

## **General Commission Advisory No. 2009-2: Public Officials' Actions Involving Their Own Stipends, Salaries, Compensation or Benefits**

### **I. General Prohibitions**

Central to the foundation of the Rhode Island Code of Ethics in Government is the core principle that a public official or employee may not take any action, or in any way use his or her position or employment, to obtain financial gain for himself or herself. This fundamental concept flows from the general conflict of interest prohibition found in R.I. Gen. Laws § 36-14-5(a), and further defined in R.I. Gen. Laws § 36-14-7, as well as the prohibition on the use of office to obtain financial gain found in R.I. Gen. Laws § 36-14-5(d).

What this means in practical terms, for example, is that a person subject to the Code of Ethics: cannot vote as a member of a city or town council to pass an ordinance to increase the pay of the incumbent council members; cannot vote as a school committee member to increase incumbent members' stipends or benefits; and cannot take action as a mayor or town manager that results in additional pay or benefits for himself or herself. This does not mean that salaries, stipends, or other forms of compensation and benefits must remain stagnant for these individuals; rather, it means that any official actions taken to increase salaries or benefits must only be realized by successors in office, and not by the current individual office holders or agency members.

#### ***EXAMPLE:***

*A is a member of the Anytown Town Council. The Council is considering an ordinance amendment that would provide for increased compensation for all current Town Council members. A and other council members are prohibited by R.I. Gen. Laws § 36-14-5(a) and (d) from participating in discussion and voting regarding an increase in their own salaries.*

*A is the Town Manager in Anytown. A has been working many long hours and believes he is worthy of a salary increase. A instructs the Anytown Finance Director, B, to increase his salary by 10%, given all of the overtime hours he has been putting in on nights and weekends. A's action in ordering B to increase his salary is prohibited.*

### **II. Specific Parameters and Limitations**

While some official actions taken by a person subject to the Code of Ethics to increase his or her own salary or benefits may obviously violate R.I. Gen. Laws § 36-14-5(a) or (d), such as voting for one's own raise or ordering a subordinate to provide a salary increase, other situations create circumstances that are not necessarily as clear-cut. Certainly, public officials' and employees' salaries are not permanently frozen by the Code of Ethics. This raises the question of what kinds of actions an official *may* take that

ultimately lead to an increase in compensation or benefits for persons subsequently occupying his or her position. The following subsections are intended to provide examples of other types of related official actions and to clarify which types of actions are prohibited by the Code of Ethics, and which do not create a prohibited conflict of interest.

**A. Salary/Stipend Increases for Prospective/Future Officials**

While an officeholder may not take official action that results in an increase in salary or benefits to himself or herself, an official may take action to increase a subsequent officeholder's compensation, provided that the official has not yet been re-elected or filed for candidacy for the same position in the next election cycle.<sup>1</sup>

***EXAMPLE:***

*A is a member of the Anytown School Committee. The School Committee wishes to consider a stipend increase for School Committee members from \$500 annually to \$1,000 annually. The proposed increase would not take effect until after the next election cycle. None of the incumbent School Committee members have declared their candidacy for the next election and the deadline to file for candidacy is one calendar year away. In this instance, School Committee members may have discussion and vote on an action to increase future School Committee members' stipends.*

It should be noted that the prohibitions found at R.I. Gen. Laws § 36-14-5(a) and (d) do not prevent a state or municipal employee from requesting a raise from their supervisor in the ordinary course of employment, even if they are supervised by an entity rather than an individual. In that instance, the employee is taking action as a private individual who happens to be a public employee and is not taking official action, such as voting, or directing a subordinate to take some action.

***EXAMPLE:***

*A is the Executive Director of the XYZ Public Agency. The XYZ Public Agency is overseen by the XYZ Commission. A believes that she is doing*

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<sup>1</sup> See A.O. 2006-28 (opining that, once the deadline for filing for candidacy has passed, Providence City Council members running unopposed were prohibited from voting on a salary increase to take effect after the next election and, furthermore, stating that "incumbent candidates . . . aware of their opposition . . . have the ability to measure the likelihood of their success in retaining their positions on the City Council. Those who face inexperienced opponents in the upcoming election, or other non-viable candidates, may reasonably conclude that they will derive a financial benefit by taking official action on the proposed salary increase[,] . . . [and thus,] Council members who face opposition in the election are likewise prohibited from participating in the City Council's consideration of a proposed salary increase.")

*twice as much work as the predecessor Executive Director and would like to be more fairly compensated. A is prohibited, in her capacity as Executive Director, from unilaterally allocating additional budgetary funds to increase her own salary. A is not prohibited, however, from approaching the XYZ Commission with her concerns, nor is she prohibited from accepting an increase in compensation proposed by the XYZ Commission.*

#### **B. Entities with Staggered Terms**

Some state and municipal agencies, boards, commissions, and councils are composed of individuals serving under staggered terms, such that members do not all leave office or run for re-election at the end of the same term. As such, the question is raised as to when members of such entities may or may not vote for salary or stipend increases for agency members. The answer is simple: consistent with prior examples, a person subject to the Code may not vote on any increase that will take effect prior to the next election cycle, or before the end of their own term of office.

