STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 3, 2014)

JOSEPH S. LARISA, JR.	:	
	:	
v.	:	**C.A. No. PC-2011-6938**
	:	
RHODE ISLAND ETHICS COMMISSION; ROSS E. CHEIT; DEBORAH S. CERRULLO; J. WILLIAM HARSCH; JAMES V. MURRAY; FREDERICK K. BUTLER; JOHN LYNCH, JR.; and MARK B. HEFFNER	:	

DECISION

MCGUIRL, J. Before the Court is the appeal of Joseph S. Larisa, Jr. (the Appellant or Larisa) seeking reversal of a decision of the Rhode Island Ethics Commission (the Ethics Commission), which found that Larisa committed a knowing and willful violation of G.L. 1956 § 36-14-5(e)(2) and imposed a civil penalty of $1000. Larisa also claims that his due process and equal protection rights under the United States Constitution have been violated and alleges a violation of 42 U.S.C. § 1983. Jurisdiction is pursuant to the Rhode Island Administrative Procedures Act (the APA), G.L. 1956 § 42-35-15.

I

Facts and Travel

The underlying facts are not disputed. Appellant Larisa has a long history of elected membership on the East Providence City Council (the City Council). (Ethics Commission Decision at 3.) Larisa served as an elected member of the City Council from late 1992 to late 2002, from late 2004 to December 7, 2006, and from late 2008 to December 6, 2010. Id. During much of that time, Larisa also served as the Mayor of East Providence, having been duly elected

by the City Council membership. Id. It is undisputed that, at all relevant times, Larisa was subject to the Rhode Island Code of Ethics in Government. Id. As part of his responsibilities as a City Council member, and as specified by article II, section 2-14 of the East Providence City Charter, Larisa also participated in the City Council's appointment of East Providence Probate Court Judge Christine J. Engustian (the Probate Judge) on December 1, 2008. Id. at 4. In addition to his official role in municipal politics, Larisa has also served as executive counsel to the former Governor Almond, acting as the Almond administration's "ethics officer." Id. at 6.

In his private capacity, Larisa was also employed at all relevant times as an attorney with Larisa Law and Consulting, LLC, in Providence. Id. at 3. In November 2005, Larisa began representing the interests of Marilyn W. Jones (Ms. Jones). Id. at 4. This included advocating for Ms. Jones's rights as a principal beneficiary and co-trustee of the Norman F. Jones Revocable Trust (the Jones Trust). Id. On the advice of Larisa, Ms. Jones also simultaneously retained separate legal counsel to help protect her interests under the Jones Trust. Id. at 4, 6.

During the period between May 25, 2006 and June 8, 2010, matters relating to the Jones Estate appeared before the Probate Court for hearing on ten occasions. Id. at 4. Larisa was the Jones family's principal attorney on these matters and he appeared before the Probate Court on four individual dates as the family's representative, including May 25, 2006 and March 9, 2010. Id. at 4-5. It is undisputed that Larisa was a member of the City Council on both of those dates. It is also undisputed that Larisa's legal representation in the Probate Court matters was the result of a longstanding, continuous relationship with the Jones family. Id. at 5. At the March 9, 2010 Probate Court hearing before the Probate Judge, Larisa represented the guardian of the person and estate of Ms. Jones regarding a petition for sale of personal estate, by which the guardian sought to sell and dispose of personal property belonging to Ms. Jones. Id. at 4-5. Larisa

appeared at the request of Ms. Jones's separately retained counsel, who was unavailable, and received no compensation for his appearance before the Probate Judge on that date. Id. at 5-6. In addition, the City of East Providence did not have an interest in the relevant proceedings before the Probate Court and was not a party to the proceedings. Id. at 5. On the day of the hearing, the Probate Judge granted the petition for sale of personal estate. Id.

A complaint was filed against Larisa with the Ethics Commission on October 1, 2010. Id. at 1. The complaint alleged that Larisa had violated § 36-14-5(e)(2) by representing clients before the Probate Court on May 25, 2006 and March 9, 2010 because he simultaneously held elective office on the City Council, which exercises appointing authority and fiscal control over the Probate Court. Id. at 1-2. The Ethics Commission determined that Larisa did not commit a willful and knowing violation of the Code of Ethics by appearing before the Probate Court on May 25, 2006 because Regulation 5016, which "redefined" relevant portions of § 36-14-5(e)(2), did not take effect until October 22, 2006, months after the alleged May 25, 2006 violation. Id. at 2. However, the Ethics Commission determined that Larisa's appearance before the Probate Court on March 9, 2010 did constitute a knowing and willful violation of § 36-14-5(e)(2) because Regulation 5016 had already taken effect. Id.

