HEARING DATE: December 7, 2012

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

In re PENSION CASES	:	C.A. Nos. 12-3166, 12-3167,
	:	12-3168, 12-3169, 12-3579

DEFENDANTS' MOTION TO RECUSE

Defendants Lincoln D. Chafee, in his capacity as Governor of the State of Rhode Island, Gina Raimondo, in her capacity as General Treasurer of the State of Rhode Island and the Employees' Retirement System of Rhode Island, by and through the Retirement Board, by and through Gina Raimondo, in her capacity as Chairperson of the Retirement Board, and Frank J. Karpinski, in his capacity as Secretary of the Retirement Board ("Defendants") hereby move for the Hon. Sarah Taft-Carter to recuse herself from presiding over this case because (1) her uncle, David W. Taft, as a recipient of a pension funded and paid from the Municipal Employees' Retirement System ("MERS"), has more than a *de minimis* interest that could be substantially affected by the proceeding and (2) as a result of her uncle's interest, her impartiality might reasonably be questioned by an objective observer and/or by the public. The grounds for Defendants' Motion to Recuse are set forth more fully in the accompanying memorandum of law.

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	:	12-3168, 12-3169, 12-3579

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO RECUSE

Defendants Lincoln D. Chafee, in his capacity as Governor of the State of Rhode Island, Gina Raimondo, in her capacity as General Treasurer of the State of Rhode Island and the Employees' Retirement System of Rhode Island, by and through the Retirement Board, by and through Gina Raimondo, in her capacity as Chairperson of the Retirement Board, and Frank J. Karpinski, in his capacity as Secretary of the Retirement Board ("Defendants") submit this memorandum of law in support of their motion for the Hon. Sarah Taft-Carter to recuse herself from presiding over this case.

INTRODUCTION

This Court should grant Defendants' Motion to Recuse for at least two reasons: (1) the Hearing Justice's uncle, David W. Taft, as a recipient of a pension funded and paid from the Municipal Employees' Retirement System ("MERS") has more than a *de minimis* interest that could be substantially affected by the proceeding and (2) as a result of her uncle's interest, the Hearing Justice's impartiality might reasonably be questioned by an objective observer and/or by the public. Each of these circumstances requires disqualification at this juncture so that Defendants are afforded a fair and proper trial.

BACKGROUND

This is one of five cases that challenge the General Assembly's enactment in November 2011 of the Rhode Island Retirement Security Act of 2011 ("RIRSA"). The five cases were brought by certain retired state employees, associations of retired state and municipal employees and labor organizations on behalf of their members. The Plaintiffs in each of the five cases seek to invalidate the enactment of RIRSA and allege that RIRSA violates the Contract Clause, the Takings Clause and the Due Process Clause of the Rhode Island Constitution.

The Plaintiffs also sought a temporary restraining order ("TRO") and sought a hearing in this case on the Superior Court's formal and special cause calendar.[1] At that time, the Hearing Justice assigned to the formal and special cause calendar was Justice Taft-Carter. Even though the Hearing Justice was later assigned to assist on another calendar, on October 19, 2012, during a hearing (which counsel had been advised would be a conference), the Hearing Justice informed the parties that it was her understanding that the Superior Court Presiding Justice had assigned this litigation to her. Ex. A at 12 (noting that "these pension cases are mine"). Defendants are unaware of any order assigning this litigation to the Hearing Justice as Defendants believe is customarily entered when cases are assigned to a single justice.

On June 22, 2012, during a chambers conference in which Plaintiffs' counsel summarized for the Court their respective claims and sought a TRO, Plaintiffs' counsel also mentioned that two additional lawsuits might be filed, one of which contemplated an action on behalf of the state police retirees. *See* Ex. B. At that time, the Hearing Justice disclosed to counsel that her son is a state police trooper and expressed some concern about whether she should hear these cases. *Id.* Plaintiffs' counsel informed the Hearing Justice that Plaintiffs did not believe she

[1] The Hearing Justice denied the Plaintiffs' request for a temporary restraining order.

would be precluded from hearing the cases that had been filed or any case that might be filed on behalf of the state police retirees, because as an active state trooper, the Hearing Justice's son's interests would not be affected by RIRSA. *Id.* Defendants' counsel had not been aware that the Hearing Justice's son is a state trooper until her disclosure and, therefore, requested an opportunity to discuss the Hearing Justice's disclosure with their clients and review the changes to RIRSA as they affect members of the state police. *Id.*

By letter dated July 12, 2012, Defendants' counsel informed the court that the following changes to RIRSA affect state police troopers:

- Prior to the 2011 pension changes (RIRSA), a state police pension was based on the officer's annual compensation for the position from which the officer retired. Under RIRSA, a state police pension is based on the employee's final five-year average compensation.

- Under RIRSA, an employee's clothing allowance is excluded from his or her compensation calculation.

- For officers hired prior to July 1, 2007, the pension multiple decreased from 2.5% for each year of service to 2% for service after July 1, 2012. For officers hired after July 1, 2007, prior legislation had already reduced the multiple to 2%.

- The cost of living adjustment ("COLA") was changed from an automatic $1,500 annually to a market based COLA equal to the plan's 5-year average rate of return minus 5.5% with a minimum of zero and a maximum of 4%.

- The COLA was suspended by RIRSA until the aggregate funding percentage for the state police, judges, state employees and teachers funds are at 80%. During the suspension period, a calculation will be made once every 5 years and an interim COLA awarded for that year if justified by the new COLA formula. Under current projections from the actuary, the COLA will be suspended for 20 years, so this has an impact on both retired officers and active officers who may retire in the next 20 years.

Id. Defendants' counsel also informed the court that regardless of whether a lawsuit is filed on behalf of state police retirees, a ruling on the pending lawsuits will affect active troopers as well as retirees because the Plaintiffs seek to invalidate RIRSA. *Id.* Defendants' counsel informed the Hearing Justice that Defendants believed that her son, as an active member of the state police, has an "economic interest" in the litigation (as that term is defined in the Code of Judicial Conduct). *Id.* Defendants also respectfully asked the Court to review Article VI, Canon 3E and requested a conference with the Court to discuss the matter further. *Id.*

On July 13, 2012, a second conference was held with the court. Ex. C. During that conference, Defendants' counsel informed the court that in this litigation the Plaintiffs seek to invalidate RIRSA in its entirety and, therefore, regardless of whether the state police retirees filed a suit challenging RIRSA, a ruling in the pending cases would have an economic affect on active members of the state police, including the Hearing Justice's son. *Id.* at 3.[2] Defendants' counsel also informed the Hearing Justice that Defendants purposely did not file a motion to recuse because they believed it would be unfair to file such a motion without first apprising the Hearing Justice of the specific legislation that would affect her son and because "it would be certainly premature to do that not having all the facts." *Id.* at 4. Defendants' counsel made clear that their correspondence to the Hearing Justice was intended to highlight some of the changes that would affect state police troopers but that "there's much more in the legislation itself." *Id.* at 6. Defendants' counsel further advised the Court that although they would not be filing a motion to recuse at that time, Defendants would decide whether they needed to do so at a later time. *Id.* at 17.[3] During the conference counsel for certain of the Plaintiffs likewise recognized that there

[2] To date, a suit has not been filed on behalf of state police retirees.

[3] Out of respect for, and fairness to the Court, Defendants did not immediately file a motion for recusal, which would have made public Defendants' concern regarding what appeared to them at

was "no pending motion" and, therefore, offered only her preliminary observations. *Id.* at 10. The Hearing Justice informed the parties that after she had an opportunity to reflect on the parties' positions and discuss the issue of recusal with the Presiding Judge, she would schedule another conference to discuss the issue of recusal. *Id.* at 2, 17.

Thereafter, by letter dated July 18, 2012, Defendants' counsel informed the Hearing Justice of certain other effects of RIRSA on state troopers. Ex. D. Defendants called to the court's attention the "normal cost," which represents the portion of the economic cost of a participant's anticipated pension benefits allocated to the current plan year. *Id.* The normal cost for a state trooper was 29.86% of salary as of the June 30, 2010 valuation before changes made by RIRSA. *Id.* After the changes made by RIRSA, the normal cost of a state trooper as of the June 30, 2011 valuation was 22.93% of salary, representing a decrease of more than 23% in the normal cost for a state trooper's retirement benefits. *Id.* In addition, counsel for Defendants enclosed with their correspondence to the court a spreadsheet which compared the benefits of four state troopers who had retired before the effective date of RIRSA to the benefits the same state troopers would have received had they retired under RIRSA and in accordance with the application of the new definition of compensation under RIRSA. *Id.* Both calculations were performed using the same level of benefit accrual. *Id.* The results, which are attached hereto as Exhibit D, are summarized as follows:

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that time as a possible conflict of interest. Rather, Defendants asked that the Hearing Justice consider her son's economic interest in light of Article VI, Canon 3E of the Code of Judicial Conduct. Additionally, Defendants were not, at that time, aware of all facts that could bear on the issue of recusal.

	Final Salary Pre-RIRSA **Pension Benefit Pre-RIRSA**	**Final Average Salary Post-RIRSA** **Pension Benefit Post-RIRSA**
Trooper 1	$131,919 $65,960	$90,461 $45,230
Trooper 2	$102,765 $51,382	$75,185 $37,592
Trooper 3	$137,620 $72,939	$115,577 $60,100
Trooper 4	$137,620 $77,067	$104,572 $56,469

As demonstrated by the foregoing results, the changes made by RIRSA affect the "economic interest" of current state troopers. The reduction in normal cost relates to the cost of pension benefits for the current year, and thus further demonstrates that the RIRSA has an economic impact on all state troopers regardless of their level or length of service.

Counsel also noted in his July 18, 2012 correspondence that regardless of a state trooper's length of service, if a state trooper is injured and becomes disabled, he or she will be entitled to receive retirement benefits at that point in time, irrespective of his or her years of service or retirement age. *Id.*

By letter dated July 26, 2012, counsel for the Plaintiffs took the position that "there is no evidence that [the Court's] son has more than a *de minimis* interest in the subject matter in controversy that could be substantially affected by the proceeding or that raises a reasonable question as to the Court's impartiality." Ex. E. Plaintiffs also argued that "[i]t is entirely 'remote, contingent, indirect [and] speculative' whether [the Court's] son will remain employed by the State Police to a point in time when he would be impacted by the RIRSA or the invalidation of the RIRSA and, thus, recusal is not required." *Id.* (citing *State of Rhode Island v. Lead Industries Ass'n*, C.A. No. 99-5226, 2005 R.I. Super. LEXIS 127, at *7 (R.I. Super. Ct. Aug. 11, 2005)). Plaintiffs also argued that because all Rhode Island state court judges are

participants in RIRSA, the rule of necessity applies and allows the Hearing Justice to hear the case, regardless of whether she has some other conflict that would require recusal. *Id.*

By letter dated July 30, 2012, Defendants' counsel once again informed the Hearing Justice that in their prior correspondence Defendants had not argued the issue of recusal, but rather had used those letters to inform the Hearing Justice of certain facts and circumstances concerning her son's economic interest in the litigation. Ex. F. Defendants' counsel advised that he would provide the Court with analysis and argument on the issue of recusal if the Court would find it helpful. *Id.*

On October 15, 2012, the parties were informed by the Court Clerk that the Hearing Justice desired to hold a conference to discuss the matter. Ex. G. On October 19, 2012, the Hearing Justice held a hearing (not a conference) during which she began by informing the parties that she would treat the letters she received from Defendants' counsel as a motion to recuse and the letter she received from Plaintiffs' counsel as an objection. Ex. A at 1. At that time, before the Hearing Justice ruled, counsel asked to be heard. *Id.* Counsel once again explained that his letters to the Hearing Justice had been intended to draw the Hearing Justice's attention to the issues concerning recusal and did not contain argument on the issue of recusal. *Id.* He expressed concern that Defendants did not have an opportunity to brief the issue of recusal and provide the court with case law and authority to support a motion to recuse. *Id.* The Hearing Justice informed the parties that she had conducted her own research, informed the parties that she would treat the letters she received from Defendants' counsel as a motion to recuse and the letters she received from Plaintiffs' counsel as an objection thereto, and that she was ready to rule. *Id.*

The Hearing Justice first addressed her son's interest as a member of the Rhode Island State Police. *Id.* at 4. She recognized that her son, as a state trooper and member of ERSRI, would be affected by RIRSA in so far as (1) pensions are calculated based on the employees' final five-year average compensation (instead of based on an officer's annual compensation for the position from which the officer retired); (2) COLAs are suspended for all state employees, teachers, state police and judges until the plans' funding level for all groups, calculated in the aggregate, exceeds an 80 percent funding level (current projections estimate that the COLA will be suspended for the next 20 years) and (3) an employee's clothing allowance is excluded from his or her compensation calculation. *Id.* at 4-6.

She also stated that her son is not a vested employee of the state police[4] and he would not be eligible to receive pension benefits for a number of years. *Id.* at 8. The Hearing Justice further noted that "[t]here is no certainty that [her] son will, in fact, become vested in the retirement system nor that he will ever seek pension benefits through the State Police at any time in his life." *Id.* at 9. Thus, the Hearing Justice concluded that "any financial interest [her] son might have as an active, unvested member of the State Police is remote and speculative," and consequently, that "interest is *de minimis* and, therefore, does not require disqualification." *Id.*[5]

The Hearing Justice next disclosed that her mother receives death benefits from her late father's ERSRI pension. *Id.* at 6. This was the first time that the Hearing Justice had disclosed her mother's interest and none of the parties had any opportunity to investigate, address, brief or argue that issue. Nevertheless, the Hearing Justice informed the parties that her mother receives

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[4] There is nothing in the applicable statute that addresses when a member of the state police becomes vested in the pension system.

[5] The Hearing Justice did not address the issue of the disability of a trooper, which would fully vest the trooper with pension benefit.

"a small monthly death benefit from [her] father's pension." *Id.* at 6.[6] The Hearing Justice recognized that her mother, as the recipient of a death benefit from her father's pension, would be affected by RIRSA as the yearly COLA was modified. *Id.*

The Hearing Justice concluded that while her mother's "financial interest does not require speculation as she is already entitled to and has been receiving a COLA," her mother's "financial interest is *de minimis* as the amount of the pension she receives is small and any increase the pension which she would receive as a result of a COLA would also be small." *Id.* The Hearing Justice additionally noted that she did not believe "that any small financial interest which [her] mother has in the outcome of the litigation is such as would reasonably give rise to doubts of [the] Court's impartiality." *Id.*

In further support of her decision not to recuse, the Hearing Justice noted that the so-called rule of necessity holds that when all judges "are disqualified, none are disqualified." *Id.* at 10-11. She therefore concluded that "[t]he instant matter, which potentially affects all state employees, including judges, properly constitutes a case where the rule of necessity must apply in order to permit the case to be heard." *Id.* at 11 (citing *Board of Trustees of Public Employees Retirement Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985)). Finally, the Hearing Justice noted that "any financial interest in the outcome of this litigation will not reasonably impact my ability to be impartial." *Id.* at 11.

