

## Advisory Opinion No. 2013-1

Re: Richard J. Fagnant

### QUESTION PRESENTED

The Petitioner, an alternate member of the Woonsocket Zoning Board, a municipal appointed position, requests an advisory opinion regarding whether the Code of Ethics prohibits him from participating in the Zoning Board's consideration of a dimensional variance application, given that he has previously done business with the applicant.

### RESPONSE

It is the opinion of the Rhode Island Ethics Commission that the Petitioner, an alternate member of the Woonsocket Zoning Board, a municipal appointed position, is not prohibited by the Code of Ethics from participating in the Zoning Board's consideration of a dimensional variance application, notwithstanding that he has previously done business with the applicant.

The Petitioner is the second alternate member of the Woonsocket Zoning Board of Review ("Zoning Board"). He states that the Zoning Board consists of five (5) members appointed by the City Council and two (2) alternates appointed by the Mayor. He informs that a quorum consists of five (5) members. He represents that in his private capacity he owns and operates a business that screen prints and embroiders apparel for advertising purposes. He informs that in May and June of 2012, he received orders for sample restaurant uniforms from the general manager of Gary Fernandes' restaurant. Given the ongoing business relationship, the Petitioner recused from Mr. Fernandes' application for a dimensional variance when it was considered by the Zoning Board on July 9, 2012, and July 23, 2012.

The Petitioner states that the Zoning Board denied Mr. Fernandes' application for a dimensional variance on July 23, 2012. Thereafter, Mr. Fernandes appealed the Zoning Board's decision. Recently, in November 2012, the Superior Court remanded the matter back to the Zoning Board after concluding that the findings of fact were insufficient. As a result of the remand, the Zoning Board must schedule Mr. Fernandes' application for reconsideration.<sup>1</sup>

At this time, the Petitioner seeks advice from the Ethics Commission as to whether he can participate in the Zoning Board's consideration of Mr. Fernandes' application, given that he is no longer doing business with Mr. Fernandes. He states that he was paid in full

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<sup>1</sup> It is possible that three (3) of the seven (7) Zoning Board members might be required to recuse from the Zoning Board's reconsideration Mr. Fernandes' application. One (1) member publically opposed Mr. Fernandes' application prior to his August 2012 appointment to the Zoning Board. Two (2) other members, including the Petitioner, may have conflicts under the Code of Ethics and this advisory opinion is one step toward ascertaining whether the Zoning Board will have a quorum to consider Mr. Fernandes' application.

by Mr. Fernandes' general manager for all outstanding orders on October 3, 2012. The Petitioner further informs that on that same day he and Mr. Fernandes' general manager got into an argument, at which time the general manager informed him that they will no longer be doing business with his company. The Petitioner states that he has not heard from Mr. Fernandes or his general manager since that time. He informs that all orders for Mr. Fernandes' business have been completed, paid in full and that there are no ongoing business transactions. Additionally, given the argument on October 3, 2012, the Petitioner states that he does not anticipate any future orders for uniforms from Mr. Fernandes' restaurant.

Under the Code of Ethics, a public official must recuse himself from participation when his business associate or a person authorized by his business associate, appears or presents evidence or arguments before his state or municipal agency. Commission Regulation 36-14-5002 ("Regulation 5002"); R.I. Gen. Laws § 36-14-5(f). The Code of Ethics also prohibits a public official from using his public office or confidential information received through his public office to obtain financial gain for himself, his family, his business associate, or any person by which he is employed or whom he represents. Section 36-14-5(d).

Additionally, 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. Section 36-14-5(a). A substantial conflict of interest exists if an official has reason to believe or expect that he, any person within his family, a business associate or an employer will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity. Section 36-14-7(a). A business associate is defined as "a person joined together with another person to achieve a common financial objective." Section 36-14-2(3). A person is defined as "an individual or a business entity." Section 36-14-2(7).

This Commission has consistently found that no conflict of interest exists under of the Code of Ethics when a prior business relationship between a public official and a private party has ended and there is no ongoing or anticipated future relationship between the parties. In such instances, a public official may participate in matters involving his or her former employer or business associate, assuming no other conflicts are present.

The Commission considered a similar fact pattern in Advisory Opinion 2011-30, in which a Gloucester Planning Board member asked if he could participate in the Planning Board's consideration of a development plot plan review submitted by someone for whom he previously worked. There, the Commission opined that the petitioner could participate because his business relationship with the applicant had ended, he was paid in full and there were no anticipated future dealings between them. See also A.O. 2011-9 (opining that an East Providence City Council member was not prohibited from participating in and voting on City Council matters in which her former employer was an interested party, given that the employment had ended, she was paid in full and there was

no ongoing or anticipated future working relationship).

In the present matter, the Petitioner represents that his business relationship with Mr. Fernandes' ended on October 3, 2012, when he was paid in full for all outstanding orders and advised by Mr. Fernandes' general manager that they would not be doing business again. Therefore, it is the opinion of the Ethics Commission that the Petitioner is not prohibited by the Code of Ethics from participating in the Zoning Board's consideration of Mr. Fernandes' dimensional variance application, notwithstanding that he previously sold uniforms to Mr. Fernandes' restaurant.

Finally, this advisory opinion only considers the Code of Ethics and provides no opinion as to whether the Woonsocket City Charter, the Woonsocket Code of Ordinances or any other statutes, regulations, rulings or policies prohibit his participation in this matter.

Code Citations:

§ 36-14-2(3)

§ 36-14-2(7)

§ 36-14-5(a)

§ 36-14-5(d)

§ 36-14-5(f)

§ 36-14-7(a)

Commission Regulation 36-14-5002

Related Advisory Opinions:

A.O. 2012-26

A.O. 2011-30

A.O. 2011-9

A.O. 2010-16

A.O. 2008-7

A.O. 2004-3

Keywords:

Business Associate

Recusal