The Ethics Commission issued its Decision and Order (the Decision) on November 9, 2011. Id. at 15. The Decision states that 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." Id. at 2. Pursuant to § 36-14-15, Larisa filed his appeal of the Decision of the Ethics Commission with this Court on December 9, 2011. Larisa also seeks relief under 42 U.S.C. § 1983 and contends that the Ethics Commission has violated the Rhode Island Supreme Court's exclusive constitutional authority to

regulate the practice of law in this state.

II

Standard of Review

Any action by the Ethics Commission shall be subject to review pursuant to the APA. See § 36-14-15. Therefore, this Court has jurisdiction over Larisa's appeal pursuant to § 42-35-15, which sets forth the following standard of review:

> "(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error or law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

Therefore, this Court is limited to determining whether there is any legally competent evidence to support an agency's decision. Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). "Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting the agency's findings." Id. "'If competent evidence exists in the record considered as a whole, the court is required to uphold the agency's conclusions.'" Id. (quoting Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). It is the Court's duty "to determine what the law is and its applicability to the facts." Chenot v. Bordeleau, 561 A.2d 891, 893 (R.I. 1989) (citing Carmody v. Rhode Island Conflict of Interest Comm'n, 509 A.2d 453, 458 (R.I. 1986)). Determinations of law made by an agency are

subject to a de novo standard of review. See Arnold v. Rhode Island Dep't of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003) (citing Johnston Ambulatory Surgical Assocs. Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000)); In re Advisory Op. to the Governor (Rhode Island Ethics Commission—Separation of Powers), 732 A.2d 55, 60 (R.I. 1999) (stating that "whether the ethics commission possesses the requisite authority to promulgate" a regulation is a legal question subject to de novo review "without deference to the agency's interpretation").

III

Analysis

A

Applicable Laws

The Ethics Commission is "empowered to adjudicate the merits of allegations of violations of the Rhode Island [C]ode of [E]thics." Secs. 36-14-1 to 36-14-13. In adjudicating alleged violations, the Ethics Commission must deliberate on the evidence and determine whether or not there has been a "knowing and willful" violation of the Code of Ethics (the Code). See § 36-14-13(a)(8); Carmody, 509 A.2d at 459-61 (discussing the standard concerning "knowing and willful" violations of the law in the civil context). In the instant case, the Ethics Commission determined that Appellant Larisa was guilty of a knowing and willful violation of § 36-14-5(e)(2) because he appeared before an agency over which he had contemporaneous appointing authority as a member of the City Council.

Section 36-14-5(e)(2) is a substantive ethics statute duly enacted by the General Assembly and titled "Prohibited Activities." The legislature has passed other laws defining terms that appear in the statutorily-enacted code of ethics, including § 36-14-2(13), which defines the term "represents" as it appears in § 36-14-5(e)(2). In addition, the Ethics

Commission has lawfully enacted Regulation 5016, which purports to expand the definition of "represents" as the term appears in § 36-14-5(e)(2). Appellant Larisa argues that Regulation 5008, lawfully enacted by the Ethics Commission, also has bearing on the proper interpretation of § 36-14-5(e)(2) because Regulation 5008 substantively permits conduct that the Ethics Commission contends is prohibited by § 36-14-5(e)(2).

