STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RHODE ISLAND ETHICS COMMISSION
40 Fountain Street
Providence, RI 02903
(401) 222-3790 (Voice/TT)
Fax Number: 222-3382

NOTICE OF OPEN MEETING

AGENDA

8th Meeting

DATE: Tuesday, June 2, 2020

TIME: 9:00 a.m.

TO ATTEND: Pursuant to Governor Gina Raimondo's Executive Order No. 20-34, dated May 15, 2020, this meeting will not be conducted in-person at the Rhode Island Ethics Commission. Rather, it will be conducted remotely in Zoom webinar format in order to minimize any possible transmission of COVID-19. Any member of the public who wishes to attend and view this video meeting may do so by:

- Clicking this link to join the webinar: https://us02web.zoom.us/j/87244110473 and using Webinar ID: 872 4411 0473
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1. Call to Order

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

3. Motion to approve minutes of Open Session held on April 28, 2020.

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

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

    a.) Discussion of impact of COVID-19 crisis on Ethics Commission operations and staffing;
    b.) Complaints and investigations pending;
    c.) Advisory opinions pending;
    d.) Access to Public Records Act requests since last meeting;
    e.) Financial Disclosure.

6. Advisory Opinions (petitioners may participate remotely):

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

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

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

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

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

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

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

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

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

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

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

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

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

i.) Motion to return to Open Session.

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

9. Report on actions taken in Executive Session.

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

11. Motion to adjourn.

ANYONE WISHING TO ATTEND THIS MEETING WHO MAY HAVE SPECIAL NEEDS FOR ACCESS OR SERVICES SUCH AS A SIGN LANGUAGE INTERPRETER, PLEASE CONTACT THE COMMISSION BY TELEPHONE AT 222-3790, 48 HOURS IN ADVANCE OF THE SCHEDULED MEETING. THE COMMISSION ALSO MAY BE CONTACTED THROUGH RHODE ISLAND RELAY, A TELECOMMUNICATIONS RELAY SERVICE, AT 1-800-RI5-5555.

Posted on May 28, 2020

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 2, 2020

Re: The Honorable Erin Lynch Prata

QUESTION PRESENTED:

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

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, a sitting member of the Rhode Island Senate, a state elected position, is prohibited by the statutory and regulatory "revolving door" provisions of the Code of Ethics from seeking or accepting a potential appointment to the Rhode Island Supreme Court. Said prohibitions remain in effect for a one-year period following the Petitioner's severance from her legislative office.

The Petitioner has continuously served as an elected member of the Rhode Island Senate since January 2009, representing District 31. In her capacity as a State Senator, the Petitioner serves as Chairperson of the Senate Committee on Judiciary, as well as a member of both the Senate Committee on Rules, Government Ethics and Oversight and the Senate Committee on Special Legislation and Veterans' Affairs. In her private capacity, the Petitioner is a practicing attorney licensed in Rhode Island and the principal of the Law Office of Erin Lynch Prata, LLC. She represents that she will not seek reelection to her legislative office in the November 2020 election.

Cognizant that the Rhode Island Code of Ethics contains certain "revolving door" provisions that apply to state elected officials generally, and to members of the General Assembly more specifically, the Petitioner requests guidance regarding whether she may apply for and, if selected, be appointed to a prospective vacancy on the Rhode Island Supreme Court ("Supreme Court") that has been advertised by the Judicial Nominating Commission ("JNC").[1]

The appointment of Supreme Court justices is expressly set forth in the Rhode Island Constitution as follows:

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[1] To comply with the JNC's application submission deadline, and in consultation with Ethics Commission staff regarding the instant request for an advisory opinion, the Petitioner has submitted her application for the position of Associate Justice of the Supreme Court.

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

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

The JNC, created by statute in 1994, is the independent, non-partisan body charged with screening applicants for vacancies on all Rhode Island Courts.[2] See R.I. Gen. Laws §§ 8-16.1-1 to -7. Upon notification of a judicial vacancy, the JNC advertises for interested candidates to apply and complete an extensive application.[3] The JNC then selects applicants to be interviewed, solicits public comment, and conducts background checks.[4] Based on the information developed throughout this screening process, the JNC votes and submits to the Governor a list of 3 to 5 highly qualified individuals for selection as a nominee.[5] See 545-RICR-10-00-1.1 to -1.9. Upon the Governor's selection of a nominee from the submitted list, the House and Senate Committees on Judiciary each separately conduct an investigation and a public hearing as to the nominee's qualifications. The nominee's appointment is subject to the advice and consent of both the House and the Senate. See R.I. Const. art. X, sec. 4; § 8-16.1-5; 545-RICR-10-00-1.1 to -1.9.

The Code of Ethics contains both statutory and regulatory "revolving door" provisions that are applicable to many public officials, including current and former members of the legislature, requiring a one-year "cooling off" period after leaving office before seeking or accepting other paid positions in state government. The Rhode Island Supreme Court has previously determined that these revolving door restrictions, whether statutory or regulatory in nature, are valid and separately enforceable. In re Advisory from the Governor, 633 A.2d 664, 669-673 (R.I. 1993) (hereinafter, "1993 Advisory Opinion"). The Court also recognized that "the legislative aim of the revolving-door provisions is to ensure that public officials adhere to the highest standards of conduct, avoid the appearance of impropriety, and do not use their positions for private gain or advantage. Id. at 671 (citing R.I. Const., art. 3, sec. 7). It further observed that "[t]he integrity of our government officials is quintessential to our system of representation. In general the purpose of revolving-door provisions is to prevent 'government employees from unfairly profiting from or otherwise trading upon the contacts, associations and special knowledge that they acquired * * *.'" Id. at 671 (quoting Forti v. New York State Ethics Comm'n, 554 N.E.2d 876, 878 (1990)). The Court concluded that "the revolving-door legislation is an effective device by which the public trust may be enhanced." Id.

The statutory revolving door provision at issue in the instant request for an advisory opinion is R.I. Gen. Laws § 36-14-5(n)(1), which provides:

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[2] http://www.jncri.gov/ (last accessed May 21, 2020).
[3] Id.
[4] Id.
[5] Id.

> No state elected official, while holding state office and for a period of one (1) year after leaving state office, shall *seek or accept* employment with any other state agency, as defined in section 36-2(8)(i), other than employment which was held at the time of the official's election . . . except as provided herein.

(Emphasis added). The judiciary is expressly included within section 36-2-(8)(i)'s definition of "state agency" and its members are employees in the unclassified state service pursuant to section 36-14-2(4); thus, the position of Supreme Court Justice constitutes employment with a state agency. Accordingly, absent application of an enumerated exception, the clear statutory language of section 5(n) not only prohibits the Petitioner's acceptance of any potential appointment to said position, but it bars her from seeking such a position in the first instance.

As to state elected officials such as the Petitioner, section 5(n)(1)'s prohibition is potentially subject to application of three enumerated exceptions. The first exception, set forth in section 5(n)(2), expressly permits a state elected official to "seek[] or accept[] appointment" as a department director by the governor and, therefore, is inapplicable to the instant facts. See section 5(n)(2).

The second exception, noted by the Petitioner in her request letter, provides that "[n]othing contained herein shall prohibit a state elected official from *seeking or being elected for* any other constitutional office." Section 5(n)(3) (emphasis added). The Petitioner maintains that the Supreme Court is a "constitutional court" pursuant to Article X, sec. 1 of the Rhode Island Constitution and, therefore, the Justices appointed to serve thereon hold "constitutional offices," thus permitting application of section 5(n)(3)'s exception to the strict revolving door prohibition. However, section 5(n)(3)'s plain statutory language applies only to those constitutional offices that are filled by *election*, and it is therefore facially inapplicable to the Petitioner seeking or accepting a gubernatorial appointment to the judiciary through the merit selection process.[6] In reaching its determination that said exception is inapplicable to the Petitioner's situation, the Ethics Commission need not consider whether the position of Supreme Court Justice is a "constitutional office."

Finally, pursuant section 5(n)(4), the Ethics Commission may authorize an exception to the statutory revolving door prohibition "where such exemption would not create an appearance of impropriety." Section 5(n)(4). This exception is also not applicable. It is our opinion that the revolving door provisions at issue here that were enacted in 1991 and 1992, as well as the 1994 amendment to the Constitution that created the JNC and the merit selection process for judges, were driven, in part, by a widespread belief that there was, at least, an appearance of impropriety in the elevation of elected officials to paid, lifetime appointments to the judiciary. This is especially true where said appointment would require the consent of the Petitioner's colleagues in the Senate following hearings before the very legislative Committee of which the Petitioner is Chairperson.

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[6] Notably, the legislature employed the phrase "seeking or being elected" in reference to section 5(n)(3)'s exception for constitutional offices, while using "seeking or accepting appointment" in section 5(n)(2)'s exception for department directors. Had the legislature intended for section 5(n)(3)'s exception to apply to offices obtained other than by election, it could have employed the same language utilized in the preceding section.

In addition to being prohibited by the statutory revolving door proscriptions set forth in section 5(n), which are applicable generally to *all* state elected officials, the Petitioner's continued application to the JNC is also restricted by a more specific, regulatory prohibition that applies only to members of the General Assembly. Adopted in 1991 by the Ethics Commission, along with several other regulations aimed at strengthening the Code of Ethics, 520-RICR-00-00-1.5.2 Prohibition on State Employment (36-14-5007) ("Regulation 1.5.2") currently reads:

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

(Emphasis added).

Unlike its statutory counterpart, Regulation 1.5.2 does not authorize the Ethics Commission to grant any exceptions to its strict prohibition. As both an employee in the unclassified service of the state and an appointed state official, the position of Supreme Court Justice constitutes "employment" pursuant to section 36-14-2(4). As such, Regulation 1.5.2 serves as an absolute bar to the Petitioner seeking or accepting a potential appointment to the Supreme Court for a period of one year following her severance from office.

Further, a third revolving door provision of the Code of Ethics, Regulation 520-RICR-00-00-1.5.1 Employment from Own Board (36-14-5006) ("Regulation 1.5.1"), also restricts the Petitioner's ability to accept an appointment to a position as a member of the Supreme Court prior to expiration of the requisite one-year "cooling off" period. It provides that "no elected or appointed official may accept any appointment or election that *requires approval by the body of which he or she is or was a member*, to any position which carries with it any financial benefit or remuneration, until the expiration of one (1) year after termination of his or her membership in or on such body." Regulation 1.5.1 (emphasis added). The Ethics Commission has previously applied Regulation 1.5.1 to prohibit public officials from accepting paid positions that required the approval of the official's public body, including by advice and consent. See A.O. 2016-43 (opining that a North Smithfield Planning Board member must wait one year from his resignation to accept, if offered, appointment by Town Administrator to position of Town Planner where selection process and final decision required the Board's approval); A.O. 2001-53 (opining that a former Tiverton Town Council member may not accept appointment as Tiverton Fire Chief prior to expiration of one year from date of leaving his position on Council, given that said appointment required the Council's advice and consent).

In the instant matter, not only is the Petitioner a sitting member of the Senate, which must confirm the nomination for a salaried judicial appointment, she is also Chairperson of the Senate Committee on Judiciary, which is charged with investigating and conducting a public hearing regarding the nominee's qualifications and providing advice to the full Senate regarding the nominee's confirmation. Therefore, absent expiration of the one-year waiting period, the

Petitioner's acceptance of an appointment to the Supreme Court is clearly prohibited by Regulation 1.5.1.

Notwithstanding said prohibition, the Ethics Commission may grant its approval for such an appointment where it is satisfied that denial of the position would create "a substantial hardship for the body." Regulation 1.5.1. The Ethics Commission does not dispute the Petitioner's qualifications for a potential appointment to the Supreme Court. However, for a hardship to exist there must be some evidence that there is a dearth of other qualified individuals interested in appointment to the Supreme Court. See A.O. 2004-36; A.O. 2000-32; A.O. 99-76.

The Ethics Commission presumes that the JNC will have sufficient applicants from which to select 3 to 5 highly qualified individuals for the Governor's consideration. The Petitioner's inability to accept such an appointment without waiting for a period of one year would not constitute a substantial hardship to either the Judiciary or the State. See A.O. 2014-18 (opining that in determining if a substantial hardship to the government body existed, the key issue was not whether the Petitioner was the most qualified candidate but whether other qualified candidates were currently available or might become available through a second posting of the position); A.O. 2010-26 (opining that in considering a hardship to the public body, the issue was not whether the petitioner was the *most* qualified candidate, but whether he was the *only* qualified candidate); A.O. 2006-1 ("The Ethics Commission could assume *arguendo* that the petitioner is the most qualified candidate for the job, but still find that no substantial hardship exists if other, less but suitably qualified individuals . . . are available to fill the vacancy").

