

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC. SUPERIOR COURT**

JOHANNA HARRIS,

Petitioner,

v.

**JEFFREY DANA, in his capacity as
City Solicitor of the City of Providence;
JORGE O. ELORZA, in his capacity as
Mayor of the City of Providence; and
SAMUEL D. ZURIER, in his capacity
as Chairman of the Committee on
Claims and Pending Suits, Providence
City Council,**

Respondents.

Case No. PC-2015-3821

PETITION FOR A WRIT OF MANDAMUS

Introduction

1. Beginning in August 2014, Petitioner Johanna Harris became the target of legal attacks intended specifically to interfere with the performance of her official duties as Commissioner and Chair of the Providence Board of Licenses. An attorney who represented numerous clients before the Board of Licenses accused Petitioner of violating the Code of Ethics, and then sought an injunction in Superior Court to recuse Petitioner from deciding any of the cases in which he represented clients on the grounds that the mere fact of his ethics complaint rendered it impossible for Petitioner to be impartial. During September 2014 through July 2015, Petitioner successfully defended herself against all of these attacks at her own expense. The Rhode Island Ethics Commission dismissed the complaint against Petitioner. The Superior Court denied the motion for an injunction to force Petitioner's recusal. The lawsuit against Petitioner was dismissed.

2. Petitioner has sought indemnification of her legal expenses from Respondents in accordance with the provisions of Rhode Island General Laws § 45-15-16. Respondents have repeatedly refused to fulfill their statutory obligation to indemnify

Petitioner. Instead, Respondents have run her around in endless circles of bureaucratic delays and arbitrary rules. Petitioner now asks this Court to order Respondents to comply with their statutory obligation and fully indemnify her accumulated legal expenses to date in the amount of \$17,983.

Parties and Jurisdiction

3. Johanna Harris is a resident of the City of Providence, State of Rhode Island and Providence Plantations, and a commissioner of the Board of Licenses of the City of Providence.

4. Jeffrey Dana is the City Solicitor of the City of Providence.

5. Jorge O. Elorza is the Mayor of the City of Providence.

6. Samuel D. Zurier is the Chairman of the Committee on Claims and Pending Suits, Providence City Council.

7. Jurisdiction over a petition for a writ of mandamus is vested in the Superior Court pursuant to Rhode Island General Laws § 8-2-16.

Factual Background

I. Petitioner's public service on the Providence Board of Licenses

8. Since 2013, Petitioner has been retired from the practice of law in Massachusetts. Petitioner has never practiced law in Rhode Island.

9. During December 2013, then Mayor Angel Taveras interviewed Petitioner for a position on the Providence Board of Licenses. During her interviews, Mayor Taveras told Petitioner that he specifically wanted someone who would be capable of performing a thorough, top-to-bottom review of the policies and procedures of the Board of Licenses, as well as making the Board's decision-making processes transparent and fair. The Mayor explained that he was interested in Petitioner as a candidate because she had a track record of establishing formal procedures and policies at her former places of employment and for several nonprofit boards on which she had served as chairman.

10. Petitioner was sworn in as Commissioner of the Board of Licenses on February 6, 2014 and was subsequently elected by her fellow board members as Chair on March 3, 2014.

11. During the remainder of 2014, Petitioner initiated a series of reforms that are detailed in a report entitled *Providence Board of Licenses Year in Review: 2014*, which was submitted to the Mayor and City Council on December 22, 2014.

12. In particular, upon assuming responsibility as Chair of the Board of Licenses, Petitioner undertook a major revision in procedure. All proceedings of the Board were to be conducted in open public meetings. During these meetings, all members of the public, including potential and current licensees, were guaranteed their free speech rights to participate. That included the rights of Board members to state on the public record the reasons for their votes in each and every case before the Board. This change of procedure represented a radical departure from the previous system, in which counsel for the licensee and the City Solicitor, behind closed doors through secret “pre-trial conferences,” routinely negotiated a resolution that was then endorsed by a pro forma unanimous vote of the Board.

II. The contract for executive coaching

13. As part of her responsibilities as labor counsel for two multinational corporations, Petitioner regularly engaged in executive coaching.

14. On March 24, 2014, less than six weeks into Petitioner’s tenure on the Licensing Board, Ms. Sybil Bailey, Director of Human Resources for the City of Providence, asked Petitioner to serve as an executive coach for a senior manager who had been repeatedly accused of sexual harassment. Ms. Bailey described the situation as an emergency. The senior manager was a critical employee. His termination would negate over one year of crucial work that he had performed in order to prevent the threatened loss of millions of dollars in federal funding. Moreover, if the senior manager were not terminated and his behavior continued, the City of Providence could have faced hundreds of thousands of dollars in damages in class action litigation under Title VII, as well as substantial litigation costs, disruption of morale in the department, and damage to the City’s reputation.