The Ethics Commission occupies a unique space in the framework of Rhode Island's government. See In re Advisory Op. to the Governor (Ethics Comm'n), 612 A.2d 1, 14-20 (R.I. 1992). "[T]he basic motivating factor in enacting the ethics amendment [to the Rhode Island Constitution] was to restore the public's trust in government, which . . . the framers and the electorate believed could only be accomplished by bestowing the power to legislate substantive ethics laws upon an independent nonpartisan ethics commission subject only to judicial review." Id. at 11-12. "[T]he terms of article 3, section 8 [of the Rhode Island Constitution], expressly confer upon the commission the limited and concurrent power to enact substantive ethics laws." Id. at 14. As a result, "the General Assembly is . . . limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission." Id. "[L]ike other 'agencies,' as the term is defined by § 42-35-1 of the APA, the commission is subject to the provisions contained therein, including the judiciary's power to review the commission's rule-making functions as set forth in § 42-35-7." Id. at 18. Moreover, the Ethics Commission's power to adopt a code of ethics is not limitless; its empowerment to do so "is not to be construed as being so comprehensive as to give the commission the ability to adopt a code that infringes upon the legislative and the executive powers." Id. at 19. "'As long as the Legislature that creates the agency demonstrates standards or principles to confine and guide the agency's power, [the Supreme Court] will sustain the delegation [of legislative power].'" Id. at

20 (quoting Davis v. Wood, 427 A.2d 332, 336 (R.I. 1981)). However, "[n]o deference would be given to a regulation through which the commission expands its power beyond its constitutional or statutory authority." In re Advisory Op. to the Governor, 732 A.2d at 72.

In determining whether there has been a knowing and willful violation of the Code, our Supreme Court has endorsed the standard used by the U.S. Supreme Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985). Carmody, 509 A.2d at 460. Under the Trans World Airlines standard, a violation is not "willful" if the alleged violator merely knew that applicable statutes were "in the picture." 469 U.S. at 127-30. In applying this standard, our Supreme Court has ruled that whether a violation of the Code is knowing and willful depends on the reasonableness of the violation. DiPrete, 635 A.2d at 1163. "[W]hen 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 . . . .'" Id. at 1163-64 (quoting Carmody, 509 A.2d at 460). As a result, "an official may escape liability when he or she acts in accordance with reason and in good faith." Id. at 1164. Importantly, our Supreme Court has emphasized that "where the mandate of the law is clear . . . it is difficult to conceive of a violation that could be [both] reasonable and in good faith." Carmody, 509 A.2d at 461. 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.'" Diprete, 635 A.2d at 1164 (quoting Carmody, 509 A.2d at 461).

B

Arguments

The central question in this administrative appeal is whether the Ethics Commission properly concluded that Larisa committed a knowing and willful violation of § 36-14-5(e)(2). Larisa argues that he could not have committed a knowing and willful violation because § 36-14-5(e)(2), on its face, does not prohibit his representation of a client before the Probate Court. He also contends that he did not commit a knowing and willful violation of § 36-14-5(e)(2) because, given that he was not paid for his appearances and that the City of East Providence had no interest in the relevant proceedings, Regulation 5008 provided a specific safe harbor for his activities in front of the Probate Court. Finally, Larisa argues that he committed no knowing and willful violation because Regulation 5016 cannot be permitted to "effectively repeal," sub silentio, both the plain language of § 36-14-5(e)(2) and the purported safe harbor of Regulation 5008.

In response, the Ethics Commission argues that it properly concluded Larisa violated the Code because the clear language of § 36-14-5(e)(2) and Regulation 5016—which "expanded the scope of the prohibitions set forth in § 36-14-5(e)(2)"—indicates that Larisa's action before the Probate Court was prohibited. In addition, the Ethics Commission contends that Regulation 5008 was "facially inapplicable" to Larisa's conduct and that it did not otherwise permit Larisa to act as a pro bono attorney before the Probate Court. The Ethics Commission argues that Larisa's past experiences and testimony support the finding that his violation of § 36-14-5(e)(2) was both entirely unreasonable and "knowing and willful." Moreover, the Ethics Commission contends that its application of Regulation 5016 to Larisa's conduct did not violate any principles of fair notice and was an entirely appropriate exercise of its regulatory authority.

C

Violation of § 36-14-5(e)(2)

Before reaching the issue of whether Larisa knowingly and willfully violated the law, the Court must first determine whether or not the conduct engaged in by Larisa was, on its face, a violation of § 36-14-5(e)(2). See Carmody, 509 A.2d at 461-62. The Ethics Commission is "empowered to adjudicate the merits of allegations of violations of the Rhode Island [C]ode of [E]thics." Sec. 36-14-13(a).

On its face, § 36-14-5(e)(2) provides that "[n]o person subject to this code of ethics shall . . . [r]epresent 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." That is not the end of the matter, however. Other statutes and regulations come into play in the parties' arguments. First, in § 36-14-2(13), the legislature defined the word "represents," as follows:

> "(13) 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 that 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." Sec. 36-14-2(13).

