

**STATE OF RHODE ISLAND
BEFORE THE RHODE ISLAND ETHICS COMMISSION**

**In re: Gordon Rogers
Respondent**

Complaint No. 2012-1

Decision and Order of the Ethics Commission

Background

This matter was adjudicated by the State of Rhode Island Ethics Commission (“Commission”) on April 23, 2013, pursuant to R.I.G.L. § 36-14-13, § 42-35-9, 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, James V. Murray, Edward A. Magro, Mark B. Heffner, John M. LaCross and Robert A. Salk.

Nicole B. DiLibero, staff attorney for the Commission, prosecuted the case. Respondent, Gordon Rogers, was present during the proceedings and was represented by Attorney Timothy F. Kane. Edmund L. Alves, Jr. attended all proceedings as legal counsel for the Commission.

At the conclusion of the adjudicative proceeding, the Commission, by a vote of 5-1 (Commissioner Murray dissenting), found that the Respondent had committed a knowing and willful violation of R.I.G.L. § 36-14-5(e) when on April 12, 2012, he represented himself and his company, GTH Bobcat Services, before the Foster Town Council while serving as a member of that public agency. The Commission imposed a civil penalty of \$250 for this violation. The Commission, by a vote of 3-3 (Commissioners Magro, Heffner, and LaCross voting aye; Commissioners Cheit, Murray and Salk voting nay), made no finding as to the allegation that the Respondent committed a similar violation of R.I.G.L. § 36-14-5(e) on March 22, 2012.

Travel of the Case

On May 11, 2012, Lynne S. Rider (Complainant) filed a complaint with the Commission naming Gordon Rogers, a member and the President of the Foster Town Council (Town Council or Council), a municipal elected official, as the Respondent. The complaint alleged that the Respondent violated the Rhode Island Code of Ethics when he bid on a town project while serving on the Town Council and then voted to award the bid to his company on April 12, 2012.

Pursuant to Commission Regulation 1003, the Commission on June 5, 2012 made an initial determination that the complaint alleged facts, which if proven, were sufficient to constitute a violation of the Code of Ethics. The Commission authorized a full investigation to determine whether probable cause existed to support the allegations.

The Commission conducted a probable cause hearing in this matter on November 20, 2012 pursuant to R.I.G.L. § 36-14-12(c)(4) and Commission Regulation 1006. After considering the Investigative Report and the arguments of counsel, the Commission by a vote of 5-1 adopted the following finding of probable cause:

There is probable cause to believe that the Respondent, Gordon Rogers, violated R.I.G.L. § 36-14-5(e) by representing himself and his company GTH Bobcat Services, before the Foster Town Council on March 22, 2012 and April 12, 2012.

The adjudicative hearing on the complaint was conducted in open session on April 23, 2013. 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 six Commissioners who were present during the adjudicative hearing and the Commission's legal counsel in attendance. After deliberating, the Commission, by a vote of 5-1, found that Respondent had committed a knowing and willful violation of R.I.G.L. § 36-14-5(e) by representing himself and his company, GTH Bobcat Services, before the Foster Town Council

on April 12, 2012. The Commission, by a vote of 5-1, imposed a \$250 civil penalty for this violation. The Commission, by a vote of 3-3, made no finding as to the allegation that the Respondent committed a similar violation of R.I.G.L. § 36-14-5(e) on March 22, 2012.

Findings of Fact

The prosecution and Respondent entered into two Joint Stipulations (Joint Exhibit #1 and #2) establishing certain findings of fact. The Commission accepts these Joint Stipulations and, after its consideration of all the evidence presented, hereby makes the following findings of fact:

1. The Respondent has been a resident of the Town of Foster since age four (4). He began his public service to the Town at age fourteen (14) when he joined the volunteer fire department. He continues to serve the volunteer fire department as an emergency medical technician. The Respondent has a long history of donating his services and time to the Town of Foster.

2. The Respondent was elected to the Foster Town Council in November, 2010 and served as a member and President of the Town Council until December 6, 2012. As an elected official, Respondent was cognizant of the fact that he was subject to the Rhode Island Code of Ethics and he filed his annual disclosure forms as required.

3. The Respondent is the owner and operator of GTH Bobcat Services ("GTH"), a Foster, Rhode Island company, that provides general construction services, including septic system installation.

4. In March, 2012, the Foster Town Clerk published a Request for Proposals (RFP) seeking the submission of sealed bids for the installation of a new septic system at the Northwest Education Building ("Northwest") located in Foster.

5. The Town received a total of five (5) sealed bids in response to the RFP for the Northwest septic project including a bid submitted by the Respondent on behalf of GTH.

