if any, the Code of Ethics places upon him in carrying out his official duties, given that his sister is employed by the Housing Authority as a Data Entry Clerk. [Staff Attorney Radiches]

- b.) Jonathan Womer, the former Director of the Office of Management and Budget, a division within the Rhode Island Department of Administration, requests an advisory opinion regarding the application of the revolving door provisions of the Code of Ethics, given that he is now privately employed by The Policy Lab at Brown University as its Senior Advisor and Lead for State Budgeting Practice. [Staff Attorney Radiches]
- c.) Jennifer Lima, a member of the North Kingstown School Committee, who in her private capacity is the founder and co-president of Towards an Anti-Racist North Kingstown (“TANK”), a non-profit organization dedicated to advancing discussions of anti-racist policies in the Town of North Kingstown, requests an advisory opinion regarding whether the Code of Ethics prohibits her from participating in School Committee and/or Subcommittee discussions and/or voting on matters relative to the topics of diversity, equity, and inclusion, given that those topics are among those advanced by TANK as part of its mission. [Staff Attorney Papa]
- d.) Christopher Abbulime, the Deputy Chief of Staff to the Governor of the State of Rhode Island, requests an advisory opinion regarding how best to avoid and/or manage potential conflicts of interest, if any, that may arise given that his spouse is the sole proprietor of a newly established private entity that intends to offer 24-hour community care in small residential facilities for eligible adults with intellectual and development disabilities and that will soon seek licensure from the Rhode Island Department of Behavioral Healthcare, Development Disabilities, and Hospitals. [Staff Attorney Papa]
- e.) Nicole Bucka, a member of the East Greenwich School Committee, whose spouse is a teacher in the East Greenwich School Department and a member of the East Greenwich teachers’ union, requests an advisory opinion regarding what restrictions, if any, the Code of Ethics places upon her ability to: (1) participate in School Department budget discussions; (2) vote to approve or reject as a whole the teachers’ collective bargaining/employee contract; and (3) participate in School Committee discussions relative to the collective bargaining/employee contract negotiations for non-teacher unions. [Staff Attorney Papa]

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

- a.) Motion to approve minutes of Executive Session held on October 5, 2021, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
- b.) In re: Steven Merolla, Complaint No. 2020-6, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).

- c.) In re: Anthony Piloizzi, Complaint No. 2021-2, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) & (4).
- d.) Motion to return to Open Session.
- 6. Motion to seal minutes of Executive Session held on November 16, 2021.
- 7. Report on actions taken in Executive Session.
- 8. New Business proposed for future Commission agendas and general comments from the Commission.
- 9. 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 November 10, 2021*

# RHODE ISLAND ETHICS COMMISSION

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## Draft Advisory Opinion

Hearing Date: November 16, 2021

Re: Robert R. Moreau

### QUESTION PRESENTED:

The Petitioner, the Executive Director of the Housing Authority of the City of Woonsocket, an employee position at a municipal public corporation, requests an advisory opinion regarding what restrictions, if any, the Code of Ethics places upon him in carrying out his official duties, given that his sister is employed by the Housing Authority as a Data Entry Clerk.

### RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the Executive Director of the Housing Authority for the City of Woonsocket, an employee position at a municipal public corporation, is prohibited by the Code of Ethics from participating in any Housing Authority matter in which his sister will be financially impacted or receive an employment advantage. The Petitioner is also prohibited from participating in the supervision, evaluation, appointment, classification, promotion, transfer, or discipline of his sister. The Petitioner is further prohibited from participating in negotiations relative to an employee contract or collective bargaining agreement that addresses or affects his sister's employment, compensation, or benefits, but may provide information relative to Housing Authority operations to those persons involved in the negotiations of such an employee contract or collective bargaining agreement, provided that it is not reasonably foreseeable that the Petitioner's sister will be financially impacted by the Petitioner's official activity, and further provided that the Petitioner is not present during the negotiations of such an employee contract or collective bargaining agreement.

The Petitioner states that he is employed as the Executive Director of the Housing Authority for the City of Woonsocket ("Woonsocket Housing Authority" or "WHA"), having been hired for that position by the WHA Board of Commissioners ("Board") on January 1, 2019. He informs that the WHA employs approximately 50 full-time employees and 15 part-time employees. The Petitioner identifies among his responsibilities as Executive Director the leadership and management of the WHA and the establishment and administration of Board policies. He offers as an example of the establishment and administration of Board policies his implementation earlier this year of a "floating holiday" for all WHA employees who are members of the American Federation of State, County and Municipal Employees ("AFSCME" or "union") in response to President Biden's declaration of June 19th ("Juneteenth") as a federal holiday. The Petitioner explains that, because all federal holidays must be observed under the Collective Bargaining Agreement ("CBA")

currently in place between the WHA and the union, he collaborated with union leaders to determine the manner in which observation of the holiday would be implemented.

The Petitioner represents that, immediately prior to becoming Executive Director, he worked as the WHA's Director of Security, a position he held for nearly a decade after having been hired in April of 2009 by a former WHA Executive Director. He further represents that, in April of 2016, during his tenure as Director of Security, his sister was hired by the WHA Executive Director at the time for the position of Data Entry Clerk. The Petitioner identifies the responsibilities of a Data Entry Clerk as follows: processing applications from individuals seeking public housing; verifying the accuracy of information and documentation provided by those applicants; and setting up applicant interviews. The Petitioner explains that, after passing an entrance exam required for candidates seeking the position of Data Entry Clerk, his sister was interviewed by an independent panel of WHA employees that did not include the Petitioner. He emphasizes that, as Director of Security, he was not involved in his sister's hiring and did not supervise her.

The Petitioner states that, presently, his sister continues to be employed by the WHA as a Data Entry Clerk and that she is a union member. He further states that his sister reports directly to the WHA's Service Center Manager who, in turn, reports directly to the Petitioner in his role as Executive Director. He adds that disciplinary matters, including such matters that could potentially involve the Petitioner's sister, are normally brought by the Service Center Manager to the attention of the WHA's Human Resources Director, who would then seek input from the Executive Director with regard to any form of disciplinary action contemplated.

The Petitioner states that he does not participate in discussions or decision-making relative to either WHA budgetary line items or approving or rejecting the entire budget as a whole, as responsibility for those matters lies with the Board. The Petitioner further states that, while he does not expect to be asked to assist the WHA's legal counsel with the negotiation of an employee contract or collective bargaining anytime in the next 18-24 months, he does expect to be asked to participate in such negotiation eventually. He adds that he will not be expected to participate in the decision to approve or reject an employee contract or collective bargaining agreement as a whole, given that such responsibility lies with the Board.

The Petitioner states that, in the event that a question about the language in an existing CBA arises, or if an existing CBA is silent on a particular matter, he will communicate with union officers in order to seek a resolution. He cites as an example the recent resolution of the interpretation of language in the current CBA addressing the manner in which a union employee would be paid for being called back to work for any number of hours in addition to those for which he or she had been scheduled ("call-back language"). He adds that his sister is not subject to the call-back language portion of the CBA. The Petitioner states that the CBA also outlines training opportunities for WHA employees who are union members, the implementation of which requires decision-making by the Executive Director.

Cognizant of the Code of Ethics, and desirous of acting in conformance therewith, it is in the context of these representations that the Petitioner seeks guidance from the Ethics Commission regarding what restrictions, if any, the Code of Ethics places upon him in carrying out his

Executive Director duties, given that his sister is employed by the WHA as a Data Entry Clerk and is a member of the union.

Under the Code of Ethics, a public official or employee 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 or employee will have an interest that is in substantial conflict with the proper discharge of his duties or employment in the public interest if it is reasonably foreseeable that a direct monetary gain or loss will accrue, by reason of the public official or employee's activity, to the public official or employee himself, his family member, his business associate, or to any business by which the public official is employed or which the public official represents. Section 36-14-7(a).

However, section 36-14-7(b) of the Code of Ethics, often referred to as the "class exception," states that a public official or employee will not have an interest which is in substantial conflict with the proper discharge of his official duties if any benefit or detriment accrues to him, any person within his family, any business associate, or any business by which he is employed or which he represents "as a member of a business, profession, occupation or group, or of any significant and definable class of persons within the business, profession, occupation or group, to no greater extent than any other similarly situated member of the business, profession, occupation or group, or of the significant and definable class of persons within the business, profession, occupation or group."<sup>1</sup> Additionally, section 36-14-5(d) prohibits a public official or employee from using his position, or confidential information received through his position, to obtain financial gain other than that provided by law for himself, any person within his family, his business associate, or any business by which the public official is employed or which the public official represents.

