STATE OF RHODE ISLAND
BEFORE THE RHODE ISLAND ETHICS COMMISSION

In re: Joseph S. Larisa, Jr.
Respondent

Complaint No. 2010-12

RECEIVED
RHODE ISLAND
ETHICS COMMISSION
11 NOV -9 PM 3:39

Decision and Order of the Ethics Commission

Background

This matter was adjudicated by the State of Rhode Island Ethics Commission ("Commission") on July 19, 2011, pursuant to R.I.G.L. § 36-14-13 and Ethics Commission Regulation 1015. The following Commissioners were present for the entire adjudicative proceeding and participated in the deliberations and rendering of this Decision and Order: Ross E. Cheit, Chair, Sr. Deborah M. Cerullo, Vice-Chair, J. William W. Harsch, Secretary, James V. Murray, Frederick K. Butler, John Lynch, Jr., and Mark B. Heffner.

Katherine D'Arezzo, staff attorney for the Commission, prosecuted the case. Respondent, Joseph S. Larisa, Jr., an attorney, represented himself pro se. Edmund L. Alves, Jr. attended all proceedings as legal counsel for the Commission.

At the conclusion of the adjudicative proceeding, the Commission, by a unanimous vote of 7-0, found that the Respondent had committed a knowing and wilful violation of R.I.G.L.§ 36-14-5(e)(2) on March 9, 2010 and imposed a civil penalty of $1,000.

Travel of the Case

On October 1, 2010, John J. Rossi filed a Complaint with the Commission naming Joseph S. Larisa, Jr., a member of the East Providence City Council ("City Council"), a municipal elected position, as the Respondent. The Complaint alleged that the Respondent violated R.I.G.L. § 36-14-5(e)(2) by his representation of clients before the East Providence Probate Court ("Probate Court"), over which he exercised appointing authority and fiscal control in his

capacity as an elected member of the East Providence City Council. The Complaint alleged that Mr. Larisa appeared before the Probate Court in May 2006 and on March 9, 2010.

Pursuant to Commission Regulation 1003, the Commission on October 21, 2010 made an initial determination that if the Respondent had represented a client before the East Providence Probate Court on March 9, 2010, he may have committed a knowing and wilful violation of the Code of Ethics. The Commission authorized a full investigation to determine whether probable cause existed to support that one allegation. The Commission also determined that the remainder of the allegations in the Complaint did not state facts sufficient to constitute a knowing and wilful violation of the Code of Ethics since Commission Regulation 5016 did not take effect until October 22, 2006, months after the first alleged violation. Regulation 5016 redefined R.I.G.L. § 36-14-5(e)(2) so that a municipal official is now prohibited from appearing not only before his or her own agency, but also before an agency over which the official has appointing authority.

The Commission conducted a probable cause hearing in this matter on March 27, 2011 pursuant to R.I.G.L. § 36-14-12(c)(4) and Commission Regulation 1006. After considering the Investigative Report, Respondent's Memorandum, and argument of counsel, the Commission unanimously adopted the following finding of probable cause:

> There is probable cause to believe that the Respondent, Joseph S. Larisa, Jr., a member of the East Providence City Council, represented the Estate of Marilyn W. Jones before the East Providence Probate Court on March 9, 2010, in violation of R.I.G.L. § 36-14-5(e)(2).

The adjudicative hearing was conducted in open session on July 19, 2011. A stenographer was present during the open session. At the conclusion of the hearing, the Commission immediately began deliberations in executive session with only the seven

Commissioners who were present during the adjudicative hearing and the Commission's legal counsel in attendance. After deliberating, the Commission, by a unanimous vote of 7-0, found that Respondent had committed a knowing and wilful violation of R.I.G.L. § 36-14-5(e)(2) as stated in its finding of probable cause, and imposed a $1,000 civil penalty.