6. GTH's bid submission provided a description of the work to be performed and stated an intention to "install the septic system at Nike site free of labor costs Town to purchase material estimated cost \$3,000.00 parts and materials." The bid form also stated the intention to provide machinery, time and labor at zero cost and estimated the savings to the Town at \$10,000.00.

7. All bids were opened and read at the March 22, 2012 Town Council Meeting during open session.

8. Immediately following the reading of GTH's bid on March 22, 2012, the Respondent interjected and discussion ensued regarding the specifics of the bid submitted by the Respondent. The Respondent stated:

"That is actually from my company. I am volunteering to put the entire system in at no cost to the Town whatsoever. To keep it clean, I will give the DPW Director all of the things that need to be ordered and they can order and pay for it themselves and I will install it for nothing including my equipment, time and labor, and fuel and machines for zero."

9. At the March 22, 2012 Town Council meeting, the Complainant publicly challenged the propriety of Respondent's bid.

10. Foster Town Solicitor David Iglizzi was present at the March 22, 2012 Town Council meeting. Solicitor Iglizzi does not recall being asked for or providing any advice to Respondent relative to his bidding, participation or vote on the Northwest septic project.

11. After the March 22, 2012 Town Council meeting, all bids were given to the Interim DPW Director, Gary Bergstrom, who thereafter made a recommendation to the Town Council that the bid for the septic system at Northwest be awarded to GTH.

12. The bid for the Northwest septic project was awarded to GTH during the April 12, 2012 Town Council meeting by a vote of 3-2 with Councilors DeStefano, Dillon, and Respondent voting in the affirmative, and Councilors Knight and Whitelaw voting in the negative.

13. Immediately prior to the beginning of the April 12, 2012 Town Council meeting, Respondent approached Assistant Town Solicitor Stephen Archambault who was sitting with the Council for that meeting. Assistant Solicitor Archambault handled police prosecutions for the Town of Foster and did not sit with the Town Council on a regular basis. The Respondent advised Assistant Solicitor Archambault that he had submitted a bid for a Town project and inquired if he could participate and vote to award the bid to his company. Assistant Solicitor Archambault incorrectly advised the Respondent that he could participate and vote if he was not receiving any financial benefit. Assistant Solicitor Archambault does not recall any other discussions or communications with Respondent relative to legal advice concerning his participation and vote on the bid award.

14. During the April 12, 2012 Town Council meeting, following the presentation of the Interim DPW Director's recommendation regarding the Northwest septic project, the Respondent and the Town Council engaged in discussion regarding the specifics and merits of GTH's bid, as well as the bid process generally for the Northwest project. The Respondent also responded to questions from the Town Council and members of the public regarding the specifics of GTH's bid submission. He stated:

"I want to be straight out, this is my company. I've offered right from the get-go to install this at no cost. As you saw, the other bids are in excess of eight to eleven thousand dollars. This is pretty much a straight forward system, I am a licensed installer. If anybody wants the info, it is license number 1678 RI DEM, uh, and if there are any other questions on it, it is overseen by not only the engineer who engineered the system, which breaks out the parts, and the State of RI DEM has final approval and say on it."

15. Councilor Whitelaw expressed his concerns at the April 12, 2012 Town Council meeting that the published bid specifications were vague and that no performance bond or insurance was being required. In response, the Respondent stated that he has installed over one hundred (100) systems and discussed how he prepares his bids. He reiterated that his labor fee is zero and that the Town would provide the materials.

16. There was further discussion at the April 12, 2012 Town Council meeting regarding performance bond and insurance issues, as well as the fact that the bid specifications called for a total bid on labor and materials. In response, the Respondent addressed his provision of insurance to the Town, stated that he has never had a complaint against him and offered to provide his license number so that people can go online and check. After discussion between Councilors Dillon and Whitelaw, the Respondent continued to address the lack of a performance bond, noting that he never provided the Town with a performance bond for his previous installation of dry fire hydrants.

17. At the April 12, 2012 Town Council meeting, the Complainant, who the Respondent acknowledged in the audience, commented that the other companies that responded were not given the opportunity to break their bids down into labor and materials separately. The Respondent answered Complainant's questions regarding the size of the subject leach field and seeding of the project site. He represented that if the DPW did not loam and seed the site, he would do so on his own dime. The Complainant continued to question the Respondent about his bid, including from whom the Town would purchase the required materials, when the Respondent refused to acknowledge her further due to her interrupting him. The Respondent responded to further inquiry about his bid from the audience.

18. At the April 12, 2012 Town Council meeting, the Complainant stated that she would like to ask the Solicitor a question. The Respondent stated that he had already recognized her a few times. The Complainant asked whether this was a properly executed municipal bid. The Respondent addressed Assistant Solicitor Archambault regarding his bid, but no one answered the question posed by the Complainant. After further discussion, the Respondent called for a vote on the bid award.