For these reasons, the Hearing Justice denied Defendants' "motion to recuse." *Id.* at 11. An order entered on November 2, 2012.

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[6] As detailed more fully herein, Defendants subsequently learned from a review of publicly available information that the Hearing Justice's mother receives a pension (based on the Hearing Justice's father's service) of $1,884.39 per month, which consists of $900 in pension benefits and $984.39 in COLA.

On November 8, 2012, Defendants filed with the Rhode Island Supreme Court a Petition for Writ of Certiorari in each of the five cases, which requested that the Supreme Court issue a writ of certiorari to review this Court's November 2, 2012 Order and October 19, 2012 Decision, which *sua sponte* ruled on what the Superior Court deemed a motion to recuse and found that recusal was not required as a result of the Hearing Justice's mother's and son's economic interests. Contemporaneous with the filing of their Petitions for Writs of Certiorari, Defendants filed in this Court a Motion to Stay the five cases pending the Supreme Court's review of their Petitions for Writs of Certiorari.

The next day, November 9, 2012, the Providence Journal ran a front-page article reporting on the Defendants' filing of the Petition for Writ of Certiorari. The Providence Journal's November 9, 2012 article reported that "[o]n Thursday night [November 8, 2012], Taft-Carter issued a statement to The Journal defending herself, along with a three-page opinion she sought from an advisory panel of judges this summer clearing her to preside over the pension cases." Ex. H. The Providence Journal's article continued:

> The Rhode Island Supreme Court Advisory Committee on the Code of Judicial Conduct is a panel of five judges, chaired by Superior Court Judge Michael A. Silverstein. In its Oct. 5 opinion, the committee concluded that Taft-Carter's mother's and son's interests were minimal, and "do not require her disqualification from the pension cases, provided, however, that Judge Taft-Carter makes a subjective determination that those interests will not affect her ability to preside over the cases fairly, objectively, and without bias."

Id.

This was the first time Defendants (and Plaintiffs) learned that the Hearing Justice had sought and received an advisory opinion. Although the advisory opinion was dated October 5, 2012, two weeks before the Hearing Justice ruled on what she deemed to be a "motion to

recuse," the Hearing Justice did not disclose to the parties that she had sought and received an advisory opinion as part of her recitation of the travel of the case. Ex. I. Indeed, in her October 19, 2012 ruling the Hearing Justice detailed at length the travel of the case but made no mention of having sought and received an advisory opinion. *See* Ex. A at 2-6.

Thereafter, on November 18, 2012, the Providence Journal reported that the Hearing Justice's uncle, David W. Taft, a former Cranston city auditor, collects a $65,900 pension benefit per year, $21,000 of which is a COLA benefit. Ex. J. The Hearing Justice had not previously disclosed her uncle's interest to the parties (and, according to the Providence Journal, the Hearing Justice had informed it that she was unaware of her uncle's pension benefits). This was the first time Defendants learned that the Hearing Justice's uncle, a third-degree family member under the Code of Judicial Conduct, receives a pension benefit. Consequently, it appears that the Hearing Justice also had not disclosed her uncle's interest to the Rhode Island Supreme Court Advisory Committee on the Code of Judicial Conduct because (a) she informed the Providence Journal that she was unaware of it and (b) the advisory opinion issued by that committee referenced only the interests of the Hearing Justice's son and mother and made no mention of the Hearing Justice's uncle.

On November 19, 2012, the Court heard arguments on Defendants' Motion to Stay. During those arguments, counsel for Defendants informed the Court that Defendants had read in the prior day's Providence Journal that the Hearing Justice's uncle receives a pension through MERS. Counsel for Defendants informed the Court that because he had learned of that information the day before, which was a Sunday, he had not yet had an opportunity to discuss the Hearing Justice's uncle's economic interest with his clients, but that he reserved his right to file an appropriate motion after so doing. *Id.*

Subsequently, Defendants confirmed through information that is publicly available, that the Hearing Justice's uncle receives a $65,900 pension, $21,000 of which is a COLA benefit.

Consequently, Defendants now respectfully move this Court to recuse from these five cases because the Hearing Justice's uncle is a person within the third degree of relationship to the Hearing Justice and is known by the Hearing Justice to have a more than *de minimis* interest that could be substantially affected by the proceeding.

ARGUMENT

I. Recusal is Required Because the Hearing Justice's Uncle Has a More than a *De Minimis* Interest That Could Be Affected by the Proceeding.

The Court has an obligation to recuse from presiding over this case for at least two reasons: (1) the Hearing Justice's uncle has more than a *de minimis* interest that could be substantially affected by the proceeding and (2) as a result of the Hearing Justice's uncle's interest, the Hearing Justice's impartiality might reasonably be questioned by an objective observer and/or by the public. Each of these circumstances requires disqualification.[7]

Article VI, Canon 3(E) of the Rhode Island Supreme Court Code of Judicial Conduct (the "Code") governs those circumstances when a judge's disqualification is required. Article VI, Canon 3(E) provides:

> 1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> . . .
>
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> . . .

[7] Standing alone, each of these circumstances favor recusal; however, when viewed in the aggregate, along with the interest of the Hearing Justice's son and mother, the collective circumstances provide even further support why the Hearing Justice should recuse.

> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.

Article VI, Canon 3(E)(1)(d)(iii). Thus, a judge shall disqualify himself or herself in, *inter alia*, two types of cases: (1) cases in which a person within the third degree of relationship[8] to the judge is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding and (2) cases in which the judge's impartiality might reasonably be questioned. *Id.*

A. Recusal Is Mandatory In The Above-Enumerated Circumstances.

Article VI, Canon 3(E)(1), which specifies that a judge *shall* disqualify himself or herself in cases in which her uncle has "a more than de minimis interest that could be substantially affected by the proceeding" is mandatory in nature. *See Castelli v. Carcieri*, 961 A.2d 277, 284 (R.I. 2008) (recognizing that "use of the word 'shall' contemplates something mandatory or the 'imposition of a duty.'").

In construing Canon 3(C)(1)(c) of the Code of Conduct for United States Judges, which contains a similar requirement that a judge *shall* disqualify himself or herself in cases in which a judge, a judge's spouse or a judge's child has a financial interest in the subject matter in controversy, the United States Supreme Court has held that such a rule "requires disqualification *no matter how insubstantial the financial interest* and *regardless of whether or not the interest actually creates an appearance of impropriety*." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60 n.8 (1988) (emphasis added). In this sense, it sets forth a "per se disqualification rule." Alan W. Perry and Martin H. Redish, 12 Moore's Federal Practice – Civil § 63.31.

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[8] The Code defines "[t]hird degree of relationship" as follows: "great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece." Article VI, Canon 3(E).

A judge also *shall* disqualify himself or herself in cases in which her impartiality might reasonably be questioned. Article VI, Canon 3(E)(1). For that reason, the United States Supreme Court held that a judge who was a trustee of a university should have disqualified himself in an action which sought a declaration concerning a corporation's ownership because the university had an interest in the corporation. *Liljeberg*, 486 U.S. at 859.[9] In so ruling, the Supreme Court recognized that the canon was enacted "to promote public confidence in the integrity of the judicial process" and, therefore, a judge must recuse "to avoid even the appearance of partiality." *Id.* at 860. The Supreme Court, adopting the United States Court of Appeals for the Fifth Circuit's interpretation of the canon, held that "'[i]f it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created *even though no actual partiality exists.*'" *Id.* at 860 (emphasis added) (quoting *Heath Services Acquisition Corp. v. Liljeberg*, 796 F.2d 802 (5th Cir. 1986)).

Thus, if the Hearing Justice's uncle has a more than *de minimis* interest that could be substantially affected by the proceeding the judge's recusal is required, regardless of whether the interest creates an appearance of partiality.

Second, as a separate and independent basis for recusal, if the Hearing Justice's impartiality might reasonably be questioned, recusal is required. Article VI, Canon 3(E)(1). Under that inquiry, the Hearing Justice must decide whether "it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then

[9] In *Liljeberg*, the judge had taken the position that his disqualification was not necessary because (1) the university was not a party to the litigation; (2) the university is a non-profit, educational institution, and any benefits [inuring] to that institution would not benefit any individual personally and (3) he had no personal knowledge of the transactions underlying the lawsuit. *Liljeberg*, 486 U.S. at 859.

an appearance of partiality is created *even though no actual partiality exists.*'" *Liljeberg*, 486 U.S. at 860. The Hearing Justice's recusal is therefore required because (1) her uncle has more than a *de minimis* interest that could be substantially affected by the proceeding and (2) because of her uncle's interest, it would appear to a reasonable person that the judge has an interest in the litigation, which creates an appearance of partiality.

B. Recusal is Required Because The Hearing Justice's Uncle Has an "More Than a De Minimis Interest That Could Be Substantially Affected By The Proceeding."

The Hearing Justice's uncle, as a recipient of a pension through MERS, has a more than *de minimis* interest that could be substantially affected by the proceeding. That interest requires the Hearing Justice to recuse from presiding over this case.

Courts have held that a judge's spouse's interest (which, under Article VI, Canon 3(E)(1) is no different than a judge's uncle's interest) in a pension fund constitutes an "other" interest that could be "substantially affected by the proceeding." *In re Perkins*, No. 86 C 7985, 1988 U.S. Dist. LEXIS 12360 at *5 (N.D. Ill. 1988), *vacated on other grounds*, 902 F.2d 1254 (7th Cir. 1990) and *In re Goldberg*, 98 B.R. 353, 354 n.1 (N.D. Ill. Bankr. 1989).

The *In re Perkins* case came before the United States District Court for the Northern District of Illinois on appeal from that district's bankruptcy court. *In re Perkins*, 1988 U.S. Dist. LEXIS 12360 at *1. The appellant creditors argued on appeal that the bankruptcy court judge's decision not to recuse himself was in error. *Id.* The issue before the court in the underlying bankruptcy case was whether the creditors could reach a debtor's retirement account. *Id.* at *2. The bankruptcy judge assigned to the case was married to a teacher who was a participant in the same retirement system as the debtor. *Id.* The bankruptcy judge's wife had accrued 16 years of service and had contributed $27,998.51 to the plan. *Id.* Nevertheless, the bankruptcy judge determined that recusal was not required.

On appeal before the Northern District of Illinois, the court noted that the bankruptcy judge's wife's participation in the retirement system arguably required the bankruptcy judge's recusal because her account with the retirement system constituted a financial interest in the case. *Id.* at *3. After evaluating this argument, however, the court concluded that the bankruptcy judge's recusal was not required. *Id.* at *1. In so concluding, the court agreed with the creditors that the bankruptcy judge's wife had a financial interest in the case due to her "interest in the [retirement] fund and the benefits she *may* receive from it." *Id.* at *5 (emphasis added). Nevertheless, the court also recognized that the subject matter of the controversy before the court did not concern the bankruptcy court judge's wife's interest in the retirement fund because the only issue before the court concerned the legal status of the debtor's interest. *Id.* The court's "ruling did not affect the value of [the fund] or [the judge's wife's] potential benefits. Nor did it affect the operation [of the fund] or [the judge's wife's] right to receive [benefits]." *Id.*

A year after the *Perkins* decision, a similar issue arose in the United States Bankruptcy Court for the Northern District of Illinois. In *In re Goldberg*, the issue before the court was whether a Chapter 7 Trustee could recover from the executor of the debtor's estate the proceeds of a pension fund and life insurance policy. *In re Goldberg*, 98 B.R. at 354 n.1. The judge assigned to the case was married to a public school teacher and a member of the Public School Teachers' Pension and Annuity Fund. *Id.* The court examined *sua sponte* potential grounds for recusal. *Id.* In so doing, he noted that his wife had a financial interest in the pension fund but that neither the value nor the terms of her interest in the pension fund were at issue in the case. *Id.* Relying on the decision in *In re Perkins*, which the court described as involving "an almost identical situation," the judge held that his recusal was unnecessary. *Id.*

Thus, in *In re Perkins* and *In re Goldberg,* the courts recognized that the judges' wives' membership in a state retirement system constituted a more than *de minimis* interest that could be affected by the question at issue in the case. *In re Perkins*, 1988 U.S. Dist. LEXIS 12360 at *5; *In re Goldberg*, 98 B.R. at 354 n.1.

In *In re Perkins*, the issue before the court was whether a retirement account is akin to a spendthrift trust which passes outside a debtor's estate. *In re Perkins*, 1988 U.S. Dist. LEXIS 12360 at *2. The court noted that resolution of that issue could affect the judge's wife: "If she went into bankruptcy, the bankruptcy judge in her case could look to her husband's decision as precedent for the proper treatment of [the Illinois Teacher Retirement System] accounts." *Id.* at *7-8. However, the court also recognized that whether an "other interest" requires recusal "may depend on the interaction of two variables: the remoteness of the interest and its extent or degree." *Id.* at 8. The court held that under the circumstances presented there it was "highly speculative" to conclude that the judge's wife could ever take advantage of her husband's decision because there was no evidence that the trial justice's wife was contemplating bankruptcy. *Id.* Thus, the remoteness of the judge's wife becoming bankrupt militated against recusal.

Similar to the *In re Perkins* case, resolution of the issue before the Court in this case – whether RIRSA is constitutional – will have an effect on the pension benefits of the Hearing Justice's uncle. His interest in receipt of a COLA is more than *de minimis*. If the constitutionality of RIRSA is upheld, her uncle will no longer be entitled to continue to accrue COLA benefits (the same benefits which resulted in a $21,000 per year COLA to date).

The average monthly Social Security benefit for a retired worker was approximately $1,230 at the beginning of 2012. *See* United States Social Security Administration, FAQ,

available at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/13/~/average-monthly-social-security-benefit-for-a-retired-worker (last updated July 2, 2012). The Hearing Justice's uncle's *COLA benefits alone*, which total approximately $1,700 per month, are significantly greater than the average *total* amount a Social Security beneficiary receives monthly. Thus, the Hearing Justice's uncle has a more than *de minimis* interest that could be substantially affected by the proceeding.[10]

Moreover, the ultimate question presented by this case – whether the Contract Clause has been violated – involves an initial three-part consideration: "(1) whether there is a contractual relationship; (2) whether a change in law impairs that contractual relationship and (3) whether the impairment is substantial." *Int'l Association of Firefighters, Local 1950 v. Johnston*, C.A. No. PC 2011-6020, 2012 R.I. Super. LEXIS 92 at *26 (R.I. Super. Ct. June 12, 2012) (Taft-Carter, J.).[11] If any one of these elements is absent, Defendants will prevail. If, in ruling on Defendants' Motion to Recuse, the Hearing Justice concludes that her uncle's interest in his COLA is *de minimis* and does not require her recusal, it is only reasonable to conclude that RIRSA does not substantially impair any contract right that her uncle or any similarly situated retirees may have in their respective COLAS. Therefore, if the interests of the Hearing Justice's son, mother or uncle in the litigation are determined to be *de minimis*, then it will be difficult to fathom how the Plaintiffs would be able to show substantial impairment of any "contract" if the economic interests affected are indeed *de minimis*.