Thus, the legislature's traditional definition of "represents" clearly sought to prohibit state and municipal officials from acting as an attorney in two situations: (1) in front of the same state and municipal agencies that employ the official, and (2) in front of the same state and municipal agencies where the official has obtained membership. It is clear that, in the absence of any further rules promulgated by the Ethics Commission or any supplemental statutory definitions enacted by the legislature, Larisa's conduct could not be considered a violation of § 36-14-5(e)(2) because Larisa, as a member of the City Council, was neither a member of the

Probate Court nor a Probate Court employee.

However, subsequent to the enactment of § 36-14-2(13), the Ethics Commission promulgated Regulation 5016, which took effect on October 22, 2006. (Ethics Commission Decision at 2.) The legislature has formally empowered the Ethics Commission to "[p]rescribe and publish, after notice and public hearings, rules and regulations to carry out the provisions of this chapter." Sec. 36-14-9(a)(3) (referring to the Code). Notwithstanding, our Supreme Court has held that the authority of the Ethics Commission to enact regulations with the force of law does not necessarily stem from statutory sources. In re Advisory Op. to the Governor, 732 A.2d at 59-61. Ethics regulations may, within certain parameters, derive directly from article 3, sections 7-8 of the Rhode Island Constitution. Id. In Regulation 5016, the Ethics Commission thus sought to expand the definitional scope of "represents" as it would apply to § 36-14-5(e)(2) as follows:

> "In addition to any other definition or provision of the Code of Ethics . . . [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 expected 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." Regulation 5016 (quoting § 36-14-5(e)(2)).

As a result, in supplementing the definition of "represents," Regulation 5016—and in particular subsection (b)(3)— has the seeming effect of prohibiting officials subject to § 36-14-5(e)(2) not

only from acting as attorneys in front of agencies where such officials are employed or have obtained membership, but also from acting as attorneys in front of agencies over which such officials have appointing authority.

Larisa contends that Regulation 5016, which prohibits nothing on its own, impermissibly "redefine[ed] 'member' to include 'nonmember'" in § 36-14-5(e)(2). Clearly, the Ethics Commission has the constitutional authority, derived from article 3, sections 7-8 of the Rhode Island Constitution, to enact substantive ethics regulations that prohibit elected officials from representing clients before agencies over which the elected official has appointing authority. See In re Advisory Op. to the Governor, 732 A.2d at 59-61; In re Advisory Op. to the Governor (Ethics Commission), 612 A.2d at 14. Even though, arguably, the Ethics Commission's redefinition of the term "represents" in Regulation 5016 does not strip § 36-14-5(e)(2) of the phrase "of which he or she is a member or by which he or she is employed," it is clear that the Ethics Commission intended Regulation 5016 to prohibit elected officials from representing clients in an expanded category of situations, such as when a City Council member appears before a Probate Court over which he or she has appointing authority. Because the Ethics Commission has the authority to enact ethics regulations that substantively add to the ethical prohibitions prescribed by the legislature, and because the Ethics Commission clearly intended that Regulation 5016 codify such enhanced prohibitions pursuant to the statute, the Court finds that Larisa's conduct was indeed a violation of § 36-14-5(e)(2). Under § 36-14-5(e)(2), a city council member is prohibited from representing clients before a probate court if the city council member has the authority to appoint judges that sit on the probate court in question.

The Court notes that Larisa has argued in passing that reversal is warranted because the Ethics Commission, in finding that Larisa violated the Code in this case, has "intruded upon the

Supreme Court's exclusive power to regulate the practice of law." The Court dismisses this argument because an independent enforcement power is plainly necessary for the Ethics Commission to implement the legitimate policy of the government, which is most clearly expressed in article 3, section 7 of the Rhode Island Constitution:

> "The people of the state of Rhode Island believe 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. Such persons shall hold their positions during good behavior."

Moreover, article 3, section 8 of the Rhode Island Constitution provides that:

> "All elected and appointed officials and employees of state and local government, of boards, commissions and agencies shall be subject to the code of ethics. The ethics commission shall have the authority to investigate violations of the code of ethics and to impose penalties, as provided by law. . . ."