The aforementioned revolving door provisions of the Code of Ethics have previously been analyzed, interpreted, and applied by the Ethics Commission, and by our Supreme and Superior Courts, in situations involving legislators, as detailed below. As previously discussed, in 1993 the Supreme Court held that section 5(n) and both Regulations 1.5.1[7] and 1.5.2[8] were constitutional, valid, and separately enforceable. 1993 Advisory Opinion, 633 A.2d at 669-673. In 1999, the Supreme Court issued another advisory opinion concerning the impact of an ethics regulation on the General Assembly's constitutional authority to place its own members on state boards, agencies and commissions. In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999) (hereinafter, "1999 Advisory Opinion"). The Court opined that

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

732 A.2d at 68-69 (quoting In re Advisory Opinion to the Governor, 612 A.2d 1, 18-19 (R.I. 1992); In re Advisory from the Governor, 633 A.2d 664, 675 (R.I. 1993)). In summary, the 1999 Advisory

[7] Regulation 1.5.1 corresponds to the former Commission Regulation 36-14-5006, Employment from own Board.

[8] Regulation 1.5.2 corresponds to the former Commission Regulation 36-14-5007, Prohibition on State Employment.

Opinion held that the Ethics Commission may not, by enacting ethics laws amend parts of the Constitution by diminishing the express powers granted to any branch of government.

Here, the Ethics Commission's application of section 5(n) and Regulations 1.5.1 and 1.5.2, which prohibit the Petitioner from seeking or accepting a potential appointment to the Supreme Court at this time, is entirely consistent with the Supreme Court's prior review of the Code of Ethics' revolving door prohibitions, as detailed above. These constitutional, valid, and separately enforceable provisions serve a key function to enhance the public's trust in its government and to ensure that public officials avoid even the appearance of impropriety.

In 2001, the Superior Court issued a decision in the case of Inman v. Whitehouse, No. 01-1256, 2002 WL 169197 (R.I. Super. Jan. 17, 2002), that addressed, and in some ways reconciled, the holdings of the 1993 Advisory Opinion (the Code's revolving door provisions are constitutional) and the 1999 Advisory Opinion (the Code's provisions cannot be inconsistent with the Constitution's express grants of authority). Inman began with a vacancy in the office of the Rhode Island Secretary of State after James Langevin was elected to Congress in 2000. Pursuant to the Rhode Island Constitution, "in case of a vacancy in the office of the secretary of state, . . . the general assembly in grand committee shall *elect* someone to fill the same . . . ." R.I. Const. art. IV, sec. 4 (emphasis added). Pursuant to that authority, the General Assembly met in Grand Committee and elected Edward S. Inman, III ("Inman"), a sitting member of the House of Representatives, to finish Langevin's term. Thereafter, complaints were filed with the Ethics Commission alleging that Inman violated the revolving door provisions of the Code of Ethics, namely Regulation 1.5.1 (then Regulation 5006) and Regulation 1.5.2 (then Regulation 5007).

Inman brought an action in the Superior Court to stay proceedings before the Ethics Commission and to obtain a declaration that, among other things, the Code of Ethics' revolving door provisions cannot restrict the Grand Committee's constitutional authority to fill a vacancy, by election, in the office of the Secretary of State. In its written decision issued on January 17, 2002, the Superior Court first recognized the Ethics Commission's constitutional authority to enact substantive ethics laws. Inman, at *3. However, the Court noted an "important distinction between the Commission's constitutional power to enact ethics regulations and the General Assembly's constitutional power [under art. IV, sec. 4] to elect an individual to fill a vacant state office." Id. Accordingly, the Court found the revolving door provisions to be no bar to Inman's election by the Grand Committee.

In contrast to the election of Inman, which fit neatly into section 5(n)(3)'s exception for election for constitutional office, none of the enumerated statutory exemptions apply to the Petitioner seeking or accepting a gubernatorial appointment to the Supreme Court. Further, unlike the unrestricted authority of the Grand Committee to fill a vacancy in the office of Secretary of State, the Governor's constitutional power to appoint a Supreme Court Justice is not unrestricted. Rather, it is limited to the small pool of 3 to 5 highly qualified individuals chosen and forwarded by the JNC. Finally, the revolving door provisions are aimed not at the Governor's appointment power, but at the Petitioner's ability to seek the position during the one-year cooling off period. By submitting her application, the Petitioner *seeks* other state employment not held at the time of her election to office, contrary to the plain proscriptions of section 5(n)(1) and Regulation 1.5.2.

The Petitioner also cites to a prior advisory opinion issued by the Ethics Commission as being supportive of her position. In 2010, the Ethics Commission issued Advisory Opinion 2010-54 to a legislator serving in the Rhode Island House of Representatives, opining that upon expiration of his term of office he could accept an appointment by the Governor to serve in the position of Secretary of Health and Human Services ("HHS"). In its opinion, the Ethics Commission considered the legal analyses set forth by the Supreme Court in the 1999 Advisory Opinion and applied by the Superior Court in Inman. There, while recognizing that such appointment fell squarely within section 5(n)(2)'s exception for gubernatorial appointment of a state elected official to a position as a department director, the Ethics Commission also considered Regulation 1.5.2's absolute prohibition, which is applicable only to members of the General Assembly. Although the Ethics Commission recognized the validity and enforceability of both section 5(n) and Regulation 1.5.2, it held that those provisions of the Code of Ethics would not prohibit the petitioner from accepting the Governor's appointment to a cabinet-level position as valid exercise of the Governor's appointment powers pursuant to Article IX, sec. 5 of the Constitution.

The instant facts are readily distinguishable from those presented in Advisory Opinion 2010-54. There, the subject gubernatorial appointment to a position as a department director was expressly permitted by section 5(n)(2), whereas, as discussed above, none of the enumerated statutory exceptions permit the Petitioner to seek or accept a potential appointment to the Supreme Court without waiting one year after leaving office. Additionally, unlike the constitutional grant of unrestricted authority to appoint department directors at issue in A.O. 2010-54, similar to the Grand Committee's unfettered election authority in Inman, the Governor's constitutional power to appoint a Supreme Court Justice is severely curtailed and limited to selection of a nominee from the list provided by the JNC, and the appointment is further conditioned upon the provision of advice and consent by both houses of the General Assembly.[9]

Furthermore, the JNC is not free to forward any names of its choosing to the Governor. Its selection is limited from among those who submit applications seeking the position, like the Petitioner. It is the Petitioner's application to the JNC, *seeking* the position of Supreme Court Justice, that initially implicates the revolving door prohibitions set forth in section 5(n) and Regulation 1.5.2.

By contrast neither the Governor's constitutional power to appoint executive branch officers nor the Grand Committee's constitutional power to fill a vacancy in the office of Secretary of State were limited by or conditioned upon interested individuals' submission of applications for a vacancy or some independent agency's selection or proposal of candidates for appointment or election. Placing a restriction of limited duration on the Petitioner's ability to apply to the JNC for a prospective vacancy, as well as her ability to accept any potential appointment, does not seriously impinge upon the Governor's constitutional power to appoint members of the Supreme Court.

For all of these reasons, it is the opinion of the Ethics Commission that section 5(n) and Regulations 1.5.1 and 1.5.2 are valid and enforceable revolving door prohibitions of the Code of

[9] The Code of Ethics does not contain the only statutory restriction on the Governor's ability to appoint members of the Judiciary. Notably, section 8-16.1-2(c) prohibits members of the JNC from being eligible for appointment to the Judiciary for a period of one year after their service.

Ethics that prohibit the Petitioner from both seeking and accepting a potential appointment to the Supreme Court while serving in her legislative office, and for a period of one year thereafter. Therefore, the Petitioner is advised to withdraw her application to the JNC seeking consideration for the subject vacancy.[10]

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

Code Citations:
§ 36-14-2(4)
§ 36-14-2(8)(i)
§ 36-14-5(n)
520-RICR-00-00-1.5.1 (36-14-5006)
520-RICR-00-00-1.5.2 (36-14-5007)

Constitutional Authority:
R.I. Const., art. III, sec. 7
R.I. Const. art. IV, sec. 4
R.I. Const. art. VI, sec. 1
R.I. Const. art. IX, sec. 5
R.I. Const. art. X, sec. 1
R.I. Const. art. X, sec. 4

Other Statutory and Regulatory Authority:
§§ 8-16.1-1 to -7
545-RICR-10-00-1.1 to -1.9.

Caselaw:
In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999).
In re Advisory from the Governor, 633 A.2d 664 (R.I. 1993).
In re Advisory Opinion to the Governor, 612 A.2d 1 (R.I. 1992).
Inman v. Whitehouse, No. 01-1256, 2002 WL 169197 (R.I. Super. Jan. 17, 2002).

Related Advisory Opinions:
A.O. 2016-43
A.O. 2014-18
A.O. 2011-25
A.O. 2010-54
A.O. 2010-26

[10] That the Petitioner has already submitted an application for the vacancy does not constitute a knowing and willful violation of the Code of Ethics where such action was undertaken in conjunction with the Petitioner's instant request for an advisory opinion and in consultation with Ethics Commission staff.

A.O. 2009-44
A.O. 2006-25
A.O. 2006-1
A.O. 2004-36
A.O. 2001-53
A.O. 2001-6
A.O. 2000-32
A.O. 99-76

Keywords:
Prospective Employment
Revolving Door

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ORIGINAL

April 28, 2020

HAND DELIVERED

Jason M. Gramitt, Esq., Executive Director
Rhode Island Ethics Commission
40 Fountain Street
Providence, RI 02903

RECEIVED
RHODE ISLAND
ETHICS COMMISSION
20 APR 29 AM 9:25

Re: Request for Advisory Opinion

Dear Mr. Gramitt:

Please accept the following as my request for an advisory opinion from the Rhode Island Ethics Commission, whether I, as a duly elected and currently serving State Senator, may apply for the prospective vacancy on the Rhode Island Supreme Court, in a manner that is consistent with the Rhode Island Constitution and ensures compliance with the Rhode Island Code of Ethics.

As a sitting State Senator, serving as the Chairperson of the Judiciary Committee, I appreciate that my application for a prospective judicial vacancy may cause others to question whether a sitting Senator may apply for a prospective Supreme Court vacancy without violating the Rhode Island Code of Ethics. From a plain reading of statutory and judicial precedent, it is clear that constitutional offices are different from ordinary state employment, as defined by the code. Our Supreme Court stated in *Gorham v. Robinson*, 57 R.I. 1, 186 A.2d 832 (1936), a "constitutional court" is a "court named or described and expressly protected by Constitution, or recognized by name or definite description in Constitution but given no express protection thereby." The Rhode Island Constitution, Art. X Sec. 1 states "the judicial power of this state shall be vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish." It is clear from a plain reading of this language that the Supreme Court is a constitutional court, and that Justices of the Supreme Court are "constitutional offices," therefore, not restricted by the so called revolving door prohibition.

In an effort to promote the public trust in the Senate, the Judiciary and the Judicial selection process, I am seeking an advisory opinion from the Ethics Commission to ensure that Regulations 1.5.1, and 1.5.2, (formerly 36-14-5006 and 5007), the so-called revolving door provisions, do not prohibit my application for the constitutional office of Justice of the Rhode Island Supreme Court.

Regulation 1.5.1, entitled "Employment from own board," states:

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

Regulation 1.5.2, entitled "Prohibition on State Employment," reads, in relevant part:

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

The facts that I am relying upon while seeking this advisory opinion are that;

1. I am a member of the State Senate representing District 31 and have held this position since January of 2009.

2. In my capacity as a State Senator, I am the Chairperson of the Senate Committee on Judiciary, and a member of both the Senate Committee on Rules, Government Ethics and Oversight, as well as the Senate Committee on Special Legislation and Veterans' Affairs.

3. I am a practicing attorney licensed in the State of Rhode Island and the principal of the Law Office of Erin Lynch Prata, LLC.

4. In furtherance of my commitment to public service, I would like to submit an application seeking to fill the prospective vacancy of Justice of the Supreme Court.

According to the "Introduction to the Code of Ethics" set forth on the Code of Ethics website, "[d]ue to the concurrent authority of the Ethics Commission and the General Assembly in the area of ethics, the Code of Ethics contains both regulations adopted by the Ethics Commission and statutes passed by the General Assembly. Therefore, the complete Code of Ethics cannot be found solely within either the Rhode Island Code of Regulations (RICR) or the Rhode Island General Laws."

Notably, R.I. Gen. Laws § 36-14-5(n) of the General Assembly's Code of Ethics states:

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

(2) Nothing contained herein shall prohibit any general officer or the general assembly from appointing any state elected official to a senior policy-making, discretionary, or

confidential position on the general officer's or the general assembly's staff, and in the case of the governor, to a position as a department director; nor shall the provisions herein prohibit any state elected official from seeking or accepting a senior policy-making, discretionary, or confidential position on any general officer's or the general assembly's staff, or from seeking or accepting appointment as a department director by the governor.

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

(4) Nothing contained herein shall prohibit the Rhode Island ethics commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety.