---

[10] Defendants respectfully disagree with the conclusion of the Hearing Justice and that of the Advisory Panel that the economic interest of the Hearing Justice's son and mother are *de minimis*.

[11] Even if the Plaintiffs were able to satisfy these criteria, they would also have to prove that there was no justifiable public purpose that necessitated the changes. *In re Advisory Opinion to the Governor*, 593 A.2d 943, 948-49 (R.I. 1991) (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983)); *Int'l Association of Firefighters, Local 1950*, 2012 R.I. Super. LEXIS 92 at *27-28.

Finally, unlike the *In re Perkins* case, however, there is no remoteness issue here. A ruling on the constitutionality of RIRSA will have a direct, immediate and substantial effect on the pension benefits to which the Hearing Justice's uncle would be entitled. The Hearing Justice's uncle's interest does not require speculation because he is already entitled to and has been receiving a COLA.

Therefore, the Hearing Justice's recusal is required in this case because her uncle has an "other more than a de minimis interest that could be substantially affected by the proceeding."

C. Recusal is Required Because the Hearing Justice's Impartiality Might Reasonably be Questioned.

As a second and independent basis for recusal, the Hearing Justice's impartiality might objectively and reasonably be questioned based on her uncle's interests, and therefore, recusal is required.

Article VI, Canon 3(E)(1) requires a judge's recusal when his or her "impartiality might reasonably be questioned." Although few Rhode Island decisions have interpreted this canon, the United States District Court for the District of Rhode Island has recently interpreted the similar canon of the Code of Conduct for United States Judges, noting that it "'was designed to promote public confidence in the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test.'" *See Unite Here Local 217 v. Sage Hospitality Res.*, C.A. No. 10-05S, 2010 U.S. Dist. LEXIS 113352, at *8-9 (D.R.I. Oct. 20, 2010) (quoting *Liljeberg*, 486 U.S. at 851 n.1). Thus, in determining whether recusal is required under that canon, "the key to the analysis is perception: 'what matters is not the reality of bias or prejudice but its appearance.'" *Id.* (quoting *Liteky v. United States*, 510 U.S. 540, 548 (1994). If there is an appearance of impropriety, recusal is necessary "regardless of the judge's own inner conviction

that he or she can decide the case fairly despite the circumstances." *Id.* (citing *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997)).

In the *In re Perkins* case, which is discussed extensively *supra*, and which concerned a judge whose spouse was a member a state retirement system, the court concluded that an objective, disinterested observer fully informed of the facts of the case would not believe that the trial justice could not dispense justice fairly. *In re Perkins*, 1988 U.S. Dist. LEXIS 12360 at *8-9. The court reached that conclusion by recognizing that the trial justice did not have a financial interest in the controversy and his wife's only interest was remote. *Id.*

Here, unlike in *In re Perkins*, the Hearing Justice not only has a financial interest in the controversy, but so does her uncle. In fact, her uncle stands to be substantially affected by the decision. Under these circumstances, a disinterested observer, fully informed of the facts of the case could reasonably harbor doubts as to whether the Hearing Justice could be impartial. In fact, in an informal online poll hosted by the Providence Journal, 74.8 percent of responders indicated that they do not believe "a judge whose son is a state employee and whose mother collects a public pension [should] be allowed to decide whether Rhode Island's landmark 2011 pension overhaul is legal." Ex. K. If the same poll was taken with respect to the Hearing Justice's uncle's interest, the result would likely be the same.

The economic interests of the Hearing Justice's uncle standing alone would lead a disinterested observer to question the Hearing Justice's ability to be impartial and, even more so, the collective impact of the Hearing Justice's son's, mother's and uncle's economic interests would undoubtedly lead a disinterested observer to question the Hearing Justice's ability to be impartial. Indeed, it is irrelevant that the Hearing Justice believes she can be so.

Therefore, the Court's recusal is required because her impartiality might reasonably be questioned based on her uncle's interests.

D. The Rule of Necessity Does Not Extinguish the Hearing Justice's Uncle's Conflict.

Even if the Court were to decide that the rule of necessity applies in this case, the United States Supreme Court has recognized that it does not operate to stamp out *all* conflicts that a judge may have. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). Indeed, under the rule of necessity, when all judges share an interest in the outcome of a case, they need not recuse because to do so "would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *United States v. Will*, 449 U.S. 200, 213-14 (1980). However, the fact that the rule of necessity permits judges to hear and decide cases notwithstanding a shared interest in the case, does not eliminate all conflicts the judge may have. *Aetna Life Ins. Co.,* 475 U.S. at 825.

The *Aetna Life Ins. Co.* case concerned an insurer's bad-faith refusal to pay. *Id.* at 815-16. A trial of that suit resulted in a $3.5 million punitive damages award. *Id.* at 816. The matter came before the Alabama Supreme Court and, in a 5-4 decision, the Court affirmed the jury's award. *Id.* The appellant filed an application for rehearing and while that application was pending, the appellant learned that while the case had been pending before the Alabama Supreme Court, one of its justices, Justice Embry, had filed two actions against insurance companies. *Id.* at 817. The first action arose out of an insurance company's failure to pay for the loss of a mink coat. *Id.* The second suit, which was styled as a class action suit, was brought by Justice Embry on behalf of himself and as a representative of a class of all other Alabama state employees insured under a group plan by Blue Cross-Blue Shield of Alabama and included a claim for willful and intentional withholding of payments on valid claims. *Id.* Both suits sought punitive

damages. *Id.* The appellant filed two motions to recuse – one challenging Justice Embry's participation in the decision and one seeking to recuse all of the justices of the court based on their interests as potential class members. *Id.* Both motions were denied. *Id.*

When the case reached the United States Supreme Court, the Court was called upon to decide whether recusal was required for either Justice Embry or the other justices of the court. The Supreme Court concluded that, even if all the justices of the court had an interest by virtue of their position as potential class members, the rule of necessity would obviate the need for all of the justice of the court to recuse. *Id.* at 825 (citing *United States v. Will*, 449 U.S. 200, 214 (1980) for the proposition that under the "'rule of necessity,' none of the judges or justices would be disqualified"). Notwithstanding the Supreme Court's conclusion that the rule of necessity would obviate the need for all of the justices of the court to recuse, the Supreme Court still concluded that Justice Embry's recusal was warranted because he had a personal stake in the outcome of the case. *Id.* at 824-25. In fact, the Alabama Supreme Court's decision, which he took part in deciding, "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Id.* at 824. Therefore, the Supreme Court concluded that the Due Process Clause of the United States Constitution required Judge Embry's recusal. *Id.* at 825.

Consistent with the result in *Aetna Life Ins. Co.*, even if all judges have the same conflict (being participants in the ERSRI) the rule of necessity does not waive *all* conflicts the Hearing Justice may have.[12]

[12] Even if all Superior Court judges have the same conflict as pension system participants, it is unlikely that all Superior Court judges also have family members who are pension system participants.

CONCLUSION

Assuming, arguendo, that all Superior Court justices have the same conflict of interest by virtue of the reduction in their pension benefits caused by the RIRSA legislation, the rule of necessity would apply and would require that some judge hear this case. However, even so, the rule of necessity does not operate to eliminate other potentially disqualifying conflicts of interest. Here, the Hearing Justice's mother receives a pension from the retirement system and her benefits have been reduced by RIRSA. The Hearing Justice's son also participates in the retirement system and his benefits have been reduced by RIRSA. Finally, the Hearing Justice's uncle also receives a pension from the retirement system and his benefits have been reduced by RIRSA. Article VI, Canon 3(E)(1) requires a judge's recusal when his or her family member has an "economic interest" in the litigation (with respect to the Hearing Justice's mother and son), "more than a *de minimis* interest" in the subject matter at issue (with respect to the Hearing Justice's uncle) or when, as a result thereof, the judge's "impartiality might reasonably be questioned." In the instant case, where the Hearing Justice's mother, son and uncle all have an economic interest in the outcome of the litigation as a result of the changes made to RIRSA, Defendants respectfully submit that the Code of Judicial Conduct requires recusal.

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EXHIBIT A

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

In re Pension Cases: PC/2012-3166
PC/2012-3167
PC/2012-3168
PC/2012-3169
PC/2012-3579

HEARD BEFORE THE HONORABLE JUSTICE SARAH TAFT-CARTER

ON FRIDAY, OCTOBER 19, 2012

APPEARANCES:

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CARLY B. IAFRATE, ESQUIRE
JAY E. SUSHELSKY, ESQUIRE
GARY T. GENTILE, ESQUIRE
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MARY M. GUGLIETTI, RPR
CERTIFIED COURT REPORTER

CERTIFICATION

I, Mary M. Guglietti, hereby certify that the succeeding pages, 1 through 16, inclusive, are a true and accurate transcript of my stenographic notes.

Mary M. Guglietti

MARY M. GUGLIETTI, RPR
Certified Court Reporter

FRIDAY, OCTOBER 19, 2012

MORNING SESSION

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

THE CLERK: Before the Court are the matters of Rhode Island Public Employees v. Lincoln Chafee, PC/2012-3166, Bristol/Warren Regional Schools v. Lincoln Chafee, PC/2012-3167, Rhode Island Council 94 v. Lincoln Chafee, PC/2012-3168, Cranston Police v. Lincoln Chafee, PC/2012-3169, and Woonsocket Fire Fighters v. Lincoln Chafee, PC/2012-3579.

THE COURT: The last time we were here, we had a conference, and the issue of my son's employment at the State Police was brought to my attention. I've given this a lot of thought, and I'm prepared at this time to treat Mr. Tarantino's letters to me as a motion to recuse and Ms. Labinger -- it wasn't Ms. Labinger, it was Ms. Iafrate's letter as an objection.

MR. TARANTINO: Your Honor, may I just be heard very briefly, if you're treating it as a motion to recuse?

THE COURT: I am.

MR. TARANTINO: That's what I would just like to be heard on.

THE COURT: Why?

MR. TARANTINO: Because I think I tried to make it

clear in the conference that we had not filed a motion to recuse.

THE COURT: Understood.

MR. TARANTINO: No, but my point, Your Honor, I'm sorry to interrupt, my point is that the last communication that we had, I had with you on behalf of the defendants, I again reiterated the fact that we were calling something to the Court's attention. The plaintiffs had filed some case authority. In my last letter to the Court, I said we're happy to do the same but we haven't done this as a motion to recuse. So my only concern, obviously, the Court can treat it however it wants, but from our own perspective, we did not provide the Court with case law authority to support a motion to recuse because we didn't treat the letter as such.

THE COURT: I think I've done sufficient research to render my decision, and your letters will be treated as a motion to recuse and the plaintiffs' letters will be treated and have been treated as an objection.

So the matter before the Court relates to these 2010 and 2012 consolidated cases for the purpose of discovery. The cases challenge certain legislative provisions regarding pensions and other retirement benefits for public sector retirees. The 2010 case involves

constitutional challenges to certain provisions of Public Law 2010, Chapter 23, Article 16, which decreases the cost-of-living adjustments, or COLA's, for current employees. The 2012 cases involve constitutional challenges to the Rhode Island Retirement Security Act, RIRSA, of 2011. Collectively, these cases will be referred to as the pension cases. The Court will now address concerns raised by the defendants under Article VI, Canon 3E of the Code of Judicial Conduct in light of certain facts as made known to the parties in a conference on June 22nd, 2012.

With regard to the 2010 case challenging the reduction of the COLA for current employees, this Court has already made an initial ruling denying the defendants' motion for summary judgment and holding that the plaintiffs possessed an implied unilateral contract right under the Employment Retirement System of Rhode Island, ERSRI. Please see Rhode Island Council 94 et al v. Donald Carcieri, Case No. 2010-2859, September 13th, 2011, my decision. With regard to the 2012 cases, this Court denied a request for a temporary restraining order on June 22nd, 2012. It was in conference with the parties that the Court was made aware that two additional pension suits may be filed, which included an action on behalf of retired State Police. To date, to the Court's

knowledge, no such suit involving the retired State Police has been filed. In response to this information, I informed the parties that my son is an active member of the Rhode Island State Police.

The travel of the instant matter is reflected in certain correspondence from John Tarantino of Adler, Pollock & Sheehan P.C. for the defendants and Carly Iafrate for the plaintiffs and in a chambers conference on July 13th, 2012. This Court will treat the July 12th, 2012, and the July 18th, 2012, correspondence from Mr. Tarantino as a motion to recuse and the July 26th, 2012, letter from Ms. Iafrate as plaintiffs' objection to the motion.

Specifically, the defendants have raised concerns that my son, as an active member of the State Police, has an economic interest in this litigation, as defendants believe that the outcome of the present lawsuits challenging the constitutionality of the recent pension changes will affect active State Police officers as well as retirees, regardless of whether a lawsuit is filed on behalf of the State Police retirees.

The defendants' concerns with my son's employment with the State Police are based on the changes to the State Police pensions under RIRSA wherein the pension was changed to being based on the employee's final five-year

average compensation instead of being based on the officer's annual compensation for the position from which the officer retired. Further, for officers hired prior to July 1st, 2007, the pension multiple decreased from 2.5 percent for each year of service to 2 percent for service after July 1st, 2012. For officers hired after July 1st, 2007, the pension multiple had already been decreased to 2 percent through prior legislation that is not at issue in the current pension cases. This Court here notes that my son was hired by the State Police after July 1st, 2007, so any decrease to the pension multiple under RIRSA is not applicable to him.

The RIRSA also suspended the COLA for a period of time until the aggregate funding percentage for the State Police, Judges, state employees and teacher funds are at 80 percent. Current projections from the actuary estimate that the COLA will thus be suspended for 20 years, affecting both retired officers and any active officers who may retire within the next 20 years. The defendants included a spreadsheet with their letter dated July 18th, 2012, listing the comparative retirement benefits of four hypothetical retirees before and after the effective date of RIRSA, finding that the pension benefits after RIRSA took effect were notably lower.

The defendants further note that under the RIRSA, an

employee's clothing allowance is excluded from his or her compensation calculation. Lastly, the defendants emphasize that as a result of RIRSA, the portion of the economic cost of a participant's anticipated pension benefits allocated to the current plan year have decreased significantly.