15. Petitioner performed the requested executive coaching services during the month of April at a total cost of \$3,400. Petitioner’s work as an executive coach for the City of Providence was a one-time isolated assignment for professional services that were requested by the City on an emergency basis.

16. In order to preserve confidentiality, Ms. Bailey instructed Petitioner to send her invoice directly to the senior manager's department, rather than the usual billing channels.

17. Ms. Bailey consulted neither the Law Department of the City of Providence nor the Rhode Island Ethics Commission before she hired Petitioner as a consultant in March 2014.

III. Attorney Peter Petrarca's attempts to interfere with Petitioner's performance of her duties

18. Attorney Peter Petrarca routinely represented licensees before the Board of Licenses. Under Petitioner's chairmanship, Mr. Petrarca's clients did not always fare well. In public votes, participating Board members unanimously voted to revoke the licenses of *3 Dollar Bar*, *Ava's Wrath* (twice), and *D'Noche*, all of which were Mr. Petrarca's clients. In public votes, the Board similarly rejected the attempts of two other clubs that were represented by Mr. Petrarca and had already lost their licenses – *Karma* and *Louie's Tavern*– to transfer those licenses to other parties. In another public vote, the Board imposed a 60-day license suspension on *Skarr*, one of Mr. Petrarca's clients, for a vicious beating in the club bathroom and fined the club \$38,000 primarily for violations of the hookah laws. In yet another public vote, the Board unanimously imposed a fine of \$4,000 on *Smoke*, a club also represented by Mr. Petrarca, for permitting disturbances on two occasions. The Board denied license applications of *Hooch* and *Luxe*, and imposed severe penalties on *Wise Guy Deli*, which were also represented by Ms. Petrarca.

19. During July 2014, a number of violent episodes occurred in connection with the *3 Dollar Bar*, including a murder on its premises. At a July 31, 2014 hearing of the Board of Licenses, it became clear that *3 Dollar Bar* would in fact lose its licenses to protect the public safety.

20. On information and belief, Petitioner has a reasonable basis for concluding that Mr. Petrarca, on July 31, 2014, relying upon confidential information that was improperly divulged by a City official, filed a public records request for all contracts between Licensing Board members and the City of Providence. On August 15, 2014, the City provided a copy of Petitioner's contract with the Department of Human Resources in response to Mr. Petrarca's public records request.

21. On August 22, 2014, Mr. Petrarca filed a complaint with the Rhode Ethics Commission alleging that Petitioner had improperly accepted a contract with the City of Providence. On the same day (six days before the Ethics Commission legally noticed the complaint), *GoLocalProv.com* published an interview with Mr. Petrarca concerning his complaint against Petitioner.

22. From September 4, 2014 (the first public meeting of the Board of Licenses after he filed his ethics complaint) through the end of October 2014, Mr. Petrarca took advantage of every appearance before the Board of Licenses to demand that Petitioner recuse herself from any matter in which he represented a client.

23. In his appearances before the Board and his interviews with the press, Mr. Petrarca claimed that once he had filed his ethics complaint, it was impossible for Petitioner to be unbiased in any of the cases where he represented clients.

24. In a September 4, 2014 public appearance before the Board, Mr. Petrarca threatened Petitioner, “I’m asking you to recuse. If you don’t recuse, I’m telling you now, tomorrow I’m going to superior court to get a restraining order and an injunction to force you to recuse, because it’s impossible for you to be impartial at this time.” (See the video at: <http://wpri.com/2014/09/04/no-decision-from-board-on-hookah-lounges-fate/>). In response, Petitioner refused to recuse herself.

25. At a September 11, 2014 public hearing of the Board of Licenses, Mr. Petrarca presented a formal *Motion to Recuse* to force Petitioner to recuse herself because he had filed an ethics complaint against her.

26. No one in the Law Office of the City of Providence made any effort to advise, support or represent Petitioner in connection with Mr. Petrarca’s ethics complaint or his motion to recuse. Assistant City Solicitor Mario Martone, who was present at the September 11, 2014 hearing, made no effort to advise, support or represent Petitioner.

27. In response to Mr. Petrarca’s ethics complaint, motion to recuse, and threats to seek an injunction against her, Petitioner retained her own legal counsel.

28. On October 8, 2014 Mr. Petrarca filed suit in Superior Court (*Petrarca v. Harris*, Case No. PC14-4936) seeking a preliminary injunction to compel Petitioner to recuse herself at all Board hearings in which Mr. Petrarca represented a client.