As set forth above, neither Regulation 1.5.1 nor Regulation 1.5.2 contain the constitutional office exception to the Ethic Commission's revolving door provision. However, an analogous issue arose in Advisory Opinion No 2010-54, wherein the Ethics Commission determined that R.I.G.L. § 36(14)(5)(n) and Regulation 1.5.2 are both valid and enforceable revolving door provisions of the Code of Ethics and neither they, nor any provisions of the Code of Ethics prohibited a member of the House of Representatives from accepting the Governor's appointment to the position of Secretary of Health and Human Services because the Governor's appointment power was expressly authorized in the Rhode Island Constitution and it was not the Commission's prerogative to amend a constitutional provision through the enactment of a contrary regulation.

Similarly, in *Inman v. Whitehouse*, 2002 WL 169197 (R.I. Super. Jan. 17, 2002), the Superior Court, on remand from the Supreme Court, held that neither Regulation 36-14-5006 (now 1.5.1) nor Regulation 36-14-5007 (now 1.5.2) restricted the Grand Committee's authority pursuant to R.I. Const. Art. IV, Sec. 4 to select one of its own members to fill a vacancy in the office of Secretary of State. Therein, a member of the House of Representatives accepted the election of the General Assembly sitting as the Grand Committee to the position of Secretary of State and Operation Clean Government and Common Cause filed complaints with the Ethics Commission alleging that the plaintiff had violated Regulations 36-14-5006 (now 1.5.1) and 36-14-5007 (1.5.2).

In support of its holding, the Court referenced *In re Advisory Opinion to the Governor* 633 A.2d 664 (R.I. 1993), in which the Supreme Court explained that:

> "Where the Commission and the General Assembly enact ethics laws in the same area, the two regulations should be read together in a way that is consistent with the objectives of both law-making bodies and which 'harmonizes' the goals of both groups. Because the Commission and the General Assembly have concurrent power to enact ethics regulations, courts should attempt to read enactments by the two bodies in a manner that treats both enactments as valid and not inconsistent with one another."

Additionally, the Superior Court noted that with respect to *Inman*, there was an important distinction between the Commission's constitutional power to enact ethics regulations and the General Assembly's constitutional power to elect an individual to fill a vacant State office. The Court explained that "[a]rticle 4, Section 4 of the Rhode Island Constitution specifically gives the General Assembly the power to fill vacancies in state offices. The Commission's constitutional power to create ethics regulations does not allow it to trump this specific constitutional power of the General Assembly simply by creating a new ethics regulation."

Notably, in A.O. 2010-54, the Ethics Commission referenced *Inman* when it stated:

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

Likewise, here, the appointment of an individual to the Supreme Court is expressly set forth in the Rhode Island Constitution. Specifically, R.I. Const. Art. X Sec. 4 states, in pertinent part, as follows:

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

Moreover, R.I. Const. Art. X Sec. 5 and 6 set forth the tenure and compensation of Supreme Court justices, respectively. As such, not only is the Governor's power to appoint an individual to the Supreme Court derived from the Constitution; moreover, the office of Supreme Court Justice is expressly contained in the Constitution and thus necessarily is a "constitutional office."

In consideration of the foregoing, my understanding is that the Ethics Commission's Code of Ethics necessarily includes the General Assembly's Code of Ethics set forth in R.I.G.L. § 36-14-1 *et seq.*, and both Codes must be read together in harmony to satisfy the goals of both bodies. Therefore, the revolving door provision does not apply to constitutional offices. Moreover, such a harmonious reading of the two Codes aligns with our Courts' holdings that the Ethics Commission cannot create a regulation that infringes upon the General Assembly's power to enact Ethics regulations or the Governor's constitutional power to appoint individuals to the Supreme Court.

In closing, I kindly request that the Ethics Commission provide me with guidance as to whether I am correct that the revolving door provision does not apply to a member of the General Assembly who seeks appointment by the Governor to the constitutional office of Supreme Court Justice. I look forward to your Advisory Opinion so that I may proceed with confidence.

Thank you for your attention to this matter.

Sincerely,

Erin Lynch Prata

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June 1, 2020

VIA EMAIL/Jason.Gramitt@ethics.ri.gov and Katherine.DArezzo@ethics.ri.gov

Chairperson Marisa A. Quinn and
Members of the Rhode Island Ethics Commission
40 Fountain Street
Providence, RI 02903

Dear Chairperson Quinn and Commissioners:

As you know, in April 2020 my client, Senator Erin Lynch Prata, requested an advisory opinion requesting whether the office of a Supreme Court Justice is a "constitutional office".

Specifically, she stated, "In an effort to promote the public trust in the Senate, the Judiciary and the Judicial selection process, I am seeking an advisory opinion from the Ethics Commission to ensure that Regulations 1.5.1 and 1.5.2 (formerly 36-14-5006 and 5007), the so-called revolving door provisions, do not prohibit my application for the constitutional office of Justice of the Rhode Island Supreme Court." In particular, Senator Lynch Prata quoted Art. X Sec. 1 of the Rhode Island Constitution stating, **"The Judicial powers of the State shall be vested in one Supreme Court and in such inferior Courts as the General Assembly may, from time to time, ordain and establish."** (Emphasis added.)

In her request, Attorney Lynch Prata cited R.I. Gen Laws § 36-14-5(n):

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

(2) Nothing contained herein shall prohibit any general officer or general assembly from appointing any state elected official to a senior policy-making, discretionary, or confidential position on the general officer's or the general assembly's staff, and in the case of the governor, to a position as a department director; nor shall the provisions herein prohibit any state elected official from seeking or accepting a senior policy-making, discretionary, or confidential position on any general officer's or the general assembly's staff, or from seeking or accepting appointment as a department director by the governor.

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

(4) Nothing contained herein shall prohibit the Rhode Island ethics commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety."

Furthermore, we requested the Commission's advice in that the Superior Court noted that with respect to *Inman,* there was an important distinction between the Commission's constitutional power to enact ethics regulations and the General Assembly's constitutional power.

Notably, in A.O. 2010-54, the Ethics Commission referenced *Inman* when it stated:

"In Inman, the Ethics Commission took the position that although Regulation 5007 was valid and constitutional when limiting a legislator from accepting general state employment or consulting work, **it did not apply to restrict Inman from accepting a position that was offered to him through a constitutionally authorized procedure."** (Emphasis added.)

Likewise, here the appointment of an individual to the Supreme Court is expressly set forth in the Rhode Island Constitution. Specifically, R.I. Const. Art. X Sec. 4 states, in pertinent part, as follows:

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

Moreover, R.I. Const. Art. X Sec. 5 and 6 set forth the tenure and compensation of Supreme Court justices, respectively. As such, not only is the Governor's power to appoint an individual to the Supreme Court derived from the Constitution; moreover, the office of the Supreme Court Justice is expressly contained in the Constitution and thus necessarily is a "constitutional office."

Remarkably, the Draft Advisory ignored the question presented. Instead, on page 3, the Draft Advisory stated, "...The Ethics Commission need not consider whether the position of the Supreme Court Justice is a 'constitutional office' ".

Please note, the purpose of the request was not to question the history, purpose or validity behind the revolving door regulation. Rather, in what one could only interpret as "plain English", we sought advice as to whether the office of a Supreme Court Justice is a constitutional office. A fair reading of the rule demonstrates that the revolving door provision is not applicable when an individual seeks or accepts a constitutional office. The Draft Advisory simply ignores the constitutional office exception/question at the beginning of the Advisory and then uses a "lack of an

exception" claim in the remainder of the Advisory. The Draft Advisory ignores the question asked. The Draft Advisory is, at best, cavalier about the process for being selected to the Supreme Court; and, at worst, for inexplicable reasons, ignores the very question posed in our request for said advisory opinion.

For the reasons stated above, we ask that you acknowledge that an office of a State Supreme Court Justice is a constitutional office and we ask for your support for Senator Erin Lynch Prata.

Sincerely,

THE FLANAGAN LAW OFFICES, LLC

By_____
Francis J. Flanagan

FJF/mbh

May 6, 2020

Jason Gramitt
Executive Director
R.I. Ethics Commission
40 Fountain Street
Providence, RI 02903

Re: Senator Erin Lynch Prata's Advisory Opinion (Corrected)

Dear Mr. Gramitt

Please accept these comments regarding State Senator Erin Lynch Prata's request for an advisory opinion related to her application to be a Rhode Island Supreme Court Justice. Neither R.I. Gen. Laws § 36-14-5 nor Ethics Commission Regulation 1.52 (36-14-5007) permit legislators to seek or be appointed to the Supreme Court until one year after he or she has left office. The exception to the revolving door prohibition in R.I. Gen. Laws § 36-14-5(n)(3) regarding "a state elected official … seeking or being elected for any other constitutional office" does not apply to an appointment to be a Justice of the Rhode Island Supreme Court. Justices of the Rhode Island Supreme Court are not elected by the public and since 1994 they are no longer elected by the Grand Committee (the term for the Senate and House meeting as one body and voting jointly). Instead, under R.I. Const. Art. X, § 4, Supreme Court Justices are nominated by the Governor, from a list submitted by the Judicial Nominating Commission, and then confirmed by a vote of the Senate and House of Representatives, separately. Furthermore, the judicial merit selection amendment in R.I. Const. Art. X, § 4 is consistent with, and complements the revolving door prohibitions related to legislators seeking judicial appointments. Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5(n) and (o), and R.I. Const. Art. X, § 4 were all adopted at about the same time for the purpose of reducing the participation and influence of sitting legislators in the judicial selection process.

Lynch Prata's interpretation is inconsistent with the language of Regulation 1.52 (36-14-5007), R.I.G.L. § 36-14-5 (n) and (o) and Art. X, § 4. It completely ignores the history leading to and surrounding the adoption of Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5(n) and (o), and R.I. Const. Art. X, § 4. It is entirely inconsistent with how these legal provisions have been followed since their adoption about a quarter century ago. The Ethics Commission should interpret Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5(n) and (o), and R.I. Const. Art. X, § 4 in a harmonious manner rather than in way which would invalidate either Regulation 1.52 (36-14-5007) or R.I. Gen Laws § 36-14-5. Lastly, if Lynch Prata's interpretation is adopted, it will represent, at least, a partial return to the embarrassing judicial selection politics of an earlier era and may lead to further undermining of the revolving door ban for other judicial appointments in the future.

Justice Oliver Wendell Holmes Jr. once declared that in interpreting the law, "a page of history is worth a volume of logic."[1] The Rhode Island Supreme Court has cited Holmes's quote and interpreted constitutional provisions and laws by using "extrinsic sources" and looking to the "history of the times" and "the state of affairs as they existed" when the laws and constitutional

[1] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

provisions were "framed and adopted."[2] Likewise, when interpreting Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5, and R.I. Const. Art. X, § 4, it is necessary for this Commission to examine the historical events that surrounded and led to their adoption. For ten years from 1985 to 1994, Rhode Island was engulfed in a series of scandals related to Rhode Island Housing and Mortgage Corporation (RIHMFC), the Rhode Island Share and Deposit Indemnity Corporation (RISDIC), two Rhode Island Supreme Court Chief Justices Joseph Bevilacqua and Thomas Fay, Governor Edward DiPrete, and numerous pension abuses. The unethical conduct exposed by these scandals wrecked the state's economy, cost taxpayers millions, and ruined public trust in government, including in the court system. Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5, and R.I. Const. Art. X, § 4 were reform minded responses to these scandals.