This Court notes that the changes to retiree pensions also affect Judges as the RIRSA suspended the COLA until the Judicial Retirement Benefits Trust, among others, is funded to at least 80 percent. Moreover, the calculation of a COLA has been changed and the contribution to the retirement from a judge's current pay has been increased, thus reducing net pay.

As a result of the letters from the defendants regarding this potential conflict of interest, I have also made an inquiry as to whether my mother receives any death benefits from my late father's pension. I have since been informed that my mother currently receives a small monthly death benefit from my father's pension and that the changes in the legislation would eliminate the yearly COLA benefit that she would receive. Any economic interest my mother has in this litigation, however, is minimal.

The defendants contend that Article VI, Canon 3E of the Code of Judicial Conduct apply to potentially require

my recusal from presiding over these pension cases. Canon 3E states, in pertinent part:

"A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding."

De minimis is defined by the Canon as "denoting an insignificant interest that could not raise reasonable question as to a judge's impartiality." An economic interest is defined as "denoting ownership of a more than de minimis legal or equitable interest."

In addressing the issue of disqualification, our Supreme Court has said:

"It is a well-recognized principle that a trial justice should recuse himself or herself in the event that he or she is unable to render a fair or an impartial decision in a particular case. It is an equally well-recognized principle that a trial justice has as

great an obligation not to disqualify himself or herself when there is no sound reason to do so as he or she has to disqualify himself or herself when a proper occasion to do so does arise." Please see Kelly v. Rhode Island Public Transit Authority, 740 A.2d 1243 at 1246 (R.I. 1999). Internal citations were omitted.

The Canon also requires that a judge shall hear and decide matters assigned to the judge except those in which qualification is required. Please see Canon 3B(1). The Canon thus contemplates that the general rule is in favor of denying motions for disqualification unless the motion is well grounded with facts reasonably giving rise to doubts about a judge's ability to render an impartial decision. Please see In re Jermaine H., 9 A.3d 1227 at 1230 (R.I. 2010). It is with this principle in mind that this Court will begin its discussion of the defendants' motion to disqualify.

The Court notes at the outset that the State Police are not parties to the litigation at present nor has there been any further indication, to the Court's knowledge, that the State Police will be made parties to the litigation. Moreover, my son is not a vested employee of the State Police nor would he be eligible to receive any pension benefits through the State Police retirement system for a number of years. The plaintiffs

assert that the defendants' calculations as to the difference between the State Police pension benefits before and after the enactment of the RIRSA were based on the value of benefits provided to already-retired State Police officers. There is no certainty that my son will, in fact, become vested in the retirement system nor that he will ever seek pension benefits through the State Police at any time in his life. Finally, this Court notes that any attempt to estimate the potential economic interest of my son in the outcome of this litigation requires a large degree of speculation and assumption, as my son is many years removed from being eligible to receive pension benefits. Accordingly, the Court finds that any financial interest my son might have as an active, unvested member of the State Police is remote and speculative. This potential interest is de minimis and, therefore, does not require disqualification.

My mother's financial interest does not require speculation as she is already entitled to and has been receiving a COLA from my late father's pension. However, my mother's financial interest is de minimis as the amount of the pension she receives is small and any increase to the pension which she would receive as a result of a COLA would also be small. Moreover, this Court does not believe that any small financial interest

which my mother has in the outcome of the litigation is such as would reasonably give rise to doubts of this Court's impartiality.

Finally, although the parties have not raised the issue, in the interest of thoroughness, this Court will address the issue of my own financial interest in the outcome of the litigation due to the changes in the Judicial Retirement Benefits System. The changes to the retirement system, as previously noted, have lessened a judge's net pay, in addition to changing the calculation of the COLA's. Furthermore, this Court notes that my financial interest in the changes to the pension system are certainly greater than any financial interest which my son might have as I am closer to retirement age than my son and are also arguably greater than the minimal financial interest which my mother has. Having acknowledged as much, the Court does not believe that my financial interest in the outcome of the litigation will affect my ability to be impartial.

Moreover, my financial interest in the outcome of the litigation is largely identical to the interest which any judge in the state has. Accordingly, if my financial interest should require disqualification, then all other state judges would be similarly required to recuse themselves. In such a situation, as has been stated,

where all are disqualified, none are disqualified. Atkins v. United States, 556 F.2d 1028 at 1038. The rule of necessity has been recognized in Rhode Island as well as in other states to permit judges who might otherwise be disqualified to hear a case if to do otherwise would result in no judge being able to hear the case. Reilly v. United States, 538 A.2d 155. The instant matter, which potentially affects all state employees, including judges, properly constitutes a case where the rule of necessity must apply in order to permit the case to be heard. See Board of Trustees of Public Employees' Retirement Fund v. Hill, 472 N.E.2d 204.

Having carefully considered defendants' concerns, this Court is satisfied that the provisions of the Canon do not require the Court to disqualify or recuse itself. This Court further believes that any financial interest in the outcome of this litigation will not reasonably impact my ability to be impartial.

For the reasons I have just stated, the defendants' motion for recusal is denied. Counsel please prepare the appropriate order.

Having put that behind us, I'd like to now discuss the issue of the motion to dismiss that was filed.

MR. TARANTINO: Your Honor, may I just ask for one additional point of clarification? When we -- I think

it's implicit in what you said, but I just want to make sure for purposes of the record in case something happens with this matter. You said the case assigned to a judge, that a judge had to take into account if a case has been assigned to him or her and it was just as important to keep a case as it was to deliberate about recusing. My question, for the record, is in the prior litigation, what I call the 2009/2010 case, the one that you decided, it was my understanding in that case you were assigned by Judge Gibney to be the judge in that case. I'm not aware of a similar order in this case. The case was filed at a point in time when you were sitting on the Formal and Special Cause calendar.

THE COURT: You can take that up with Judge Gibney. As far as I am concerned, she has assigned this to me. I've had a conversation with her. I don't believe there's an order on it, but it's my understanding, subject always to Judge Gibney, of course, that these pension cases are mine.

MR. TARANTINO: I was not aware of that. That's what I wanted to understand for the record. But it's your understanding the case has been assigned?

THE COURT: Yes.

MR. TARANTINO: Thank you, Your Honor.

THE COURT: There's no order that I know of.

MR. TARANTINO: Thank you.

THE COURT: With respect to the motion to dismiss that is scheduled for October --

MR. TARANTINO: Your Honor, what had happened with the motion to dismiss is, again, at the point in time it was filed, you were sitting on the Formal and Special Cause calendar, you had not moved off the calendar, and we got a date at that time. When we got the date, we were told that you likely were not going to be on the Formal and Special Cause calendar. So, right now, the date is October 30th, but I've had discussions with Ms. Labinger. Ms. Labinger, are those dates still --

MS. LABINGER: Yes.

MR. TARANTINO: Ms. Labinger has indicated that the plaintiffs would like to have until November 5th to respond to the motion and that we would have until, I believe, November 19th, two weeks later --

MS. LABINGER: Yes.

MR. TARANTINO: -- to file a reply and then the matter would be set for hearing sometime following that.

THE COURT: This is my thought, first Friday of the month I could set aside for motions and conferences in these pension cases so that we know -- I'm not sure we'll be here once every month, but if the first Friday of the month works for everyone, I can assign the motions to

dismiss.

MR. TARANTINO: That would be December 7th.

THE COURT: December 7th. Does that work for everyone?

MS. LABINGER: Yes.

THE COURT: Does the first Friday of every month work for everyone? Understood if there's emergencies or things like that, but just as a general rule.

MR. TARANTINO: I would say as a general rule that's fine. If there is particular problems on either side, we can alert the Court.

THE COURT: And just let Brian know.

MR. TARANTINO: So if motions are filed, any motions, that we should set them for the first Friday of the month?

THE COURT: Yes. That makes the most sense to me, we all know when we're going to be here, rather than trying to coordinate with all these lawyers. Again, there are exceptions to every rule. I would like the general rule to be the first Friday of every month. If there's an emergency or a particular scheduling problem and the attorneys do not want to go out an additional four weeks, that's fine, we'll make other arrangements.

Motion to dismiss, we'll schedule that for 12-7, 9:30 a.m.

MR. TARANTINO: Your Honor, there actually are motions to dismiss and alternative motions as well.

THE COURT: I understand. I'm collectively referring to them as motions to dismiss. I think that takes care of it from my perspective. Just remember to send bench copies along with your objections and your replies.

MR. TARANTINO: Your Honor, do you have the copies of the papers that we've already filed?

THE COURT: I do.

MR. TARANTINO: Okay.

THE COURT: I do, I have yours.

MS. LABINGER: Yes. You have nothing from me.

THE COURT: No, I have nothing from you.

MS. LABINGER: Would it be acceptable to send things by CD, you know, provide you the objections and all the cases on a DVD or a CD, as opposed to paper copies?

THE COURT: I'd like one paper copy.

MS. LABINGER: Okay.

THE COURT: I think that's easier for the clerk, law clerk.

MS. LABINGER: Okay.

THE COURT: Is that correct?

MS. LABINGER: So in addition to what we file in the court, in the clerk's office, you want one paper copy?

THE COURT: Yes, please. You can put the cases on CD.

MS. LABINGER: Perfect.

THE COURT: But if I could have just one paper copy of the objection.

MS. LABINGER: All the cases can be on CD?

THE COURT: Yes, that's fine.

MS. LABINGER: Excellent. Thank you.

THE COURT: Thank you. Do we need a scheduling order for the reply or objection?

MR. TARANTINO: I don't think so.

THE COURT: All right. See everyone on December 7th.

(A D J O U R N E D)

* * * * * * * * * * *

EXHIBIT B

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July 12, 2012

Via Hand Delivery

The Honorable Sarah Taft-Carter
Providence County Superior Court
250 Benefit Street
Providence, RI 02903

Re: *Rhode Island Public Employees' Retirement Coalition, et al. v. Chafee, et al.*, C.A. No. 12-3166
Bristol/Warren Regional School Employees, Local 581, et al. v. Chafee, et al., C.A. No. 12-1367
Rhode Island Council 94, AFSCME, AFL-CIO Locals, et al. v. Chafee, et al., C.A. No. 12-3168
City of Cranston Police Officers International Brotherhood of Police Officers, Local 301, AFL, CIO, et al., C.A. No. 12-3169

Dear Judge Taft-Carter:

I am writing on behalf of the defendants in the above-referenced matters. During the chambers conference on June 22, 2012 when counsel for the plaintiffs were summarizing their respective claims, they also mentioned that two additional lawsuits might be filed, one of which contemplated an action on behalf of state police retirees. (To our knowledge no such lawsuit has yet been filed, although Plaintiffs' counsel suggested that it might be filed the first week of July.) At that time, you disclosed to counsel that your son is a state trooper and you expressed some concern about whether you should hear these cases. Plaintiffs' counsel then informed you that they did not believe there would be a problem with you hearing these cases (including any case that might be filed by state police retirees) because as an active trooper, your son's interests would not be affected by this litigation.

Because we were not aware that your son is a state trooper until you made the disclosure during the chambers conference, neither Jim Lee nor I wanted to comment on the matter until we had time to discuss your disclosure with our clients and review the changes to the pension statutes as they affect the state police. A summary of those changes follows:

- Prior to the 2011 pension changes (RIRSA), a state police pension was based on the officer's annual compensation for the position from which the officer retired. Under RIRSA, a state police pension is based on the employee's final five-year average compensation.
- Under RIRSA, an employee's clothing allowance is excluded from his or her compensation calculation.

- For officers hired prior to July 1, 2007, the pension multiple decreased from 2.5% for each year of service to 2% for service after July 1, 2012. For officers hired after July 1, 2007, prior legislation had already reduced the multiple to 2%.
- The COLA was changed from an automatic $1,500 annually to a market based COLA equal to the plan's 5-year average rate of return minus 5.5% with a minimum of zero and a maximum of 4%.
- The COLA was suspended by RIRSA until the aggregate funding percentage for the state police, judges, state employees and teachers funds are at 80%. During the suspension period, a calculation will be made once every 5 years and an interim COLA awarded for that year if justified by the new COLA formula. Under current projections from the actuary, the COLA will be suspended for 20 years, so this has an impact on both retired officers and active officers who may retire in the next 20 years.

We believe that whether a lawsuit is filed on behalf of state police retirees, a ruling on the present lawsuits, which challenge the constitutionality of the 2011 pension changes, will affect active officers as well as retirees. For this reason, we believe that your son, as an active member of the state police, has an "economic interest" in the litigation, (as that term is defined in the Code of Judicial Conduct). We, therefore, respectfully ask the Court to review Article VI, Canon 3E and we request a conference with the Court to discuss this matter further. We also respectfully request that the Court not schedule or rule on any substantive issues or matters in the case until such time as the Court determines whether it will preside over these cases. I spoke with Lynette Labinger this morning to apprise her of this letter, and while she did not have time to confer with counsel for the other Plaintiffs to discuss their views on this issue, we both believed that it would make sense to postpone Monday's hearing and use that time for a conference with the Court, if that suggestion is acceptable to the Court.

Sincerely,

John A. Tarantino

John A. Tarantino
jtarantino@apslaw.com

cc: All counsel of record

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EXHIBIT C

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

RHODE ISLAND COUNCIL 94, ET ALS)
)
VS.) CASE NO: PC/2012-3168
)
LINCOLN CHAFEE, ET ALS)

HEARD BEFORE THE HONORABLE JUSTICE SARAH TAFT-CARTER

ON FRIDAY, JULY 13, 2012

CONFERENCE

APPEARANCES:

THOMAS R. LANDRY, ESQUIRE
LYNETTE J. LABINGER, ESQUIRE
CARLY B. IAFRATE, ESQUIRE
CHRISTOPHER LAMBERT, ESQUIRE
GARY T. GENTILE, ESQUIRE
MARC B. GURSKY, ESQUIRE.....FOR THE PLAINTIFFS

JOHN A. TARANTINO, ESQUIRE
REBECCA J. PARTINGTON, ESQUIRE
JAMES R. LEE, ESQUIRE
MARK A. DINGLEY, ESQUIRE.....FOR THE DEFENDANTS

MARY M. GUGLIETTI, RPR
CERTIFIED COURT REPORTER

CERTIFICATION

I, Mary M. Guglietti, hereby certify that the succeeding pages, 1 through 20, inclusive, are a true and accurate transcript of my stenographic notes.

MARY M. GUGLIETTI, RPR
Certified Court Reporter

FRIDAY, JULY 13, 2012

MORNING SESSION

THE COURT: Why don't we go around the table again and just have everyone identify themselves for the record and state who they represent.

MR. LANDRY: Tom Landry for the active municipal employees.

MR. TARANTINO: John Tarantino for the Employees' Retirement System of Rhode Island.