29. A hearing on Mr. Petrarca's motion for a preliminary injunction took place in Superior Court on October 28, 2014. Justice Van Couyghen, denying Mr. Petrarca's request for a preliminary injunction, ruled, "To hold otherwise would allow the litigants to remove board members out of the administrative arena based upon a conflict with a litigant's attorney. That would allow litigants to manipulate the composition of boards throughout our state."

30. On March 31, 2015, Mr. Petrarca's complaint in Superior Court was dismissed in its entirety.

31. At no time from February 6, 2014, when Petitioner joined the Board of Licenses, until September 5, 2014, did the Licensing Administrator, the City Clerk, or any other City official forward Petitioner's name to the Ethics Commission. On September 5, 2014, the Administrative Officer of the Ethics Commission wrote to the Administrator for the Board of Licenses, stating that it had no prior record of Petitioner as a covered official and did not know how to contact her. Petitioner first became aware that she was an official covered under the Code of Ethics on August 22, 2014, when she read about Mr. Petrarca's complaint in *GoLocalProv.com*.

32. On July 21, 2015, the Rhode Island Ethics Commission dismissed Mr. Petrarca's ethics complaint against Petitioner. Upon dismissing the complaint, Commission Chairman Ross Cheit excoriated the City of Providence and its Director of Human Resources for entering into a no-bid contract with a board member without competitive bidding or public disclosure of the contract.

III. Petitioner's request for indemnification from the City of Providence

33. From August 22, 2014 onward, the Assistant City Solicitors appearing before the Board were fully apprised that Mr. Petrarca had filed an ethics complaint in tandem with multiple attempts to force Petitioner to recuse herself, including his lawsuit in Superior Court. During September and October 2014, Petitioner's legal counsel had two conversations about Petitioner's case with then City Solicitor Jeff Padwa. After the change in City administration, Petitioner herself made two calls to the new City Solicitor Mr. Dana, seeking to discuss her representation and legal expenses, but Mr. Dana never returned her calls. Another private attorney called Mr. Dana on Petitioner's behalf and likewise received no response. In a March 5, 2015 meeting, Petitioner apprised

Respondent Mayor Jorge Elorza, his chief of staff and his chief of operations about the litigation against her, including Mr. Petrarca's attempts to interfere with the performance of her duties on the Licensing Board. At no time did anyone from the Providence Law Department or the Mayor's Office offer to assist Petitioner in her defense.

34. On April 7, 2015, Petitioner submitted a request to the City of Providence for indemnification of legal expenses in accordance with R.I.G.L. § 45-15-16. Having found no City ordinance that would put her on notice as to the procedures for seeking indemnification, Petitioner sent her request to Respondent Samuel Zurier, Chairman of the Claims Committee of the Providence City Council. On April 10, 2015, Mr. Zurier advised Petitioner that her claim had to be submitted to the City Clerk, who would then forward it to the Law Department for review prior to consideration by the Claims Committee. On the same day, Petitioner complied with Mr. Zurier's instructions and forwarded her claim to the City Clerk.

35. Petitioner received no response from the Law Department or the City Council concerning her claim. On June 10, 2015, Petitioner wrote to Respondent Councilman Zurier, requesting a response to her claim for indemnification. Mr. Zurier emailed Petitioner on June 11, 2015, indicating, "As I said before, my understanding is that the proper procedure for these claims is for them to go first to the Clerk, then to the Solicitor and then to the Claims Committee from the Solicitor. ... If the City Solicitor fails to handle a claim properly and incurs a liability for the City, then the Solicitor is accountable for any such failure."

36. Petitioner met with Respondent City Solicitor Dana and Deputy City Solicitor Adrienne Southgate on June 17, 2015. At the meeting, Mr. Dana stated that he had not received Petitioner's claim for indemnification. Subsequently, the City Clerk informed Petitioner that her claim had been assigned a number (15-391) and then forwarded to Ms. Sharon Mulcahey, Claims Coordinator in the Law Department. Ms. Mulcahey did not return an email requesting information on the whereabouts of Petitioner's claim.

37. At the June 17, 2015 meeting, City Solicitor Jeff Dana, without having examined Petitioner's claim, advised Petitioner that she should have approached the Law Department before she retained outside legal counsel to represent her in connection with Mr. Petrarca's ethics complaint and lawsuit in Superior Court. He stated that this

requirement was codified in Providence City Charter. Neither the City Charter nor the Code of Ordinances contains any such provision.