The 1986 Constitutional Amendments: Ethics and Judicial Merit Selection

In 1985, it was revealed that RIHMFC had granted low-interest mortgages to politically connected individuals while its Executive Director, Ralph Pari embezzled funds.[3] In 1986, Rhode Island's Chief Justice Joseph Bevilacqua resigned under the threat of impeachment pertaining to Bevilacqua's connections to organized crime.[4] In response to these scandals, a state constitutional convention proposed two constitutional amendments. One amendment created the Rhode Island Ethics Commission and gave it authority to adopt an ethics code. It was approved by the voters.[5] A second amendment created a commission to nominate judges, but continued to allow Supreme Court justices to be elected by the Grand Committee. (At the time, Supreme Court judges were elected by the Grand Committee and lower court judges were nominated by the Governor with the consent of the Senate.) This amendment was rejected by the voters largely due to public mistrust over the General Assembly's role in the selection of judges.[6]

The Adoption of and Challenge to Revolving Door Regulation

In 1991, after the RISDIC debacle, other scandals, and the failure of the General Assembly to adopt a revolving door ban, Commissioner Mel Topf urged the Ethics Commission to utilize its constitutional authority to adopt a regulation prohibiting state legislators from seeking or accepting state jobs, including judgeships, while they served in the General Assembly and for a year after they left office.[7] In November 1991, despite opposition from House Speaker Joseph DeAngelis, Senate Majority Leader John Bevilacqua, and Governor Bruce Sundlun, but with support from Alan Flink, the President of the Rhode Island Bar Association, the Ethics Commission adopted Regulation 36-14-5007, the revolving door ban on legislators.[8]

In that same month, Governor Bruce Sundlun requested an advisory opinion from the R.I. Supreme Court as to whether the Ethics Commission had substantive legislative authority over

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[2] Kass v. Retirement Board of the Employees' Retirement System, 567 A.2d 358, 360 (R.I. 1989); City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995).
[3] H. Philip West Jr, Secrets & Scandals, at 1-2 (2014).
[4] Id., at 1, 3. In 1976, as the sitting House Speaker, Bevilacqua engineered his election by the Grand Committee to the Supreme Court.
[5] Id., at 4-5, 7; see R.I. Const. Art. III, §§7 8; In Re: Advisory Opinion to the Governor (Ethics Commission), 612 A.2d 1, 2-3 (R.I. 1992).
[6] Id., at 3, 7. John Marion, "Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island," Roger Williams U. L. Rev, vol. 15, Issue 3, at 737-738 (2010); Alan Flink, "Rhode Island's Judicial Merit Selection Process Merits Improvement: Response," Roger Williams U. L. Rev, vol. 15, Issue 3, at 729 (2010).
[7] West, Secrets & Scandals, at 82-83.
[8] Id. at 84-89.

ethics. On June 10, 1992, the Supreme Court issued its advisory opinion. The Supreme Court first noted that the "years preceding the 1986 constitutional convention were marked by scandal and corruption at all levels of government" which "decimated the public's trust in government."[9] The Supreme Court then declared that the state constitution gave "the commission the limited and concurrent power to enact substantive ethics laws" and that "the General Assembly is merely limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission."[10]

The Adoption of the Revolving Door Law and a Supreme Court Vacancy

While awaiting the Supreme Court's advisory opinion on the Ethics Commission revolving door regulation, the House of Representatives moved forward with revolving door legislation. In March 1992, the House Judiciary Committee recommended revolving door legislation, but it exempted judgeship positions from the revolving door ban.[11] On May 19, 1992, the House of Representatives passed revolving door ban legislation, but a floor amendment to include judgeships in the ban was defeated by a 39-52 vote.[12] To help win passage of the revolving door bill, on the same day, the House passed a measure creating a screening panel for judgeships.[13]

State House political calculations dramatically changed after June 10, 1992 when the Supreme Court ruled that the Ethics Commission had the authority to adopt substantive ethics regulations such as Regulation 36-14-5007. On June 26, 1992, the Senate passed multiple revolving door bills, including S-2762, which was a comprehensive revolving door ban which applied to legislators seeking judgeships.[14] On July 9, 1992, the House responded by passing revolving ban legislation, H-8542, which in "most respects" were "identical" to the Senate revolving door bill, S-2762, that prohibited legislators from seeking judgeships. However, the newly revised House bill exempted Sundlun's two pending judicial nominees and did permit elected officials to seek and be elected to any constitutional office in what was codified as R.I. Gen. Laws § 36-14-5(n).[15] House Judiciary Chairman Jeffry Teitz, who worked on the legislation, explained to Phil West, the lobbyist for Common Cause, that "election to a constitutional office is an entirely reasonable exemption" because the "notion of getting a job through election is categorically different from a revolving door appointment."[16] The Senate subsequently passed this legislation without modification.[17]

But the controversy was not over. A few days later, Supreme Court Justice Thomas Kelleher announced he was retiring. Teitz now interpreted the exemption to the revolving door law in R.I. Gen. Laws § 36-14-5(n) as permitting sitting legislators to be Supreme Court justices because Supreme Court justices are elected by the Grand Committee.[18] The Senate Judiciary Chairman Thomas Lynch said it was "an open question" while Senate Majority Leader Bevilacqua

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[9] In Re: Advisory Opinion to the Governor (Ethics Commission), 612 A.2d at 11.
[10] Id., at 14.
[11] "House panel Oks 3 government ethics bills" ProJo (4/10/1992).
[12] "House approves revolving-door jobs prohibition 75-18 sends bill to Senate" ProJo (5/20/1992).
[13] Id.
[14] "Senate sends 4 revolving-door bills to House" ProJo (6/27/1992).
[15] "House panel Oks stringent revolving-door bill" ProJo (7/9/1992); "House Oks revolving-door ban" ProJo (7/10/1992).
[16] West, Secrets & Scandals, at 171.
[17] "Senate panel Oks strong revolving-door legislation ProJo (7/11/1992); Assembly finally hits finish line" ProJo (7/14/1992); West, Secrets & Scandals, at 178.
[18] "Law may permit legislator to become judge" ProJo (7/20/1992).

declared that even if it was legal it would be inappropriate for a sitting legislator to go to the Supreme Court because "it would fly in the face of the ethics reform everyone just supported."[19] Also, Ethics Commissioner Topf asserted the authority of the Ethics Commission and threatened to file a complaint against any legislator who sought the judgeship.[20] Despite Teitz's interpretation, in spring of 1993, at the Grand Committee meeting, no one was nominated or elected to fill the Supreme Court vacancy who was either a sitting legislator or had been a member of the General Assembly within the past year.[21]

The Court interprets the Revolving Door Law and Revolving Door Regulation

While the revolving door prohibition was being adhered to in the election of new Supreme Court Justice, the legality of R.I. Gen. Laws § 36-14-5(n) and (o) as well as Regulation 36-14-5007 were being challenged at the Supreme Court. Although Governor Sundlun had signed the revolving door legislation, after he was reelected he challenged its legality along with the Ethics Commission revolving door regulation.[22] On November 15, 1993, the Supreme Court issued an advisory opinion indicating that the "revolving-door legislation addresses the imbroglio of public officials who use their present positions and contacts as unfair bargaining tactics in gaining future employment."[23] The Court determined that R.I. Gen. Laws § 36-14-5(n) and (o) as well as Regulation 36-14-5007 were valid. The Court stated that although R.I. Gen. Laws § 36-14-5(n) and (o) were "less constrictive that the regulations," they "are not inconsistent."[24] The Court expressed a preference "to interpret statutes that relate to the same subject matter so that each may be given its full effect."[25] The Court determined that "the statute and the regulations are not inconsistent but are compatible."[26]

The Court went onto interpret the "specific exclusion for seeking election to state constitutional office" in R.I. Gen. Laws § 36-14-5(n).[27] The Court decided to construe the statute consistently and harmoniously with how the Ethics Commission had interpreted Regulation 36-14-5007. The Court noted that the Ethics Commission interpreted Regulation 36-14-5007 to permit "public officials to seek elective office" which is subject to a "popular vote" and then cited cases related to "ballot access."[28] The Court concluded that "public positions to which the revolving-door legislation applies are appointed positions or are positions elected from a state or a municipal governing body. They are not positions that are elected by the general electorate."[29] The Court had the opportunity to interpret R.I. Gen. Laws §36-14-5(n) as permitting sitting legislators to seek to be elected by the Grand Committee to the office of a Supreme Court Justice, but it did not. Instead, the Court limited the exclusion in R.I. Gen. Laws § 36-14-5(n) to "positions that are elected by the general electorate," and even stated that the revolving door ban applied to "positions elected from a state … governing body." At the time of this decision, the entire Supreme Court membership was composed of individuals who were former legislators who had been

[19] Id.
[20] Id.
[21] West, Secrets & Scandals, at 241-244; R.I. House Journal (4/29/1993).
[22] Id., at 198-200.
[23] In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d 664, 671(R.I. 1993).
[24] Id., at 669.
[25] Id.
[26] Id.
[27] Id., at 670, 676.
[28] Id., at 670.
[29] Id.

selected through the Grand Committee process, and none of them decided the process they went through was covered by the exclusion in R.I. Gen. Laws § 36-14-5(n).

The Fay Scandal and Judicial Merit Selection Amendment

In Rhode Island history, the pace of government reform is usually set by the speed at which scandalous behavior is exposed. While the Supreme Court was interpreting ethics laws, the Supreme Court was also being rocked by an ethics scandal. In July 1993, a scandal involving Chief Justice Thomas Fay and Matthew Smith, a top court administrator was revealed. In 1978, Fay had gone from being Chairman of House Judiciary directly to a judgeship in the Family Court. In 1986, House Speaker Matthew Smith helped Fay get elected by the Grand Committee to the position of Chief Justice of the Supreme Court. Subsequently, Fay appointed Smith to a top administrative post in the courts. The Providence Journal exposed how Fay and Smith had used their offices to benefit themselves, their business associates, and their political cronies.[30] Some of their activities were criminal. Smith resigned his position in August 1993, and in October 1993, Fay resigned under the threat of impeachment.[31]

This scandal led to the adoption of a merit-based judicial selection amendment to the state constitution.[32] Along with the formation of a commission to create a list of potential judicial nominees from whom the Governor could chose, it eliminated the role of the Grand Committee for election of Supreme Court Justices. This change further reduced the role of legislators in the selection of judges. The elimination of the Grand Committee's role was strongly opposed by the leadership of the House. At one point, the House wanted the confirmation to be done by the House and Senate meeting as one body as in the Grand Committee.[33] Eventually, the House accepted that, for Supreme Court justices, the Senate and House would each be given the power confirm a nominee separately. For all other judges, it would only be Senate confirmation. In November 1994, the amendment for judicial merit selection was overwhelmingly approved by the voters.[34] Once the election by the Grand Committee was eliminated from the process for selecting Supreme Court nominees, any possible interpretation that R.I. Gen. Laws § 36-14-5(n) permitted sitting legislators to seek to be "elected" by the Supreme Court was closed.

Judicial Selection complying with the Revolving Door Prohibition

With both the revolving door prohibition and merit selection process in place, there have been eight vacancies on the Rhode Island Supreme Court. None of them have been filled by a sitting state legislator or one who had been out of office for less than one year. Also, there appears to be no record of any sitting legislator or one who had been out of office for less than one year being interviewed for a Supreme Court vacancy by the Judicial Nominating Commission. During that time period, there undoubtedly have been powerful legislators with judicial aspirations, but when Supreme Court vacancies arose, apparently, none of them decided that R.I. Gen. Laws § 36-14-5(n) allowed them to seek the position.[35] It does not appear that any sitting legislator has even

[30] West, Secrets & Scandals, at 257-262.
[31] Id., at 259, 262.
[32] Id., at 275, 278-279, 285-287, 290; John Marion, "Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island, Roger Williams U. L. Rev, vol. 15, Issue 3, at 739-740.
[33] West, Secrets & Scandals, at 278-279, 285.
[34] Id., at 681. see R.I. Const. Art. IV, §4.
[35] For example, in 2004, a vacancy on the Supreme Court arose but Senate President Joseph Montalbano did not seek the position. Currently, Montalbano is a justice of the Superior Court, and complied with the revolving door requirements to obtain his current position.

requested an advisory opinion from the Commission as to whether he or she could seek a judgeship during this entire time period. For a quarter-century, spanning eight Supreme Court vacancies, and numerous attorneys in the General Assembly leadership, no sitting legislator attempted to ignore the revolving door ban and seek a Supreme Court judgeship. The behavior of an entire generation of legislators in relation to judicial vacancies suggest that the adoption of the revolving door regulation in 1991, the revolving door law in 1992, with the approval of the merit selection amendment in 1994, closed the legal ability of any sitting legislator to seek any judicial vacancy.

R.I. Gen. Laws § 36-14-5(n)(3) does not apply to Supreme Court vacancies

Lynch Prata's main legal argument is that Supreme Court justice vacancies are encompassed by R.I. Gen. Laws § 36-14-5(n)(3), which exempts from the revolving door ban "a state elected official … seeking or being elected for any other constitutional office." In 1992, right after the passage of the revolving door law, there was a difference of opinion among lawmakers as to whether R.I. Gen. Laws § 36-14-5(n)(3) encompassed Supreme Court vacancies. But, in 1993, the Supreme Court interpreted R.I. Gen. Laws § 36-14-5(n) consistently with how the Ethics Commission interpreted Regulation 36-14-5007, which only exempted legislators from the revolving door ban for an office elected by the public.[36] The Court concluded that "public positions to which the revolving-door legislation applies are appointed positions or are positions elected from a state … governing body. They are not positions that are elected by the general electorate."[37] The Court made no exception for Supreme Court vacancies elected by the Grand Committee. Lastly, a constitutional amendment in 1994, approved by the voters, eliminated the election of Supreme Court justices by the Grand Committee entirely. Now, Supreme Court justices are nominated by the Governor, from a list provided by the Judicial Nominating Commission, and confirmed by the Senate and House, separately. Therefore, the language in R.I. Gen. Laws § 36-14-5(n) cannot be construed in any way as applying to Supreme Court vacancies because Supreme Court nominees are not elected by anyone, neither the public nor the Grand Committee.