Findings of Fact

The prosecution and Respondent entered into a Joint Stipulation (Joint Exhibit #1) establishing certain findings of fact. The Commission adopts this Joint Stipulation and hereby makes the following findings of fact:

1. The Respondent was first elected to the East Providence City Council ("City Council" or "Council") in November 1992. With the exception of a two-year term from 2002-2004, he continuously served as a member of the City Council until December 7, 2006.

2. The Respondent was re-elected to the City Council in November 2008 and served as a member thereof until December 6, 2010.

3. During such time, the Respondent also served as the Mayor of the City of East Providence, having been elected by the Council membership to preside at Council meetings and serve as the ceremonial head of city government.

4. At all times hereto relevant, the Respondent was subject to the Rhode Island Code of Ethics in Government in his capacity as a municipal elected official.

5. At all times hereto relevant, the Respondent was employed as an attorney in his private capacity with Larisa Law and Consulting, LLC, in Providence, Rhode Island.

6. In November 2005, the Respondent began representing Marilyn W. Jones regarding her rights as principal beneficiary and co-trustee of the Norman F. Jones Revocable Trust ("Jones Trust"), which had been established by her late husband, as well as her personal assets and the removal of John R. Monson, Esq., from any role in Ms. Jones' affairs, which included power of attorney, health care surrogate and as co-trustee of the Jones Trust.

7. In November 2005, Ms. Jones also retained Raymond A. Marcaccio, Esq., of Oliverio & Marcaccio LLP as legal counsel to protect her interest under the Trust and her personal assets.

8. During the period of May 25, 2006 through June 8, 2010, in Docket No. 15932 matters relating to the Jones Estate appeared before the Probate Court for hearing on ten (10) dates.

9. The Respondent represented the Jones Estate before the Probate Court on four (4) individual dates during said period: May 25, 2006; June 9, 2006; September 25, 2007; and March 9, 2010.

10. Pursuant to Article II, Section 2-14 of the East Providence City Charter, the City Council shall appoint a judge of probate to serve for a term of office concurrent with that of the Council.

11. On December 1, 2008, the Respondent participated in the City Council's unanimous vote to appoint Christine J. Engustian to the Probate Court.

12. On March 9, 2010, the Respondent appeared before the Probate Court on behalf of Joan Anderson, as guardian of the person and estate of Ms. Jones, regarding a Petition for Sale

of Personal Estate, prepared and filed by Teresa Giusti, Esq. of Oliverio & Marcaccio, LLP, by which Ms. Anderson sought to sell and dispose of certain of Ms. Jones' personal property.

13. After hearing thereof, Probate Court Judge Christine J. Engustian granted the Petition on March 9, 2010.

14. At the time of his March 9, 2010 appearance before the Probate Court, the Respondent was a sitting member of the City Council.

15. The Respondent was not compensated for his appearance before the Probate Court on March 9, 2010.

16. The City of East Providence neither had an interest in nor was a party to the Jones Estate proceedings before the Probate Court.

The Commission makes the following additional findings of fact based on the testimony of Mr. Larisa as well as Prosecution Exhibit #1:

17. The Respondent's legal representation of the Marilyn Jones family, Nancy Stevens and Joan Anderson was the result of a long-standing relationship with the family.

18. The Respondent was the family's principal attorney in East Providence Probate Court Case #15932 and a related case in New Hampshire. Mr. Larisa's representation of the family was a continuous act and not restricted to the uncompensated Probate Court appearance on March 9, 2010.

19. The Respondent advised the Marilyn Jones family to retain the law firm of Oliverio & Marcaccio, LLP, in the East Providence Probate Court matter, and to retain another law firm in the New Hampshire case.

20. Both Attorneys Giusti and Marcaccio were unavailable on March 9, 2010, but they wanted the probate hearing to go forward since Ms. Anderson wanted the estate assets sold quickly. They, therefore, asked Mr. Larisa if he could appear at the hearing on behalf of the estate. The Respondent agreed and did represent his client on March 9, 2010 before the East Providence Probate Court, but he did not submit a bill for this specific service. Mr. Larisa was otherwise generally compensated for his services in the East Providence Probate Court matter although he did not bill on several occasions due to other attorneys also billing extensively for their services.