#### **Participation in Matters That Involve or Financially Impact the Petitioner's Sister**

Under the general nepotism prohibitions of the Code of Ethics, a public official or employee shall not participate in any matter as part of his public duties if he has reason to believe or expect that any person within his family or any household member is a party to or participant in such matter or will derive a direct monetary gain or suffer a direct monetary loss, or obtain an employment advantage, as the case may be. Commission Regulation 520-RICR-00-00-1.3.1(B)(1) Prohibited Activities – Nepotism (36-14-5004) ("Regulation 1.3.1"). The definition of "any person within his [] family" specifically includes "sister." Regulation 1.3.1(A)(2). Notably, Regulation 1.3.1(B)(1) not only prohibits actions by a public official or employee that would financially impact his family member, but also applies when such actions involve a family member as a party or participant, regardless of the potential for financial impact. Further, under Regulation 1.3.1(B)(1), a public official or employee is prohibited from participating in matters that may bestow an employment advantage upon a family member. Such an advantage, which might not appear to be a direct financial gain, could be some type of opportunity (such as an educational or

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<sup>1</sup> When determining whether any particular circumstance supports and justifies the application of the class exception, the Ethics Commission considers the totality of the circumstances. Among the important factors considered are: 1) the description of the class; 2) the size of the class; 3) the function or official action being contemplated by the public official or employee; and 4) the nature and degree of foreseeable impact upon the class and its individual members as a result of the official action.

travel experience) or resource (such as access to enhanced technology) that the family member would not otherwise have had but for the public official or employee's participation.

Thus, in the event that the Petitioner's sister would be directly financially impacted or obtain an employment advantage by reason of the Petitioner's official activity, the Petitioner is required to recuse in accordance with section 36-14-6. *See, e.g.,* A.O. 2019-19 (opining, *inter alia*, that a member of the Warwick School Committee was prohibited by the Code of Ethics from participating in any School Committee matter in which his mother was a party or participant, or in which she would be financially impacted or receive an employment advantage); A.O. 2013-8 (opining that a Bristol Town Council member was prohibited by the Code of Ethics from participating in the Town Council's appointment of a new harbormaster and the Town Council's review of any amendments to the harbormaster's job description, given that his brother was then serving as interim harbormaster and was also one of nineteen applicants for the permanent harbormaster position). An example of a matter from which the Petitioner would be required to recuse would include, though not be limited to, the exercise of discretion by the Petitioner when selecting training opportunities for his sister that are not made available to other similarly situated employees. To the extent that the Petitioner were to select training opportunities that would also be available to and appropriate for all other Data Entry Clerks and similarly situated WHA employees, the "class exception" would likely apply to such decision-making. The Petitioner is encouraged to consult with the Ethics Commission regarding such matters.

#### **Advocacy/ Supervision of Petitioner's Sister**

Regulation 1.3.1 also prohibits a public official from participating in the supervision, evaluation, appointment, classification, promotion, transfer, or discipline of any person within his family, or from delegating such tasks to a subordinate, except in accordance with advice received in a formal advisory opinion from the Ethics Commission. Regulation 1.3.1(B)(2)(a)&(b). *See, e.g.,* A.O. 2016-26 (opining that a lieutenant in the East Greenwich Fire Department was not prohibited from serving in that position upon the hiring of his brother as a probationary firefighter in the same department, provided that certain procedures were followed so that the lieutenant was removed from personnel decisions or other matters that particularly affected his brother). Here, the Petitioner represents that he was not involved in his sister's hiring and plays no role in his sister's day-to-day supervision. However, in response to the Petitioner's disclosure that in the event of a potential disciplinary matter involving his sister which has reached the attention of the Housing Authority's Human Resources Director the matter would then be brought before the Executive Director, the Petitioner is advised that he is prohibited from participating in such matter and must recuse consistent with section 36-14-6 and/or seek additional guidance from the Ethics Commission regarding the potential approval of a proposed alternate chain of command.<sup>2</sup>

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<sup>2</sup> While not determinative of the instant request for an advisory opinion, we note that section 18-17 of the WHA's own personnel regulations appears to prohibit the Petitioner from serving in a position in which he works directly above his sister's immediate superior. <https://ecode360.com/14482761>.

### Participation in Collective Bargaining/Employee Contracts

Regulation 1.3.1(B)(4) also addresses a public official or employee's participation in collective bargaining/employee contracts. It specifically prohibits a public official or employee from participating in negotiations relative to an employee contract or collective bargaining which addresses or affects the employment, compensation, or benefits of any person within his family or a household member. 1.3.1(B)(4)(a). However, a public official or employee may participate in a decision to accept or reject an entire employee contract or collective bargaining agreement as a whole, provided that the person within his family or his household member is impacted by the contract or agreement as a member of a significant and definable class of persons, and not individually or to any greater extent than any other similarly situated member of the class. 1.3.1(B)(4)(b). See General Commission Advisory 2009-1. The basis for allowing such participation is an assumption that a vote on an entire contract, once negotiated by others, is sufficiently remote from individual contract issues impacting a family member so as to not constitute a substantial conflict of interest in violation of the Code of Ethics.

Regulation 1.3.1(B)(4)'s blanket prohibition against involvement in contract negotiations is based on an understanding that, during negotiations, the impact of decisions as to individual components of a contract can be difficult to predict. For that reason, an official's participation in a contract issue that is seemingly unrelated to a family member can still have a resulting impact on other areas of the contract that would directly affect the family member. However, the Ethics Commission has allowed a municipal employee to provide information to those persons involved in the negotiations of a collective bargaining agreement. In Advisory Opinion 2021-4, the Ethics Commission opined that the Chief of the Lime Rock Fire Department ("Fire Department") was not prohibited by the Code of Ethics from continuing to provide information to the Chair of the Board of Commissioners for the Fire Department concerning the negotiation of a collective bargaining agreement addressing the employment of firefighters within the Fire Department, notwithstanding that a firefighter within the Fire Department had recently become the petitioner's son-in-law.

That petitioner had represented that his consultations with the Chair were limited to providing information relative to Fire Department operations, and specifically excluded financial matters such as firefighter compensation or benefits. Furthermore, the petitioner had stated that he did not attend the collective bargaining agreement negotiation sessions, was not actively involved in those negotiations, and had no voting authority over the collective bargaining agreement which would eventually be presented to members of the Board of Commissioners for consideration. The Ethics Commission determined that the petitioner's communications with the Chair did not rise to the level of participation in negotiations relative to the collective bargaining agreement and, therefore, did not trigger the provisions of Regulation 1.3.1(b)(4)(a). Nor was it reasonably foreseeable that such communications would result in a direct financial impact upon the petitioner's son-in-law as prohibited by Regulation 1.3.1(b)(1).

Here, the Petitioner must recuse from participating in any negotiations relative to an employee contract or collective bargaining which addresses or affects the employment, compensation, or benefits of his sister. However, the Petitioner is not prohibited from providing information relative to WHA operations to those persons involved in the negotiations of a collective bargaining



agreement between the WHA and the union, provided that it is not reasonably foreseeable that the Petitioner's sister will be financially impacted by the petitioner's official activity.

The Petitioner's example of collaborating with union leaders concerning the implementation of a floating holiday in response to the addition of Juneteenth as a federal holiday that is to be observed under the CBA does not constitute the negotiation of an employee contract or collective bargaining agreement. Rather, the decision to give WHA employees who are union members a floating holiday constitutes the accomplishment of a contract provision previously negotiated. Similarly, the Petitioner's example of communicating with union officers to interpret the language addressing the manner of compensation as regards the call-back language of the CBA (language to which the Petitioner's sister is not even subject) does not constitute the negotiating of an employee contract or collective bargaining agreement but, rather, amounts to an interpretation or clarification of an employee contract or collective bargaining agreement provision that had already been negotiated and voted on by others, and which applies to a group of similarly situated employees. The Petitioner is not prohibited from discussing or interpreting a union contract that was negotiated by others and that applies to a similarly situated group of employees that may include his sister.