MS. PARTINGTON: Rebecca Partington for the Governor and the Treasurer in their official capacities.

MR. LEE: Jim Lee for the Governor and Treasurer in their official capacities.

MS. LABINGER: Lynette Labinger for the unions representing state employees and public school teachers, active employees.

MS. IAFRATE: Carly Iafrate for the Rhode Island Public Employees' Retiree Coalition.

MR. LAMBERT: Chris Lambert, Cranston IBPO.

MR. DINGLEY: Mark Dingley for the General Treasurer.

MR. GENTILE: Gary Gentile for the active unions representing municipal police.

MR. GURSKY: Marc Gursky for the active firefighters.

THE COURT: We're here today because I received a letter yesterday from John Tarantino dated July 12th, 2012. The letter resulted from a disclosure that I made at a conference on June 22nd. I disclosed at that time that my son was an active state trooper. The issue came up at the conference because it was thought that an action might be brought on behalf of the retired state troopers.

Mr. Tarantino sent me a letter expressing some concerns about myself handling the case because of my son's potential economic interest in the outcome of the litigation, and we're here today because I asked everyone to come. The matter is scheduled for Monday on motions, and I thought it would be best if Mr. Tarantino expressed his concerns to me so that I could discuss them with the Presiding Justice and have them researched. So if you wouldn't mind.

MR. TARANTINO: Sure, Your Honor. What I did after we had our chambers conference and you made your disclosure is I went back and I looked at the 2011 changes as they affected the State Police, whether retirees or active members, and based on my reading of the changes, it appeared to me that there were several changes that applied to active State Police troopers. I had a discussion with my co-counsel, Jim Lee and Becky

Partington, and we thought it appropriate to inform our clients, our respective clients, first of your disclosure that you had made and what the 2011 pension changes said about active State Police pension changes.

I asked Mark from the General Treasurer's office if he could provide me with a summary of what those changes were so I could review them. We did review them, and obviously none of us knew all the specifics about, you know, when your son joined the State Police or any of those kinds of things.

THE COURT: Understood.

MR. TARANTINO: But based on what we saw, it appeared to us that whether a lawsuit was brought on behalf of retirees or a lawsuit was brought on behalf of retirees and active members, the latter case your son would be, you know, in a plaintiff class, so to speak. But whether such a lawsuit was brought or not, because there's one piece of legislation and that piece of legislation is being challenged, if the Court were to basically -- however the Court rules on it, whether the Court upholds it or whether the Court strikes it down, it would, in our view, affect active State Police members as well as many other -- you know, many other teachers and many other people.

We then looked at the Code of Judicial Conduct, and

it was not entirely unfamiliar to me. I sat on the commission that had been I guess formed by then Chief Justice Williams. Justice Weisberger was asked to head it. I was on that committee to look at the Code of Judicial Conduct. We made suggestions, so I'm familiar with the Code of Judicial Conduct. This was not the particular area of the code that was assigned to me, but I did look at it, and at least the way I read it, it seems to me to say that whether a judge has a child or a family member, whether that child is or is not a party to litigation, if that child has what is termed an economic interest in the litigation, and there's a discussion of that in the code, what that is, then the judge, you know, should take that into account, and if the judge determines that the child does have an economic interest, at least my reading of the code, it says the judge shall recuse.

We did not file a motion for recusal for a specific purpose. We thought it would be certainly premature to do that not having all of the facts. On the other hand, we also thought, not only from our perspective but in fairness to the Court, that we'd certainly let you know about these specific legislative changes, and we tried to do it promptly. I was on vacation. I didn't have an opportunity to meet with my co-counsel and my clients

until this week, and we knew that there was a hearing scheduled on Monday, and I think the -- I think it's certainly appropriate to bring it to the Court's attention before the Court, you know, rules on any matters, however the Court is going to come out on this. And that was really the purpose of the letter. The purpose of the letter was -- and I tried to make it non-argumentative. I tried to simply say these are the legislative changes, these are the things that I wasn't sure whether the Court was aware of. I certainly wasn't aware of your son's membership in the State Police until that time.

Now, based on my understanding of what the Court said earlier this morning, it appears one of these -- from my reading, anyway, one of these changes, meaning what I had as bullet point three, may not apply, it probably doesn't apply to your son because by its terms appears to pertain to officers hired -- the difference between officers hired before July 1, 2007, and after July 1, 2007.

THE COURT: That's right. We did have a discussion before the stenographer came in, and I did say he was hired after July 1st, 2007.

MR. TARANTINO: Right. And, again, these are and they were meant to be simply bulleted summary points.

There's much more in the legislation itself. They go into greater detail. The Treasurer's office separate and apart from this -- we did this with respect to basically all of the different folks, but the Treasurer's office had done an analysis of what are the savings, how are these changes -- you know, if effected at the point in time when they were advocating for the legislative changes, what would they be, how would they affect each of the various groups, what would be the differences in terms of the economics, and there is an analysis that was done or summary analysis done with respect to the State Police and the active State Police. And, again, we'd be happy to provide that to the Court and to counsel if you think it would be helpful, but it basically takes these changes and the others and it monetizes them and it says these are the monetary savings -- we would call them savings, the plaintiffs may say these are the damages -- but these are the differences in terms of what an active State Police who would be covered, generally covered by the plan, would get before the legislation, this is what an active State Police, again, assuming he or she remains in the State Police, would get after the changes, and so it is monetized and we would be able to say, you know, you can compare before and after.

THE COURT: But your assumption with respect to

those numbers is that the police officer completes his tenure through retirement and retires, correct?

MR. TARANTINO: Well, certainly retires. The reason I say that is the State Police are different or appear to be different than some of the others in terms of when they could get a pension, how many years they have to work. My understanding --

THE COURT: May I just stop you for one second. Lynette, do you have anything you want to say with respect to this?

MS. LABINGER. I've just delegated it to Carly.

THE COURT: Thank you very much.

MS. LABINGER: And I apologize for having to leave.

THE COURT: No worry.

MR. TARANTINO: It's not quite the same as some of the other state employees in terms of specific years, how it's determined and the like, so that I think is -- at least from my perspective, I think is an open question of how many years must the State Police trooper work before he or she could get some retirement benefit. But, yes, it certainly -- there certainly is an assumption that your son would stay, you know, wasn't going to resign next week, would stay as a State Police officer for some period of time. He would be subject to this plan. Whether he retired in 20 years from now or he retired in

five years from now, he would be -- he is presently subject to this plan, and as a person who is presently subject to this plan, how his retirement benefits are now calculated beginning from right now, beginning from November -- I'm sorry, July 1 of 2012, now, in our view, are affected by these legislative changes.

I don't know what your son's plans are. I don't know if he intends to stay with the State Police or do something else, but for present purposes, all we know is he is a member of the State Police, he is subject to this, and as an active member, the way his benefits are determined are different than the way they would have been determined before this legislation was passed, and, frankly, Judge, that's all I know. And because I think it is an important issue, and I think it's important to the parties but I also think it's important to the Court, the Court made the disclosure and I think appropriately so, I think it would have been -- I just don't think it would be appropriate to have done more than just simply what's in this letter based on the state of the knowledge that we have, but I thought it was important and I thought it was important that we alert the Court as promptly as we could and opposing counsel and before the Court was asked to rule on substantive matters in the event the Court -- you know, however the Court determined

it would ultimately rule on this.

THE COURT: Thank you. I'm going to ask everyone just to reflect on what Mr. Tarantino said, what you have to say about that, and place it on the record. Please identify yourself.

MR. LANDRY: Sure. Tom Landry. Well, it just seems based upon what Mr. Tarantino said and what we understand to be the facts at this point that to the extent there is any economic interest here, it's -- well, it's completely speculative, we just don't know based upon there's a lot of could be's, and it's not clear either -- or I should say this, let me back up, speaking for myself, the litigation that's been brought on behalf of the active municipal employees is based upon those that are either vested or have a contract through their union for a COLA benefit, and I don't see that under the circumstances through a collective bargaining relationship that -- and I think that's typical of each of the complaints here with the exception of the retirees -- that your son would be impacted directly one way or the other based upon the complaints that are out there.

THE COURT: Ms. Partington.

MS. PARTINGTON: I'll defer to Jim.

MR. LEE: I just want to add one thing, I know we discussed, I don't know if we have a final answer, but in

addition -- my understanding is in addition to the time in service for a State Police officer to get a pension, I think they could be disabled and changes would affect them as early as tomorrow.

MR. TARANTINO: True.

MR. LEE: So the State Police officer, in my understanding, does not have to serve ten years or 20 years or even five years to be affected by this pension statute if they become disabled on duty.

THE COURT: Thank you.

MS. IAFRATE: Carly Iafrate for the retiree group. I received a copy of John's letter yesterday afternoon I think it was. I did not have time to really digest it, nor have I ever dealt with an issue of recusal such that I had to look at the canon and figure out whether it was applicable or not. So my comments are really just observations at this point, given the fact that there is no pending motion, but my observations are that no State Police group, whether it be active or retirees, are parties to this case. Your son will not be -- does not appear directly affected by the outcome here, given the fact that he is not a party nor is he a vested employee, and hopefully he would not be vested by the time this litigation comes to a conclusion. As far as whether he has any economic interest, in the event that the entire

statute was thrown out, I don't know if we can determine it today, and I agree with Tom that that's speculative.

I also want to note, and I don't know whether this makes any difference under the canon, but it would seem to me that every judge in this courthouse, in Superior Court, anyway, would have an interest of some kind, given the fact that they or the majority of them, anyway, are contributing members to the system and that there were changes to that pension system. So I know there's a Rule of Necessity. I don't know enough about it to know whether it would apply here, but it's something that I'm thinking about, anyway, as to whether any of this makes any difference because most of the judges themselves have some interest, and I would think some of them also have the same kind of family relationships, and I guess to the extent that we're taxpayers and some of us public employees, we have an interest too.

So I'm wondering if under the rule the ultimate question is whether you, Your Honor, given the facts, feel that you can handle the case in a way that takes into account, you know, all of these interests and is fair and impartial. Again, I don't know enough about the canon to know whether that's the ultimate question, but it seems to me that it might be.

THE COURT: Thank you.

MR. LAMBERT: Chris Lambert, Cranston IBPO, and I'll defer to Gary Gentile.

MR. DINGLEY: Mark Dingley, General Treasurer's office. I concur with what Mr. Tarantino said. The only thing I would add in response to what Carly mentioned is the cases that have been brought by the plaintiffs, you know, all challenge the constitutionality of the statute, and they've made a motion to consolidate all those cases saying that they have the same issues of law and fact. So it would just seem to me that if the statute is ruled to be unconstitutional, it's going to impact all of the affected parties similarly whether they're parties to the litigation or not because it's the same issues and facts that are governing on the entire case based on our motion to consolidate. So the fact that the State Police are not specifically a party to the action currently doesn't seem to me to impact whether or not there's an economic interest here.

THE COURT: Thank you.

MR. GENTILE: I'm going to --

THE COURT: Just for the record state your name, please.

MR. GENTILE: -- caution not to be redundant.

THE COURT: Just state your name for the record.

MR. GENTILE: Gary Gentile.

THE COURT: Thank you.

MR. GENTILE: Representing active municipal police. I concur with my brother and my sister in terms of the fact that State Police are not parties to this case. We have as far as municipal police are concerned, similar to municipal employees, collective bargaining agreements and we operate under a different statute, a statute that does not include State Police. State Police are under a different statute, and based on the complaints, as many as there are, that statute is not before this Court. I don't know without getting -- and I'll defer on the issues of constitutional severability and all the other aspects of it, but, quite frankly, the statute is not before the Court. I don't know what this Court may or may not do with regard to a statute that's not before it. I don't know what the State may do, but that is entirely premature at this point. It's not before the Court.

THE COURT: Thank you. Mr. Gursky.

MR. GURSKY: I didn't want to be last, and I was afraid if I sat here, this is what would happen, but I do agree with Tom and Carly and Gary on the points that they made, and I give John all the credit in the world for delicately raising this issue because it's a hard thing to raise in a case; but I guess my concern is that, you know, the elephant in the room is that you have some

history in deciding similar cases, and the danger is that there needs -- that the public needs to understand that you can be fair even in the face of public criticism. And what one judge pointed out to me in a similar kind of a situation is that you need to decide cases even regardless of what the public thinks and that you have an obligation to decide the cases that come before you regardless of that, and so I would just say that it seems a little early to be making the decision.

I do think, also, that if there are other studies or facts that show that there's some particular interest that a State Police officer, an active State Police officer would have, those should come out now. And the last thing, as I understand it because we hadn't said anything yet, we all concur that at least discovery should be consolidated. We're not asking you to rule on that as a substantive matter.

THE COURT: All right.

MR. GURSKY: And we've also concurred on a date to respond to the complaints so that could happen.

MR. TARANTINO: I hope you're right on the first. That's certainly our position. I have not heard that from the plaintiffs.

MR. GURSKY: Well, it's my position. I won't speak for everybody else. I think you made --

THE COURT: So Monday might be moot anyway?

MS. IAFRATE: Yes.

THE COURT: Is there an agreement on the motion to consolidate?

MS. IAFRATE: If I heard Marc correctly, the agreement would be we consolidate for purposes of discovery only and we meet as to whether we consolidate everything else.

THE COURT: That makes sense to me.

MR. TARANTINO: Judge, if we did that by stipulation, I don't think there would be an issue on that part of the motion. It would moot it out. Our objection was basically one of that it's premature. The issues just aren't mature enough, crystalized enough, to know whether they're really going to be the same issues in each one of the cases of fact and law. We had no objection to consolidation for discovery purposes. That just makes sense from a judicial perspective and for the parties so that they don't have to take the same discovery over and over and the discovery would simply apply in each of the cases, irrespective of whether they ultimately were consolidated on the merits, but I had not heard the plaintiffs' position one way or the other on that.

THE COURT: Is Lynette on board with this?

MS. IAFRATE: Lynette is on board with what I just stated in terms of consolidation for discovery, Your Honor, only and revisit such that the motion would be I guess withdrawn without prejudice and just do a stipulation.

THE COURT: And the pro hac motions?

MS. IAFRATE: I believe there's no objection.

MR. TARANTINO: No objection.

THE COURT: So Monday is taken care of?

MS. IAFRATE: Yes.

THE COURT: So we're not going to continue it? There's an agreement between the parties, and that's what I am going to tell Craig Berke, the public relations liaison with the Supreme Court.

My thoughts on this is that I'll get back to everyone. It might take a couple of weeks. I want to sort through the law, do some reflection, speak to the Presiding Justice, because it is an important issue. I am not at all offended by the letter. I made the disclosure. It needs to get out there. I haven't drawn any conclusions one way or the other because I've just received the letter. I need to take a look at the canon and the law. I'm assuming you're not going to file a motion?