38. At the June 17, 2015 meeting, Deputy City Solicitor Adrienne Southgate stated that the City would indemnify an individual who has been charged with an ethics violation only if that individual is subsequently exonerated. Neither the City Charter nor the Code of Ordinances contains any such provision.

39. On June 19, 2015, Petitioner emailed Mr. Zurier, advising him that City Solicitor Dana had never received her claim for indemnification of April 7. Petitioner stated, "In view of Mr. Dana's statement that he never received anything from either you or the City Clerk, I would much appreciate your clarifying exactly what is the correct procedure for filing a claim." Responding via email the same day, Mr. Zurier stated, "As I have said before (and I do not intend to repeat again) please do not direct further inquiries to me - it is not appropriate."

40. On July 6, 2015, Petitioner wrote to Mr. Dana, "Please inform me in writing whether the City will pay my legal costs. If the City chooses not to fully indemnify me, please advise me in writing as to all factual and/or legal bases for its determination."

41. By July 13, 2015, it was clear to Petitioner that the Ethics Commission would dismiss the complaint against her at its upcoming meeting. On July 13, 2015, Mr. Dana emailed Petitioner with the following offer: "1. We can meet to discuss the potential for the city law department to assist you in dealing with the pending state ethics commission complaint against you. 2. The city can reimburse you for legal fees paid to outside counsel to represent you in your defense of the Superior Court complaint filed against you by Peter Petrarca, in the amount of \$3,000.00."

42. On July 21, 2015, Petitioner responded in writing to Mr. Dana's offer. She informed Mr. Dana that the Ethics Commission had dismissed the complaint against her. Petitioner reminded Mr. Dana of the Law Department's rule that it would indemnify individuals exonerated of ethics charges. Petitioner further noted that the City would have been barred from representing her because of three specific conflicts of interest. First, the City itself failed in its statutory duty to inform the Commission that she was a covered official. Second, based upon information and belief, a City official improperly divulged confidential personnel information to Mr. Petrarca. Third, the City's Director of Human

Resources failed to consult with the Law Department before awarding Petitioner a contract.

43. In her July 21, 2015 response, Petitioner made a one-time offer to settle her claim if the City of Providence paid her \$12,000.

44. In a July 27, 2015 letter, Mr. Dana asserted that Providence Code of Ordinances Sec. 2-99 barred him from offering more than \$3,000. He contended that Petitioner was not entitled to a “blank check” for indemnification of legal fees incurred by her own private counsel.

45. Petitioner responded to Mr. Dana in writing on July 31, 2015. Again rejecting Mr. Dana’s offer of \$3,000, Petitioner noted, “You refer to a \$3,000 limit established by Providence Code of Ordinances, Sec. 2-99. This limit applies solely to settlements reached by the City Solicitor ‘without the necessity of the approval of the mayor or the chairman of the committee on claims.’ It does not bar you from recommending to the Mayor or to the Committee on Claims that the City pay a settlement in excess of \$3,000.”

46. In her July 31, 2015 response, Petitioner drew attention to the recent Rhode Island Supreme Court decision in *Shine v. Moreau*, in which the Court noted that a municipality’s obligation to indemnify public officials acting within the scope of their official duties was non-discretionary. While other municipalities had enacted ordinances pursuant to RIGL § 45-15-16 that specifically addressed private legal expenses, the City of Providence had not done so. “The City of Providence did not put public officials like me on notice as to its procedures for legal representation or indemnification of private legal expenses.”

47. In her July 31, 2015 response, Petitioner further noted, “Your contention that I am not entitled to ‘a blank check from the City’ is irrelevant. The facts in the present case will show that I did not obtain any windfall through the use of private counsel. I employed a firm that has been regularly retained by municipal governments. The firm’s legal bills were reasonable. I made documented efforts to reduce my legal expenses by devoting hundreds of hours of my own time to my defense.”

48. Finally, in her July 31, 2015 response, Petitioner noted that from August 2014, the Law Department was fully aware of Mr. Petrarca’s complaint and lawsuit, yet no one in the Law Department made any effort to assist her.

49. On August 1, 2015, Petitioner again wrote to Mr. Dana, proposing a list of facts that both parties could agree upon.

50. To date, Mr. Dana has not responded to Petitioner's letters of July 31 and August 1, 2015.

51. On August 11, 2015, Petitioner wrote to Mr. Brett Smiley, Chief Operating Officer of the City of Providence and a member of the Mayor's staff, asking him if Respondent Mayor Elorza would authorize her proposed settlement of \$12,000. In a return email of August 13, 2015, Mr. Smiley stated that he supported the Law Department's position.