### **Conclusion**

In conclusion, in consideration of the facts as represented, 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 prohibited by the Code of Ethics from participating in any WHA matter in which his sister is a party or participant, or by which his sister will be financially impacted or receive an employment advantage other than as a member of a class of similarly situated employees. The Petitioner is also prohibited from participating in the supervision, evaluation, appointment, classification, promotion, transfer, or discipline of his sister. Further, the Petitioner is prohibited from participating in negotiations relative to an employee contract or collective bargaining which addresses or affects his sister's employment, compensation, or benefits. However, the Petitioner may provide information relative to WHA operations to those persons involved in the negotiations of such an employee contract or collective bargaining agreement between the WHA and the union, provided that it is not reasonably foreseeable that the Petitioner's sister will be financially impacted by the Petitioner's official activity, and further provided that the Petitioner is not present during the negotiations of such an employee contract or collective bargaining agreement. Notice of recusal in any instance shall be filed with the Ethics Commission consistent with section 36-14-6.

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

**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(a)

§ 36-14-5(d)

§ 36-14-6

§ 36-14-7(a)

§ 36-14-7(b)

520-RICR-00-00-1.3.1 Prohibited Activities – Nepotism (36-14-5004)

Related Advisory Opinions:

A.O. 2021-4

A.O. 2019-19

A.O. 2016-26

A.O. 2013-8

General Commission Advisory 2009-1

Keywords:

Conflict of Interest

Nepotism

# RHODE ISLAND ETHICS COMMISSION

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## Draft Advisory Opinion

Hearing Date: November 16, 2021

**Re: Jonathan Womer**

### **QUESTION PRESENTED:**

The Petitioner, the former Director of the Office of Management and Budget, a division within the Rhode Island Department of Administration, a state appointed position, requests an advisory opinion regarding the application of the revolving door provisions of the Code of Ethics, given that he is now privately employed by The Policy Lab at Brown University as its Senior Advisor and Lead for State Budgeting Practice.

### **RESPONSE:**

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, the former Director of the Office of Management and Budget, a division within the Rhode Island Department of Administration, a state appointed position, is prohibited by the Code of Ethics from performing his duties for The Policy Lab with respect to the Budget Cohort for which the State of Rhode Island is one of seven participants until the expiration of one year following the Petitioner's severance from his former state employment.

The Petitioner is the former Director of the Office of Management and Budget ("OMB"), a division within the Rhode Island Department of Administration ("DOA"). The OMB provides fiscal analysis, management support, and analytical research to the public, the Governor, the General Assembly, and to Rhode Island state agencies.<sup>1</sup> The Petitioner states that the Budget Office, an office within the OMB, produces the Governor's annual, supplemental, and capital budgets, including the individual budgets for each of Rhode Island's state agencies. The Petitioner further states that, in his former capacity as Director of the OMB, he had substantial involvement with every state agency under the Governor's purview.

The Petitioner left state employment on August 27, 2021, to accept a position with The Policy Lab at Brown University as its Senior Advisor and Lead for State Budgeting Practice. The Policy Lab was founded in 2019 in collaboration with Brown University and a grant from Arnold Ventures and has since developed partnerships with government entities and organizations throughout the United States dedicated to evidence-based policymaking.<sup>2</sup> The Petitioner identifies among his duties at The Policy Lab the following: communicating with government partners at a high level;

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<sup>1</sup> <https://www.omb.ri.gov> (last accessed on November 1, 2021).

<sup>2</sup> <https://thepolicylab.brown.edu/about> (last accessed on November 1, 2021).

advising The Policy Lab's Director and Associate Directors on emergent priorities, opportunities for collaboration, and engagement tactics; and facilitating the generation of new projects by making cross-governmental agency connections and guiding conversations about possible interventions to support governmental agency outcomes.

The Petitioner informs that The Policy Lab hosts an ongoing Budget Cohort ("Cohort"), which he describes as a group currently consisting of state and local budget and administration directors from Rhode Island, North Carolina, Ohio, Colorado, Louisiana, the District of Columbia, and the City of Tulsa, Oklahoma. The Petitioner states that he is unsure of how the particular Cohort participants were selected but notes that The Policy Lab's physical presence in Rhode Island makes Rhode Island a natural selection for participation.<sup>3</sup> He represents that the Cohort participants do not pay fees to The Policy Lab in order to participate in the Cohort.<sup>4</sup> The Petitioner states that the Cohort meets quarterly to discuss what changes could be made to improve program implementation and outcomes through the participants' individual budget and management offices. The Petitioner cites as examples of topics discussed by the participants at Cohort meetings the following: advocating for changes to federal regulations that all Cohort members would support; standardizing budget proposal templates across states or testing new budget templates that would enable improved decision-making; and requesting joint funding from foundations that could be shared among the states participating in the Cohort to implement best practices in budgeting and program evaluation.

The Petitioner describes one aspect of his role at the Cohort meetings as that of a facilitator of discussions. He informs that at the last Cohort meeting, which was held on October 21, 2021, he asked the participating budget directors to identify problem areas in their particular states. The Petitioner states that he then collected the responses, drafted a memorandum memorializing those responses, edited the memorandum following additional input from the participants, and will use the final memorandum to work toward improving the specific problems identified by the participants. The Petitioner states that the State of Rhode Island did not participate at the last Cohort meeting because The Policy Lab felt that the Ethics Commission should first advise and the state had not yet hired a new OMB Director.<sup>5</sup>

The Petitioner states that he is also tasked with performing work in between Cohort meetings, such as producing work products emanating from the group including, but not limited to, the development and delivery of training, written guidance documents, and model legislation. The Petitioner further states that he performs research and drafting, shares and develops best practices, reviews agency applications for federal money; and seeks and pursues grant opportunities for the

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<sup>3</sup> The Petitioner states that in his previous capacity as Director of the OMB he served as Rhode Island's representative in the Cohort.

<sup>4</sup> The Petitioner explains that The Policy Lab has occasionally contracted with the State of Rhode Island on miscellaneous matters unrelated to the Cohort and with which the Petitioner was not involved. He cites, as examples, analytical work performed by data scientists from The Policy Lab for the Department of Children, Youth and Families and the Department of Labor and Training during the COVID-19 pandemic which was paid for by the State of Rhode Island.

<sup>5</sup> The Petitioner states that, upon information and belief, his replacement is expected to start on or about November 8, 2021.

Cohort. He describes the unified activity of Cohort participants as an increased opportunity for attention from funders.

The Petitioner represents that the activities of the Cohort are currently funded by a grant from the Hewlett Foundation.<sup>6</sup> He further represents that the procedure for obtaining future grant funding for the Cohort will likely not involve specific grant solicitation but is more conceptual and operates on somewhat of a rolling basis, but that it does eventually result in a written agreement between a grant foundation and a grant recipient. The Petitioner states that some grant foundations may require a participating state to provide a matching contribution. He cites as an example a situation in which an institution might offer to provide the funds to hire two data analysts for a particular state but may condition such provision of funds on that state's commitment to hire or provide an existing third data analyst with its own funds. The Petitioner states that, while there have been no requests from grant foundations for matching contributions from the Cohort participants to date, the possibility exists that there could be such a request in the future.

Cognizant of the Code of Ethics and desirous of acting in conformance therewith, the Petitioner represents that he will refrain from representing himself, The Policy Lab, or any other person before the Governor's Office, the DOA, or any of the executive agencies under the Governor's purview for a period of one year following the severance from his former state employment, unless he receives advance written approval from the Ethics Commission. The Petitioner currently seeks guidance from the Ethics Commission regarding whether he may continue his work with the Cohort if Rhode Island continues to participate as a member of the Cohort. He states that having someone else from The Policy Lab facilitate Cohort activities is not an option. The Petitioner states that he does not believe that his work with the Cohort constitutes the representation of himself or another before state agencies with which he has had substantial involvement. In the event that the Ethics Commission does not agree with this assessment, the Petitioner seeks a hardship exception that would allow him to continue to perform his duties at The Policy Lab involving the Cohort with the State of Rhode Island as a member of the Cohort. The Petitioner represents that, in the event that the Ethics Commission determines that he may not continue to perform said duties with the State of Rhode Island as a member of the Cohort and does not grant a hardship exception that would allow him to perform what he describes as a fundamental aspect of his job, the result may be to exclude Rhode Island from continued membership in the Cohort and replace it with another state or local government.<sup>7</sup>

Under the Code of Ethics, no person shall represent himself or another person before any state agency by which he is employed. R.I. Gen. Laws § 36-14-5(e)(1)&(2) ("Section 5(e)"). A person will represent himself or another person before a state agency if he participates in the presentation

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<sup>6</sup> The William and Flora Hewlett Foundation is a nonpartisan, private charitable foundation that advances ideas and supports institutions to promote a better world by, in part, making grants to a broad range of institutions including, among others, research universities contributing to public knowledge. <https://hewlett.org/about-us/> (last accessed November 2, 2021).