Lynch Prata has argued in her request for an advisory opinion, that a Supreme Court justice is a "constitutional office." This is irrelevant and dangerous. Even if the office of a Supreme Court justice is a constitutional office, it is still not an office to which someone is elected, and therefore, R.I. Gen. Laws § 36-14-5(n)(3) does not apply. Furthermore, the Supreme Court has used the term "constitutional office" nine times in its opinions, and seven times, the reference was to a general officer elected statewide such as Attorney general or Lieutenant Governor.[38] In 1993, the Supreme Court mentioned the term "constitutional office" as used in R.I. Gen. Laws § 36-14-5(n) and went on to interpret R.I. Gen. Laws § 36-14-5(n) as only applying to an office elected by the general electorate.[39]

The other case was Gorham v. Robinson, which is cited by Lynch Prata. In Gorham v. Robinson, there is a passing reference to "constitutional office" but it comes when discussing the decision of another state court.[40] The focus in Gorham was whether district courts were

[36] In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 670.
[37] Id.
[38] See e.g. State v. State Troopers Assn, 187 A.3rd 1087, 1100 (R.I. 2018); State v. Lead Industries Assn, Inc, 951 A.2d 428, 470 (R.I. 2008); and In Re: Advisory Opinion to the Governor (Lieutenant Governor Vacancy) 688 A.2d 288, 290 (R.I. 1997).
[39] In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d, at 670.
[40] 186 A. 832, 846 (1936).

"constitutional courts."[41] The majority decided that "our districts courts are constitutional courts … but the judges of those courts are not protected in their compensation and tenure as are the judges of the Supreme Court."[42] Meanwhile, the dissenters asserted that district courts "are constitutional courts because they are ordinated and established by the General Assembly with constitutional sanction."[43] If the Ethics Commission decided that a judgeship in a "constitutional court" like the Supreme Court is a constitutional office covered by R.I. Gen. Laws § 36-14-5(n), despite the fact that it is not an office to which someone is elected, there is a danger that vacancies for other courts could also be deemed to be "constitutional offices" since these courts are expressly mentioned in Art. X, § 4 and expressly permitted by Art. X, §§ 1, 2. Other sitting legislators could claim that judgeships in these lower courts are constitutional offices since these courts are "constitutional courts" and then seek an appointment to a lower court judgeship. This is one example of how Lynch Prata's interpretation, if taken to its logical conclusion, could erode both the ethics code and laws covering judicial vacancies that have been followed for the last quarter century.

The Inman decision is not applicable

Lynch Prata argues that Superior Court decision in Inman v. Whitehouse[44] indicates that her appointment to the Supreme Court is not prohibited by the revolving door ban. This is incorrect. In Inman, a Superior Court judge determined that Edward Inman, a sitting legislator, could be elected by the Grand Committee to fill the vacancy in the office of Secretary of State because Regulation 36-14-5007[45] could not trump R.I. Const. Art. IV, § 4, which permits the Grand Committee to elect someone to fill a vacancy in the office of secretary of state. The facts of this case are very different. Inman was elected by the Grand Committee to a vacancy in a general officer position. A vacancy to the Supreme Court is not filled by election by the Grand Committee. Instead, it is an appointment. The Governor nominates an individual who must be confirmed with the consent of the Senate and House. A vacancy in the office of Secretary of State, an elected position, and in a vacancy in the Supreme Court, a lifetime appointed position, are filled in two very different ways under the state constitution.

R.I. Const. Art. IV, § 4 which allows the Grand Committee to fill vacancies in the offices of Secretary of State, Attorney General and General Treasurer was adopted in 1900; well before the creation of Ethics Commission in 1986, its adoption of Regulation 36-14-5007 in 1991, and the revolving door law R.I. Gen. Laws § 36-14-5(n) and (o) in 1992. Therefore, a Superior Court judge could have assumed that the constitutional provision and the Ethics Commission regulation were somehow in conflict. However, that is not the case with merit selection amendment, Art. X, §4. The merit selection process in Art. X, § 4, which covers all judges, including Supreme Court judges, was adopted in 1994, soon after the adoption of the Regulation 36-14-5007 and the revolving door law R.I. Gen. Laws § 36-14-5(n) and (o). In fact, a review of history would show that the adoption of revolving door prohibitions and merit selection of judges was part of the same

[41] Id. In Gorham, the dispute was whether district court judges who had a six-year term could have their terms terminated after three years. The majority determined they could be terminated after three years. The majority determined they could be terminated after three years. The dissenters believed the judges could not be terminated prior to the end of their six-year term.
[42] Id., at 850.
[43] Id., at 864 (Capotosto dissenting).
[44] Inman v. Whitehouse, No. 01-1256 (R.I. Superior Court 1/17/2001)
[45] Strangely, there was no discussion or interpretation of R.I.G.L. §36-14-5(n) or (o) in the Inman decision.

reform movement that swept Rhode Island in the early 1990s. A goal of the revolving door prohibitions and the merit selection amendment was the same: to minimize the participation and influence of legislators in the judicial selection process.

Art. X, § 4 did not invalidate revolving door prohibitions in law or regulation

Lynch Prata argues that Art. X, § 4 is a "constitutionally authorized procedure" and therefore, her appointment is not subject to the revolving door prohibition. Essentially, Lynch Prata is arguing because the judicial merit selection amendment in Art. X, § 4 is a "constitutionally authorized procedure," it invalidates laws or regulations that restrict in anyway a gubernatorial appointment made through that process. This is an erroneous and dangerous argument. Reasonable limitations can be placed on a governor's constitutional appointment authority. For example, in 2004, the voters approved a variety of constitutional amendments to establish separation of powers. One of those amendments expanded the governor's appointment powers under Art. IX, § 5. However, the House of Representatives argued that General Assembly still had the authority to require legislators to be appointed to the Coastal Resources Management Council (CRMC). The Supreme Court rejected this argument, but indicated that the General Assembly could still place limitations on a governor's ability to appoint members to the CRMC. Specifically, the Court noted that because the General Assembly has the authority to pass laws pertaining to natural resources it could pass laws to "provide specific criteria with respect to CRMC membership composition and qualifications."[46] If, after the separation of powers, the General Assembly still has the constitutional authority to place restrictions on who can be appointed to the CRMC, then the General Assembly and the Ethics Commission certainly still have the constitutional authority to impose revolving door ethics restrictions on sitting legislators becoming judges after the adoption of the judicial merit selection amendment.

Reasonable statutory restrictions can also be placed on appointments to bodies expressly mentioned in the state constitution like the Supreme Court. For example, Art. X, § 4 does not state that Supreme Court nominees must be attorneys. But, R.I. Gen. Laws § 8-16.1-4(a) requires that a nominee be an attorney licensed in Rhode Island and a "current member of the Rhode Island bar association in good standing." Also, R.I. Gen. Laws § 8-16.1-2(c) prohibits any members of the Judicial Nominating Commission from being "eligible for appointment to a state judicial office during the period of time he or she is a commission member and for a period of one year thereafter." Furthermore, under R.I. Gen. Laws § 8-16.1-5(g) Supreme Court nominees are investigated to determine their "compliance with the provisions of chapter 14 of title 36," the Code of Ethics. Therefore, there exists various reasonable ethical restrictions on those seeking to be appointed to the Supreme Court. If a one-year revolving door prohibition on Judicial Nominating Commission members seeking a judicial appointment is permissible so should a one-year revolving door prohibition on legislators seeking a judicial appointment.[47]

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[46] In Re: Advisory Opinion from the House of Representatives (CRMC), 961 A.2d 930, 943 (R.I. 2008).

[47] There are restrictions on the appointments to other bodies specifically mentioned in the state constitution. For example, the Ethics Commission is specifically mentioned in Art. III, § 8 and there are restrictions on being appointed to this body in R.I. Gen. Laws § 36-14-8. Specifically, there is a prohibition on the appointment of anyone who "held elective public office or have been a candidate for elective public office for a one year period prior to appointment." The Judicial Nominating Commission is specifically mentioned in Art. X, § 4, and there are restrictions on being appointed to this body in R.I. Gen. Laws § 8-16.1-2. Specifically, a member cannot be a "legislator, judge, or elected official, or be a candidate for any public office, or hold any compensated … public office or elected office in a political party during his or her tenure or for a period of one year prior to appointment."

When the Supreme Court interprets different constitutional provisions and laws, they attempt to harmonize them.[48] For example, the Supreme Court has already determined that Regulation 36-14-5007 and R.I. Gen. Laws § 36-14-5(n) and (o) should be interpreted harmoniously.[49] The Supreme Court has noted that "repeals by implication are disfavored by the law."[50] Furthermore, the Court has indicated that a law cannot be deemed unconstitutional unless it can be shown beyond a reasonable doubt that it violates a specific constitutional provision.[51] Also, in interpreting constitutional provisions and laws, the Supreme Court does use "extrinsic sources" and looks to the "history of the times" and "the state of affairs as they existed" when the laws and constitutional provisions were "framed and adopted."[52] From the language of the merit selection amendment, it is clear that it did not either explicitly or implicitly limit or repeal to the revolving door prohibitions in law. The merit selection amendment was not adopted to invalidate revolving door ban on legislators becoming judges. It was designed to complement it. The "primary motivation for the switch to merit selection" was "reducing the influence of the General Assembly on the judiciary."[53]

The intent behind both the revolving door ban and merit selection was to reduce the participation and involvement of sitting legislators in the judicial selection process. In 1986, voters rejected a merit selection amendment primarily because it allowed the Grand Committee to elect Supreme Court justices. Eight years later, in 1994, they voted for a merit selection amendment after it reduced the influence of legislators in the judicial selection process by eliminating the role of the Grand Committee. In 1994, the public did not vote in favor of the merit selection amendment because they wanted to invalidate the revolving door prohibition directed at legislators. Instead, they voted for it because they wanted to reduce the ability of legislators to insert themselves in the judicial selection process.

The Ethics Commission has never indicated that the merit selection amendment in Art. X, § 4 invalidated in any way the revolving door ban in either statute or in regulation. In at least three advisory opinions, the Ethics Commission interpreted and applied the revolving door statutory restrictions in relation to pursuits of judgeships.[54] Also, the Ethics Commission stated in a General Advisory Opinion 2009-04 that "in addition to the prohibition on state employment found at R.I. Gen. Laws § 36-14-5(n), Commission Regulation 36-14-5007 prohibits members of the General Assembly from seeking or accepting state employment, other than that held at the time of election to office, for their term of office and for one year after leaving office." In that opinion, the Commission did not indicate there was an exception to Regulation 36-14-5007 for judgeships because of the merit selection amendment.[55] There is no reason now for the Commission to change

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[48] In Re: Advisory Opinion from the House of Representatives (CRMC), 961 A.2d 930, 935-936, n.7 (R.I. 2008); In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 671.

[49] Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 671.

[50] In Re: Advisory Opinion from the House of Representatives (CRMC), 961 A.2d at 935-936, n.7.

[51] Riley v. R.I Department of Environmental Management, 941 A.2d 198, 204-205 (R.I. 2008)

[52] Id. at 205.

[53] Michael Yelnosky, "The Impact of 'Merit Selection' on the Characteristics of Rhode Island Judges" Roger Williams U. L. Rev, Vol. 15, Issue 3, at 657 (2010).

[54] See e.g. A.O. 2009-16, Brian Stern; A.O. 2013-1, Richard Licht; and A.O. 2016-1, Timothy Williamson.

[55] In A.O. 2010-54, the Ethics Commission did indicate that a legislator could be appointed by a Governor to be Secretary of Health and Human Services. However, the primary reason the Ethics Commission permitted the appointment was because it was cabinet-level appointment that "fits neatly" into an exception to the revolving door ban in R.I.G.L. § 36-14-5(n)(2). The Ethics Commission also referenced the Supreme Court advisory opinion in 1993

its interpretation and decide that the merit selection amendment in Art. X, § 4 invalidated, in some way, either revolving door ban on legislators in statute or in regulation.

If the Ethics Commission were to determine that merit selection appointments Art. X, § 4 are exempt from Regulation 36-14-5007 and R.I.G.L. § 36-14-5(n) and (o), there could be far reaching negative consequences. Art. X, § 4 encompasses not only appointments to the Supreme Court but other lower court judicial appointments. Justice Benjamin Cardozo once discussed the "tendency of a principle to expand itself to the limit of its logic."[56] If Lynch Prata's interpretation is taken to its logical conclusion, it could open the door to many other sitting legislators who want to become a judge. It could undermine the ethics code and could cause the judiciary to revert it back to an earlier scandal plagued era.

Impact and Importance of the Revolving Door Ban on Judicial Appointments

The revolving door prohibitions in statute and regulation, coupled with the merit selection amendment, has had a beneficial impact on the judiciary. "Rhode Island has not endured an ethical scandal in the judiciary since the Fay/Smith debacle."[57] Also, judgeships are now held by fewer former legislators than in the past. Prior to 1994, approximately one-third of all judges had either been legislators or had served as counsel to a legislative leader, but by 2010, it had gone down to about 20 percent.[58] In 1992, all five Supreme Court justices had been former legislators. Four of them had gone from the legislature directly to a judgeship and the other justice had gone from the legislature to the governor's office and then to the bench.[59] Today, there are only two justices on the Supreme Court who were former legislators and they went from the legislature directly to a lower court judgeship before 1992.