52. Petitioner's total legal expenses to date in order to defend herself against legal actions intended to interfere with her official duties on the Board of Licenses amount to \$17,983.

Argument

53. In *City of Providence v. Estate of Tarro*, 973 A.2d 597 (R.I. 2009), the Rhode Island Supreme Court set forth the requirements for a writ of mandamus:

It is well settled in this jurisdiction that the issuance of a writ of mandamus is an extraordinary remedy. "A writ of mandamus is an extreme remedy that will be issued only when: (1) the petitioner has a clear legal right to the relief sought, (2) the respondent has a ministerial duty to perform the requested act without discretion to refuse, and (3) the petitioner has no adequate remedy at law." *New England, Development LLC v. Berg*, 913 A.2d 363, 368 (R.I. 2007). "A ministerial function is one that is to be performed by an official in a prescribed manner based on a particular set of facts 'without regard to or the exercise of his own judgment upon the propriety of the act being done'." *Id.* at 368-69 (quoting *Arnold v. Rhode Island, Department of Labor and Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003)). *Tarro* at 604.

54. In what follows, Petitioner argues that her petition adheres to each of the three requirements set forth in *Tarro*.

I. Petitioner has a clear legal right to the relief sought.

55. Rhode Island General Laws § 45-15-16 ("Indemnity of public officials, employees, or elected officials") provides in relevant part:

All town or city council or any fire district shall, by ordinance or otherwise, indemnify any and all ... members of boards ... from all loss, cost, expense, and

damage, including legal fees and court costs, ... if the elected or appointed ... member ... was acting within the scope of his or her official duties or employment. ... The indemnity shall be provided by the city or town council or any fire district on a case by case basis or by ordinance of general application. The ordinance or agreement to indemnify shall include, among other things, the provision of legal counsel at the expense of the city or town and/or the reimbursement for attorneys' fees and other expenses incurred in connection with the conduct of the defense, including payment of the judgment.

56. In particular, R.I.G.L. § 45-15-16 provides for indemnification so long as the municipal official “was acting within the scope of his or her official duties or employment.” At all relevant times, Petitioner was a commissioner of the Providence Board of Licenses and was thus covered under the statute. As a commissioner, Petitioner was charged with the responsibility of voting on all cases before the Board. As Chair of the Board of Licenses, Petitioner instituted significant reforms in the procedures for deciding such cases, including a requirement that all proceedings be conducted in open public meetings, rather than in secret “pre-trial conferences.” (See Factual Background, *supra*, at ¶¶11–12.) These actions were entirely within the scope of Petitioner’s official duties.

57. As the factual record makes clear, the reforms instituted by Petitioner had a significant adverse effect on the clients of one attorney, Mr. Peter Petrarca (*supra*, at ¶¶18–19). The tandem legal strategy adopted by Mr. Petrarca – first filing an ethics complaint against Petitioner and then filing suit to seek her recusal – was an overt attempt to interfere with the performance of Petitioner’s statutorily required duties and thereby neutralize the reforms that she was duly authorized to carry out. Ultimately, this strategy did not succeed. The Ethics Commission dismissed Mr. Petrarca’s complaint (*supra*, at ¶32). The Superior Court denied Mr. Petrarca’s motion for a preliminary injunction, and Mr. Petrarca’s complaint was ultimately dismissed in its entirety (*supra*, at ¶¶29–30).

58. If Mr. Petrarca had simply filed an ethics complaint against Petitioner and then let the investigatory process play out, then no one would have questioned his right to do so. But that is not what happened. Instead, Mr. Petrarca immediately released his ethics complaint to the press, along with a press interview, failing even to respect the blackout period established by the Ethics Commission to notify the respondent. Instead,

Mr. Petrarca immediately began to use the fact of the complaint in a blatant attempt to intimidate and disqualify Petitioner (*supra*, at ¶¶21–25, 28).

59. The facts show that Mr. Petrarca followed the classic, two-step “accuse-to-recuse” strategy, memorialized in the case of *In Re Zachary B. Antonio*, 612 A.2d 650 (decided June 16, 1992). Step One: accuse a judge or any other public official of some infraction. Step Two: move in court to have the official recused, thus forcing him to incur substantial legal expenses. The substance of the accusation in Step One is irrelevant and need have no relation to the official’s duties, so long as the act of picking a fight creates the impression in Step Two of a lack of impartiality.¹

60. But for Petitioner’s performance of her official duties as Chair of the Board of Licenses, Mr. Petrarca would not and could not have filed an ethics complaint against her. But for Petitioner’s performance of her official duties on Board of Licenses, Mr. Petrarca would not and could not have filed suit to have her recused on the grounds that she would be biased by the mere fact of his ethics complaint.