<sup>7</sup> The Petitioner states that it is possible that, if the State of Rhode Island is prohibited from future participation in the Cohort during the one-year period following the Petitioner's severance from state service, it might be able to rejoin the Cohort after the expiration of said one-year period. However, if funding is received in the interim, and Rhode Island is not part of that funding, it may not be possible to rejoin.

of evidence or arguments before that agency for the purpose of influencing the judgment of that agency in his own favor or in favor of another person. Section 36-14-2(12); Commission Regulation 520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016) (A)(1)(a) & (b) ("Regulation 1.1.4"). Nor may a person subject to the Code of Ethics act as an expert witness before any state agency by which he is employed with respect to any matter the agency's disposition of which will or can reasonably be expected to directly result in an economic impact upon himself or any business by which he is employed. Section 5(e)(3). Section 5(e)'s prohibitions are absolute and apply to the entire agency by which a person is employed, including all of its offices, sections, programs or divisions and last while the public official is serving and for a period of one year thereafter. Section 5(e)(4).

The Code of Ethics specifically prohibits a person holding or fulfilling a position in the Governor's Office or the Department of Administration, who in the course of and by reason of his official duties has substantial involvement<sup>8</sup> in matters involving a state agency, from representing himself or any other person before the state agency with which he has substantial involvement during the term of his state employment and for a period of one year after he has officially severed his position with the Governor's Office or the Department of Administration, unless such representation is in the proper discharge of his official duties or the particular matter before the state agency requires only ministerial acts, duties, or functions involving neither adversarial hearings nor the authority of the agency to exercise discretion or render decisions. Commission Regulation 1.5.5 State Executive/Administrative Revolving Door (36-14-5015)(A)(1)-(3) ("Regulation 1.5.5"). Regulation 1.5.5(A)(1) allows the Ethics Commission to give its approval for such a person to represent himself before a state agency with which he has substantial involvement by issuing a written advisory opinion under circumstances where the Ethics Commission is satisfied that denial of such self-representation would be a hardship and, further provided, that the person complies with certain attendant conditions.<sup>9</sup>

Regulation 1.5.5(B) (1)&(2) prohibits a director or head of a state department, including directors and heads of divisions within the Department of Administration who are appointed by the Governor and/or the Director of the Department of Administration, from representing himself or any other person before the Governor's Office or the Department of Administration for a period of one year after he has severed his position, unless such representation is in the proper discharge of his official duties or the particular matter before the Governor's Office or Department of Administration requires only ministerial acts, duties, or functions involving neither adversarial hearings nor the authority to exercise discretion or render decisions. Regulation 1.5.5(B)(1) allows the Ethics Commission to give its approval for such a person to represent himself before the

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<sup>8</sup> "For purposes of this regulation 'substantial involvement' shall include, but is not necessarily limited to, substantial control or influence over and/or substantial participation in matters involving budget, communications, legal, legislative, or policy matters. Positions exercising such involvement shall include, but are not limited to, Budget Officer, Chief of Staff, Deputy Chief of Staff, Executive Counsel, Communications Director, Director of Administrative Services, Director of Policy, and Director of Legislative Affairs." Regulation 1.5.5(A)(4).

<sup>9</sup> Conditions include that the person subject to the Code of Ethics shall first: (1) Advise the Governor's Office or the Department of Administration and the state agency in writing of the existence and the nature of his relationship with the agency and his interest in the matter at issue; (2) recuse himself from participating in the state agency's consideration and disposition of the matter at issue; and (3) follow any other recommendations the Ethics Commission may make to avoid any appearance of impropriety in the matter. Regulation 1.5.5 (A)(1)(b)(1)-(3).

Governor's Office or the Department of Administration by issuing a written advisory opinion under circumstances in which the Ethics Commission is satisfied that denial of such self-representation would create a hardship and, further provided, that the person follows any recommendations made by the Ethics Commission to avoid any appearance of impropriety in the matter.

The "revolving door" restrictions within the Code of Ethics were enacted so as to minimize any undue influence that a former public official or employee might have in a matter before his former agency or, in the case of an executive branch department head, before the Department of Administration or the Office of the Governor. The Ethics Commission has previously issued a number of advisory opinions to former state employees, and/or to individuals whose separation from state employment was imminent, regarding their responsibilities under the revolving door restrictions within the Code of Ethics for the one-year period following the official severance from their public positions.

For example, in Advisory Opinion 2017-4, a former Deputy Budget Officer in the Office of Management and Budget was prohibited from representing his new private employer, the Rhode Island League of Cities and Towns, before the Office of the Governor, the Department of Administration and its divisions, including the Office of Management and Budget, as well as before any other state agencies with which he had substantial involvement as part of his prior public duties, until the expiration of one year after leaving his public position. See also A.O. 2020-11 (opining that the former Director of the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals was prohibited from representing herself or others, including her new employer, before the Executive Office of Health and Human Services and all of its departments, divisions, offices, sections, and programs; the Department of Administration; and/or the Office of the Governor for one year after leaving her state employment); A.O. 2019-72 (opining that the outgoing Director of Administration was prohibited from representing himself or his private employer before the Office of the Governor, the Department of Administration and its divisions, all agencies within the Executive Branch of Government within which he had substantial involvement, and all state or municipal boards and/or commissions on which he personally served or had appointed a designee to serve in his place, until the expiration of one year after leaving his public position); A.O. 2017-2 (opining that the outgoing Chief Strategy Officer for the Executive Office of Health and Human Services was prohibited from representing her new employer before the Executive Office of Health and Human Services, the Department of Children, Youth and Families, the Department of Administration, and/or the Office of the Governor for one year after leaving her state employment).

Notably, activities that would constitute representation generally include the presentation of information or arguments for the purpose of influencing the judgment of a state agency on matters concerning a former state employee and/or his new employer. Prohibited interactions are not limited to business meetings, and could occur at a restaurant, on the phone, in an email or in any social or political gathering. It is the content of a discussion, rather than its venue, that is most relevant when applying the Code of Ethics' revolving door/post-employment restrictions. On the other hand, contacts involving purely personal or ministerial matters that do not involve discretion or decision-making on the part of the state agencies with which a former state employee was affiliated are not prohibited.

Some of the duties described by the Petitioner as part of his role with the Cohort do present as ministerial, including certain events that he represents took place at the Cohort meeting on October 21, 2021. These include asking the budget directors who were present to identify problem areas in their particular states; collecting the responses; drafting a memorandum memorializing them; and editing the memorandum following additional input from the participants.

However, certain other duties with which the Petitioner is tasked in his role with the Cohort involve the exercise of discretion and/or decision-making on the part of the Cohort participants. For example, the Petitioner states that he seeks and pursues grant opportunities for the Cohort. He adds that the unified activity of Cohort participants increases the opportunity for attention from funders. The Petitioner is working on behalf of The Policy Lab to achieve unity on the part of the Cohort participants in order to increase the opportunity for The Policy Lab to receive grant funding. A decision by the Cohort participants to unify and work toward goals established in connection with The Policy Lab in its pursuit for grant funding, whether during or as a result of discussions facilitated by the Petitioner both during and in between Cohort meetings, involves the exercise of discretion and/or decision-making on the part of those participants that impacts the Petitioner's employer. For this reason, to the extent that the State of Rhode Island is a Cohort participant, and the Petitioner is facilitating discussions by the Cohort participants in an effort to achieve unity among the Cohort participants, such activity on the part of the Petitioner amounts to representation before Rhode Island's OMB Director or whomever might be attending a Cohort meeting on behalf of the state.

Additionally, the Petitioner states that some grant foundations may require a participating state to provide a matching contribution. He cites, as an example, a situation in which an institution might offer to provide the funds to hire two data analysts for a particular state but may condition such provision of funds on that state's commitment to hire or provide an existing third data analyst with its own funds. Were a funding institution to seek a matching contribution from the State of Rhode Island as a member of the Cohort, the State of Rhode Island would need to agree to that, which would aid the Petitioner in his goal of pursuing funding opportunities for the Cohort and The Policy Lab's activities.

