STATE OF CONNECTICUT
OFFICE OF STATE ETHICS

Draft Advisory Opinion No. 2013-3

July 11, 2013

Question Presented: **The petitioner asks (1) whether a Deputy Commissioner of the Department of Public Health ("DPH") may serve on the Board of Trustees of the Tobacco and Health Trust Fund "when her employer, DPH, is soliciting funds from [that entity] for its programs"; and if so, (2) whether she must "recuse herself from voting or making recommendations as they relate to DPH's proposals."**

Brief Answer: **We conclude (1) that the Deputy Commissioner may serve on the Board; and (2) that the Ethics Code does not mandate that she recuse herself from taking official action as a Board member relating to DPH's proposals, provided that such action would not affect her financial interests or those of certain family members.**

At its June 2013 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Stacy Schulman, Adjudicator/Ethics Liaison for DPH. In accordance with General Statutes § 1-81 (a) (3), the Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials (Ethics Code),[1] is binding on the Board concerning the person who requested it and who acted in good-faith reliance thereon, and is based solely on the facts provided by the petitioner.

[1]Chapter 10, part I, of the General Statutes.

Facts

The pertinent facts provided by the petitioner are set forth below and are considered part of this opinion:

> Pursuant to § 4-28f (c) of the Connecticut General Statutes, a Deputy Commissioner for [DPH] was appointed by the Governor on February 13, 2013 to be a member of the Board of Trustees for the Tobacco and Health Trust Fund. She was appointed as Deputy Commissioner of DPH in August 2012, prior to her appointment as a member of the Board of Trustees for the Tobacco and Health Trust Fund ("the Board").
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> In accordance with § 4-28f (c) and (d) (2) of the Statutes, the members of the Board are responsible for establishing criteria, processes and procedures to be used in selecting programs to receive money from the trust fund; and recommending authorization of disbursement from the trust fund for the purpose of: 1) supporting and encouraging development of programs to reduce tobacco abuse through prevention, education, and cessation programs; 2) support and encourage development of programs to reduce substance abuse; and, 3) develop and implement programs to meet the unmet physical and mental health needs in the state. *Conn. Gen. State. 4-28f (a).*
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> An employee from DPH would like to present a proposal for funding for a DPH program before the Tobacco and Health Trust Fund Board of Trustees.
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> Is it permissible for the Deputy Commissioner to sit as a member of the Board when her employer, DPH, is soliciting funds from the Tobacco and Health Trust Fund for its programs? If it is permissible, should the Deputy Commissioner recuse herself from voting or making recommendations as they relate to DPH's proposals?

Analysis

Taking those issues in turn, the first is whether the Deputy Commissioner may serve on the Board of the Tobacco and Health Trust

Fund "when her employer, DPH, is soliciting funds from [that entity] for its programs." To answer that question, we must resolve a conflict between two advisory opinions—Advisory Opinion Nos. 91-1[2] and 2006-1[3]—as to the proper interpretation of General Statutes § 1-84 (b).

Under § 1-84 (b), "[n]o public official"—which the Deputy Commissioner happens to be by virtue of her Board appointment[4]—"*shall accept other employment which will . . . impair his independence of judgment as to his official duties . . . .*"[5] Generally, a public official violates § 1-84 (b) by accepting other "employment with an . . . entity which can benefit from the state servant's official actions . . . ."[6] The "other employment" of concern here is the Deputy Commissioner's employment with DPH, an entity that can certainly benefit from her official actions as a Board member. The question, though, is whether this "other employment"—which was "accepted" *before* she was appointed to the Board—violates § 1-84 (b)'s prohibition on "acceptance" of other employment that impairs one's independence of judgment.

And that brings us to the conflicting opinions, the first being Advisory Opinion No. 91-1, which involved a State program that called for private entities to loan executives to the State.[7] An issue was whether the executives could work for the State (including state agencies involved in regulating their private employers) while "retain[ing] employment relationships with their present employers," without violating § 1-84 (b).[8] The answer was yes, and the reason was this: "the outside employment relationship would not violate § 1-84 (b)'s proscription on *acceptance* of other employment which impairs independence of judgment, *since the relationship in question is a preexisting one*."[9] In other words, under § 1-84 (b), "[n]o public official . . . shall accept" certain outside employment; the executives had accepted their private employment before becoming public officials; ergo, no § 1-84 (b) violation.

Under that rationale, the Deputy Commissioner could both serve on the Board and retain her DPH employment, without violating § 1-84

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[2]Connecticut Law Journal, Vol. 52, No. 35, p. 1D (February 26, 1991).

[3]Connecticut Law Journal, Vol. 67, No. 42, p. 4E (April 18, 2006).

[4]She is also a "public official" by virtue of her position as a Deputy Commissioner of DPH. See General Statutes § 1-79 (k).

[5](Emphasis added.)

[6]Regs., Conn. State Agencies § 1-81-17.

[7]Connecticut Law Journal, Vol. 52, No. 35, supra, p. 1D.

[8]Id.

[9](Emphasis in original and added.) Id., 2D.

(b), because she had "accepted" her DPH employment *before* she was appointed to the Board. That is, she did not "accept" other employment with DPH after becoming a Board member, i.e., after becoming a public official, which is plainly required by § 1-84 (b): "*No public official* shall accept other employment . . . ."[10]

A different result would follow, however, were we to apply the rationale set forth in Advisory Opinion No. 2006-1. That opinion dealt with the Stem Cell Research Advisory Committee, which provides grants to "institutions for the advancement of . . . stem cell research in this state . . . ."[11] At issue was how the Ethics Code applies to "committee members . . . employed by . . . institutions [both State and private] that submit applications for grants . . . ."[12] It was determined that § 1-84 (b) prohibits committee members from being "employed by . . . institutions that submit applications for grants"[13]—*regardless of whether they had "accepted" the employment before becoming committee members*. The reason (which is crucial to our inquiry) was that they "would be *engaging* in outside employment" that would impair their independence of judgment as to their official duties.[14]

That rationale, applied here, would compel the conclusion that § 1-84 (b) prohibits the Deputy Commissioner from serving on the Board, and the reason is this: She would be "engaging" in other employment (with DPH) that would impair her independence of judgment as to her duties as a member of the Board, given that her employer would be seeking funds from that entity.