The Ethics Commission is clearly vested with the power to determine violations of the Code and impose penalties on state or local officials to whom the Code applies, irrespective of whether the ethical violation at issue involves the practice of law. As a result, Larisa's argument—that the decision of the Ethics Commission must be reversed for infringing on the Supreme Court's power to regulate the practice of law—is not persuasive to this Court.

D

The "Knowing and Willful" Requirement

Whether or not Larisa committed a "knowing and willful" violation of § 36-14-5(e)(2) presents a separate question. See Carmody, 509 A.2d at 461-62. Our Supreme Court has "adopted different analyses of what constitutes a knowing-and-willful violation of the statute depending upon the reasonableness of the violation." DiPrete, 635 A.2d at 1163. Therefore, it is

incumbent on this Court to first determine whether Larisa's violation of the statute was in any manner reasonable and in good faith or whether the Ethics Commission "had before it a record of sufficient evidence to conclude that [Larisa's] actions were deliberate and unreasonable." Id. at 1164. Although it is "difficult to conceive of a violation that could be reasonable and in good faith," our Supreme Court has held that "an official may escape liability when he or she acts in accordance with reason and in good faith." Id. (citing Carmody, 509 A.2d at 461). In order to show a violation of the ethics rules "[w]hen 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.'" Id. at 1163-64 (quoting Carmody, 509 A.2d at 460). In contrast, if there is competent evidence in the record to conclude that the official's action was "deliberate and unreasonable," the Ethics Commission must merely be satisfied 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.'" Id. at 1164 (quoting Carmody, 509 A.2d at 461).

Larisa argues that his violation of § 36-14-5(e)(2) could not have been knowing and willful, in part because a separate regulation enacted by the Ethics Commission, Regulation 5008(b), specifically permitted the conduct that became prohibited upon enactment of Regulation 5016. Regulation 5008, in relevant part, states:

> "(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." (Emphasis added.)

On account of Regulation 5008(b), Larisa concedes that, ordinarily, "a sitting council member who possesse[s] appointing authority over a probate court may not represent a client as attorney before that court if he was paid and if the municipality possesse[s] an interest or [is] a party to the litigation." Under the circumstances of the present case, however, where Larisa was not paid for his appearances and the City of East Providence had no interest in the relevant proceedings, Larisa contends that Regulation 5008 acts as a form of "safe harbor" for his activities.

In the context of statutory interpretation, our Supreme Court has endorsed the maxim expressio unis est exclusio alterius, which provides that "'the expression of one thing is the exclusion of another.'" See Ret. Bd. of Emps.' Ret. Sys. of State of Rhode Island v. DiPrete, 845 A.2d 270, 287 (R.I. 2004); see also Murphy v. Murphy, 471 A.2d 619, 622 (R.I. 1984) (stating that "[a]lthough this principle is an aid, it should be used cautiously to further rather than to defeat legislative intent"). Although the Ethics Commission contends that Regulation 5008 is simply inapplicable to Larisa's conduct, the Court finds that the maxim above applies to Regulation 5008(b). In most situations, Regulation 5008(b) clearly prohibits a City Council member from representing clients for compensation before the Probate Court or when the city has an interest in the proceedings. The negative implication of this prohibition is that a City Council member is not ordinarily prohibited from representing clients pro bono before the Probate Court when the city has no interest in the proceedings. That is precisely what Appellant Larisa did in this case, and an ordinary reading of Regulation 5008(b) would reasonably indicate

that Larisa's conduct was permitted.

Regardless of the applicability of Regulation 5008(b) to Larisa's conduct in this case, the Ethics Commission argues that competent evidence on the record supports the finding of a knowing and willful violation. See Envtl. Scientific Corp., 621 A.2d at 208. The Ethics Commission contends that Larisa's prior experiences dealing with the Code and Larisa's testimony before the Ethics Commission support a finding that Larisa's conduct was entirely unreasonable. Therefore, argues the Ethics Commission, Larisa's appeal must be dismissed because of "[h]is failure to take any steps reasonably calculated to support or confirm his interpretation of the Code of Ethics."