MR. TARANTINO: We're not.

THE COURT: Not right now.

MR. TARANTINO: Not right now. Obviously, I need to talk to my client, but, no, Judge, we purposely didn't want to do that.

THE COURT: I get it.

MR. TARANTINO: There's no need to do that at this point in time.

THE COURT: Again, I understand.

MR. TARANTINO: Yes.

THE COURT: What I'll do is, like I said, some research, some reflection, some discussion. This is a very important case, and it needs to be done in the purest of form really. Why don't we plan on another conference in a couple of weeks. I'll have Brian call. Who did he call? I think he called you, and you can figure out a date. I know there's a lot of you. We do have some flexibility, and there's really nothing pending right now, correct, that we need to discuss?

MR. TARANTINO: No.

THE COURT: Or that needs to be addressed? So that's how I think I'll handle it with Craig Berke, and we'll get back to you in a couple of weeks.

MR. TARANTINO: Judge, would you like us to provide you and counsel with the more detailed financial information? Would that be helpful to you?

THE COURT: You might as well, if you have it.

MR. TARANTINO: I'll just do it in a letter to you.

THE COURT: That's fine. We won't schedule anything, but I will get back to John, who will get back to everyone, and we'll set up a conference.

MR. TARANTINO: May I just make one comment? And it's just to address, because I think it's an important issue as well, and, again, it's not to be argumentative, but the Rule of Necessity was brought up, and I think there is a difference and the case law, you know, does deal with the issue of what happens if all judges, all judges in the court, the court that can hear a matter, have some kind of conflict, and there are cases where that happens. There is such a thing called the Rule of Necessity, and the Rule of Necessity says, yes, there is a conflict and under normal circumstances a judge should recuse and have another judge hear the matter, but if all judges have that conflict, the same conflict, then the Rule of Necessity says at some point in time some court has to hear it if there's no other court that can hear it and that's what a court does. Usually it happens not at the Superior Court level but at the Supreme Court level, but there is case law that talks about this. To me, that's a different issue.

I will even assume, I don't know if it's true or not

true, I don't know if every judge in the Superior Court is treated the same way, I just don't even know that, and, frankly, it's not something I focused on, but even assuming it were true, I think this is a different issue. This is an issue of assuming every judge was the same whether it makes a difference if a judge's family member, which is specifically provided for in the canons, if the family member has an economic interest. The rule assumes even if the judge doesn't have a conflict. Obviously, if the judge has her own conflict or his own conflict, it normally would never get to the family member. But assuming that a judge doesn't have a conflict, the rules talk about what happens with the judge's spouse, children and the like. And so I am aware of the Rule of Necessity. I understand what it is.

This is a unique kind of case because the challenges are solely based on the Rhode Island Constitution only. The Rhode Island courts are going to deal with it. It's not a federal and state constitutional challenge where there would be the opportunity to have federal courts look at it. It's just Rhode Island, and the judges here are going to have to look at it, some Superior Court judge, whether it's you or another, and the Supreme Court is ultimately -- whether we win or they win, is ultimately going to look at this.

THE COURT: Thank you. Any other comments?

MS. IAFRATE: You know what might be important, just because of how this was generated in the first place, when we met on June 22nd, I think the way that this came up was that you had asked, Judge, do we know of any other lawsuits that may be filed, and I was the person who said I believed that there may be a State Police component to this, and just so the record reflects what that was, it was a State Police retiree interest in becoming part of the retiree group. That did not happen, so I don't anticipate at this time that that is going to change.

THE COURT: Any other comments? We'll touch base in a couple of weeks.

MR. TARANTINO: All right. And, Judge, sometime next week I'll get that letter to you and all counsel with the economic analysis.

MR. LEE: There'll be no hearing on Monday?

THE COURT: No, because you have an agreement, everybody is in agreement, a stipulation will enter.

MR. LEE: Right.

THE COURT: All right. Perfect.

(A D J O U R N E D)

* * * * * * * * * * *

EXHIBIT D

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July 18, 2012

Via Hand Delivery

The Honorable Sarah Taft-Carter
Providence County Superior Court
250 Benefit Street
Providence, RI 02903

Re: *Rhode Island Public Employees' Retirement Coalition, et al. v. Chafee, et al.*, C.A. No. 12-3166
Bristol/Warren Regional School Employees, Local 581, et al. v. Chafee, et al., C.A. No. 12-3167
Rhode Island Council 94, AFSCME, AFL-CIO Locals, et al. v. Chafee, et al., C.A. No. 12-3168
City of Cranston Police Officers International Brotherhood of Police Officers, Local 301, AFL, CIO, et al. v. Chafee, et al., C.A. No. 12-3169
Woonsocket Fire Fighters, IAFF Local 732, AFL-CIO, et al. v. Chafee, et al., C.A. No. 12-3579

Dear Judge Taft-Carter:

I am writing on behalf of the defendants in the above-referenced actions. As a follow-up to the conference of July 13, 2012, and as I informed the Court I would do, I am writing to provide additional information regarding the "economic interest" of a state trooper with respect to the changes made by RIRSA. As background, and as set forth in my letter to you of July 12, 2012, the following changes were made by RIRSA with respect to state police pension benefits:

- Prior to the 2011 pension changes (RIRSA), a state police pension was based on the officer's annual compensation for the position from which the officer retired. Under RIRSA, a state police pension is based on the employee's final five-year average compensation.

- Under RIRSA, an employee's clothing allowance is excluded from his or her compensation calculation.

- For officers hired prior to July 1, 2007, the pension multiple decreased from 2.5% for each year of service to 2% for service after July 1, 2012. For officers hired after July 1, 2007, prior legislation had already reduced the multiple to 2%.

- The COLA was changed from an automatic $1,500 annually to a market based COLA equal to the plan's 5-year average rate of return minus 5.5% with a minimum of zero and a maximum of 4%.

- The COLA was suspended by RIRSA until the aggregate funding percentage for the state police, judges, state employees and teachers funds are at 80%. During the suspension period, a calculation will be made once every 5 years and an interim COLA awarded for that year if justified by the new COLA formula. Under current projections from the actuary, the COLA will be suspended for 20 years, so this has an impact on both retired officers and active officers who may retire in the next 20 years.

Additionally, I call to the Court's attention the so-called "normal cost," which represents the portion of the economic cost of a participant's anticipated pension benefits allocated to the current plan year. The normal cost for a state trooper was 29.86% of salary as of the June 30, 2010 valuation before changes made by RIRSA. After the changes made by RIRSA, the normal cost of a state trooper as of the June 30, 2011 valuation was 22.93% of salary, representing a decrease of more than 23% in the normal cost for a state trooper's retirement benefits.

I have attached a spreadsheet which looks at four troopers who retired before the effective date of RIRSA. We asked the Retirement System to recalculate the benefits of these four retirees as if the troopers had retired under RIRSA and specifically had retired in accordance with the application of the new definition of compensation under RIRSA. Both calculations were done with the same level of benefit accrual (see spreadsheet, Exhibit 1 attached).

The results are summarized as follows:

	Final Salary Pre-RIRSA Pension Benefit Pre-RIRSA	Final Average Salary Post-RIRSA Pension Benefit Post-RIRSA
• Trooper 1	$131,919	$90,461
	$65,960	$45,230
• Trooper 2	$102,765	$75,185
	$51,382	$37,592
• Trooper 3	$137,620	$115,577
	$72,939	$60,100
• Trooper 4	$137,620	$104,572
	$77,067	$56,469

As can be seen from the foregoing, the changes made by RIRSA affect the "economic interest" of current state troopers. The reduction in normal cost (explained above) relates to the cost of pension benefits for the current year, and thus further shows that RIRSA changes have an economic impact on all state troopers regardless of their level or length of service.

Finally, as we discussed at the conference, if a state trooper is injured and becomes disabled, his or her retirement benefits begin at that point in time, irrespective of years of service or retirement age.

Sincerely,

JOHN A. TARANTINO

JAT:dh

Attachment

cc: All Counsel of Record *(via email)*

616279.1

Exhibit 1

STATE TROOPER		
20 YEARS OF SERVICE		
DOR < 7/1/2012		
SALARY (base salary for position)	124,350.00	
CLOTHING	775.00	
OT	0.00	
HOLIDAY PAY	6,794.00	
	131,919.00	**Final Salary**
Final Salary x 50% w/20 years	**65,959.50**	**Annual Benefit**
DOR > 7/1/2012		
5 YR AVG (ANCHOR)	83,927.42	
CLOTHING	0.00	
OT	0.00	
HOLIDAY PAY (assuming 2% increase per year	6,533.20	
with 6,794.00 final year)	**90,460.62**	**Final Average Salary**
5 Year Average Salary x 50% w / 20 years	**45,230.31**	**Annual Benefit**

	SALARY FROM ANCHOR	PAYPERIODS
2012	41,709.78	9.5
2011	93,729.07	26.0
2010	85,979.16	26.0
2009	79,265.44	26.0
2008	74,668.99	26.0
2007	44,284.68	16.5
	419,637.12	130.0
	83,927.42	**5 YEAR AVG**

STATE TROOPER		
20 YEARS OF SERVICE		
DOR < 7/1/2012		
SALARY (base salary for position)	76,722.00	
CLOTHING	750.00	
OT	21,077.50	
HOLIDAY PAY	4,215.50	
	102,765.00	**Final Salary**
Final Salary x 50% w/20 years	**51,382.50**	**Annual Benefit**
DOR > 7/1/2012		
5 YR AVG (ANCHOR)	71,131.45	
CLOTHING	0.00	
OT	0.00	
HOLIDAY PAY (assuming 2% increase per year	4,053.39	
with 4,215.50 final year)	**75,184.84**	**Final Average Salary**
5 Year Average Salary x 50% w / 20 years	**37,592.42**	**Annual Benefit**

	SALARY FROM ANCHOR	PAYPERIODS
2012	29,508.50	10.0
2011	77,150.19	26.0
2010	69,274.13	26.0
2009	69,436.90	26.0
2008	68,760.19	26.0
2007	41,527.36	16.5
	355,657.27	130.5
	71,131.45	**5 YEAR AVG**

STATE TROOPER		
21 YEARS OF SERVICE		
DOR < 7/1/2012		
SALARY (base salary for position)	129,756.00	
CLOTHING	775.00	
OT	0.00	
HOLIDAY PAY	7,088.95	
	137,619.95	**Final Salary**
Final salary x 53%, 50% w/20 years, 3% for	**72,938.57**	**Annual Benefit**
21st year		
DOR > 7/1/2012		
5 YR AVG (ANCHOR)	108,760.35	
CLOTHING	0.00	
OT	0.00	
HOLIDAY PAY (assuming 2% increase per year	6,816.25	
with 7,088.95 in final year.)	**115,576.60**	**Final Average Salary**
5 Year Average Salary with 50% for 20 years	**60,099.83**	**Annual Benefit**
and additional 2% for 21st year		

	SALARY FROM ANCHOR	PAYPERIODS
2012	9,981.24	2.0
2011	129,508.55	26.0
2010	116,230.81	26.0
2009	113,989.01	26.0
2008	98,714.66	26.0
2007	75,377.50	24.0
	543,801.77	130.0
	108,760.35	**5 YEAR AVG**

STATE TROOPER		
22 YEARS OF SERVICE		
DOR < 7/1/2012		
SALARY (base salary for position)	129,756.00	
CLOTHING	775.00	
OT	0.00	
HOLIDAY PAY	7,088.95	
	137,619.95	**Final Salary**
Final salary x 56%, 50% w/20 years, 3% for	**77,067.17**	**Annual Benefit**
21st and 22nd years		
DOR > 7/1/2012		
5 YR AVG (ANCHOR)	97,755.77	
CLOTHING	0.00	
OT	0.00	
HOLIDAY PAY (assuming 2% increase per year	6,816.25	
with 7,088.95 in final year.)	**104,572.02**	**Final Average Salary**
5 Year Average Salary with 50% for 20 years	**56,468.89**	**Annual Benefit**
and additonal 2% for 21st and 22nd years		

	SALARY FROM ANCHOR	PAYPERIODS
2012	7,485.93	1.5
2011	129,811.37	26.0
2010	103,763.13	26.0
2009	87,039.94	26.0
2008	86,208.79	26.0
2007	74,469.69	24.5
	488,778.85	130.0
	97,755.77	**5 YEAR AVG**

EXHIBIT E

Law Office of

Carly Beauvais Iafrate

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Admitted in RI

July 26, 2012

The Honorable Sarah Taft-Carter
Rhode Island Superior Court
250 Benefit Street
Providence, RI 02903

Re: *RIPERC v. Chafee, C.A. No. 12-3166*
Bristol-Warren Reg. School Employees, Local 581 v. Chafee, C.A. No. 12-3167
Rhode Island Council 94, AFSCME, AFL-CIO Locals v. Chafee, C.A. No. 12-3168
City of Cranston Police Officers, IBPO, Local 301 v. Chafee, C.A. No. 12-3169
Woonsocket Fire Fighters, IAFF, Local 732, AFL-CIO v. Chafee, C.A. No. 12-3579

Dear Judge Taft-Carter:

I write on behalf and with the concurrence of all counsel for the Plaintiffs in the above-referenced actions to provide Plaintiffs' perspective on the matters raised in letters of July 12 and July 18, 2012, presented by John Tarantino on behalf of the Defendants in the above-referenced actions.

As you know, the Defendants have suggested that your son's status as a member of the Rhode Island State Police may raise concerns about your handling of these cases and that Article VI, Canon 3E may require you to recuse yourself on the basis that "your son, as an active member of the state police, has an 'economic interest' in the litigation." (Tarantino letter of 7/12/12 at 2).

The specific language at issue provides that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: * * * (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child * * * has an economic interest in the subject matter in controversy or is a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding." Canon 3E(1)(c) (emphasis added).

Both "de minimis" and "economic interest" are defined by Article VI. In particular "de minimis" "denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality," and "economic interest" "denotes ownership of more than de minimis legal or equitable interest, * * *." There are several provisions that speak to what is not an economic interest, including "ownership of an interest in a mutual or common investment fund that holds securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest * * *." Rule I, Terminology.

The Canons do not strike a balance in favor of recusal. To the contrary, Canon 3B(1) provides: "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required." Much has been written on the judge's duty to sit in the face of a suggestion that recusal may be appropriate. Indeed, "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." United States v. Cooley, 1 F.3d 985, 994 (10th Cir. 1993) (quoting Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir.1987)); see also United States v. Bray, 546 F.2d 851 (10th Cir. 1976). "The statute is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." Cooley, 1 F.3d at 993 (citing In re United States, 666 F.2d 690, 694 (1st Cir. 1981)).