II. The City of Providence has a non-discretionary obligation to indemnify Petitioner under R.I.G.L. § 45-15-16.

61. In 2009, the General Assembly amended R.I.G.L. § 45-15-16, explicitly changing its first sentence to “All town or city councils or any fire district *shall*, by ordinance or otherwise, indemnify ...,” where the word “shall” replaced the word “may” in the original statute (P.L. 2009, ch. 361, §1, enacted November 13, 2009).

62. Referring explicitly to this statutory amendment, the Rhode Island Supreme Court recently concluded in *Shine v. Moreau*, Nos. 2013–247–Appeal, 2013–248–Appeal, 2013–249–Appeal, decided June 18, 2015:

The use of the word “shall” makes mandatory the indemnification provided for in the statute and the City Ordinance if the criteria set forth in the statute are met. [Citations omitted.] Thus, any discretion accorded to a city council with respect to deciding whether or not to provide indemnification relates only to making a determination as to whether the requirements of § 45–15–16 and the City Ordinance have been met—i.e., whether the city official in question was acting within the scope of his or her employment. If the answer to that inquiry is yes, then that official is entitled to indemnification.” *Shine*, at 19.

¹ “As a matter of policy, the mere filing of such a complaint as a ground for recusal would encourage judge shopping and cannot stand. To allow attorneys to engage in such behavior would in essence allow the attorneys to circumvent the entire judicial system.” *Antonio*, at 655.

The Supreme Court continued:

The 2009 amendment changed the term “may” to “shall.” It necessarily follows that the General Assembly thereby made indemnification mandatory, rather than discretionary, if the criteria set forth in the statute are met. *Shine*, at 19, footnote 16.

63. In *Shine*, the City of Central Falls had enacted an ordinance implementing R.I.G.L. § 45-15-16. (See *Central Falls Code of Ordinances*, Chap. 2, Art. III, Div. 3, § 2-108.) So have many other municipalities in Rhode Island. (See, for example, *Pawtucket Code of Ordinances, Chapter 30. Defense and Indemnification*.) The City of Providence has never enacted such an ordinance. Accordingly, the City’s discretion is restricted solely to determining whether a city official acted within the scope of his or her employment. “If the answer to that inquiry is yes, then that official is entitled to indemnification.” *Shine* at 19.

64. In the Superior Court case of *Venturini v. Costello*, C.A. No. PC 2004-6588 (decided July 31, 2013), a Providence policeman was found at trial to have acted negligently while driving an official city police vehicle. Contesting the jury’s award of damages, the City of Providence contended that the 2009 legislated change in statutory language made indemnification mandatory under R.I.G.L. § 45-15-16 and thus brought the policeman’s liability under the umbrella of the statutory limit on a municipality’s liability, as provided by R.I.G.L. § 9-31-3. Rejecting the City’s position, Superior Court Justice Taft-Carter ruled that the mandatory provision of R.I.G.L. § 45-15-16 did not shield an individual tortfeasor from liability. The Court observed, “In addition, the statute as written supports the voluntary aspect because it states that ‘[t]he indemnity shall be provided by the city or town council . . . on a case by case basis.’ Sec. 45-15-16. This language suggests there *may* be discretion.” *Venturini* at 12. (Emphasis added.) However, *Venturini* was decided nearly two years before the Rhode Island Supreme Court spoke definitively on the issue in its June 2015 decision in *Shine*.

III. To the extent that Respondents have any discretion under R.I.G.L. § 45-15-16, they have abused such discretion.

65. In *Tarro*, the Rhode Island Supreme Court further held:

Mandamus will not be issued “to compel a public officer to perform an act the performance of which rests within his discretion.” *Rossi*, 862 A.2d at 193

(quoting *Adler v. Lincoln Housing Authority*, 623 A.2d 20, 25 (R.I. 1993)). However, we have stated that mandamus may be used to require the reasonable exercise of discretion. *Newman v. Mayor of Newport*, 73 R.I. 435, 436, 57 A.2d 180, 181 (1948) (“he can only be directed to perform his duty under the law, but he cannot be directed to perform it in a particular way”). “If the performance of the duty involves the exercise of discretion or judgment, the writ will not be issued *except in cases where there has been an abuse of discretion.*” *Adler*, 623 A.2d at 26 (quoting *McLyman, ex rel. Hogan v. Holt*, 51 R.I. 96, 98, 151 A. 1, 2 (1930)). *Tarro* at 605. (Emphasis added.)