With respect to Larisa's prior experiences dealing with the Code, the Ethics Commission points in particular to a case from 2007 (the 2007 Case) in which Larisa was found to have committed a knowing and willful violation of § 36-14-5(e)(4). In the 2007 Case, Larisa also raised a "safe harbor" defense, citing Regulation 5008(b) as he does here, and the Superior Court affirmed the Ethics Commission's decision in a ruling from the bench. See Larisa v. Rhode Island Ethics Comm'n, No. 2008-7325 (R.I. Super. Ct. July 30, 2010). That case, however, presented an entirely different set of facts and different applicable regulations. There, Larisa had represented a client pro bono, before the City Council itself, within one year of having left his elected position on the City Council. Id. Unlike the violation at issue in the present case, such conduct was clearly and unambiguously prohibited by § 36-14-5(e)(4), which prohibits any person subject to the Code from representing others "before any state or municipal agency of which he or she is a member or by which he or she is employed" within "a period of one year after he or she has officially severed his or her position with said state or municipal agency." Secs. 36-14-5(2), 36-14-5(4). Moreover, Regulation 5008(b) was facially inapplicable, as

demonstrated in the Ethics Commission's decision at that time. See Larisa v. Rhode Island Ethics Comm'n, No. 2008-7325 (R.I. Super. Ct. July 30, 2010).

In addition, Regulation 5008(b) plainly does not apply to officials who have left elected office and who no longer maintain any form of "fiscal or jurisdictional control" over a governmental entity. See Regulation 5008(b). The Court finds that the knowledge Larisa should have gained about Regulation 5008(b), and its applicability as a "safe harbor" in the factual context then presented, has no definitive bearing on the applicability of Regulation 5008(b) to the actions underlying Larisa's present appeal. Moreover, in the 2007 Case, the statutory language of § 36-14-5(e)(4) was clearly and unambiguously violated without reference to any regulation subsequently enacted by the Ethics Commission because Larisa had been a "member" of the City Council and then represented a client before the same body less than one year after leaving the position. Because Regulation 5008(b) is situated differently in relation to the facts of the present case, and because the nature of Larisa's violation in the present case is not clearly and unambiguously indicated in the statute currently under examination, the Court finds that Larisa's prior dealings with the Code, as stated above, do not serve as competent evidence so as to show a "knowing and willful" violation of § 36-14-5(e)(2).

As evidence of a knowing and willful violation of § 36-14-5(e)(2), the Ethics Commission also points to certain excerpts of Larisa's July 19, 2011 testimony at his adjudicative hearing. In particular, the Ethics Commission argues that because Larisa admitted that he read Regulation 5016 at some point in time prior to the conduct at issue in this case, his uncompensated activities as an attorney before the Probate Court were unreasonable and constituted a knowing and willful violation of § 36-14-5(e)(2). The record is clear that Larisa did, at some point prior to his appearance before the Probate Court on March 9, 2010, read

Regulation 5016. However, in his testimony before the Ethics Commission, Larisa claimed that reading Regulation 5016 did not put him on notice to the fact that his appearance would put him in violation of § 36-14-5(e)(2) because the regulatory "redefinition" did not comport with his understanding of either the statutory language contained in §§ 36-14-5(e)(2) and 36-14-2(13) or Regulation 5008(b). Larisa testified that in light of those other portions of the Code, Regulation 5016 "didn't make any impression on [him]." (Ethics Comm'n Hr'g at 27:23-28:7, July 19, 2011.)

The Court must determine whether Larisa's testimony may be looked upon as competent evidence to support a finding that Larisa's violation of § 36-14-5(e)(2) was unreasonable. DiPrete, 635 A.2d at 1163. The Court is also mindful of its own duty "to determine what the law is and its applicability to the facts." Chenot, 561 A.2d at 893 (citing Carmody, 509 A.2d at 458). In answering this question, the Court considers the unique position of the Ethics Commission in Rhode Island's framework of government to have special relevance. See In re Advisory Op. to the Governor (Ethics Commission), 612 A.2d at 14-20. It is clear that the Ethics Commission has "the limited and concurrent power to enact substantive ethics laws" and that this power may derive directly from the Rhode Island Constitution. Id. at 14. On the other hand, like other agencies whose regulatory authority does not derive from the Rhode Island Constitution, the Ethics Commission is subject to the provisions of the APA, "including the judiciary's power to review the commission's rule-making functions as set forth in § 42-35-7." Id. at 18.