21. Mr. Larisa served as former Governor Lincoln Almond's executive counsel for over six years. In that capacity, he acted as the Administration's "ethics officer". As part of his duties, he was familiar with the Code of Ethics, Commission Regulations, and various advisory opinions. He provided ethics advice to state employees, particularly cabinet directors. He also coordinated ethics training seminars with the Commission.

22. In a prior case adjudicated in 2008 (the 2008 case), the Commission found that the Respondent committed a knowing and wilful violation of the Rhode Island Ethics Code, R.I.G.L. § 36-14-5(e)(4), when he represented Thomas C. Riley pro bono before the East Providence City Council on July 12, 2007. The Commission imposed a $500 civil penalty on Mr. Larisa for that violation. The Commission's decision in that matter (Prosecution Exhibit #1)

was upheld by the Rhode Island Superior Court and became final when the Rhode Island Supreme Court denied Respondent's petition for writ of certiorari.

23. During the proceedings before the Commission in the 2008 case, Mr. Larisa read the Rhode Island Ethics Code – including Regulation 5016 – numerous times.

Legal Discussion

At all relevant times, the Respondent was subject to the Code of Ethics in his capacity as a municipal elected official. R.I.G.L. § 36-14-4(1). Pursuant to the Code of Ethics, a public official shall not represent any other person before any state or municipal agency of which he or she is a member or by which he or she is employed. R.I.G.L. § 36-14-5(e)(2). A person "represents" another person before a state or municipal agency if he or she is authorized by that other person to act, and does in fact act, as the other person's attorney-at-law or his or her attorney-in-fact in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in favor of that other person. R.I.G.L. § 36-14-2(13).

Commission Regulation 5016, "Representing Oneself or Others, Defined," further provides:

In addition to any other definition or provision of the Code of Ethics:

***

(b) A person will "represent any other person before a state or municipal agency" if:

(1) He or she is authorized by that other person to act, and does in fact act, as the other person's attorney at law or his or her attorney in fact in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in favor of that other person;

(2) he or she acts as an expert witness with respect to any matter the agency's disposition of which will or can reasonably be excepted to directly result in an economic benefit or detriment to him or herself, or any person within his or her family or any business associate of the person or any business by which the person is employed or which the person represents; or

(3) he or she engages in the conduct described in subsection (b)(1) or (b)(2) *before another agency for which he or she is the appointing authority or a member thereof.* (emphasis added).

The Commission unanimously adopted Regulation 5016 at a public hearing held in September, 2006. At the time of Mr. Larisa's appearance before the East Providence Probate Court on March 9, 2010, Regulation 5016 had been in full force and effect for over three years. At that time, the Respondent, East Providence's Mayor and a sitting member of the City Council, represented a private client before East Providence Probate Judge Christine Engustian, who had been appointed by Mr. Larisa and his fellow City Councilors.

Mr. Larisa's March 9, 2010 appearance before a probate judge appointed by himself and the other members of his own agency was a clear and obvious violation of R.I.G.L. § 36-14-5(e)(2) as defined by Regulation 5016. The City's Probate Judge should not have been placed in the position of ruling on a petition advocated for by the City's Mayor and City Councilor -- an official who was a member of the agency that appointed her. The Probate Judge's March 9, 2010 ruling was favorable to the Jones Estate and conferred a benefit not only on Mr. Larisa's client, but on Mr. Larisa as well. Even though the Respondent was not paid for the March 9, 2010 appearance, he was paid for other services he rendered to his client in this matter. Mr. Larisa remained in good stead with his client by successfully handling the March 9, 2010 hearing when the usual probate attorneys were unavailable. In the view of the Commission, Mr. Larisa's March 9, 2010 Probate Court appearance constituted a use of his public position for private gain and advantage.