66. Respondents may contend that, while they do not have discretion to indemnify Petitioner, they still have some discretion over the *extent* of indemnification. Apart from the option of enacting an ordinance implementing RIGL § 45-15-16 – which the City of Providence has explicitly chosen not to do – nothing in the Supreme Court’s recent decision in *Shine* even hints at discretion in the amount of indemnification. Still, to the extent that Respondents have any discretion in complying with RIGL § 45-15-16, the factual record demonstrates that they have abused that discretion.

67. Quite apart from the fact that the City of Providence has not enacted an ordinance implementing RIGL § 45-15-16, Respondents have not established any guidelines, posted any website, printed any handbook, or issued any publication that puts officials like Petitioner on clear notice as to the City’s procedures for legal representation or indemnification of private legal expenses. Outside of public notice or scrutiny, the Respondents have effectively set up a hidden system – more accurately, an arbitrary non-system – that has permitted them to pick and choose which City officials they will indemnify based on the content of their speech.

68. The factual record is rife with evidence of Respondents’ arbitrary non-system of indemnification. Twice during March 2015, Petitioner called Respondent City Solicitor Jeffrey Dana seeking information and guidance as to how to submit a claim, but Mr. Dana did not return her calls. When she asked her attorney to call Mr. Dana on her behalf, he likewise did not receive a response (*supra*, at ¶33). Having received no response, Petitioner filed a formal claim for indemnification on April 7, 2015 with Respondent Samuel D. Zurier, Chairman of the Claims Committee of the Providence City Council (*supra*, at ¶34). In response, Mr. Zurier advised Petitioner that she had to submit her claim to the City Clerk, after which City Solicitor Dana would review it and make a

recommendation to the City Council (*supra*, at ¶34). Petitioner immediately complied with Mr. Zurier's requirements, but received no response. When Petitioner inquired of Mr. Zurier about the status of her indemnification claim, he told her not to contact him further (*supra*, at ¶39). When Petitioner finally met with City Solicitor Dana and Deputy Solicitor Southgate on June 17, 2015, they still had not received Petitioner's claim (*supra*, at ¶36). Without having reviewed a single page of Petitioner's claim, Mr. Dana told Petitioner that her claim was invalid (*supra*, at ¶37).

69. At the same June 17 meeting, while the complaint against Petitioner before the Ethics Commission was still pending, the Deputy City Solicitor Southgate advised Petitioner that the City would indemnify her only if she were exonerated (*supra*, at ¶38). Petitioner has subsequently determined that at least one other City official, Mr. Stephen Durkee, a member of the Providence City Plan Commission, was likewise told that the City would not indemnify him unless he were exonerated from a 2010 ethics complaint against him. Such a policy of *conditional* indemnification puts officials like Petitioner in the precarious if not untenable position of accumulating legal expenses without knowing whether the City of Providence will pay for them. Such an abuse of discretion runs completely contrary to the legislative intent of RIGL § 45-15-16, as interpreted by the Rhode Island Supreme Court in *Shine*.

70. In his July 27, 2015 letter to Petitioner, Mr. Dana asserted that Providence Code of Ordinances Sec. 2-99 barred him from offering her more than \$3,000 (*supra*, at ¶44). However, the limit imposed by this section of the Providence Code of Ordinances applies solely to settlements reached by the City Solicitor 'without the necessity of the approval of the mayor or the chairman of the committee on claims.' Sec. 2-99 does not bar the City Solicitor from recommending to the Respondent Mayor Jorge Elorza or to the Respondent Committee Chairman Samuel Zurier that the City pay a settlement in excess of \$3,000. Respondent City Solicitor Dana's hiding behind this artificial non-limit of \$3,000 is likewise an abuse of discretion.

71. In his July 27, 2015 letter, Respondent Dana maintained that Petitioner was not entitled to a "blank check" in the reimbursement of outside attorneys' fees. Yet there is no evidence on the record that Petitioner's legal expenses were anything but reasonable. There is no evidence that Petitioner somehow gained a windfall. What's

more, Petitioner spent hundreds of hours of her own time in an effort to reduce her legal bills. To hide behind pat, baseless assertions that Petitioner cannot have a blank check is likewise an abuse of discretion.