Although politics undoubtedly still plays a role in judicial selection in Rhode Island, the combination of the judicial merit selection process and the revolving door prohibition together reduce the obvious politicization and ethical conflicts of the past. In fact, some have argued that the revolving door ban on legislators seeking judgeships has played a more important role than the merit selection process for improving the judicial selection process. Stephen Carlotti, Chairman of the Judicial Nominating Commission, explained "the biggest single change in Rhode Island is not the creation of the Judicial Nominating Commission. The biggest change is the enactment of the 'revolving door rule.'"[60] With the revolving door rule, he stated "we solved a multitude of problems. There is no person more powerless than a former office holder. No one has to pay any attention to a former Speaker of the House."[61]

The revolving door ban on sitting legislators seeking judgeships exists because of the tremendous potential for ethical abuses by sitting legislators in pursuit of a judgeship for themselves. The "revolving-door legislation addresses the imbroglio of public officials who use

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in which the Court determined that Regulation 36-14-5007 and R.I.G.L. § 36-14-5(n) were valid and should be read in harmony.

[56] Benjamin Cardozo, The Nature of the Judicial Process, at 51 (1921).

[57] Judge William E. Smith, "Reflections of Judicial Merit Selection, the Rhode Island experience, and Some Modest Proposals for reform and Improvement", Roger Williams U. L. Rev, Vol. 15, Issue 3, at 681(2010).

[58] Michael Yelnosky, "The Impact of 'Merit Selection' on the Characteristics of Rhode Island Judges" Roger Williams U. L. Rev, Vol. 15, Issue 3, at 655 (2010).

[59] R.I. Manual 1991-1994, at 353-357.

[60] Stephen Carlotti, "General Response" Roger Williams U. L. Rev, Vol. 15, Issue 3, at 661 (2010).

[61] Id., at 661-662.

their present positions and contacts as unfair bargaining tactics in gaining future employment."[62] Specifically, the revolving-door prohibition on state legislators exists to hinder legislators from trading their votes on legislative matters to gain a judgeship for themselves. Currently, legislators can use their influence to promote their personal friends and political allies to obtain a judgeship. While this is inappropriate to many, it does not, in general, clearly violate the ethics code because the legislator does not directly financially benefit from the selection of his or her friend or ally to the bench under R.I. Gen. Laws § 36-14-5(d). However, if a state legislator uses his or her office to get himself or herself to get nominated or confirmed to judgeship it would violate R.I. Gen. Laws § 36-14-5(d). A sitting legislator seeking a judgeship creates an appearance of impropriety and creates the obvious opportunity for unethical behavior.

Rhode Island history is rich with scandals over the unseemly scramble for spoils in which sitting legislators go through the revolving door to the bench.[63] But, perhaps the most blatant example of a sitting legislator using the power of his office to get himself a lifetime position involved Chief Justice Edmund Flynn. In 1935, Lieutenant Governor Robert Quinn, Governor Theodore Francis Green and other Democrats had come up with a plan to seize control of the Senate, vacate the Supreme Court, and dominate state government. But the plan almost went awry when House Majority Leader Edmund Flynn insisted on being made Chief Justice of the new Supreme Court. Flynn "let it be known that unless he were made Chief Justice, there would be a great deal trouble pushing the Governor's contemplated reforms through the House of Representatives." As one Green administration official stated: "He held a gun to our heads." In the end, Flynn was given the spot.[64] The most important political event in 20th century Rhode Island history, the Coup of 1935, was only able to go forward after a powerful sitting state legislator was given the position of Chief Justice. The revolving door ban is designed to prevent this sort of unethical conduct by sitting legislators from happening again. Why would the Ethics Commission want to interpret the law to go back in some way to the way it was? Rhode Island history records House Speaker Joseph Bevilacqua as the last sitting legislator to go directly to the Supreme Court. He should remain the last.

Conclusion

This is not about preventing Senator Lynch Prata from ever becoming a judge. It is about requiring her and other legislators to wait at least a year after they leave the General Assembly before they can seek to become a judge. Being required to leave the General Assembly for one year is not much to ask of someone before you bestow the honor of a lifetime appointment.

This is not about the qualities or qualifications of Senator Lynch Prata to be a judge. This is about requiring all legislators to follow an ethical requirement: the revolving door prohibition. If Lynch Prata is permitted to seek and be appointed to the Supreme Court, legislators who are more powerful and less principled than her, more questionable and less qualified than her will seek a seat on the Supreme Court in the future.

In recent years, Rhode Island has seen powerful legislators, who were attorneys, engage in unethical conduct. If the revolving door to the Supreme Court is open to these type of legislators, one can imagine the type of unethical lengths they would go to secure themselves a position at the

[62] In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 671.
[63] Steven Frias, "The rush to be a Rhode Island judge" ProJo (9/24/14); Steven Frias, "Going backwards on ethics in R.I." ProJo (10/7/15).
[64] Erwin Levine, Theodore Francis Green: the Rhode Island Years, 1906-1936, at 179 (1963).

Supreme Court if they wanted it. Furthermore, once the Ethics Commission interprets the law to permit sitting legislators to seek a Supreme Court appointment, undoubtedly other legislators will seek to extend that interpretation to other courts. The more often the revolving door swings open for legislators, the more likely the trading of votes for judgeships will creep back into the legislature. Rhode Island cannot move forward by going backwards on ethics. The ambitions of one State House politician should not be allowed to undo the accomplishments of a generation of reform.

The philosopher George Santayana famously declared that: "Those who do not learn history are doomed to repeat it." I have tried my best to present the history; it is the choice of the Ethics Commission whether they want to repeat it.

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May 15, 2020

Mr. Jason Gramitt
Executive Director
R.I. Ethics Commission
40 Fountain Street
Providence, RI 02903

Dear Director Gramitt:

I write to express the opinion of Common Cause Rhode Island regarding the request for an advisory opinion from the Rhode Island Ethics Commission by Senator Erin Lynch Prata.[1] Common Cause believes that the revolving door statute and regulations prohibit Senator Lynch Prata from seeking nomination to, or accepting appointment to, the Rhode Island Supreme Court until she has no longer been a member of the Rhode Island Senate for one year.

This letter is not meant as a comment on Senator Lynch Prata's qualifications for a seat on the Rhode Island Supreme Court. That is a matter for the state's Judicial Nominating Commission to determine. Common Cause is concerned with the application of the Code of Ethics by the Ethics Commission and the sanctity of the revolving door statute and regulations as applied to any sitting legislator, particularly one who remains in such seat and holds the chair of the very committee with which provides advice and consent of the Governor's appointment.

Common Cause has read the May 6th letter sent to the Commission by Mr. Steven Frias on this matter.[2] So as not to waste the Commission's time, we will not repeat many of the legal arguments made by Mr. Frias. To the extent his letter cites our history involving the revolving door and merit selection, we agree with his reading.

Senator Lynch Prata's request invokes three portions of the Code of Ethics; Regulation 1.5.1 (formerly 36-14-5006), Regulation 1.5.2 (formerly 36-14-5007) and R.I. Gen. Laws § 36-14-5(n).

Regulation 1.5.1 states that no "elected or appointed official *may accept any appointment or election* that requires approval by the body of which he or she is or was a member . . . until the expiration of one (1) year after the termination of his or her membership in or on such body." (Emphasis added).

Regulation 1.5.2 states that no "member of the General Assembly *shall seek or accept* state employment, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office." (Emphasis added).

[1] Letter from Senator Erin Lynch Prata to Jason Gramitt, Executive Director, Rhode Island Ethics Commission (April 28, 2020).
[2] Letter from Steven Frias to Jason Gramitt, Executive Director, Rhode Island Ethics Commission (May 8, 2020).

Finally, R.I. Gen. Laws § 36-14-5(n) reads, in part, "(1) No state elected official, while holding state office and for a period of one year after leaving state office, *shall seek or accept* employment with any other state agency, as defined in § 36-14-2(8)(i), other than employment which was held at the time of the official's election or at the time of enactment of this subsection, except as provided herein. . . (3) Nothing contained herein shall prohibit a state elected official from *seeking or being elected* for any other constitutional office." (Emphasis added).

The Rhode Island Supreme Court was confronted with the question of how these three different revolving door prohibitions can be read together. *In re Advisory Opinion to the Governor (Revolving Door)* 633 A.2d 664 (R.I. 1993). "The statute and the regulations are not inconsistent but are compatible," the Court concluded. Id. 669. The Court opined that they should be read in a way that "harmonizes" the different versions of the revolving door. Id. 670. Common Cause argues that when read together, the revolving door statute and regulations bar Senator Lynch Prata from seeking nomination to or accepting appointment to the Rhode Island Supreme Court

1. Section 36-14-5(n) Must Be Interpreted Strictly According to Its Plain and Unambiguous Meaning

In seeking to be considered for appointment, Senator Lynch Prata misapplies the clear and unambiguous terms of the statute and regulations at issue. Senator Lynch Prata's argument implies a constitutional conflict requiring a "constitutional exception" where none exists.

As is well-established, "[w]hen construing a statute [a court's] 'ultimate goal is to give effect to the purpose of the act as intended by the Legislature."' *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (quoting *Webster v. Perotta*, 774 A.2d 68, 75 (R.I. 2001)). "This Court must literally interpret a clear and unambiguous statute and attribute the plain and ordinary meanings to its words." *Arnold v. R.I. DOL & Training Bd. of Review*, 822 A.2d 164, 168-69 (R.I. 2003)(citing *Solas v. Emergency Hiring Council of Rhode Island*, 774 A.2d 820, 824 (R.I. 2001)). Indeed, "[w]hen examining an unambiguous statute, 'there is no room for statutory construction and we must apply the statute as written.'" Id. (quoting *Solas*, 774 A.2d at 824 (quoting *State v. DiCicco*, 707 A.2d 251, 253 (R.I. 1998))). Moreover, the Court "presumes that the General Assembly knows the state of existing relevant law when it enacts or amends a statute." *State v. Maxie*, 187 A.3d 330, 341 n.11 (R.I. 2018) (quoting *Power Test Realty Company Limited Partnership v. Coit*, 134 A.3d 1213, 1222 (R.I. 2016) (quoting *Ret. Bd. of the Emples. Ret. Sys. of R.I. v. DiPrete*, 845 A.2d 270, 287 (R.I. 2004))).

Despite Senator Lynch Prata's arguments otherwise, the clear and unambiguous terms of the statute do not impede the Governor's constitutional power to appoint. Rather, fully aware of the state of the law and the climate in our State at the time, the legislative branch placed the burden upon elected officials not to "seek" appointment to the judiciary[3] until one year after such elected official has left

[3] Section 36-14-5(n)(1), citing to R.I. Gen. Laws § 36-14-2(8)(i), specifically includes the judiciary as a seat of employment that elected officials are prohibited from seeking based on the revolving door prohibition.

elected office. § 36-14-5(n)(1). Any *arguendo* to the contrary is misplaced and a misstatement of the law.

Unequivocally, the ethical obligation is firmly upon an elected official to refrain from seeking appointment to the judiciary until the revolving door period has lapsed. Indeed, further belying Senator Lynch Prata's contention is the fact that, in order to be appointed by the Governor to the judiciary, one must first *seek and accept* approval from the Judicial Nominating Commission to have one's name placed on a list to be presented to the Governor. Therefore, pursuant to our State Constitution, the Governor's appointment power is limited to those who first seek and then accept appointment. Accordingly, when the legislature sought to prohibit the practice of a legislator's "automatic" appointment to the bench, in its wisdom, it chose to prohibit the elected official from seeking and accepting appointment rather than to limit the Governor's authority. § 36-14-5(n)(1).

Axiomatically, any elected official is ethically prohibited from seeking and accepting appointment to the judiciary, among other offices, until the revolving door period has lapsed.

2. The Exception in § 36-14-5(n)(4) Cannot Be Contorted to Evade the Revolving Door Prohibition.

Senator Lynch Prata also cannot find succor in the exception of § 36-14-5(n)(3). Senator Lynch Prata claims that appointment to the RI Supreme Court is akin to being "elected for any constitutional office." Again, these arguments are misplaced; they also fly in the face of the intent of the revolving door prohibition.

To be clear, Common Cause does not concede that the Supreme Court is a "constitutional office". But, for purposes of argument only, even if the Supreme Court were a "constitutional office", there is no doubt that the Supreme Court is not an *elected* constitutional office, which is reserved for offices such as the Governor, Lt. Governor, Treasurer, Attorney General, and Secretary of State. The distinction is of vast importance, particularly given the history and purpose of the revolving door statute, which was to halt the flow of legislators from the legislature to the bench by use of their political power. Such policy is just as necessary today as it was then.

The clear and unambiguous terms of § 36-14-5(n)(3) intended not to impede the right of a sitting elected official to seek *election* to a higher, constitutional office. As stated above, "[w]hen construing a statute [a court's] 'ultimate goal is to give effect to the purpose of the act as intended by the Legislature."' *Oliveira*, supra, (citations omitted). The Legislature's ultimate goal was to distinguish between an elected constitutional office and an appointment.

Section 36-14-5(n)(1) sets out the broad ethical prohibition placed on elected officials: such officials shall not "seek or accept". On the other hand, § 36-14-5(n)(3), which limits that prohibition, uses the conjunction "seeking or being elected". The former conjunction unmistakably refers to offices that can be offered by, for example, appointment, while the latter references those offices chosen by the people through free and open elections. If the Legislature intended the two conjunctions to be treated the same, it would have used the same language to evidence its intent. But it did not.