Further, the Petitioner represents that, in the event that the Ethics Commission determines that he may not continue to perform his duties as an employee of The Policy Lab if the State of Rhode Island is a member of the Cohort during the one-year period following the Petitioner's departure from state service, and if the Ethics Commission does not grant a hardship exception that would allow the Petitioner to perform what he describes as a fundamental aspect of his job, the result may be to exclude Rhode Island from continued membership in the Cohort and replace it with another state or local government. The Petitioner articulates the possibility that, under such circumstances, the State of Rhode Island might not be able to rejoin the Cohort after the expiration of said one-year period if funding is received in the interim and Rhode Island is not part of that funding. The scenario described by the Petitioner suggests that a Cohort participant's decision to collaborate with the other Cohort participants during the grant seeking process is a condition of the ability to eventually benefit from any grant funding that the Cohort might receive as a result of such collaboration. This highlights the significance of the discretion exercised by Cohort participants during the grant seeking process.



It is the opinion of the Ethics Commission that the Petitioner's proposed continued activities as an employee of The Policy Lab, prior to the expiration of one year following his departure from state service, while the State of Rhode Island is a member of the Cohort, would constitute representation before his former state agency in violation of the revolving door provisions of the Code of Ethics. Given this determination, the Ethics Commission will now address the Petitioner's request for a hardship exception that would allow him to continue to work with the State of Rhode Island as a member of the Cohort, lest Rhode Island potentially be excluded from continued membership in the Cohort, thus constituting a hardship on the part of the state.

The hardship exception referenced in each of the applicable revolving door provisions of the Code of Ethics is, in the case of Section 5(e)(1), available only for an individual seeking to represent "him or herself" before a state or municipal agency by which he or she is or was employed in the past year or, in the case of Regulation 1.5.5, available only for an individual seeking to represent "him or herself" before a state agency with which he or she has or had substantial involvement while holding or fulfilling, or having held or fulfilled in the past year, a position in the Governor's Office or the Department of Administration. Section 5(e)(2), which prohibits a person subject to the Code of Ethics from representing "any other person" before any state or municipal agency of which he or she is a member or by which he or she is employed does not provide for a hardship exception. Similarly, Regulation 1.5.5(2), which prohibits a person holding or fulfilling a position in the Governor's Office or the Department of Administration from representing "any other person" before the state agency with which he or she has or had substantial involvement in the course of and by reason of his or her official duties, does not provide for a hardship exception. Consequently, the Petitioner's request for a hardship exception is denied.

Accordingly, based upon the Petitioner's representations, the application of the Code of Ethics, and consistent with prior advisory opinions issued, it is the opinion of the Ethics Commission that the Petitioner is prohibited from performing his duties for The Policy Lab with respect to the Budget Cohort for which the State of Rhode Island is a participant until the expiration of one year following the Petitioner's severance from his former state 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. Under the Code of Ethics, advisory opinions are based on the representations made by, or on behalf of, a public official or employee and are not adversarial or investigative proceedings. Finally, this Commission offers no opinion on the effect that any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics may have on this situation.**

Code Citations:

§ 36-14-2(12)

§ 36-14-5(e)

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

520-RICR-00-00-1.5.5 State Executive/Administrative Revolving Door (36-14-5015)

Related Advisory Opinions:

A.O. 2020-11

A.O. 2019-72

A.O. 2017-4  
A.O. 2017-2

Keywords:

Post-Employment

Revolving Door

State Executive/Administrative Revolving Door

DRAFT

# RHODE ISLAND ETHICS COMMISSION

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## Draft Advisory Opinion

Hearing Date: November 16, 2021

Re: Jennifer Lima

### QUESTION PRESENTED:

The Petitioner, a member of the North Kingstown School Committee, a municipal elected position, who in her private capacity is the founder and co-president of Towards an Anti-Racist North Kingstown ("TANK"), a non-profit organization dedicated to advancing discussions of anti-racist policies in the Town of North Kingstown, requests an advisory opinion regarding whether the Code of Ethics prohibits her from participating in School Committee and/or Subcommittee discussions and/or voting on matters relative to the topics of diversity, equity, and inclusion, given that those topics are among those advanced by TANK as part of its mission.

### RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the North Kingstown School Committee, a municipal elected position, who in her private capacity is the founder and co-president of Towards an Anti-Racist North Kingstown ("TANK"), a non-profit organization dedicated to advancing discussions of anti-racist policies in the Town of North Kingstown, is not required by the Code of Ethics to recuse from participating in School Committee and/or Subcommittee discussions and/or voting on matters relative to the topics of diversity, equity, and inclusion, notwithstanding that those topics are among those advanced by TANK as part of its mission provided, however, that otherwise there are no grounds for recusal.

The Petitioner is a member of the North Kingstown School Committee ("School Committee") and has served in that position since her election in November of 2020. As part of her School Committee duties, she serves as a co-chair to the recently created Diversity, Inclusivity, and Equity Subcommittee ("Subcommittee"). According to the School Committee's Resolution creating the Subcommittee,<sup>1</sup> the purpose of the Subcommittee is to examine how race, ethnicity, language, disability, religion, age, gender, socio-economic status, sexual orientation, gender identity or expression, country of ancestral origin, interrupted education status, military status, or any other category protected by law affect and influence district-wide practices in order to create a respectful and inclusive environment for all students and school department staff.

The Petitioner represents that, in her private capacity, she is the founder and co-president of a non-profit organization called Towards an Anti-Racist North Kingstown ("TANK") which she describes as being comprised of local students, teachers, parents, and allies dedicated to enacting

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<sup>1</sup> A copy of the resolution was submitted by the Petitioner with her request for the instant advisory opinion.

antiracist policies in the Town of North Kingstown ("Town" or "North Kingstown"). The Petitioner further represents that TANK's mission is to move the Town forward as a community that acknowledges its history, celebrates its potential, and fosters a climate honoring and encouraging diversity, equity, and the unique character of all its residents through anti-racist policy reform, education, and advocacy.

The Petitioner states that the topics discussed by the Subcommittee and those advanced by TANK may overlap. The Petitioner further states that TANK is neither a political nor lobbying organization, but rather, an advocacy group that only identifies issues that need the Town's attention without comment on how those issues should be resolved by the Town. She explains that neither TANK, nor any other person authorized by TANK, appears before the School Committee, the Subcommittee, or other Town Departments, but that individual TANK members or officers may appear before the School Committee in their private capacities as residents of the Town. The Petitioner states that neither TANK nor she stand to benefit personally from any policy changes enacted by the North Kingstown School Department in the area of anti-racist education, as such changes would benefit the community as a whole. Based on this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding whether the Code of Ethics prohibits her from participating in School Committee and/or Subcommittee discussions and/or voting on matters relative to the topics of diversity, equity, and inclusion, given that those topics are among those advanced by TANK as part of its mission.

Under the Code of Ethics, a public official may not participate in any matter in which she has an interest, financial or otherwise, which is in substantial conflict with the proper discharge of her duties in the public interest. R.I. Gen. Laws § 36-14-5(a). A substantial conflict of interest exists if a public official has reason to believe or expect that she, her family member, 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). The Code of Ethics also prohibits a public official from using her public office or confidential information received through her public office to obtain financial gain for herself, her family member, her business associate, or any business by which she is employed or which she represents. Section 36-14-5(d). Finally, 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 recuse from participation in any matter if her business associate appears or presents evidence or arguments or authorizes another person, on his or her behalf, to appear or to present evidence or arguments before the public official's state or municipal agency. 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 previously reviewed somewhat similar situations. In Advisory Opinion 2005-20, the Ethics Commission opined that the chairman of the North Smithfield Planning Board was not required to recuse from participating in discussions and voting relative to a Planning Board application about which the petitioner had previously made public comments of support. In that advisory opinion, the Planning Board had considered and unanimously approved a master plan for the development of Dowling Village. Approximately two weeks after the vote, the petitioner wrote a letter that was published in the Providence Journal explaining the reasons behind his support and the Planning Board's approval of the development. A local grassroots

organization then objected to the petitioner's subsequent participation in the Planning Board's discussions and voting on the application for an amended master plan and, later, for preliminary and final approval. The Ethics Commission based its opinion on the fact that there was no indication of a financial benefit or detriment to the petitioner, his family members, his business associates, or employer, adding that, although the views expressed in the petitioner's letter to the Providence Journal might have indicated an existing personal inclination for the development, such preference alone did not support mandatory recusal under the Code of Ethics.