72. In his July 27, 2015 letter, Respondent Dana maintained that Petitioner was required to approach the City Solicitor before she retained outside counsel. He insisted that the Law Department of the City of Providence stood “ready, willing and able” to defend her from the start. The Providence Home Rule Charter § 603(b)(2) makes clear that the City Solicitor is “the attorney for the city and all departments, boards, commissions, ...” Such a provision creates a pre-existing attorney-client relationship between the City Solicitor and Petitioner, who has been a commissioner of the Board of Licenses. Yet the Law Department of the City of Providence – which was well aware of the legal maneuvers against Petitioner from the moment in August 2014 that Peter Petrarca initiated his tandem strategy of filing an ethics claim against Petitioner and then suing to have her recused – waited passively for her to establish an attorney-client relationship that in fact already existed. To hide behind fiction that Respondents were ready, willing and able to defend Petitioner, when in fact they had already defaulted on their obligation, is likewise an abuse of discretion.

73. In his July 13, 2015 correspondence, Respondent City Solicitor Dana offered to discuss the *potential* for representing Petitioner in the complaint before the Ethics Commission (*supra*, at ¶41). Yet the City of Providence would have been barred from representing Petitioner because of three specific conflicts of interest. First, the City itself failed in its statutory duty to inform the Ethics Commission that Petitioner was an official covered by the Code of Ethics. Second, upon information and belief, a City official improperly divulged confidential personnel information to Mr. Petrarca. Third, the City’s Director of Human Resources failed to consult with the Law Department before awarding Petitioner a contract. In fact, during the Ethics Commission’s deliberations of July 21, 2015 on a proposed resolution dismissing the complaint against Petitioner, Ethics Commission Chair Ross Cheit chastised the City for failing to follow the Code of Ethics (*supra*, at ¶32).

74. What’s more, Providence Home Rule Charter § 603(b)(2) provides that any outside attorney authorized by the City to “shall be subordinate to the City Solicitor” and

“shall be under the direction of the City Solicitor.” Accordingly, the retention of outside counsel under the Solicitor’s direction would not have permitted to City to escape such a conflict. In short, Respondent City Solicitor Dana’s proposal to discuss the *potential* of representing Petitioner was no more than an empty offer and a further abuse of discretion.

IV. Petitioner has no alternate remedy at law.

In *Muschiano v. Travers*, 973 A.2d 515 (R. I. 2009), the Supreme Court addressed the question of an alternate remedy at law.

We also have recognized, however, that the failure to pursue a remedy at law may not be fatal in all circumstances. Although “mandamus does not lie if the party seeking the writ has not exhausted an administrative remedy that is available for obtaining the same relief; ... the existence of a legal remedy other than mandamus does not necessarily mean that mandamus will not lie. If the remedy provided is one that is not plain, speedy, and adequate, mandamus may lie.” *Wood v. Lussier*, 416 A.2d 690, 692 (R.I. 1980). Whether an administrative remedy is plain, speedy, and adequate must be evaluated on a case-by-case basis. See, e.g., *Krivitsky v. Town of Westerly*, 849 A.2d 359, 362-63 (R.I. 2004) (right of company to appeal fire chiefs denial of helicopter license to town council adequate); *Wood*, 416 A.2d at 693 (building inspector’s refusal to furnish the plaintiff with a permit application “effectively nullified plaintiff’s right to apply to his office for a building permit and to obtain review ... of any denial”); *Marran v. West Warwick School Committee*, 113 R.I. 42, 43-45, 317 A.2d 455, 456-57 (1974) (appeal process for adverse school committee decision on school transportation to commissioner of education adequate); *Warren Education Association v. Lapan*, 103 R.I. 163,175, *523523235 A.2d 866, 873 (1967) (state labor relations board’s power to compel school committee to “sign a written contract formalizing any prior oral agreement reached by the parties at the bargaining table” gave labor union adequate administrative remedy). *Muschiano*, at 522-523.

75. In the instant case, there is no formal right of appeal, as there was in *Krivitsky* and in *Marran*. As in *Wood*, the City Solicitor’s denial of Petitioner’s request for payment effectively nullified her right to indemnification under the statute. There is no administrative agency that can compel the City of Providence to adhere to the law, as there was in *Lapan*. Petitioner has not obtained any other court order compelling Respondents to comply with their legal obligations, as in *Bristol Warren Regional School District v. Town of Warren*, C.A. No. PC 12-4653, decided April 4, 2014 (plaintiffs’ motion for a writ of mandamus denied because the Court had already issued an order for declaratory judgment). While it is arguable that Petitioner could bring suit in this Court

against the City of Providence, with its extended procedures for pretrial discovery and motion practice, such an alternative would not be “plain, speedy, and adequate.”

Conclusion

76. For the reasons set forth above, Petitioner respectfully requests that this Court issue a writ of mandamus ordering Respondents to fully indemnify her legal expenses to date in the amount of \$17,983.

Respectfully submitted,



JOHANNA HARRIS 9/1/2015
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