19. At its April 12, 2012 meeting, the Town Council, including the Respondent, engaged in approximately sixteen (16) minutes of discussion regarding the specifics and merits of GTH's bid, as well as the bid process generally for the Northwest project.

20. Later in the April 12, 2012 meeting, during the "Concerned Citizens" portion of the meeting, there was public comment regarding the bid process relative to the Northwest septic project. The Respondent foreclosed discussion regarding a member of the public's request for a legal opinion from the Assistant Solicitor relative to the bid process. The Respondent stated that the question had been asked and answered.

21. Shortly thereafter, the Respondent acknowledged his wife, Heidi Rogers, who asked for a legal opinion from the Solicitor regarding whether recusal was required where there is no financial gain. Assistant Solicitor Archambault opined that it is only when one stands to make a financial gain that there is a conflict of interest and one should recuse.

22. The Respondent completed all work on the Northwest septic project in or about May, 2012.

23. The Town, through its DPW Director, purchased all materials required for the completion of the Northwest project totaling Three Thousand Seven Hundred Twenty-Five Dollars and Sixty-Three Cents (\$3,725.63).

24. Neither the Respondent nor GTH billed the Town for the services provided on the Northwest septic project.

25. The Town did not provide any monetary compensation to the Respondent or GTH for the work performed on the Northwest septic project.

Respondent's Contentions

The Respondent contends that he did not represent himself before his own agency on April 12, 2012 since he did not present evidence or arguments for the purpose of influencing the judgment of his fellow agency members. He further argues that any violation on April 12, 2012 was not knowing and willful since he acted on the erroneous advice of the Assistant Town Solicitor. For the reasons stated below, the Commission rejects both of these contentions.

Legal Discussion

The Prohibition of R.I.G.L. § 36-14-5(e)

At all times relevant to this complaint, the Respondent was subject to the Code of Ethics in his capacity as a municipal elected official. See, R.I.G.L. § 36-14-4(1). No person subject to the Code shall represent him or herself before any municipal agency of which he or she is a member without first obtaining a hardship exception from the Ethics Commission. See, R.I.G.L. § 36-14-5(e). A person "represents" him or herself before a municipal agency by participating in the presentation of evidence or arguments before that agency for the purpose of influencing the judgment of the agency in his or her own favor. See, R.I.G.L. § 36-14-2(12). Unlike some other provisions of the Code of Ethics, Section 5(e) does not require that the public official obtain financial gain in order to violate the Code of Ethics. Section 5(e) is an absolute prohibition against representing oneself, or another person, before one's own public agency irrespective of financial gain unless the Commission first grants the official a hardship exception.

Respondent Represented Himself Before His Own Agency on April 12, 2012

There can be no question that on April 12, 2012, Respondent represented himself before his own agency in contravention of R.I.G.L. § 36-14-5(e). Respondent acted as the Town Council President in chairing the meeting, but he also acted as a private business owner when he engaged his fellow Council members and the audience in a protracted discussion of the merits and specifics of his bid. This extended discourse was far more than a mere disclosure that the Respondent's company was the recommended low bidder. This was a sixteen (16) minute substantive discussion of the merits of the Respondent's bid. Respondent even added to his bid during the course of the discussion by stating that he would loam and seed the site if the Town did not do so.

Nor can there be any question that Respondent's remarks were made for the purpose of influencing the judgment of his agency in his own favor. Simply because he did not receive a direct financial gain from the Northwest project does not mean that Respondent was not motivated to win the bid for his company. Respondent exhibited considerable tenacity in responding to questions, fending off criticism, and stressing his own competence and experience as he urged his colleagues to vote in his favor. The fact that Respondent reaped no direct financial gain from this project did not diminish his zeal in pursuit of the bid award. In fact, Respondent may well have benefitted from this project. His public display of community volunteerism could have garnered him good will, business opportunity and political advantage among his constituents.

Faulty Legal Advice Is Not A Defense To An Ethics Code Violation.

Respondent also argues that his violation was not knowing and willful since he obtained admittedly faulty legal advice just before the April 12 meeting and then acted in reliance on it.

Faulty legal advice will not insulate a public official from an Ethics Code violation since the official could avoid the violation simply by recusing or refraining from the activity in question, or by seeking an advisory opinion from the Ethics Commission.

The knowing and willful standard is defined in DiPrete v. Morsilli, 635 A.2d 1155, 1163-4 (R.I. 1994) as follows:

This Court has held that when a violation of the statute is reasonable and made in good faith, it must be shown that the official “either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute ***.” Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is “difficult to conceive of a violation that could be reasonable and in good faith.” In contrast, when the violative conduct is not reasonable, it must be shown that the 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.” (Citations omitted).