Additionally, in Advisory Opinion 98-3, the Ethics Commission determined that the Code of Ethics did not bar an Exeter Planning Board member from participating in subsequent discussions and votes on a proposed zone change and amendment to the Exeter Comprehensive Plan relating to Bald Hill Nursery, despite the fact that the petitioner had previously voted against the zoning change and amendment and had given public testimony against the proposal before the Exeter Town Council in his private capacity as an Exeter resident. The Ethics Commission noted that the petitioner did not have a financial interest in the matter that would result in a substantial conflict of interest under the Code of Ethics.

Similar to the above-cited advisory opinions, the views expressed by the instant Petitioner as the founder and co-president of TANK may indicate an existing, personal inclination toward matters relative to the topics of diversity, equity, and inclusion discussed or voted on by the School Committee or Subcommittee; however, such preference alone does not support mandatory recusal under the Code of Ethics. Thus, based on the Petitioner's representations, the applicable provisions of the Code of Ethics, and consistent with the prior advisory opinions cited above, it is the opinion of the Ethics Commission that the Petitioner is not required to recuse from participating in School Committee and/or Subcommittee discussions and voting on matters relative to the topics of diversity, equity, and inclusion, notwithstanding that those topics are among those advanced by TANK as part of its mission. The Petitioner is advised, however, that although she is not generally required to recuse from School Committee and/or Subcommittee matters that align with TANK's ideology, she is required to recuse from School Committee and/or Subcommittee matters when she has reason to believe or expect that she, her family member, her business associate,<sup>2</sup> or her employer will derive a direct monetary gain or suffer a direct monetary loss by reason of her

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<sup>2</sup> The Petitioner is advised that TANK and her fellow TANK officers are considered her business associates under the Code of Ethics. The Ethics Commission has consistently opined 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. See, e.g., A.O. 2014-14 (opining that the Director of the Rhode Island Department of Environmental Management ("DEM"), 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 DEM 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). Further, the Ethics Commission has determined that those who are fellow officers or directors within an organization are "business associates." Specifically, the Ethics Commission has opined that, while an organization may pursue various objectives that are not financial, the existence of a financial component is sufficient to qualify an official and his fellow officers as business associates. See, e.g., A.O. 2018-30 (opining that a member of the Coventry Town Council was prohibited by the Code of Ethics from participating in the Town Council's discussions and decision-making relative to the reappointment of the Coventry Municipal Court Judge, given that both were members of the Board of Directors of Gabriel's Trumpet Christian Book Store, Inc., and the existence of a financial component was sufficient to qualify the fellow Board members as business associates).

official activity. The Petitioner is also prohibited from using her public office or confidential information received through her public office to obtain financial gain for herself, her family member, her business associate, or any business by which she is employed or which she represents. Finally, the Petitioner may be required to recuse from participation in any School Committee and/or Subcommittee matter if her business associates appear or authorize another person to appear on their behalf to present evidence or arguments before the School Committee and/or Subcommittee.

This advisory opinion cannot anticipate every possible situation in which a conflict of interest might arise and, thus, provides only general guidance as to the application of the Code of Ethics based upon the facts represented above. The Petitioner is advised to remain vigilant about identifying potential conflicts of interest and to either recuse or seek further guidance from the Ethics Commission in the future as warranted. 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:

§ 36-14-2(3)

§ 36-14-2(7)

§ 36-14-5(a)

§ 36-14-5(d)

§ 36-14-6

§ 36-14-7(a)

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

Related Advisory Opinions:

A.O. 2014-14

A.O. 2018-30

A.O. 2005-20

A.O. 98-3

Keywords:

Business Associate

Recusal

# RHODE ISLAND ETHICS COMMISSION

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## Draft Advisory Opinion

Hearing Date: November 16, 2021

Re: Christopher Abhulime

### QUESTION PRESENTED:

The Petitioner, the Deputy Chief of Staff to the Governor of the State of Rhode Island, a state employee position, requests an advisory opinion regarding how best to avoid and/or manage potential conflicts of interest, if any, that may arise given that his spouse is the sole proprietor of a newly established private entity that intends to offer 24-hour community care in small residential facilities for eligible adults with intellectual and development disabilities and that will soon seek licensure from the Rhode Island Department of Behavioral Healthcare, Development Disabilities, and Hospitals.

### RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the proposed recusal procedures set forth by the Petitioner, the Deputy Chief of Staff to the Governor of the State of Rhode Island, a state employee position, are sufficient to avoid and/or manage potential conflicts of interest, if any, that may arise given that his spouse is the sole proprietor of a newly established private entity that intends to offer 24-hour community care in small residential facilities for eligible adults with intellectual and development disabilities, and that will soon seek licensure from the Rhode Island Department of Behavioral Healthcare, Development Disabilities, and Hospitals.

The Petitioner is the Deputy Chief of Staff to Governor Daniel J. McKee and has served in this position since March of 2021. The Petitioner represents that each senior staff member in the Governor's Office is responsible for a portfolio of certain state agencies for which he or she serves as an intermediary between the agencies and the Governor. The Petitioner states that his departmental policy portfolio includes the Department of Labor and Training, the Office of Energy Resources, the Department of Environmental Management, the Public Utilities Commission and Divisions, the National Guard, and the Cybersecurity Office under the Department of Administration. He further states that the focus of those agencies is, respectively, on labor and training, energy, environment, and public safety. He explains that he also advises the Governor on diversity, equity, and inclusion issues, as well as on various disparities related to socioeconomic, educational, health, and other issues within Rhode Island.

The Petitioner states that his spouse is the sole proprietor of Agape Homes of Rhode Island ("AHRI"), a newly established private entity that intends to offer 24-hour community care in small residential facilities for eligible adults with intellectual and developmental disabilities and complex health needs. He further states that he does not have any financial and/or ownership interest in

AHRI. The Petitioner explains that AHRI will soon be seeking licensure from the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities, and Hospitals ("BHDDH") and that, if licensed, AHRI will be providing participants with services covered by the state Medicaid program. He further explains that AHRI would be submitting documents to BHDDH on a regular basis and would be subject to discretionary inspections by BHDDH.

The Petitioner represents that his departmental policy portfolio does not include oversight over BHDDH, the Rhode Island Department of Human Services, or Medicaid programs and that those state agencies and programs are within the purview of the Governor's Senior Chief of Staff, who sits above the Petitioner in the Governor's Office chain of command. Thus, the Petitioner states that he will not be involved in any state licensure, oversight, or Medicaid coverage of AHRI or other such community care residences. He advises that the licensing process, including appeals, for his spouse's entity is conducted entirely by the BHDDH and that the Governor's Office does not address such matters. The Petitioner states that he does not foresee any circumstances where his spouse would be required to appear before him or the Governor's Office. He further states that it is unlikely that his advisory role to the Governor on socioeconomic disparities in the minority community would ever require him to give advice on the kind of adult community residences within which his spouse seeks to operate and that he does not have any other duties that may impact his wife or her newly established entity.

Cognizant of the Code of Ethics, and out of an abundance of caution, the Petitioner proposes the following steps to avoid any potential conflict of interest regarding his spouse's business. First, the Petitioner states that he will recuse himself from participation in any agency budgetary discussions related to or impacting the operation, regulation, or oversight of AHRI.<sup>1</sup> Next, the Petitioner represents that his spouse will make any decisions relating to AHRI without any input, consultation, or advice from him. He further represents that he will not participate in any discussions or decision-making concerning AHRI-related matters with other members of the Governor's staff, other cabinet officials, or other members of the executive branch. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding what additional steps, if any, he is required to take in order to avoid any potential conflicts of interest involving his spouse's business.

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 substantial conflict of interest exists if an official has reason to believe or expect that he, any person within his family, a business associate or an employer will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity. Section 36-14-7(a). A public official has reason to believe or expect that a conflict of interest exists when it is "reasonably foreseeable," that is, when the probability is greater than "conceivably," but the conflict of interest is not necessarily certain to occur. Commission Regulation 520-RICR-00-00-1.1.5 Reasonable Foreseeability (36-14-7001).

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<sup>1</sup> The Petitioner notes that each senior staff member normally only becomes involved in budgetary matters relative to the particular agencies that are part of his/her policy portfolio. Therefore, given the nature of his departmental policy portfolio, the Petitioner states that he would not be involved in budgetary discussions relative to agencies outside of his portfolio.



A public official will not have an interest which is in substantial conflict with his official duties if any benefit or detriment accrues to him, any person within his family, his business associate, or any business by which he is employed or which he represents "as a member of a business, profession, occupation or group, or of any significant and definable class of persons within the business, profession, occupation or group, to no greater extent than any other similarly situated member of the business, profession, occupation or group, or of the significant and definable class of persons within the business, profession, occupation or group."<sup>2</sup> Section 36-14-7(b).