#### ***EXAMPLE:***

*A is a member of the Anytown School Committee. School Committee members serve on two-year staggered terms such that: Members A and B's terms will conclude in December 2009; Members C and D's terms will conclude in December 2010; and Members E and F's terms will conclude in December 2011. The School Committee wishes to consider an increase in stipend for School Committee members from \$500 annually to \$1,000 annually. If the proposed increase would not take effect until after the November 2011 election cycle, then all incumbent School Committee members may participate in discussion and vote on related action. If, however, the proposed increase would take effect in January, 2011, then E and F would be prohibited from participating in any discussion or vote regarding this action, given that they would receive a raise. Additionally, any other members who have declared their candidacy for the 2010 election cycle would also be prohibited from participating. Alternatively, a School Committee member could make a motion to stagger the salary increases, in accordance with the conclusion of the members' various staggered terms, such that no one member is voting on an increase that they would themselves realize.*

#### **C. Voting Oneself into a Position with an Additional Stipend**

A variation on the previously described circumstances arises when members of a commission, board, agency, or other public entity elect officers such as Chair, Vice-Chair, or Secretary and such positions carry with them an additional stipend above and beyond what other non-officer members receive. Commission Regulation 36-14-7004 addresses precisely this set of circumstances. This Regulation provides that a public

official may participate in the vote to elect himself or herself to such a position that carries with it additional compensation *only* if the additional compensation was in effect when the vote was taken; otherwise, pursuant to the Regulation, the additional monies must be waived.

**EXAMPLE:**

*A is a non-officer member of the Anytown Library Board of Trustees. Regular members of the Board receive a \$50 annual stipend, while officers of the Board receive a \$100 annual stipend; these stipend amounts have been the same for ten years. The Board is taking up its annual election of officers. A may participate in the election and vote for herself as Chair, Vice-Chair, or Secretary without violating the Code.*

*B is a non-officer member of the Anytown Zoning Board of Review ("ZBR"). B participates in the vote for Chairperson of the ZBR and votes for himself. Subsequent to the vote, the ZBR decides to discuss under "New Business" the possibility of increasing the Chair's stipend from \$50 annually to \$75 annually. While it is not a violation for B to have voted for himself as Chair, pursuant to Regulation 7004, he must recuse from all discussion and vote regarding an increase in the incumbent Chair's stipend.*

**D. Financial Town Meetings**

The prohibitions set forth in the Code of Ethics adhere to actions that state and municipal officials and employees undertake in their public capacities; accordingly, prohibitions in the Code do not generally apply to actions that public officials take as private citizens, unless such actions are specifically proscribed by the Code (for example, among other things, the acceptance of secondary employment that impairs one's independence of judgment in the performance of public duties pursuant to R.I. Gen. Laws § 36-14-5(b) and the prohibition on representing oneself or others before one's former public agency for one year subsequent to separation from service, pursuant to R.I. Gen. Laws § 36-14-5(e)).

In this instance, a public official or employee may wonder if they are permitted to participate in a municipal financial town meeting as a member of the public in matters that may impact the budget, salaries, or benefits of their own public agency. On this matter, the Ethics Commission has specifically stated that "nothing in the Code of Ethics limits a duly registered member of the Rhode Island electorate from properly voting, pursuant to R.I. Const. art II, sec. 1, on any matter submitted to the electors."<sup>2</sup>

**EXAMPLE:**

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<sup>2</sup> A.O. 2009-19.

*A is an employee of the Anytown Department of Public Works (“DPW”). B is a member of the Anytown School Committee. At the Anytown Financial Town Meeting, voters will take up various warrant articles of the Anytown budget, including the overall budget for the DPW and for the School District. Both budgets include line items regarding employee compensation, including A’s salary as a DPW employee and B’s stipend as a School Committee member. Neither A nor B is prohibited by the Code of Ethics from voting on these matters as private citizen/electors at the Town Financial Meeting.*

**E. Prohibition Includes Monetary Loss**

Included within the definition of conflict of interest pursuant to R.I. Gen. Laws § 36-14-7(a), are actions taken in the discharge of public duties that result in a “direct monetary loss” to the official “by reason of his or her official activity.” What this means is that an official may not vote or take action that results in a loss of compensation or benefits to him or herself.

**EXAMPLE:**

*A is a member of the Anytown School Committee. Currently, Anytown is experiencing a deep fiscal crisis. A would like to propose that the stipend for School Committee members be reduced from \$500 to \$1 as a cost saving measure. A believes that this measure should be voted on immediately and should apply to the current fiscal year, and, thus, would impact the incumbent School Committee members. A is prohibited from voting on or otherwise participating in this matter, given that he will “suffer a direct monetary loss” by way of his official action, and thus, will have participated in prohibited activity pursuant to R.I. Gen. Laws § 36-14-5(a). This prohibition prevents an official from taking official action that results in a direct monetary loss; this does not, however, prevent an official from individually opting, as a private citizen, to waive or return their stipend.*

**F. No Increase**

Finally, officials and employees *may* participate in actions that involve no resulting increase or decrease in compensation or benefits, but, merely maintain a *status quo*.