This conduct falls well below the Declaration of Policy found in the Rhode Island Code of Ethics, R.I.G.L. § 36-14-1:

> It is the policy of the state of Rhode Island that public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety, and not use their position for private gain or advantage.

It is also clear that the Respondent's violation of R.I.G.L. § 36-14-5(e)(2) was knowing and wilful as that term is defined in DiPrete v. Morsilli, 635 A.2d 1155, 1163-4 (R.I. 1994) and Carmody v. Rhode Island Conflict of Interest Commission, 509 A.2d 453, 460 (R.I. 1986). It is not reasonable conduct for a municipal official to appear as an attorney before a probate judge who he has voted to appoint. As the Supreme Court noted in DiPrete, it is "difficult to conceive of a violation that would be reasonable and in good faith". DiPrete, supra., 635 A.2d at 1164. Since the violative conduct was not reasonable, it must be shown that the public official was "cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt", such as delivery of a statement of potential conflict of interest to the Commission. Id. at 1164. The public official is not free to "consciously and voluntarily chart[s] a course which turns out to be wrong." Carmody, supra., 509 A.2d at 460.

Here, Mr. Larisa was well aware that his actions as a public official were subject to the Rhode Island Code of Ethics. He was Governor Almond's "ethics officer", was and is familiar with the Code of Ethics and Commission Regulations, provided ethics advice to state employees, particularly cabinet directors, and coordinated ethics training seminars with the Commission.

Mr. Larisa testified that he read the Ethics Code – including Regulation 5016 – numerous times during the proceedings before the Commission in the 2008 case.

Yet, Mr. Larisa did nothing to resolve any doubt as to whether his appearance before the East Providence Probate Court would violate the Ethics Code. He did not seek an advisory opinion from the Commission. He did not file a statement of potential conflict of interest with the Commission. He simply acted on his own interpretation of the Ethics Code. Just as in the case of Governor DiPrete, Mr. Larisa's failure to take steps reasonably calculated to resolve the doubt as to the existence of an ethics violation forms the basis for the conclusion by the Commission that his violation of the Ethics Code was knowing and wilful. DiPrete, supra., 635 A.2d at 1164.

Respondent's Contentions

I. Regulation 5008 and the question of a "safe harbor".

The Respondent maintains that Commission Regulation 5008 provides him with a "safe harbor" since he did not violate its express terms and therefore, he argues, his conduct does not violate the Code of Ethics. This contention is without merit since Regulation 5008 is not applicable to the facts presented in this case.

Commission Regulation 5008, in pertinent part, reads as follows:

> (b) No municipal appointed or elected official or employee, who exercises fiscal or jurisdictional control over any municipal agency, board, Commission or governmental entity, shall act for compensation as an agent or attorney before such agency, board, Commission or governmental entity for any person or organization in any particular matter in which the municipality has an interest or is a party, unless
>
> (1) such representation is in the proper discharge of official duties; or

(2) such official or employee is acting as a representative of a duly certified bargaining unit of state or municipal employees, or

(3) such appearance is before a state court of public record; or

(4) the particular matter before the municipal agency requires only ministerial acts, duties or functions involving neither adversarial hearings nor the authority of the agency to exercise discretion or render decisions.

(c) For purposes of this Regulation, "fiscal control" shall include, but is not necessarily limited to, authority to approve or allocate funds or benefits for the applicable state or municipal entity.

(d) For purposes of this Regulation, "jurisdictional control" shall include, but is not necessarily limited to, appointing authority, appellate review, or other substantive control in connection with the operation of the applicable state or municipal entity.