Commission Regulation 520-RICR-00-00-1.3.1 Prohibited Activities – Nepotism (36-14-5004) ("Regulation 1.3.1") sets forth more specific nepotism provisions which are applicable to matters that involve or impact any person within a public official's family or any person who resides in his household. In general, Regulation 1.3.1(B)(1) prohibits a public official from participating in any matter as part of his public duties if he "has reason to believe or expect that any person within his [ ] family, or any household member, is a party to or a participant in such matter, or will derive a direct monetary gain or suffer a direct monetary loss, or obtain an employment advantage, as the case may be." Regulation 1.3.1(B)(3)(a) further prohibits a public official from participating "in discussion or decision-making relative to a budgetary line item that would address or affect the employment, compensation or benefits of any person within his [ ] family or a household member." However, Regulation 1.3.1(B)(3)(c) provides that the public official is not prohibited from participating "in discussion or decision-making relative to approving or rejecting the entire budget as a whole, provided that the person within his [ ] family or her household member . . . is impacted by the entire budget as a member of a significant and definable class of persons, and not individually or to any greater extent than any other similarly situated member of the class."

A public official must also recuse from participation in a matter in which any member of his family appears or presents evidence or arguments before his state agency. Commission Regulation 520-RICR-00-00-1.2.1(A)(1) Additional Circumstances Warranting Recusal (36-14-5002) ("Regulation 1.2.1"). Finally, the Code of Ethics prohibits a public official from using his public office or confidential information received through his public office to obtain financial gain for himself, his family, his business associate, or any business by which he is employed or which he represents. Section 36-14-5(d).

Section 36-14-5(a) and Regulation 1.3.1 clearly prohibit the Petitioner from participating in any matters, including budgetary line items, as part of his official duties in which his spouse is likely to be directly financially impacted, positively or negatively. See, e.g., A.O. 2021-15 (opining that a member of the Tiverton Budget Committee was required to recuse from participating in the Budget Committee's discussions and voting on budgetary line items that addressed or affected the employment, compensation, or benefits of his spouse, an employee of the Tiverton School Department, but he could discuss and vote to approve or reject other budgetary line items and the entire School Department budget as a whole, provided that his spouse was impacted by the entire budget as a member of a significant and definable class of persons, and not individually or to any

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<sup>2</sup> When determining whether any particular circumstance supports and justifies the application of the class exception, the Ethics Commission considers the totality of the circumstances. Among the important factors considered are: 1) the description of the class; 2) the size of the class; 3) the function or official action being contemplated by the public official; and 4) the nature and degree of foreseeable impact upon the class and its individual members as a result of the official action.

greater extent than any other similarly situated member of the class); A.O. 2018-29 (opining that a legislator serving in the Rhode Island House of Representatives could participate in discussions and voting by the House of Representatives relative to the FY2019 State Budget as a whole, but had to recuse from participating in any discussions or voting on particular budget amendments or line-items that impacted or specifically addressed his employer's contracts or finances); A.O. 2007-30 (opining that a member of the East Providence School Committee was prohibited by the Code of Ethics from participating in discussions and voting regarding any budgetary line item relative to bus monitors, given that he had a family member who was employed as a bus monitor, but that he could vote on the budget as a whole).

Here, the Ethics Commission acknowledges that, based on the facts represented by the Petitioner, it is very unlikely that he would be required as part of his duties to participate in the matters set forth above, or in matters in which his spouse appears to present evidence or arguments. The Ethics Commission also acknowledges that the Petitioner's proposed recusal procedures are appropriate and generally required to avoid potential conflicts of interest stemming from his spouse's new business venture, unless the specific circumstances justify the application of the class exception as set forth in section 36-14-7(b). See, e.g., A.O. 2015-4 (applying the class exception and permitting a Charlestown Town Council member to participate in the Town Council's discussions and decision-making relative to remediating ground water pollution, given that it was reasonably foreseeable that the financial impact upon the entire class would be substantially similar in the form of equal or proportional assessments to connect to community water and/or wastewater systems, or a Town-wide tax increase to subsidize improvements to the water and sewer infrastructure to prevent pollution and salt water intrusion).

Although unlikely to occur, the Petitioner would also be required to recuse himself from participation in discussions and voting on matters in which his spouse appears or presents evidence or arguments before his state agency. Regulation 1.2.1(A)(1). Finally, the Code of Ethics prohibits the Petitioner from using his public office or confidential information received through his public office to obtain financial gain for his spouse. Section 36-14-5(d). Recusal shall be consistent with section 36-14-6.

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

**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(a)

§ 36-14-5(d)

§ 36-14-6

§ 36-14-7(a)

§ 36-14-7(b)

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)

520-RICR-00-00-1.3.1 Prohibited Activities – Nepotism (36-14-5004)

Related Advisory Opinions:

A.O. 2021-15

A.O. 2018-29

A.O. 2015-4

A.O. 2007-30

Keywords:

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Family

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DRAFT

# RHODE ISLAND ETHICS COMMISSION

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## Draft Advisory Opinion

Hearing Date: November 16, 2021

**Re: Nicole Bucka**

### **QUESTION PRESENTED:**

The Petitioner, a member of the East Greenwich School Committee, a municipal elected position, whose spouse is a teacher in the East Greenwich School Department and a member of the East Greenwich teachers' union, requests an advisory opinion regarding what restrictions, if any, the Code of Ethics places upon her ability to: (1) participate in School Department budget discussions; (2) vote to approve or reject as a whole the teachers' collective bargaining/employee contract; and (3) participate in School Committee discussions relative to the collective bargaining/employee contract negotiations for non-teacher unions.

### **RESPONSE:**

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a member of the East Greenwich School Committee, a municipal elected position, whose spouse is a teacher in the East Greenwich School Department and a member of the East Greenwich teachers' union may participate, consistent with the guidance set forth below, in matters relative to: (1) School Department budget discussions; (2) a vote to approve or reject as a whole the teachers' collective bargaining/employee contract; and (3) School Committee discussions relative to the collective bargaining/employee contract negotiations for non-teacher unions.

The Petitioner is a member of the East Greenwich School Committee ("School Committee") to which she was elected on October 5, 2021, following a special election to fill a vacancy. She represents that the School Committee's primary duties include updating and maintaining policies that guide the East Greenwich School District ("School District"), approving and presenting the School District's final budget to the East Greenwich Town Council, negotiating and approving all bargaining unit contracts, and hiring and evaluating the superintendent.

The Petitioner states that her spouse is a teacher in the School District and, until recently, was the Vice-President of the East Greenwich Educator's Association ("Teachers' Union") and a member of its Executive Board. The Petitioner informs that her spouse's term as an officer of the Teachers' Union expired in the end of October of 2021 and that he did not renew his candidacy but remains a member of the Teachers' Union.

The Petitioner expects that the School Committee will begin its discussions and decision-making relative to the School District's budget in January of 2022, followed by collective bargaining/employee contract negotiations with the Teachers' Union in March and/or April. The

Petitioner states that because her spouse is no longer an officer or member of the Teachers' Union's Executive Board, he will not represent the Teachers' Union during the collective bargaining/employee contract negotiation process. The Petitioner explains that, in addition to the Teachers' Union there are two other unions representing school employees, namely the custodial union and the paraprofessional union, for which collective bargaining/employee contract negotiations will also be conducted in March and/or April. She further explains that while preparing for negotiations with one union, the School Committee may discuss strategies or priorities that may also apply to negotiations with another union. Given this set of facts, the Petitioner seeks guidance from the Ethics Commission regarding what restrictions, if any, the Code of Ethics places upon her ability to: (1) participate in School Department budget discussions; (2) vote to approve or reject as a whole the teachers' collective bargaining/employee contract; and (3) participate in School Committee discussions relative to the collective bargaining/employee contract negotiations for non-teacher unions, including when negotiation strategies or priorities are discussed that may affect the teachers' union negotiations.

Under the Code of Ethics, a public official 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 public official will have an interest that is in substantial conflict with her 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, her family member, her business associate, her employer, or any business which the public official represents. Section 36-14-7(a); Commission Regulation 520-RICR-00-00-1.1.5 Reasonable Foreseeability (36-14-7001). Furthermore, section 36-14-5(d) prohibits a public official from using her position or confidential information received through her position to obtain financial gain, other than that provided by law, for herself, her employer, her business associate, or any person within her family.