If a motion to disqualify is not well-grounded, the proper resolution of the motion, both as a matter of law and judicial ethics, is to deny it. From the standpoint of ethics, Canon 3(A)(1) provides that "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required." As for the law, the Seventh Circuit has explained that:

> "A judge may decide close calls in favor of recusal. But there must first be a close call. As we put it in Suson v. Zenith Radio Corp., 763 F.2d 304, 308–09 n. 2 (7th Cir.1985), a 'district judge is * * * obligated not to recuse himself without reason just as he is obligated to recuse himself when there is reason.'" New York City Hous. Dev. Corp. v. Hart, 796 F.2d 976, 980–81 (7th Cir.1986) (criticized on other grounds, In re: School Asbestos Lit., 977 F.2d 764, 785 n.28 (3d Cir. 1992)).

Commenting on the federal "duty to sit" doctrine, the First Circuit stated:

> "Nevertheless, judges are not to recuse themselves lightly under § 455(a). See H.R.Rep. No. 93-1453, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355 * * * As Snyder contends, an erroneous recusal may be prejudicial in some circumstances. See United States v. Arache, 946 F.2d 129, 140 (1st Cir.1991) (finding that 'there appears to be some force' to argument that recusal may prejudice defendant where recusing judge has become familiar enough with facts of case to question reliability of key testimony). In any event, the unnecessary transfer of a case from one judge to

> another is inherently inefficient and delays the administration of justice. See Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482, 491 (1st Cir. 1989) (noting that the judicial system would be 'paralyzed' were standards for recusal too low). For these reasons, '[a] trial judge must hear cases unless [there is] some reasonable factual basis to doubt the impartiality or fairness of the tribunal.' Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979). Thus, under § 455(a) a judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise, he has a duty to sit." United States v. Snyder, 235 F.3d 42, 45-46 (1st Cir. 2000), cert. denied, 532 U.S. 1057 (2001) (footnote omitted).

Based upon the facts and circumstances present here, and in light of the above-referenced authorities, Plaintiffs respectfully submit that recusal is not appropriate or required here. First, there is no evidence that your son has more than a de minimis interest in the subject matter in controversy that could be substantially affected by the proceeding or that raises a reasonable question as to the Court's impartiality. The information provided to date is that your son is a non-vested employee of the State Police. The figures provided by the Defendants as to the difference between the state police pension benefits before the enactment of the RIRSA and after the enactment of the RIRSA were generated based on comparing the value of an already-retired state police officers before and after RIRSA. These figures have no relationship to any actual economic interest of your son because he was never entitled to the benefits earned by the four retirees at issue. It is entirely "remote, contingent, indirect [and] speculative" whether your son will remain employed by the State Police to a point in time when he would be impacted by the RIRSA or the invalidation of the RIRSA and thus, recusal is not required. See, e.g., State of Rhode Island v. Lead Industries Association, 2005 R.I. Super. Lexis 127, at *7 (R.I. Super. Lexis, filed Aug. 11, 2005). Accordingly, the Defendants have not established any actual "economic interest" in the current litigation for any current non-vested state trooper, including your son.

In addition, none of the Plaintiffs purport to represent or mount a challenge of RIRSA on behalf of current, former or retired members of the Rhode Island State Police. Thus, the subject matter in controversy is not the impact of RIRSA on any state trooper's pension.

There is one additional issue that warrants discussion and that is the applicability of the rule of necessity. If the Defendants are correct, that a decision by the Court might impact the future of RIRSA as it relates to members of other pension plans not at issue in this case then that reasoning must apply equally to both state police and judges. Given the fact that all of the judges are members of a pension system that might be affected by a determination of the constitutionality of RIRSA (according to the Defendants), then the rule of necessity would apply and the Court remains duty bound to hear the case. See, e.g., Board of Trustees v. Hill, 472 N.E.2d 204, 205 (Ind. 1985) (applying the rule of necessity to allow Supreme Court to hear appeal despite justices' direct economic interest in pension fund at issue).

The canons are rules of reason which should be practically applied. There is no evidence that the Court's impartiality might reasonably be questioned in the instant case for any reason and thus, disqualification is simply not appropriate.

Very truly yours,

Carly Beauvais Jafrate

c: John Tarantino, Esq.
James Lee, Esq.
Rebecca Partington, Esq.

EXHIBIT F

ADLER POLLOCK & SHEEHAN P.C.

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July 30, 2012

Via Hand Delivery

The Honorable Sarah Taft-Carter
Providence County Superior Court
250 Benefit Street
Providence, RI 02903

Re: *Rhode Island Public Employees' Retirement Coalition, et al. v. Chafee, et al.*, C.A. No. 12-3166
Bristol/Warren Regional School Employees, Local 581, et al. v. Chafee, et al., C.A. No. 12-3167
Rhode Island Council 94, AFSCME, AFL-CIO Locals, et al. v. Chafee, et al., C.A. No. 12-3168
City of Cranston Police Officers International Brotherhood of Police Officers, Local 301, AFL, CIO, et al. v. Chafee, et al., C.A. No. 12-3169
Woonsocket Fire Fighters, IAFF Local 732, AFL-CIO, et al. v. Chafee, et al., C.A. No. 12-3579

Dear Judge Taft-Carter:

On July 26, 2012, we received Attorney Iafrate's letter. The letter contains analysis and argument on whether you should or should not recuse. In our prior letters to you, we attempted not to argue, but rather set forth the facts and circumstances as we understand them. If the Court would find it helpful for us to provide our analysis and argument on the issue, please let us know and we shall do so promptly.

Sincerely,

JOHN A. TARANTINO

JAT:dh

cc: All Counsel of Record *(via email)*

617509.1

EXHIBIT G

Tarantino, John

From: Carly Iafrate [ciafrate@verizon.net]
Sent: Monday, October 15, 2012 3:03 PM
To: Tarantino, John; labinger@roney-labinger.com; 'Thomas R. Landry'; 'Gary Gentile'; 'Sushelsky, Jay'; 'Kurt Rumsfeld'; 'Marc B. Gursky'; 'Rebecca Partington'; jlee@riag.ri.gov
Subject: RE: pension

Thank you - I will inform the Court. Is there anyone who is definitely not available who needs to be present?

From: Tarantino, John [mailto:jtarantino@apslaw.com]
Sent: Monday, October 15, 2012 12:22 PM
To: Carly Iafrate; labinger@roney-labinger.com; Thomas R. Landry; Gary Gentile; Sushelsky, Jay; Kurt Rumsfeld; Marc B. Gursky; Rebecca Partington; jlee@riag.ri.gov
Subject: RE: pension

Counsel for the defendants are available.

John

From: Carly Iafrate [mailto:ciafrate@verizon.net]
Sent: Monday, October 15, 2012 11:56 AM
To: labinger@roney-labinger.com; Thomas R. Landry; 'Gary Gentile'; 'Sushelsky, Jay'; Kurt Rumsfeld; 'Marc B. Gursky'; Tarantino, John; 'Rebecca Partington'; jlee@riag.ri.gov
Subject: FW: pension

Please see below e-mail from Judge Taft-Carter's clerk Brian Thompson concerning a conference on Friday at 9 a.m.

Please note that this e-mail is being sent to all Plaintiffs and all Defendants counsel.

Thanks,

Carly

From: Thompson, Brian [mailto:bthompson@courts.ri.gov]
Sent: Monday, October 15, 2012 8:56 AM
To: 'Carly Iafrate'
Subject: RE: pension

Hi Carly,

I spoke with Judge Taft-Carter this morning. She would like to have a conference on the Pension cases on Friday morning 10/19 at 9:00. Would you be able to contact the parties to see if everyone would be availabvle.

Thanks,
Brian

From: Carly Iafrate [mailto:ciafrate@verizon.net]
Sent: Thursday, September 20, 2012 11:52 AM
To: Thompson, Brian
Subject: RE: pension

Great thank you.

From: Thompson, Brian [mailto:bthompson@courts.ri.gov]
Sent: Thursday, September 20, 2012 11:44 AM
To: ciafrate@verizon.net
Subject: pension

Carly,

I got your voicemail, but couldn't get your cell phone #. Judge Taft-Carter will be hearing the Motion to Dismiss. I will let you know of an available date and time for a conference for this motion and any discovery issues.

Brian

EXHIBIT H

Publication: The Providence Journal; Date: Nov 9, 2012; Section: Rhode Island; Page: A1

PENSIONS

State moves to block judge from pension case

State says family members of Superior Court Judge Sarah Taft-Carter could be affected by decision

By MIKE STANTON
JOURNAL STAFF WRITER

Should a judge whose son is a state employee and whose mother collects a public pension be allowed to decide whether Rhode Island's landmark 2011 pension overhaul is legal?

Lawyers for the state asked the Rhode Island Supreme Court Wednesday to block Superior Court Judge Sarah Taft-Carter's decision to remain on the case. Taft-Carter's son, Andrew Carter, is a Rhode Island state trooper and her mother, Sallyanne Taft, collects a $22,000-a-year death benefit from her late husband, former Cranston Mayor James L. Taft Jr.

Taft-Carter ruled on Oct. 19

SEE **PENSION, A8**

JOURNAL FILES/**JOHN FREIDAH**

Superior Court Judge Sarah Taft-Carter ruled Oct. 19 that she would not recuse herself from a challenge to the state's pension overhaul.

PENSION

Continued from A1

Panel cleared judge to serve

that she would not recuse herself from a challenge to the pension overhaul filed by several public-employee unions in June. A hearing on the state's motion to dismiss the case is scheduled for Dec. 7.

The stakes are huge for both sides, affecting tens of thousands of public employees and retirees as well as billions of dollars in projected savings to taxpayers, including $274 million next year.

John Tarantino, lawyer for the state, argues in court papers that Taft-Carter's impartiality could reasonably be questioned because "her son and her mother stand to be substantially affected by the decision." Tarantino cites the Rhode Island Supreme Court Code of Judicial Conduct, which says a judge should disqualify himself or herself if a parent or child has an economic interest in a case.

Taft-Carter called her family members' financial interests insignificant and said it would not affect her impartiality. Because her son was hired in 2009 and is years away from a pension if he remains with the state police, the judge said that any economic interest is "remote and speculative."

Tarantino counters that the pension reform law reduced state troopers' pension benefits by more than 23 percent, and suspended annual cost-of-living increases for benefits currently paid to Taft-Carter's mother.

On Thursday night, Taft-Carter issued a statement to The Journal defending herself, along with a three-page opinion she sought from an advisory panel of judges this summer clearing her to preside over the pension cases.

The Rhode Island Supreme Court Advisory Committee on the Code of Judicial Conduct is a panel of five judges, chaired by Superior Court Judge Michael A. Silverstein. In its Oct. 5 opinion, the committee concluded that Taft-Carter's mother's and son's interests were minimal, and "do not require her disqualification from the pension cases, provided, however, that Judge Taft-Carter makes a subjective determination that those interests will not affect her ability to preside over the cases fairly, objectively, and without bias."

The first union lawsuits challenging the law, named the Rhode Island Retirement Security Act, were filed on June 22. Those and subsequent suits, five in all on behalf of state and municipal unions and retirees, have been consolidated before Taft-Carter.

Superior Court Judge Sarah Taft-Carter's son, Andrew Carter, is a Rhode Island state trooper and her mother, Sallyanne Taft, collects a $22,000-a-year death benefit from her late husband, former Cranston Mayor James L. Taft Jr.

Under the landmark legislation, most of the state's public employees were moved from a defined-benefit pension plan that provided up to 80 percent of their salary into a new hybrid plan that includes a 401(k)-style plan. The size of pensions was cut, minimum retirement ages raised and expensive cost-of-living increases for retirees suspended until the state's underfunded retirement system reaches 80-percent funding, which could take 16 years.

The union lawsuits argue that the law is an illegal breach of contract, an illegal taking of personal property and a violation of their state constitutional rights.

The defendants, including Governor Chafee, who supported and signed the law, and General Treasurer Gina Raimondo, its chief architect, argue that there is no contract right to a pension, which is determined by state law and therefore can be changed by the legislature.

The unions chose not to claim a violation of federal constitutional rights, which would have landed the case in federal court, where a Rhode Island federal judge had ruled that public employees do not have a contract right to a public pension.

Instead, the cases are in state court, where every Rhode Island judge participates in the judicial retirement system, which is affected by the new law.

Superior Court Presiding Justice Alice Gibney assigned the cases to Taft-Carter, who was already presiding over a 2010 union lawsuit challenging benefit reductions enacted by the General Assembly in 2009 and 2010.

Taft-Carter had denied a state motion to dismiss that case in September 2011, ruling that public employees have an implied contract right to pension benefits.

During a June 22 conference in her chambers with lawyers in the new suits, Taft-Carter disclosed that her son was a state trooper "and expressed some concern about whether she should hear these cases," according to Tarantino's memorandum to the Supreme Court.

Lawyers for the state and the unions disputed whether the 2011 pension overhaul would significantly affect Taft-Carter's son, or whether it should require her to step aside. In letters to the judge, Tarantino spelled out changes reducing state troopers' retirement benefits.

Tarantino's motion Wednesday also asserts that Taft-Carter acted arbitrarily when she ruled at an Oct. 19 hearing that she would not recuse herself. The state had not formally made a motion for recusal, lawyers argue, and did not have the opportunity to present formal arguments before the judge ruled.

Furthermore, during the Oct. 19 hearing, Taft-Carter also disclosed, for the first time, that her mother receives death benefits from her late husband's state pension — giving the state's lawyers no time to argue whether that should also warrant her stepping aside.

Taft-Carter's father, Jim Taft, was able to combine his eight years as Cranston mayor, eight as a state senator and two as a Cranston councilman into a legislative pension. Following his death, on Sept. 5, 2011, his widow Sallyanne began receiving a death benefit that now stands at $22,612 a year, including a cost-of-living payment of $11,812, according to state retirement system records.

During the hearing, Taft-Carter said that her mother's pension payment and any COLA increase were so small that her financial interest would not "reasonably give rise to doubts" as to the judge's impartiality.

The state is not only asking the Supreme Court to reverse Taft-Carter's decision to remain on the case, but also asking Taft-Carter to refrain from hearing any matters involving the pension suits until the higher court has weighed in.

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EXHIBIT I

Rhode Island Supreme Court
Advisory Committee on the Code of Judicial Conduct
Opinion No. 2012-02
Issued October 5, 2012

Associate Judge Sarah Taft-Carter of the Superior Court seeks the Committee's opinion on whether she is precluded from presiding over several cases, collectively known as the pension cases, that have been assigned to her. One of the cases was filed in 2010 and involves constitutional challenges to certain provisions of P.L. 2010, Ch. 23, Art. 16. Judge Taft-Carter has presided over this case since 2011. She made an initial ruling in this case denying the defendants' Motion for Summary Judgment and holding that the plaintiffs possess an implied unilateral contract right arising from the Employment Retirement System of Rhode Island. No party raised any ethical issues relating to her hearing the case.