**EXAMPLE:**

*A is a member of the Anytown School Committee. The School Committee must create a proposed budget that will be approved by the Anytown Budget Committee and eventually voted on at the Anytown Financial Town meeting. Included in the proposed budget is a line-item for School Committee members’ stipends, which has been \$100 annually for the past*

*ten years. A may vote on the proposed budget, notwithstanding that her own stipend is a line-item in the budget, as she will experience neither a financial benefit nor a financial loss if the stipend stays at the same amount.*

#### **V. Topical Advisory Opinion Abstracts:**

The following citations are to advisory opinions previously issued that have dealt with public officials' and employees' participation in matters concerning their own compensation and benefits and are included to provide general information and guidance as to some of the types of issues previously raised in the advisory opinion context regarding this issue. However, be advised that, pursuant to Commission Regulation 36-14-1024, persons subject to the Code may not rely on advisory opinions issued to others. Additionally, individuals may not request advisory opinions regarding other peoples' conduct; accordingly, persons subject to the Code may only request an advisory relative to the provisions of the Code which may affect that individual, and may not ask for one on behalf of anyone else. Also included are citations to relevant Rhode Island Superior and Supreme Court decisions.

##### **Expense Reimbursement:**

**97-128** (opining that Warwick City Council members may not accept expense reimbursement payments of \$100 per month because they directly participated in the discussions relating to an increase in benefits to themselves, even though the funding for the expense reimbursement resulted ultimately from the Mayor's veto and not from an affirmative vote of the City Council)

##### **Financial Town Meeting:**

**2009-19** (opining that a Tiverton School Committee member was not prohibited by the Code from properly voting, as a duly registered member of the Rhode Island electorate, pursuant to R.I. Const. art II, sec.1, on any matter submitted to the electors and, thus, was not prohibited from participating as an elector in the Tiverton Financial Town meeting in matters regarding the School Committee budget, including School Committee members' stipends)

##### **Increase Proposed by Supervisory Entity:**

**2008-29** (opining that the Treasurer for the Town of Scituate was not prohibited from accepting an offer from the Town Council that would expand his position as Treasurer from that of a part-time to a full-time position, with an associated increase in salary commensurate with the expansion of his duties)

**2000-6** (opining that a New Shoreham Island Free Library Board of Trustees member may accept remuneration for her services as Treasurer, provided that she neither 1) requested compensation from the Board, nor 2) participated in the Board's efforts to obtain such compensation from the Town Council)

99-115 (opining that, while members of the Gloucester Housing Authority may not receive compensation for their efforts in regard to additional duties handled in the absence of a manager if the members of the Housing Authority themselves take action to provide for or set their own compensation, the Code does not prevent another body, *i.e.* Town Council, from setting compensation for the Board members independent of any action by the Housing Authority members)

**No Financial Gain:**

2009-19 (opining that a Tiverton School Committee member may make a recommendation to the Budget Committee, as a part of the overall School Committee budget, as to School Committee members' stipends for incumbent members that does not include an increase, given that such action will be voted upon by the qualified electorate at a duly noticed public meeting)

**Resolution Sufficient to Constitute Official Activity:**

*Celona v. Rhode Island Ethics Com'n*, 544 A.2d 582 (R.I. 1988) (holding that members of the North Providence Town Council violated conflict of interest law by passing and obtaining the adoption of a resolution authorizing payment to each Council member of fixed \$100 per month for expenses, notwithstanding that resolution would subsequently require legislative action by the General Assembly to become effective)

**Voting on Increase after Filing Candidacy or Having Been Re-Elected:**

2006-28 (opining that members of the Providence City Council who were seeking re-election to office were prohibited from participating and voting on a proposed salary increase for the City Council which would take effect in January 2007, given that the deadline for filing candidacy declarations had expired, and thus, the affected City Council members were cognizant of the opposition, if any, that they would face in the next election; therefore, it was reasonably foreseeable that by participating and voting on the proposed salary increase, the affected members would derive a financial benefit)

97-130 (opining that, while members of the Board of Utility Commissioners of the Pascoag Fire District were prohibited from proposing, voting or otherwise participating in any process or mechanism that would result in the receipt of a stipend of up to \$5,000 per year by individual incumbent members of the Board of Utility Commissioners for administrative services rendered, but, a mechanism whereby the Board of Commissioners or the voters approve the receipt of a stipend by Commissioners, including re-elected incumbents, elected at an annual meeting subsequent to the approval of the stipend would be consistent with the provisions of the Code of Ethics)

96-21 (opining that the Pawtucket Mayor and City Council members may vote on salary increases taking effect in a subsequent term, provided that the vote is taken before candidacy declarations are filed for the next election)

*Traficante v. Conflict of Interest Comm.*, 1991 WL 789832 (R.I. Super. 1991) (holding that the Code of Ethics prohibited Cranston City Council members who had been re-elected from voting on a salary increase for the next ensuing term during the interim

between the election and the commencement of the next term, and furthermore, prohibited the Cranston Mayor, who had been re-elected to office, from approving or otherwise acting in a manner resulting in approval of an ordinance increasing his salary for the next ensuing term of office)