This distinction is evident in *Inman v. Whitehouse*, 2002 R.I. Super. LEXIS 3. There the Court found that an *election* by the Grand Committee to fill the vacancy of the Secretary of State by a sitting legislator was not a violation. Id 12. The distinction, in the first place, being the process of filling the vacancy is a constitutionally authorized election, unlike an appointment to the bench. Therefore, *Inman* does not apply under these circumstances.

Moreover, as intimated above, this distinction is even more important from a policy perspective. An appointment to the judiciary is a lifetime appointment that evades checks and balances by the people, from which true "constitutional offices" derive their power. On the other hand, an appointment to an elected constitutional office has checks and balances built into it: the people have the opportunity to vote whether to keep or expel that individual from office in four-year terms.

In sum, § 36-14-5(n) – the statute – in and of its own accord bars Senator Lynch Prata's ability to seek appointment to the judiciary until one year after she leaves office and the application of the statute does not require a constitutional exception.

3. Regulations 1.5.1 and 1.5.2 Stand as a Bar to Seeking or Accepting Appointment

As stated in *In re Advisory Opinion to the Governor (Revolving Door)*, the statute must be read in harmony with the revolving door regulations. Regulation 1.5.1 prohibits any "elected …official" from "accept[ing] any appointment…that requires approval by the body of which he or she is…a member…until the expiration of one (1) year after the termination of his or her membership in or on such body." Read harmoniously with the statute, this regulation unequivocally bars Senator Lynch Prata's application to the Judicial Nominating Commission at this time.

As stated above, Senator Lynch Prata use of *Inman* to attempt to create the need for a constitutional exception is misplaced. In addition to the distinguishing election mechanism already discussed, in *Inman* the Superior Court faced the challenge of harmonizing three (3) separate constitutional issues: (1) authority of the Ethics Commission to issue regulations; (2) the legislature's authority to pass laws; and (3) the authority of the Grand Committee to vote to fill a vacancy in particular constitutional offices. It is this third prong that rules out *Inman* from application to the matter at hand.

The friction created in *Inman* was the constitutional grant of authority for the Grand Committee to fill a vacancy in certain constitutional offices without exception. The Court there found that the Ethics Commission's regulation had to be read in a way that allowed all constitutional authority to be exercised. However, as stated in the previous sections above, there is no such constitutional tension to be harmonized here.

The Constitutional power to appoint is granted to the Governor, but it is not already without limits. She makes that appointment from a list provided by the Judicial Nominating Commission *after* a person *first must seek* an application to the Judicial Nominating Commission. Because the regulations and statute prohibit a person from "seek[ing] and accept[ing]" such appointments *and* the Governor's authority is limited to that pool of applicants, there is no constitutional tension akin to the Grand Committee as in *Inman*.

Additionally, Senator Lynch Prata is indisputably a member of the Rhode Island Senate. R.I. Const. Art. X, § 4 clearly states "any vacancy of any justice of the Rhode Island Supreme Court" requires "the advice and consent of the senate." Therefore, she is prohibited by the regulation from "accept[ing]" appointment to the Court at the present time.

The other applicable regulation, which nearly mirrors the revolving door statute, also presents an absolute bar. Regulation 1.5.2 states that no "member of the General Assembly shall seek or accept state employment, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office." Justice of the Rhode Island Supreme Court clearly constitutes "state employment" and Senator Lynch Prata is clearly "serving in the General Assembly."

4. Other Policy and Historical Perspectives

Our belief that Senator Lynch Prata must wait until one year after leaving office before applying for a vacancy on the Supreme Court is grounded both in the text of the statute and regulations, as well as their spirit, history, and purpose. We were involved when the General Assembly adopted § 36-14-5(n), we were an amicus when the Supreme Court issued *In re Advisory Opinion to the Governor (Revolving Door)*, and we were involved when the people created our merit selection process. Indeed, the very precipitate of Common Cause's work in this area has been the historical stream of legislators from going directly from the Assembly to any judgeship by use of their political power. Chief Justice Joseph Bevilaqua's direct ascendance from Speaker of the House to that position was a primary example cited for the aforementioned reforms. Accordingly, we believe that the revolving door statute and regulations prohibit legislators from going directly from the Assembly to any judgeship.

Common Cause does not take this issue lightly. While we have actively participated in many matters involving the Ethics Commission, it has been more than two decades since we have weighed in on a pending advisory opinion. We write this letter because Common Cause believes that if the Ethics Commission provides Senator Lynch Prata an advisory opinion that interprets the Code of Ethics as allowing a member of the General Assembly to seek or accept appointment to a pending vacancy of the Rhode Island Supreme Court it will set a dangerous precedent and set back the cause of good government in Rhode Island.

Sincerely,

John Marion
Executive Director

Cc: Senator Erin Lynch Prata

H. Philip West, Jr.

May 22, 2020

Ms. Marisa Quinn, Chairperson
RHODE ISLAND ETHICS COMMISSION
40 Fountain Street
Providence, RI 02903

Re: Advisory to Sen. Erin Lynch Prata

Dear Chairperson Quinn:

I write in support of the May 15 letter from Common Cause director John Marion regarding Sen. Erin Lynch Prata's request for an advisory opinion as she considers applying for a seat on the Rhode Island Supreme Court. I hold Sen. Lynch Prata in high regard and trust that no one will mistake my comments here as criticism of her character or legal qualifications. During several years of watching her, first as a member and then as chairperson of the Senate Judiciary Committee, I have come to deeply appreciate both her legal acumen and the way she listens to witnesses who testify. My concern is that the act of her seeking this appointment — if approved by the Commission — would torpedo this historic anti-corruption measure.

I served as executive director of Common Cause Rhode Island from 1988-2006. In retirement, I spent several years compiling materials from those years in a book published in 2014 by the Rhode Island Publications Society: *SECRETS & SCANDALS: Reforming Rhode Island, 1986-2006*. I wrote in the hope that a carefully documented record might help future generations embrace the unique constitutional power of the Rhode Island Ethics Commission to adopt and enforce a code of ethics for all public officials in our state.

In 1921, Justice Oliver Wendel Holmes wrote: "A page of history is worth a volume of logic." To help you weigh the propriety of Sen. Lynch Prata's request, I attach two parts of my book as searchable PDFs, along with notes referencing cited regulations, bills, laws, judicial decisions, and newspaper articles. A word search for "revolving door" will guide you through historic rulemaking by the Ethics Commission, legislative deliberations in the General Assembly, and advisory opinions of the Rhode Island Supreme Court.

This history is clear and unambiguous. Rules promulgated by the Ethics Commission and laws enacted by the General Assembly prohibit Sen. Lynch Prata from "seeking or accepting" appointment to the high court until she has been out of the Senate for a full year. Legislators enacted RIGL 36-14-5(n)(3) to avoid any charge that a member of the General Assembly might violate the Revolving Door by campaigning for election by the people to any of the five statewide offices: governor, lieutenant governor, attorney general, secretary of state, or general treasurer. Seeking appointment to the Supreme Court cannot be considered permissible under this exemption.

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I am copying this letter and these materials to Sen. Lynch Prata, in the hope that she will review carefully these events that occurred long before she was elected to the Senate. Her eventual candidacy for a seat on the Supreme Court will be enhanced if she announces that she will honor the letter and spirit of the Revolving Door prohibitions — as promulgated by the Ethics Commission, enacted into the Rhode Island General Laws, and upheld in a unanimous ruling of the Rhode Island Supreme Court.

With cordial best wishes,

H. Philip West Jr.

c: The Honorable Erin Lynch Prata, Senate Dist. 31
The Honorable Gina Raimondo, Governor
Jason Gramitt, Executive Director, Rhode Island Ethics Commission
John Marion, Executive Director, Common Cause Rhode Island

Attachments:
Secrets and Scandals»Part 1.pdf
Secrets and Scandals»Part 2.pdf
Secrets and Scandals»Afterword-Backmatter.pdf

16 Unity Street, Pawtucket, Rhode Island 02860 401-475-1246 hphilipwestjr@icloud.com

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 2, 2020

Re: Richard Thomsen

QUESTION PRESENTED:

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

RESPONSE:

It is the opinion of the Rhode Island Ethics Commission that the Code of Ethics does not prohibit the Petitioner, a member of the Dunn's Corners Fire District Operating Committee, a municipal elected position, who is also a volunteer firefighter on the Dunn's Corners Fire Department, a municipal employee position, from simultaneously serving in both positions, given that his employment as a volunteer firefighter predates his election to the Operating Committee. However, the Petitioner is required to recuse from participating in discussions and decision-making by the Operating Committee regarding matters in which it is reasonably foreseeable that there will be direct financial impact upon the Petitioner personally, any person within his family, his business associate, or his employer.

The Petitioner is a member of the Dunn's Corners Fire District Operating Committee ("Operating Committee"). He states that, after initially having been selected by the Operating Committee to fill a vacancy, he was elected in July of 2017 to serve a one-year term and re-elected in July of 2018 to serve a two-year term. He informs that he is not compensated for his service on the Operating Committee. The Petitioner represents that the Operating Committee is vested with the full charge, control, and management of the property and finances of the Dunn's Corners Fire District ("Fire District"), which provides emergency services to the citizens of Westerly and Charlestown. He adds that the members of the Operating Committee, with input and advice from two members of the Fire Department who are not members of the Operating Committee, are tasked with hiring the Fire Chief for the Dunn's Corners Fire Department ("Fire Department") in light of the former Fire Chief's resignation in April of 2020. The Petitioner explains that the Fire Chief and the Fire District Treasurer work together to create the Fire Department budget, which must be approved by the Operating Committee before being presented as part of the Fire District budget on which qualified voters of the Fire District vote as a whole at the annual meeting.

The Petitioner states that he retired from a career in public service in Connecticut ten years ago and is currently a volunteer firefighter on the Fire Department, a position he has held continuously since 2015. He informs that his service as a volunteer firefighter predates his initial appointment and eventual election to the Operating Committee. The Petitioner represents that the Operating Committee is not involved in the hiring or supervision of volunteer firefighters, who report directly to the Fire Chief. He explains that volunteer firefighters are eligible for stipends, provided that they attend the requisite number of trainings and meetings, and respond to a certain number of emergency calls, each month. The Petitioner further explains that the stipends are funded from the Fire Department's budget and distributed on a quarterly basis. He states that stipend amounts are determined by the number of emergency calls to the Fire Department each month divided by the number of eligible volunteer firefighters who respond to each emergency call. The Petitioner represents that there are approximately 30 active volunteer firefighters on the Fire Department and that, when an emergency call is dispatched, every available volunteer firefighter is expected to respond. The Petitioner further represents that the presence of a volunteer firefighter in response to an emergency call is documented on a form signed by the officer at the scene, which could be the Fire Chief, and by the volunteer firefighter. He explains that a clerk then enters the information into a matrix on the Fire Department website which calculates the amount of the stipend to be paid to the eligible volunteer firefighter. The Petitioner states that volunteer firefighters were formerly Fire Department sub-contractors but now, primarily for tax purposes, are Fire Department employees. He further states that, while he cannot recall a volunteer firefighter ever having been terminated from his or her position, any decision to terminate a volunteer firefighter would require a majority vote by all officers and senior members of the Fire Department.

The Petitioner represents that he would like to seek re-election to the Operating Committee in July of 2020, or as soon thereafter as the election can be held. It is in the context of these facts that he seeks advice from the Ethics Commission regarding whether the Code of Ethics prohibits him from serving simultaneously as a member of the Operating Committee and as a volunteer firefighter in the Fire District.

Under Commission Regulation 520-RICR-00-00-1.5.4 Municipal Official Revolving Door (36-14-5004) ("Regulation 1.5.4"), no municipal elected official, while holding office and for a period of one (1) year after leaving municipal office, shall seek or accept employment with any municipal agency in the municipality in which the official serves. Notably, the Code of Ethics specifically includes fire districts in both the statutory and regulatory definitions of "municipal agency." R.I. Gen. Laws § 36-14-2(8)(ii); Regulation 1.5.4(A)(2). An exception exists if the municipal official held the employment in question at the time of his election to office. Regulation 1.5.4(A).