Under an ordinary administrative agency standard, Larisa's argument that he was denied proper notice of the applicability of Regulation 5016's redefinition of prohibited activities under § 36-10-14(e)(2) is compelling. That is because, under normal circumstances, "[a]n administrative agency is a product of the legislation that creates it, and it follows that '[a]gency

action is only valid, therefore, when the agency acts within the parameters of the statutes that define [its] powers.'" Iselin v. Ret. Bd. of Emps.' Ret. Sys. of Rhode Island, 943 A.2d 1045, 1050 (R.I. 2008) (quoting In re Advisory Op. to the Governor, 627 A.2d 1246, 1248 (R.I. 1993)). Likewise, statutes that are unambiguous and express a clear and sensible meaning allow no room for statutory construction or extension, and the words of such a statute must be given their plain and obvious meaning. In re Advisory Op. to the Governor, 504 A.2d 456, 459 (R.I. 1986). Moreover, "[a]n interpretive regulation issued by an agency charged with the administration of a statute will ordinarily be given great weight when the statute is ambiguous and in need of interpretation, provided the agency's interpretation does not alter or amend the scope of the statute." Id. (emphasis added) (citing Statewide Multiple Listing Service, Inc. v. Norberg, 120 R.I. 937, 940-41, 392 A.2d 371, 373 (1978)).

Here, the statutory language in §§ 36-10-14(e)(2) and 36-14-2(13) clearly and unambiguously prohibits an elected official from acting as an attorney on behalf of a client before "any state or municipal agency of which he or she is a member or by which he or she is employed." This prohibition on the activities of an elected official is of limited scope insofar as it does not prohibit an elected official from acting as an attorney before state or municipal agencies of which he or she is not a member or by which he or she is not employed. Significantly, the Ethics Commission concedes that in enacting Regulation 5016, it has "expanded the scope of the prohibitions set forth in § 36-14-5(e)(2)." While the Ethics Commission is unlike other administrative agencies in that it may implicitly exceed the scope of statutes because of its concurrent power to enact ethics laws under the Rhode Island Constitution, this principle does not render Appellant Larisa's understanding of § 36-14-5(e)(2) unreasonable, even in spite of the fact that he admits to at some point in the past having read

Regulation 5016. Even if Larisa had conceded to understanding the impact of Regulation 5016, which he does not, it would be reasonable for him to expect that, in the current circumstances, "[n]o deference would be given to a regulation through which the commission expands its power beyond its constitutional or statutory authority." In re Advisory Op. to the Governor, 732 A.2d at 72. Moreover, even if the Ethics Commission's redefinition of "represents" is read directly into § 36-14-5(e)(2), there is a genuine interpretive problem because the phrase "of which he or she is a member or by which he or she is employed" remains undisturbed at the end of the statute.[1] As a result, the Court finds that Larisa's admission that he read Regulation 5016 at some point prior to his appearance before the Probate Court on March 9, 2010, does not serve as compelling evidence in and of itself that Larisa acted unreasonably when he violated § 36-14-5(e)(2).

The Ethics Commission, however, argues that Larisa's failure to consult its advisory opinions prior to his appearance before the Probate Court or to obtain guidance from the Ethics Commission shows that Larisa's conduct was unreasonable. Had Larisa done so, the Ethics Commission contends, he would have found a number of advisory opinions noting that Regulation 5016 is applicable to § 36-14-5(e).

As explained above, in order for Larisa to have violated § 36-14-5(e), his actions must have been not only unreasonable but also deliberate. DiPrete, 635 A.2d at 1163-64. Such deliberate action is characterized by knowledge that "'the conduct was prohibited by [the] statute'" or by "'reckless disregard for the question of whether the conduct was prohibited by [the] statute.'" Id. (quoting Carmody, 509 A.2d at 460).

[1]Regulation 5016 defines only the phrase "represent any other person before a state or municipal agency" as it appears in Section 36-14-5(e)(2), which in turn states that "[n]o person subject to this code of ethics shall . . . [r]epresent 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." (Emphasis added.)

This Court is not satisfied that Larisa's conduct was "deliberate and unreasonable." See Carmody, 509 A.2d at 461. In Diprete, the Supreme Court explained that "deliberate and unreasonable" conduct could occur where one "fail[s] to take any steps to resolve [the ethical] problem." Diprete, 635 A.2d at 1164 (emphasis in the original). In that case, the Governor of Rhode Island was accused of violating the "state's ethics laws by improperly utilizing his position as Governor to obtain state contracts for relatives, friends, or business associates." Id. at 1158. The Court concluded that the Ethics Commission "had before it a record of sufficient evidence to conclude that [the Governor's] actions were deliberate and unreasonable" because he did not attempt to resolve the ethical problem. Id. at 1164.