#### Participation in Matters That Involve or Financially Impact the Petitioner's Spouse

Under the general nepotism provisions of the Code of Ethics, a public official shall not participate in any matter as part of her public duties if she has reason to believe or expect that any person within her family or any household member is a party to or a participant in such matter, or will derive a direct monetary gain or suffer a direct monetary loss, or obtain an employment advantage. Commission Regulation 520-RICR-00-00-1.3.1(B)(1) Prohibited Activities – Nepotism (36-14-5004) ("Regulation 1.3.1"). The definition of "any person within [] her family" specifically includes "spouse." Regulation 1.3.1(A)(2). Notably, Regulation 1.3.1(B)(1) not only prohibits actions by a public official that would financially impact her family member, but also applies when such actions involve a family member as a party or participant, regardless of whether or not there will be a financial impact to the family member. Furthermore, under Regulation 1.3.1(B)(1) a public official is prohibited from participating in matters that may bestow an employment advantage upon a family member. Such an advantage, which might not appear to be a direct financial gain for the official's family member, could be some type of opportunity (such as an educational or travel experience) or resource (such as access to enhanced technology) that the family member would not otherwise have had.

Thus, in the event that the Petitioner's spouse is a party to or participant in a matter before the School Committee, or will be directly financially impacted or will obtain an employment advantage by the School Committee's decision-making, the Petitioner is required to recuse in accordance with section 36-14-6. See, e.g., A.O. 2013-8 (opining that a Bristol Town Council member was prohibited by the Code of Ethics from participating in the Town Council's appointment of a new harbormaster and the Town Council's review of any amendments to the harbormaster's job description, given that his brother was then serving as interim harbormaster and was also one of nineteen applicants for the permanent harbormaster position); A.O. 2009-1 (opining that a Scituate Town Council member was prohibited by the Code of Ethics from participating in Town Council matters involving S & C Collins Bus Company, Inc. ("Collins Bus"), one of the three companies that provided school busing services to the Scituate School Department, given that Collins Bus was owned by his mother and he was an employee and officer of Collins Bus).

### Participation in Budgets

Regulation 1.3.1 also addresses a public official's participation in budgets that could financially impact or involve the public official's family member. Specifically, a public official is prohibited from participating "in discussion or decision-making relative to a budgetary line item that would address or affect the employment, compensation or benefits of any person within [] her family." Regulation 1.3.1(B)(3)(a). However, Regulation 1.3.1(B)(3)(c) provides that the Petitioner is not prohibited from participating "in discussion or decision-making relative to approving or rejecting the entire budget as a whole, provided that the person within [] her family . . . is impacted by the entire budget as a member of a significant and definable class of persons, and not individually or to any greater extent than any other similarly situated member of the class."

In Advisory Opinion 2021-15, the Ethics Commission opined that a member of the Tiverton Budget Committee was required to recuse from participating in the Budget Committee's discussions and voting on budgetary line items that addressed or affected the employment, compensation, or benefits of his spouse, an employee of the Tiverton School Department, but he could discuss and vote to approve or reject other budgetary line items and the entire School Department budget as a whole, provided that his spouse was impacted by the entire budget as a member of a significant and definable class of persons, and not individually or to any greater extent than any other similarly situated member of the class. The basis for allowing participation relative to a budget as a whole is an assumption that a vote on the entire budget is sufficiently remote from most particular line items so as not to constitute a substantial conflict of interest in violation of the Code of Ethics. See also A.O. 2007-30 (opining that an East Providence School Committee member was prohibited by the Code of Ethics from participating in any budgetary line items relative to bus monitors, given that he had a family member who was employed as a bus monitor, but could that he vote to approve or reject the budget as a whole).

Therefore, while the Petitioner is prohibited from participating in the School Committee's discussions and decision-making relating to budget line items that would address or affect the employment, compensation or benefits of her spouse, she may participate in the School Committee's discussions and voting to approve or reject other budgetary line items and the entire School Department budget as a whole, provided that her spouse is impacted by the entire budget

as a member of a significant and definable class of persons, and not individually or to any greater extent than any other similarly situated member of the class.

#### Participation in Collective Bargaining/Employee Contracts

Regulation 1.3.1(B)(4) also addresses a public official's participation in collective bargaining/employee contracts. Specifically, it prohibits a public official from participating in negotiations relative to an employee contract or collective bargaining which addresses or affects the employment, compensation or benefits of any person within her family or a household member. 1.3.1(B)(4)(a). However, a public official may participate in a decision to accept or reject an entire employee contract or collective bargaining agreement as a whole, provided that the person within her family or household member is impacted by the contract or agreement as a member of a significant and definable class of persons, and not individually or to any greater extent than any other similarly situated member of the class. 1.3.1(B)(4)(b). Regulation 1.3.1(B)(4)'s blanket prohibition against involvement in contract negotiations is based on an understanding that, during negotiations, the impact of decisions as to individual components of a contract can be difficult to predict. For that reason, a public official's participation in a contract issue that is seemingly unrelated to a family member can have a resulting impact on other areas of the contract that would directly affect the family member.

For example, in Advisory Opinion 2018-49, the Ethics Commission opined that a member of the Cumberland School Committee was prohibited from participating in the negotiation of the teachers' union contract, given that his spouse was teacher with the Cumberland School Department and a member of the local teachers' union. However, the petitioner could participate in the vote to ratify the contract in its entirety, provided that his spouse would be impacted by the contract as a member of a significant and definable class of persons, and not individually or to any greater extent than any other similarly situated member of the class. See also A.O. 2011-14 (opining that a member of the Foster-Glocester Regional School Committee, whose spouse was a teacher in the Foster-Glocester Regional School District and a member of the Foster-Glocester Teachers' Union, was prohibited by the Code of Ethics from participating in contract negotiations between the School Committee and the Foster-Glocester Teachers' Union, but could participate in the School Committee's decision to accept or reject a contract in its entirety once negotiated by the other School Committee members and Foster-Glocester Teachers' Union, provided that her husband was impacted by the contract as a member of a significant and definable class of persons, and not individually or to any greater extent than other similarly situated member of the Foster-Glocester Teachers' Union).

Therefore, the Petitioner is prohibited from participating in contract negotiations with the Teachers' Union, given that her spouse is a teacher in the School Department and a member of the Teachers' Union. However, the Petitioner may participate in the School Committee's discussions and decision-making relative to approving or rejecting the contract in its entirety once it has been negotiated by others. The basis for allowing such participation is an assumption that a vote on an entire contract, once negotiated by others, is sufficiently remote from individual contract issues impacting a family member so as to not constitute a substantial conflict of interest in violation of the Code of Ethics.

Although the Petitioner is permitted to participate in the overall vote to approve or reject the contract as a whole, the Ethics Commission is aware that a general discussion can quickly devolve into a more narrow review of specific contractual provisions. As such, the Petitioner must be vigilant about recognizing instances where a general conversation begins to focus on individual aspects of the contract that are likely to financially impact her spouse. Should such instances arise, the Petitioner must recuse from further participation in that discussion pursuant to section 36-14-6 or seek further guidance from the Ethics Commission.

Participation in School Committee Discussions Relative to the Collective Bargaining/Employee Contract Negotiations for the Non-Teacher Unions

The Code of Ethics does not prohibit the Petitioner from participating in collective bargaining/employee contract negotiations relative to the custodial and/or the paraprofessional unions, given that her spouse is not a member of either of those unions and provided that the matters discussed do not directly financially impact, or address or affect the employment, compensation or benefits of her spouse. Because the Petitioner does not describe any particular matter pending before the School Committee with regard to a collective bargaining/employee contract for the Teachers' Union, the custodial union, or the paraprofessional union, the Ethics Commission is not in a position to offer any specific guidance at this time. However, the Petitioner is advised that she must recuse from any matters that are considered part of, or could directly impact, the negotiation process with the Teachers' Union. See e.g., A.O. 2013-44 (opining that a North Providence School Committee member was prohibited by the Code of Ethics from participating in the School Committee's discussion and vote regarding whether to request arbitration for the contract negotiations with the Teachers' Union, given that his daughter was a member of the Teachers' Union and such a vote was part of the negotiations process).

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

**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(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-00-00-1.3.1 Prohibited Activities - Nepotism (36-14-5004)



Related Advisory Opinions:

A.O. 2021-15

A.O. 2018-49

A.O. 2013-44

A.O. 2013-8

A.O. 2011-14

A.O. 2009-1

A.O. 2007-30

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