Here, a municipal official represented himself before his own agency in an effort to persuade his fellow agency members to award a contract to his company. This was most certainly not reasonable conduct. As the Supreme Court noted in DiPrete, it is “difficult to conceive of a violation that would be reasonable and in good faith.” Id. 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.

In this case, the Respondent was admittedly aware that his actions as a public official were subject to the Rhode Island Code of Ethics since he annually filed statements with the Commission. However, he did not seek an advisory opinion from the Commission, nor did he file a potential conflict of interest statement with the Commission when he first considered submitting a bid to his own agency – a bid which he would ultimately advocate for and vote on.

When the bids were opened and discussed by the Town Council on March 22, Respondent simply acted on his own interpretation of the Ethics Code. He did not discuss the matter with Town Solicitor Iglizzi who was in attendance at that meeting. He just informed his colleagues that his company was bidding on the project without charge for his equipment, time and labor.

Respondent then waited three weeks until immediately prior to the beginning of the April 12 meeting – the meeting at which the Council was to discuss and award the bid – and only then did he approach Assistant Solicitor Archambault and ask him if he could participate in and vote on the Northwest bid award. Assistant Solicitor Archambault was the Town’s police prosecutor and did not sit with the Town Council on a regular basis. He incorrectly advised the Respondent that he could participate and vote on the matter since he would not realize any financial gain.

Under these circumstances, Respondent did not take steps reasonably calculated to resolve the ethical doubt – doubt which should have arisen in his mind when he first considered submitting a bid that would require discussion and a vote by his own agency. The Complainant publicly challenged the propriety of Respondent’s bid at the March 22 meeting, yet Respondent did not take timely steps to resolve the ethical doubt. Rather, he waited until just before the April 12 Town Council meeting to ask the inexperienced assistant solicitor an ethical question that should have been paramount in Respondent’s mind for weeks.

The Ethics Commission is available to provide advisory opinions to Rhode Island public officials in a prompt and efficient manner in most cases. Usually, very little is required of an official who seeks such an advisory opinion beyond the filing of the initial request. Once issued, the advisory opinion provides the official with an ethical safe harbor for the conduct in question. An official who does not take advantage of the advisory opinion procedure, and instead relies on faulty legal advice, will not be insulated from a Commission finding that an ethics violation was

knowing and willful. This is a case in point. The Respondent did not seek an advisory opinion, but instead acted on the Assistant Solicitor's faulty advice. Respondent's actions in this case were not reasonably calculated to resolve a situation fraught with ethical doubt. As a result, the Commission finds that Respondent's violation of Section 5(e) was knowing and willful.

Conclusions of Law

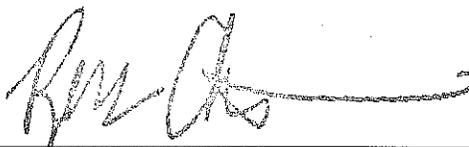
1. Based on the foregoing Findings of Fact and Legal Discussion, the Commission by a vote of 5-1 (Commissioner Murray dissenting) finds that the Respondent violated R.I.G.L. § 36-14-5(e)(1) on April 12, 2012 when he represented himself and his company, GTH Bobcat Services, before the Foster Town Council while serving as a member of that agency.

2. The Commission by a vote of 5-1 (Commissioner Murray dissenting) finds that the Respondent's said violation of R.I.G.L. § 36-14-5(e)(1) on April 12, 2012 was knowing and willful.

Civil Penalty

In light of the fact that the Respondent has a long history of donating his time and services to the Town of Foster, the Commission by a vote of 5-1 (Commissioner Murray dissenting) imposes on the Respondent a civil penalty of Two Hundred Fifty Dollars (\$250) pursuant to R.I.G.L. § 36-14-13(d)(3), an amount less than the Commission normally imposes for a first offense of this nature.

10-1-2013
Date

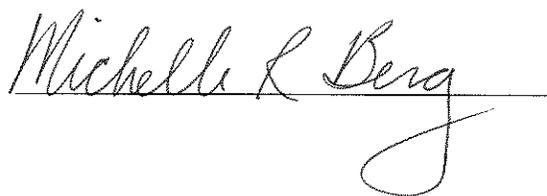


Ross E. Cheit, Chair
Rhode Island Ethics Commission

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 THE ETHICS COMMISSION HAS MAILED NOTICE OF THIS DECISION AND ORDER. 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 1st day of October, 2013, I mailed via regular mail, postage prepaid, a copy of the within Decision and Order of the Ethics Commission to Timothy F. Kane, Kane Law Office, 627 Putnam Pike, Greenville, RI 02828.

A handwritten signature in cursive script, reading "Michelle R. Berg", is written over a horizontal line.