Unlike Diprete, however, Larisa admitted that he read the Code prior to the conduct at issue in this case, and as a result, he believed he was acting within the Code. (Ethics Comm'n Ex. C, Tr. of Adjudicative Hr'g, 25:21-26.) Moreover, our Supreme Court has rejected a strict liability standard for violations of the Code of Ethics, "declin[ing] to embrace [the] maxim fully" that "ignorance of the law is no excuse. See Carmody, 509 A.2d at 460. Such a maxim "oversimplifies the difficulties that may be encountered in interpreting the statutes and regulations governing contemporary society in its manifold activities." Id. For these reasons, this Court is not satisfied that the Ethics Commission had before it "a record of sufficient evidence" that Larisa 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." See Carmody, 509 A.2d at 461. Therefore, based on this lack of evidence, this Court cannot conclude that Larisa's actions were "deliberate and unreasonable." DiPrete, 635 A.2d at 1164.

On the other hand, "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.'" Id. at 1163-64 (citing Carmody, 509 A.2d at 460). The Ethics Commission has not shown that Larisa's decision to appear before the Probate Court was unreasonable, and it concedes that the very same conduct by Larisa on May 25, 2006—on behalf of essentially the same parties—was not a violation of § 36-14-5(e)(2). In light of the analysis above, and viewed more broadly in the context of Larisa's prior and ongoing appearances before the Probate Court which were not considered violations of the Code of Ethics, the Court finds that Larisa's conduct was reasonable. In addition, the Ethics Commission has not shown by competent evidence that Larisa knew or showed reckless disregard for the question of whether his conduct was prohibited by § 36-14-5(e)(2). Id. Because the Ethics Commission did not have competent evidence to find that Larisa acted unreasonably or to find that Larisa knew or showed reckless disregard for the question of whether his conduct was prohibited by § 36-14-5(e)(2), the Ethics Commission erred in determining that Larisa's violation of the statute was "knowing and willful." As a result, the Decision of the Ethics Commission is reversed.

E

Attorney Fees and § 1983 Claim

Larisa attempts to consolidate his administrative appeal with a § 1983 claim, alleging violation of his equal protection and due process rights under the United States Constitution. Larisa seeks an award of attorney's fees on the basis of the § 1983 claim.

Our Supreme Court has held that the consolidation of an administrative agency appeal with a civil enforcement action constitutes "clear error" on the part of the trial justice. Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004). Although such actions may be connected factually, "[a]n administrative appeal and a civil trial differ greatly with respect to governing

procedural rules, burdens of proof, and standards of review." Id. Such contrasting procedural postures make consolidation "impermissible." Id.

This Court's review of an administrative agency's decision is "circumscribed and limited to 'an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision.'" Id. (quoting Barrington Sch. Comm., 608 A.2d at 1138). As such, it would be improper for this Court to decide the merits of Larisa's § 1983 civil action on the basis of the record before it and in light of the procedural posture of this administrative appeal. Therefore, Larisa's request for attorney's fees is denied.

IV

Conclusion

The Ethics Commission has not infringed on the Supreme Court's exclusive power to regulate the practice of law. However, the Ethics Commission lacked sufficient evidence to support a finding that Larisa's violation of § 36-14-5(e)(2) was unreasonable, or that the violation was made with knowledge or with reckless disregard for the possibility that Larisa's conduct would violate the statute. For all the foregoing reasons, the Ethics Commission's finding that Appellant Larisa committed a knowing and willful violation of § 36-14-5(e)(2), imposing a civil penalty of $1000, is reversed. In addition, because it would be improper for this Court to consolidate the Appellant's administrative appeal with his civil claim alleging violation of § 1983, the Appellant's request for attorney's fees is denied. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Larisa v. Rhode Island Ethics Commission, et al.**
CASE NO:	**PC-2011-6938**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 3, 2014**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph S. Larisa, Jr., Esq.**
For Defendant:	**Katherine D'Arezzo, Esq.**