Regulation 5008 has no applicability to the Respondent's conduct in this case since the City of East Providence had no interest in and was not a party to the probate proceedings, and because Mr. Larisa was not compensated for his March 9, 2010 Probate Court appearance. By the express terms of Regulation 5008(b), the Regulation applies only to a compensated appearance by a public official in a matter in which the municipality has an interest or is a party. Since Mr. Larisa was uncompensated and acting for a private client in a matter unrelated to the municipality, his conduct on March 9, 2010 did not fall within the parameters of Regulation 5008.

Regulation 5008 proscribes and prohibits certain activities which involve the municipality that the public official serves. It does not by implication provide a "safe harbor" for conduct beyond the scope of the Regulation. Here, the Respondent's conduct is expressly prohibited by R.I.G.L. § 36-14-5-(e)(2) as defined by Regulation 5016. Regulation 5008 has no applicability to the facts presented in this case. It does not provide Respondent with a "safe harbor" for his conduct.

II. Respondent's claim that Regulation 5016 is definitional only, not substantive.

Respondent also argues that the 2006 amendments to Regulation 5016 merely added a procedural definition which cannot substantively change the meaning of a statute. This argument misconceives the Constitutional authority of the Commission to enact substantive ethical regulations. The Rhode Island Supreme Court has made clear that the Commission has the authority under the Rhode Island Constitution to enact substantive ethics regulations, with the General Assembly possessing concurrent authority to enact substantive ethics legislation that is not inconsistent with, or contrary to, any code of ethics adopted by the Commission. In Re: Advisory Opinion to the Governor (Rhode Island Ethics Commission – Separation of Powers), 732 A.2d 55, 60 (R.I. 1999).

The 2006 amendments to Regulation 5016 were valid substantive enactments by which the Commission redefined and broadened the scope of the prohibitions contained in R.I.G.L. § 36-14-5(e)(2). These amendments were not merely procedural or definitional. They resulted in substantive changes to the State's ethics laws which are binding on the conduct of public officials such as the Respondent.

III. The Rule of Lenity.

Respondent argues that the so-called rule of lenity should absolve him of responsibility for acting contrary to R.I.G.L. § 36-14-5(e)(2) as defined by Regulation 5016. The policy of lenity applies to the construction of criminal statutes and requires that the court adopt the less harsh of two possible meanings when faced with an ambiguous criminal statute. The rule of lenity, however, applies only when the meaning of a criminal statute is ambiguous. Such v. State, 950 A.2d 1150, 1158 (R.I. 2008).

There is no ambiguity presented here, however. R.I.G.L. § 36-14-5(e)(2) as defined by Regulation 5016 is clear and unambiguous. It is equally clear that Regulation 5008 by its express terms has no applicability to the facts presented in this case. The Commission must follow the plain language of these enactments for to ignore the plain language of a statute is "perhaps the ultimate error of law." Town of Smithfield v. Churchill & Banks Companies, LLC, 924 A.2d 796, 805 (R.I. 2007). Clearly, the language of R.I.G.L. § 36-14-5(e)(2) and Regulation 5016 prohibited Mr. Larisa from appearing before the East Providence Probate Court on March 9, 2010. The plain wording of Regulation 5008 did not authorize such conduct. The language of these enactments is unambiguous. Accordingly, the rule of lenity has no application to this matter.

IV. Regulation of the Practice of Law.

The Respondent contends that the terms of Regulation 5016 cannot be applied to him with respect to East Providence Probate Court case number 15932 since he began his legal representation of the estate in 2005, prior to the enactment of Regulation 5016 in 2006. He argues that he is essentially "grandfathered" and may continue his legal representation of the estate until the matter is concluded. Otherwise, Respondent contends, the adoption of Regulation 5016 would result in the unauthorized and retroactive regulation of the practice of law.