The other pension cases were filed in 2012 and involve constitutional challenges to the Rhode Island Retirement Security Act (R.I.R.S.A.) of 2011. It has been brought to Judge Taft-Carter's attention that additional pension cases may be filed, including an action on behalf of retired state police. Based on this information, Judge Taft-Carter made it known to the parties that her son is an active member of the Rhode Island State Police, and has been employed there for two and one-half years. Judge Taft-Carter also informs the Committee that her mother receives a monthly death benefit from her late father's legislative pension, and that the 2011 legislative change would eliminate the cost of living adjustment from that benefit.

Judge Taft-Carter asks the Committee whether she is precluded from hearing the pension cases that were filed in 2012 because her mother receives a death benefit from a legislative pension; whether she is precluded from hearing any or all of the pension cases because her son is an active member of the state police; and whether she is precluded from hearing any or all of the pension cases because she has an economic interest as a judge whose contributions and pension benefits are affected by the 2011 legislative changes.

Canon E of the Code of Judicial Conduct, entitled "Disqualification" is applicable to this inquiry. In pertinent part, it states as follows:

> E. Disqualification.
> 1. A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> * * *
>
> (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis

interest that could be substantially affected by the proceeding:
(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) is a party to the proceeding, or an officer, director or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

The terminology section to the Code explains:

> "De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.
>
> "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party. . . .

There are four exceptions to the term "economic interest" that are not applicable to the facts of this inquiry.

The Committee is of the opinion that Judge Taft-Carter's mother interest in the pension cases, her son's interest in the cases, and her own interest in the cases, as one of all other judges whose pensions are affected by the 2011 legislation, are interests that are objectively de minimis. While the Committee believes that the nature of those interests are objectively de minimis and do not per se disqualify Judge Taft-Carter from hearing the pension cases, the Code requires that Judge Taft-Carter make a subjective determination about whether the de minimus interests of her mother, her son, or her own interests will affect her ability to preside impartially over the cases.

If Judge Taft-Carter believes that her ability to preside fairly and impartially over the pension cases will not be affected by those interests, she may indeed have a duty not to recuse. Our Supreme Court stated in Kelly v. Rhode Island Public Transit Authority, 740 A.2d 1243 (R.I. 1999):

> "It is a well recognized principle that a trial justice should recuse himself or herself in the event that he or she is unable to render a fair or an impartial decision in a particular case. (Cite omitted). It is an equally well recognized principle that a trial justice has a great obligation not to disqualify himself or herself when there is no sound reason to do so as he or she has to disqualify himself or herself when a proper occasion to do so does arise. (Cite omitted)." Id. at 1246.

The Committee therefore concludes that the interests of Judge Taft-Carter's mother, her son, and her own interests are objectively de minimis, and as such do not require her disqualification from the pension cases, provided, however, that Judge Taft-Carter makes a subjective determination that those interests will not affect her ability to preside over the cases fairly, objectively, and without bias.

This opinion is issued by the Advisory Committee in accordance with the provisions of the Code of Judicial Conduct, which states in pertinent part as follows: "Any judge who acts in accordance with an opinion of the advisory committee shall be presumed to have abided by the Canons of the Code of Judicial Conduct."

EXHIBIT J

Publication: The Providence Journal; Date: Nov 18, 2012; Section: Rhode Island; Page: A1

GOVERNMENT

Judge in a tough spot described as qualified, fair

JOURNAL FILES

Superior Court Judge Sarah Taft-Carter grew up in the political arena in Cranston, where her late father James L. Taft Jr. was mayor and also served as state GOP leader.

State argues Superior Court judge's family ties pose a conflict, seeks to remove her from pension-overhaul suits

By MIKE STANTON
JOURNAL STAFF WRITER

Sarah Taft-Carter is a judge unafraid to make tough decisions, those who know her say, even if it means holding on to a high-profile case in which her impartiality and family ties have been questioned.

Family ties figured into her application to become a Rhode Island judge. She was the last judge appointed, in 2010, by Republican Gov. Donald Carcieri, who had counted her father, former Cranston mayor and state GOP leader James L. Taft Jr., as a campaign adviser.

Letter after letter praising her qualifications also alluded to her father and her grandfather, a former probate judge.

"I first met Sarah when her father was running for Governor and she was a student at the University of Rhode Island," wrote Supreme Court Justice Gilbert V. Indeglia.

"Because this is Rhode Island," wrote U.S. Bankruptcy Judge Arthur N. Votolato of Rhode Island, "my knowledge of Ms. Taft-Carter extends back to family/law firm ties that began in her infancy."

But in 28 years as a lawyer at the firm her father co-founded, Taft-Carter also earned a reputation as her own person — a smart, fair and well-rounded lawyer, a grounded wife and mother who raised four children and volunteered her time at their schools as well as Ocean Tides, a Christian Brothers school for troubled teens, and the South Shore Mental Health Center.

"Her abilities are diverse and I believe the solid family she is from (and they have created) gives her a strong perspective on what it takes to be a good citizen," wrote Donna Pillsbury, a friend since college.

SEE **JUDGE, A14**

JUDGE Continued from A1

State says Taft-Carter has conflict

Now, nearly two years after being sworn in as a Superior Court judge, Taft-Carter, 55, faces a motion by the state to remove her from high-stakes lawsuits challenging Rhode Island's public-pension overhaul. Arguments on a related motion will be heard Monday in Superior Court. Lawyers for the state, which has been sued by public-employees unions and retirees, say that Taft-Carter has a conflict because her son, Rhode Island state trooper Andrew Carter, is potentially in line for a public pension, and because her mother, Sallyanne Taft, collects a $22,000-a-year death benefit from her late father's pension as a public official.

The Rhode Island Supreme Court Code of Judicial Conduct states that a judge should step aside if a parent or a child has an economic interest in a case. But Taft-Carter ruled Oct. 19 that her family members' interest is insignificant, and that she can be impartial.

Additionally, The Journal has found, her uncle, David W. Taft, a former Cranston city auditor, collects a $65,900-a-year pension. The judge said through a court spokesman on Friday that she was not aware of her uncle's pension.

The judicial code also says a judge should step aside if "a person within the third degree of relationship" — which under the federal code for judges includes uncles — has an economic interest in a case. If so, the question for Taft-Carter is whether she considers her uncle's pension to be significant now that she knows about it. Under the 2011 pension changes, cost of living increases are frozen; her uncle's COLA is $1,700 a month, or about $21,000 a year.

Taft-Carter, who declined to be interviewed for this story, said in her October ruling that the code "contemplates that the general rule is in favor of denying motions for disqualifications."

She quoted from a past state Supreme Court decision: "It is a well-recognized principle that a trial justice should recuse himself or herself in the event that he or she is unable to render a fair or an impartial decision in a particular case. It is an equally well-recognized principle that a trial justice has as great an obligation not to disqualify himself or herself when there is no sound reason to do so."

At her State House swearing-in ceremony just before Christmas 2010, Sarah Taft-Carter thanked her father: "my mentor, my confidant, my best friend."

James Taft could not attend due to illness, and died nine months later, at the age of 80.

Kenneth McKay worked with Sarah and Jim Taft at the family law firm, Taft & McSally, in Cranston, in the late 1990s.

"Her father was a wonderful gentleman, very old school," recalls McKay, former chairman of the state Republican Party and chief of staff of the national GOP. "Do what you say you're going to do. Try your hardest. Sarah learned a lot from him, not only how to be a lawyer, but how to be a professional, pay attention to detail, be a critical thinker, don't make assumptions.

"He respected Sarah as a lawyer, and she loved and respected him. You could see why she would follow in his footsteps."

Jim Taft was a titan in Republican politics. He ran unsuccessfully for governor in 1976, against J. Joseph Garrahy, and served as Cranston mayor from 1971 to 1979, where he helped build a Republican machine that ruled the city for nearly three decades.

When his brother-in-law and law partner died unexpectedly in 1978, Taft abandoned his bid for reelection to devote his time to the family law practice. He remained politically active behind the scenes, backing his friend Edward D. DiPrete to succeed him as mayor and then serving as a key adviser when DiPrete went on to be governor from 1985 to 1991.

The DiPrete years were marred by scandal and corruption, and DiPrete later went to prison after pleading guilty to taking bribes for state contracts. Taft did not figure in the criminal case, but the Rhode Island Ethics Commission fined DiPrete for improperly steering state legal work to Taft & McSally.

Taft, who served as Governor DiPrete's campaign finance chairman, also was DiPrete's partner in the infamous Cranston land deal that became a major issue in DiPrete's 1988 reelection campaign. A company controlled by DiPrete, Taft and three DiPrete family members obtained a zoning variance on land in Cranston, then bought and resold the land the same day for a $2-million profit.

THE PROVIDENCE JOURNAL/**RUBEN W. PEREZ**

Sarah Taft-Carter is sworn in as a Superior Court judge by then-Gov. Donald Carcieri in December 2010 as her daughter Katherine, husband John, and daughter Georgia look on.

Michael J. Sepe, a Democratic councilman at the time, blasted the deal as profiting "a cozy little network — I call it the 'Republican Boys Club' of Cranston."

Today, Sepe, the Cranston Democratic chairman, says that while he had his political battles with Taft, he respected him — and also respects his daughter. Earlier this year, Sepe and the Cranston City Council found themselves before Judge Taft-Carter. City Republicans had challenged the Democrat-controlled council's appointment of a Democrat to fill a vacant seat, arguing instead for a special election.

Taft-Carter ruled in favor of the Democrats.

"She was very up front, not afraid to make a decision," says Sepe. "She grew up in the political arena in Cranston and was involved in her father's campaigns. I knew she was going to be fair, because her father was fair."

McKay says that Taft introduced him to Carcieri, who was searching for a campaign manager for his first run for governor in 2002. McKay signed on, and Taft was a regular advisor. Sarah Taft-Carter also volunteered to help the campaign, he says. Campaign records show that Taft-Carter and her husband donated $4,250 to Carcieri's campaigns.

McKay, who also served as Carcieri's chief of staff in his first term, had moved on by 2010, when Carcieri nominated Taft-Carter to the Superior Court.

McKay acknowledges the perception of patronage, but praises Taft-Carter's qualifications.

"I can see how it would play to people's cynicism," says McKay. "All I can tell you is that, in this instance, that's not the case. Sarah is wonderful. She's qualified."

McKay and other friends describe Taft-Carter as down-to-earth. She met her future husband, John C. Carter, a landscape architect, at Plum Beach in North Kingstown, where the Tafts had a summer home.

Early in their marriage, McKay recalls, they ran a stand selling Christmas trees near their home in the Eden Park section of Cranston. Today they hold annual Christmas parties at their home in Narragansett, where Taft-Carter is an avid runner and ocean swimmer.

A graduate of the University of Rhode Island and Suffolk University Law School, Taft-Carter joined Taft & McSally in 1982. She has been an assistant town solicitor in Narragansett and North Kingstown, and a special counsel in South Kingstown, handling zoning and housing issues.

In her first year on the bench, Taft-Carter received her first major pension case.

Public-employee unions had sued to block reductions in retirement benefits made by the General Assembly in 2009 and 2010, saying that it breached their contract rights. In the summer of 2011, the state asked Taft-Carter to dismiss the case, arguing that the legislature sets pension benefits by law and can legally make changes to the plan.

On Sept. 13, 2011, Taft-Carter rejected the state's request, ruling that public employees have an implied contractual right to pension benefits, even though the Rhode Island Constitution doesn't explicitly say so.

But while she allowed the case to proceed, she also questioned some of the unions' positions, and noted that they had additional legal hurdles to clear to ultimately prevail.

The decision — the week after her father's death — also put Taft-Carter in the spotlight because the state's political leaders were preparing a more massive overhaul of public pensions, the Rhode Island Retirement Security Act. The act, which passed in November 2011, prompted a second legal challenge from the unions, filed in June 2012.

Presiding Superior Court Justice Alice Gibney assigned the new pension cases to Taft-Carter, since she already had the 2010 lawsuit. And given Taft-Carter's decision in that case that the unions had an implied contract right, the battle lines were quickly drawn when the subject of the judge's recusal came up.

When Taft-Carter volunteered, during a conference of lawyers in the case, that her son was a state trooper, the state's lawyers raised concerns. But union lawyers countered that she could be impartial.

"The elephant in the room is that you have some history in deciding similar cases," firefighters' union lawyer Marc Gursky told the judge. "The public needs to understand that you can be fair even in the face of public criticism."

In October, Taft-Carter said that she would not recuse herself. In that hearing, she also mentioned her mother's pension, and cited an opinion from the Supreme Court's Advisory Committee on the Code of Judicial Conduct that cleared her to preside.

That prompted the state to appeal to the Supreme Court — and to ask Taft-Carter to hold off on a scheduled Dec. 7 hearing on the state's motion to dismiss the 2012 suits. She is scheduled to hold a hearing Monday on the state's request.

"The code places the burden for recusing squarely on the judge herself," said court spokesman Craig Berke on Friday. "Our judges take this responsibility seriously. Judge Taft-Carter knows she is under public scrutiny and she is certain she can be impartial and follow the law in these cases."

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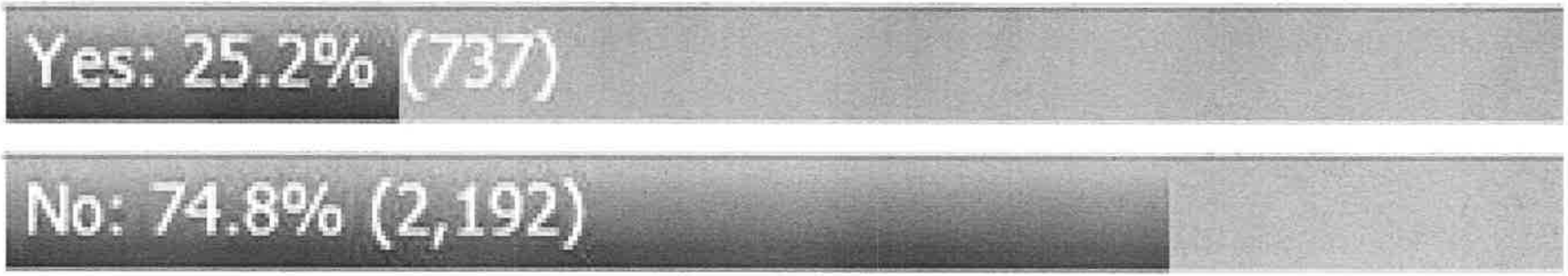
EXHIBIT K

Should a judge whose son is a state employee and whose mother collects a public pension be allowed to decide whether Rhode Island's landmark 2011 pension overhaul is legal? (2,929 votes)



Vote