Here, the Petitioner's service as a volunteer firefighter predates his initial appointment and eventual election to the Operating Committee. Accordingly, based on the Petitioner's representations, Regulation 1.5.4 does not prohibit him from continuing to serve as a member of the Operating Committee, notwithstanding his current employment as a volunteer firefighter within the Fire Department. See A.O. 2017-16 (opining that a member of the Lime Rock Board of Fire Commissioners could continue his contract employment as the Director of Plan Review for the Lime Rock Fire District, a position he had held since prior to his election to the Board of Fire Commissioners, provided that he recuse from participation in Board matters that would impact his employment as the Director of Plan Review); A.O. 2008-72 (opining that an East Providence City

Council member's towing company could remain on the City's tow list, notwithstanding his membership on the City Council, given that his company had been on the tow list since before his election to office, but that his participation in City Council matters involving his company and others on the tow list, or relative to towing within the City in general, was prohibited); A.O. 2007-3 (opining that a Charlestown Town Council member could retain his part-time employment as a custodian at the Charlestown Senior Center which was held prior to his election to the Town Council, but that his participation in Town Council matters involving the Senior Center that would impact his part-time employment was prohibited). Compare A.O. 2013-11 (opining that a former volunteer firefighter in the Pascoag Fire District who resigned from that position in order to seek election to the Pascoag Fire District Board of Commissioners was prohibited from seeking reinstatement as a volunteer firefighter in the Fire District once elected to the Board, for the duration of his service on the Board, and for a period of one (1) year after leaving office).

Although the Petitioner's simultaneous service as a member of the Operating Committee and as a volunteer firefighter is not prohibited by Regulation 1.5.4, several other provisions of the Code of Ethics are implicated, as illustrated in the string of advisory opinions cited above. Specifically, 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 a public official has reason to believe or expect that he, any person within his family, his business associate or his employer will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity. Section 36-14-7(a). Further, a public official is prohibited from using his public office or confidential information received through his public office to obtain financial gain for himself, any person within his family, his business associate, or any business by which he is employed or which he represents. Section 36-14-5(d). Finally, a public official may not accept other employment that would impair his independence of judgment as to his official duties or require or induce him to disclose confidential information acquired by him in the course of his official duties. Section 36-14-5(b).

Although the Code of Ethics does not create an absolute bar to the Petitioner's simultaneous service in both positions, a matter-by-matter evaluation and determination as to whether substantial conflicts of interest exist with respect to the Petitioner's execution of his duties in the public interest will be required on an ongoing basis. Presently, given the Petitioner's representation that the Operating Committee has no direct involvement in the hiring or supervision of volunteer firefighters, coupled with his explanation of how stipends are funded and determined, it does not appear likely that the Petitioner's activity as a member of the Operating Committee would impair his independence of judgment as to his official duties as a volunteer firefighter, or vice versa. Absent some direct financial nexus between the Petitioner's actions as a member of the Operating Committee and his actions as a volunteer firefighter in the same district, no inherent conflict of interest would preclude such simultaneous service.

Further, the Petitioner's description of his duties, both as a member of the Operating Committee and as a volunteer firefighter in the same district, do not indicate that such simultaneous service, in and of itself, creates a substantial conflict of interest within the meaning of the Code of Ethics. The Petitioner represents that the members of the Operating Committee, with input and advice from two members of the Fire Department who are not members of the Operating Committee, are

tasked with hiring the Fire Chief to whom the Petitioner will eventually report in his capacity as a volunteer firefighter. While this could potentially present an appearance of impropriety, any such appearance of impropriety would likely be lessened by the system in place under which the volunteer firefighters respond to and are compensated for emergency calls and the lack of discretion on the part of the Fire Chief with respect to both. Additionally, the termination of a volunteer firefighter's employment requires a majority vote by all officers and senior members of the Fire Department.

In summary, it is the opinion of the Ethics Commission that the Code of Ethics does not prohibit the Petitioner from simultaneously serving as a member of the Operating Committee and as a volunteer firefighter in the Dunn's Corner Fire District, given that his employment as a volunteer firefighter predates his election to the Operating Committee. However, this advisory opinion is limited to the specific issue of simultaneous service only. It does not, nor can it, contemplate circumstances in which the Operating Committee might be tasked with deciding matters that might impact volunteer firefighters like the Petitioner. Therefore, the Petitioner is advised that if any matters should come before him as he is carrying out his duties in either of his public roles that may present a potential conflict of interest, or if circumstances arise in which it is reasonably foreseeable that there will be a financial impact upon the Petitioner personally, any person within his family, his business associate, or his employer, he should either request further advice from the Ethics Commission or recuse from participation 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(8)
§ 36-14-5(a)
§ 36-14-5(b)
§ 36-14-5(d)
§ 36-14-6
§ 36-14-7(a)
520-RICR-00-00-1.5.4 Municipal Official Revolving Door (36-14-5014)

Related Advisory Opinions:
A.O. 2017-39
A.O. 2013-11
A.O. 2008-72
A.O. 2007-3

Keywords:
Dual Public Roles

Revolving Door

RHODE ISLAND ETHICS COMMISSION

Draft Advisory Opinion

Hearing Date: June 2, 2020

Re: Gregory Maxwell, AIA

QUESTION PRESENTED:

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

RESPONSE:

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

The Petitioner has been a member of the East Greenwich Historic District Commission ("HDC") since 2015. In his private capacity, the Petitioner is an architect, registered in Rhode Island since 2009. The Petitioner represents that his personal residence, which he has owned since 2013, is located within the East Greenwich Historic District and, thus, subject to the jurisdiction of the HDC. He states that he would like to install a new garden shed with dimensions ten (10) feet by twenty-two (22) feet and a roof-mounted solar array on his property and that, in order to do so, he must receive Certificates of Appropriateness from the HDC prior to erecting, altering, restoring, moving or demolishing any part of his historic property. The Petitioner explains that he intends to use the shed to store tools, a lawn mower, and other personal items. He further explains that he would like to personally present the drawings and specifications relative to the installation of the proposed new shed to the HDC in order to seek approval and issuance of a Certificate of Appropriateness. However, for the solar array, he would like to engage a local installation company that would present the proposal to the HDC. The Petitioner states that he will recuse from HDC's discussions and decision-making relative to his applications. Based on this set of facts, the Petitioner seeks the guidance of the Ethics Commission regarding whether he qualifies for a hardship exception to represent himself and/or authorize another person to represent him, before the HDC.

The Code of Ethics prohibits a public official from representing himself or authorizing another person to appear on his behalf before a state or municipal agency of which he is a member, by which he is employed, or for which he is the appointing authority. R.I. Gen. Laws § 36-14-5(e)(1);

Commission Regulation 520-RICR-00-00-1.1.4(A)(1) Representing Oneself or Others, Defined (36-14-5016) ("Regulation 1.1.4"). Absent an express finding by the Ethics Commission in the form of an advisory opinion that a hardship exists, these prohibitions continue while the public official remains in office and for a period of one year thereafter. Section 36-14-5(e)(1) & (4). Moreover, while many conflicts can be avoided under the Code of Ethics by recusing from participation, such recusal is insufficient to avoid section 36-14-5(e)'s ("section 5(e)") prohibitions against self-representation absent an express finding by the Ethics Commission that a hardship exists. Upon receiving a hardship exception, the public official is required to recuse from participating in his agency's consideration and disposition of the matter at issue. Section 36-14-5(e)(1)(ii). The public official must also "[f]ollow any other recommendations that the Ethics Commission may make to avoid any appearance of impropriety in the matter." Section 36-14-5(e)(1)(iii).

Hardship Exception – R.I. Gen. Laws § 36-14-5(e)(1)

The Petitioner's proposed conduct falls squarely within the Code of Ethics' prohibition on representing himself before an agency of which he is a member. Having determined that section 5(e)'s prohibitions apply to the Petitioner, the Ethics Commission will consider whether the unique circumstances represented by the Petitioner herein justify a finding of hardship to permit him to appear, either personally or through a representative, before the HDC.

The Ethics Commission reviews questions of hardship on a case-by-case basis and has, in the past, considered some of the following factors in cases involving real property: whether the subject property involved the official's principal residence or principal place of business; whether the official's interest in the property was pre-existing to his public office or was recently acquired; whether the relief sought involved a new commercial venture or an existing business; and whether the matter involved a significant economic impact. The Ethics Commission may consider other factors and no single factor is determinative.

Recently, the Ethics Commission applied the hardship exception in an analogous situation. In Advisory Opinion 2020-15, the Ethics Commission granted a hardship exception to a member of the Exeter Zoning Board of Review to allow him to represent himself before his own board in order to seek a dimensional variance to construct a shed at his personal residence that he acquired prior to his appointment to the Zoning Board. The Ethics Commission opined, however, that the petitioner was required to recuse from participation and voting during the Zoning Board's consideration of his request for relief, consistent with section 36-14-6. See also A.O. 2011-34 (granting a hardship exception to an East Greenwich Zoning Board member and opining that she could represent herself before her own board in order to seek a dimensional variance from the side-yard setback requirement to build a storage shed at her personal residence that she acquired prior to her appointment to the Board).

In the present matter, the Petitioner seeks to install a new shed and a solar array at his personal residence, his ownership of which predates his appointment to the HDC. Further, the relief sought is personal, not commercial. Based upon the above representations, it is the opinion of the Ethics Commission that the totality of the circumstances justifies making an exception to section 5(e)'s prohibitions against self-representation. Accordingly, the Petitioner may appear, either personally

or through a representative, before the HDC to seek Certificates of Appropriateness for the installation of a new shed and a solar array at his personal residence. However, the Petitioner must recuse from participation and voting when the HDC considers his applications. Notice of recusal must be filed with the Ethics Commission consistent with section 36-14-6.

Hardship Exception – GCA 2010-1 for "Historic Architects Who Are Members of Historic District Commissions."

The Ethics Commission has also carved out a specific hardship exception outlined in GCA 2010-1 for "Historic Architects Who Are Members of Historic District Commissions."[1] This exception is based upon the Ethics Commission's finding that "municipal historic district commissions within the state of Rhode Island are best served if they are able to have a sitting member who specializes in historic architecture and preservation." GCA 2010-1. The Ethics Commission has concluded that, given the limited number of historic architects in the state, recruiting qualified persons to serve on historic district commissions would be difficult and would reduce the ability of historic district commissions to effectively function if those architects are thereafter prohibited from representing private clients before the commission on which they serve.

Notably, pursuant to GCA 2010-1, members of historic district commissions may not presume that the exception is applicable to their specific set of circumstances, but are required to seek an advisory opinion each time they consider accepting a client whose project would require them to appear before their own board.

Additionally, GCA 2010-1's narrow exception only applies to historic architects and does not apply to other architectural specialties. See A.O. 99-120 (declining to grant a hardship exception to a member of the New Shoreham Historic District Commission who was a landscape architect and the owner of a landscape architecture business on the island because his occupation did not fall within the guidelines of a historic architect). Thus, in order for GCA 2010-1 to apply to a particular set of facts, the Petitioner must make representations to establish that he is a qualified historic architect. For example, the Ethics Commission granted six separate hardship exceptions to a member of the North Kingstown Historic District Commission, who was also an architect in private practice in that same town, after concluding that it was satisfied by her representations regarding her education, work experience in historic preservation, and her qualifications as a historic architect. A.O. 2020-24; 2018-37; 2018-2; A.O. 2015-39; A.O. 2015-7 & A.O. 2014-24.

In the present matter, the Petitioner represents that his work experience and education meet the United States Secretary of the Interior's minimum professional qualifications for a historic

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

architect.[2] The Petitioner represents that he has a Bachelor's degree in Art History from the University of Texas at Austin, where he also completed a graduate level course in Historic Preservation, and a Master of Architecture degree from Rhode Island School of Design. He further represents that he has been a licensed architect in Rhode Island since 2009. The Petitioner states that, although his current practice has been largely non-specialized, he has previously provided oversight and prepared drawings and specifications for several historic buildings including the Chorus of Westerly, St. Teresa's Church in Pawtucket, the Peerless Building in Providence, and two late 19th-century homes, one designed by Charles Bevins located in Jamestown, Rhode Island and the other designed by William Emerson located in Gosnold, Massachusetts. Furthermore, the Ethics Commission previously issued two advisory opinions to this same Petitioner, relative to his service on the HDC having been satisfied with his representations that he was qualified as a historic architect. See A.O. 2018-10 & A.O. 2017-51.

Accordingly, it is the opinion of the Ethics Commission that the Petitioner qualifies for a hardship exception to the Code of Ethics' prohibition on representing himself before the HDC, in accordance with GCA 2010-1, to seek Certificates of Appropriateness for the installation of a new shed and a solar array at his personal residence, provided that he recuses from participating in all HDC matters involving the aforementioned matters. Notice of recusal shall be filed consistent with section 36-14-6.

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

Code Citations:
§ 36-14-5(e)
§ 36-14-6
520-RICR-00-00-1.1.4 Representing Oneself or Others, Defined (36-14-5016)

Related Advisory Opinions:
G.C.A. 2010-1

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

> A professional degree in architecture or a State license to practice architecture, plus one of the following:
>
> 1. At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or
>
> 2. At least one year of full-time professional experience on historic preservation projects.
>
> Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specifications for preservation projects.

http://www.nps.gov/history/local-law/arch_stnds_9.htm (last accessed on May 22, 2020).

A.O. 2020-24
A.O. 2020-15
A.O. 2018-37
A.O. 2018-10
A.O. 2018-2
A.O. 2017-51
A.O. 2015-39
A.O. 2015-7
A.O. 2014-24
A.O. 2011-34
A.O. 99-120

Keywords:
Hardship Exception
Historic Architect