This argument is without merit. The Rhode Island Supreme Court regulates and controls the practice of law in Rhode Island. Rhode Island Bar Association v. Automobile Service Association, 55 R.I. 122, 127; 179 A.139, 141 (1935). The Rhode Island Code of Ethics governs the conduct of state and municipal elected officials, appointed officials, and employees. See, R.I.G.L § 36-14-4. If an attorney chooses to become a public official or employee, he or she

then becomes subject to both the Code of Ethics and the Supreme Court's rules governing the practice of law. As a municipal elected official and attorney, Mr. Larisa must comply with R.I.G.L. § 36-14-5(e)(2), Commission Regulations, and all applicable Supreme Court rules governing lawyers. He is not exempt from compliance with the State's ethics laws simply because his conduct as an attorney is regulated by the State Supreme Court. As the Court has noted, quoting Justice Cardozo: "Membership in the bar is a privilege burdened with conditions." In re Application for Registration by the Law Offices of James Sokolove, LLC, 986 A.2d 997, 998 (R.I. 2010).

Nor was Mr. Larisa grandfathered and immune from the effect of Regulation 5016 when he appeared before the Probate Court on March 9, 2010. Regulation 5016 took effect in October, 2006 and is being applied prospectively, not retroactively. The Commission voted not to investigate Mr. Larisa's May, 2006 appearance before the Probate Court since it occurred before the passage of Regulation 5016. Neither Regulation 5016 nor R.I.G.L. § 36-14-5(e)(2) contains a grandfathering provision which would have allowed the Respondent to continue to represent his client before the East Providence Probate Court after passage of Regulation 5016.

Conclusions of Law

1. Based on the foregoing Findings of Fact and Legal Discussion, the Commission by a unanimous vote of 7-0 finds that the Respondent, a member of the East Providence City Council which is the appointing authority for the East Providence Probate Court, violated R.I.G.L. § 36-14-5(e)(2) on March 9, 2010 when he appeared as an attorney on behalf of a private client before the East Providence Probate Court.

2. The Commission by a unanimous vote of 7-0 finds that Respondent's said violation of R.I.G.L. § 36-14-5(e)(2) on March 9, 2010 was knowing and wilful.

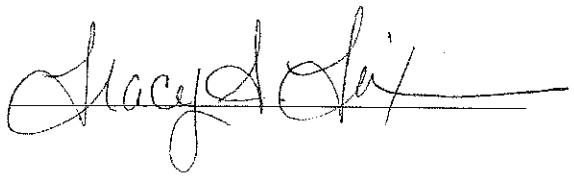
Civil Penalty

In light of the fact that this is Respondent's second adjudicated violation of the Code of Ethics of a similar nature since 2007, the Commission by a unanimous vote of 7-0 imposes on the Respondent a civil penalty of One Thousand Dollars ($1,000) pursuant to R.I.G.L. § 36-14-13(d)(3).

11/9/2011
Date

Ross Cheit, Chair
Rhode Island Ethics Commission

PURSUANT TO THE PROVISIONS OF R.I.G.L. § 42-35-15 ANY PERSON WHO IS AGGRIEVED BY THIS DECISION AND ORDER IS ENTITLED TO JUDICIAL REVIEW. PROCEEDINGS FOR SUCH REVIEW ARE INSTITUTED BY FILING A COMPLAINT IN THE SUPERIOR COURT FOR PROVIDENCE COUNTY WITHIN THIRTY DAYS AFTER MAILING NOTICE OF THIS DECISION AND ORDER BY THE ETHICS COMMISSION. A COPY OF THE COMPLAINT MUST BE SERVED UPON THE ETHICS COMMISSION WITHIN TEN DAYS AFTER IT IS FILED IN COURT, PROVIDED HOWEVER THAT THE TIME FOR SERVICE OF THE COMPLAINT MAY BE EXTENDED BY ORDER OF THE COURT FOR GOOD CAUSE.

Certificate of Service

I hereby certify that on the 9th day of November, 2011, I mailed via regular mail, postage prepaid, a copy of the within Decision and Order of the Ethics Commission to Joseph S. Larisa, Jr., Larisa Law & Consulting, LLC, 55 Dorrance Street, Suite 301B, Providence, RI 02903.