We have, then, conflicting readings of § 1-84 (b), which, if applied here, would result in disparate outcomes. The former (found in A.O. No. 91-1) is that § 1-84 (b) can be violated only if other employment is accepted *after* one becomes a public official. Under the latter (found in A.O. No. 2006-1), the timing of the other employment's acceptance (be it before or after becoming a public official) is irrelevant; what matters is that a public official is "engaging" in other employment that impairs independence of judgment as to his or her official duties.

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[10](Emphasis added.)

[11]Connecticut Law Journal, Vol. 67, No. 42, supra, p. 4E.

[12]Id.

[13]Id., 6E.

[14]Id. After the opinion's release, the General Assembly passed legislation to bypass the opinion's conclusion. See Public Acts 2006, No. 06-33, § 1.

Of the two interpretations, the second has a glaring problem, namely, that § 1-84 (b) prohibits a public official—not from "engaging" in certain other employment—but from "accepting" it. Not only that, one of § 1-84 (b)'s neighbors—§ 1-84 *(a)*—uses the very word "engage" in its prohibition, which reads thus:

> No public official or state employee shall, while serving as such, have any financial interest in, or *engage* in, any business, employment, transaction or professional activity, which is in substantial conflict with the proper discharge of his duties or employment in the public interest and of his responsibilities as prescribed in the laws of this state, as defined in section 1-85.[15]

The use of the word "engage" in § 1-84 (a) and the word "accept" in § 1-84 (b) "suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings."[16] Put differently, that the legislature used the word "engage" in § 1-84 (a) and the word "accept" in § 1-84 (b) suggests that it did not intend "accept" to be synonymous with "engage," as was concluded in Advisory Opinion No. 2006-1.

If not "engage," then what is meant by the word "accept," for purposes of § 1-84 (b)? The Ethics Code does not define it, so "[w]e may presume . . . that the legislature intended [the word] to have its ordinary meaning in the English language . . . ."[17] "Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary."[18] The dictionary definition of "accept" is to "undertake the responsibility of (as a task or employment)."[19] As noted by one court, the word "accept" is "defined in anticipatory terms that

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[15](Emphasis added.) Although, at first glance, it appears that § 1-84 (a) may prohibit the Deputy Commissioner from serving on the Board, that provision is expressly qualified by § 1-85, under which the remedy for a "substantial conflict" is recusal.

[16](Internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *State*, 299 Conn. 167, 177, 9 A.3d 326 (2010).

[17](Internal quotation marks omitted.) *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 216, 38 A.3d 1183, cert. denied, ___ U.S. ___, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012).

[18](Internal quotation marks omitted.) *Tine* v. *Zoning Board of Appeals*, 308 Conn. 300, 307, 63 A.3d 910 (2013).

[19]Webster's Third New International Dictionary (1981).

suggest a precondition . . . ."[20] The precondition here—i.e., the condition that must exist before § 1-84 (b)'s prohibition on "accepting" certain other employment can be violated—is this: that the one doing the "accepting" be a "public official." Again, § 1-84 (b) plainly states that "[n]o *public official* . . . shall accept other employment . . . ."[21]

In light of the foregoing, we resolve the conflict over the proper interpretation of § 1-84 (b) in favor of Advisory Opinion No. 91-1, meaning two things: first, that the interpretation of § 1-84 (b) in Advisory Opinion No. 2006-1 is hereby overruled, and second, that § 1-84 (b) can be violated only if other employment is accepted *after* one becomes a public official. Applying that interpretation here, because the Deputy Commissioner was employed by DPH before becoming a Board member, she cannot be said to have "accepted" other employment that impairs her independence of judgment as to her Board duties, in violation of § 1-84 (b). Because there is no violation of § 1-84 (b), nor of any other provision, we conclude that she may serve on the Board even though "her employer, DPH, is soliciting funds from [that entity] for its programs."[22]

Having so concluded, we must now answer the follow-up question, which is whether the Deputy Commissioner need "recuse herself from voting or making recommendations as they relate to DPH's proposals." The provisions relevant to that question are General Statutes §§ 1-85 and 1-86, which define and proscribe substantial and potential conflicts of interests for purposes of the Ethics Code.

Under § 1-85 (with an exception not pertinent here), a public official has a substantial conflict of interests—and may not take official action—if she has "reason to believe or expect" that the official action would directly affect her financial interests or those of her spouse, a dependent child, or a "business with which [s]he is associated."[23] Even in the absence of a substantial conflict of interests, a public official may

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[20]*Boettger* v. *Bowen*, 923 F.2d 1183, 1189 (6th Cir. 1991).

[21](Emphasis added.)

[22]This conclusion is limited to the facts at hand, specifically, that DPH is not a "business with which [the Deputy Commissioner] is associated," as defined in General Statutes § 1-79 (b).

[23]The term "Business with which he is associated" is defined in part (with an exception not pertinent here) as follows: Any "entity through which business for profit or not for profit is conducted in which the public official . . . is a director, officer, owner, limited or general partner, beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of any class . . . ." General Statutes § 1-79 (b).

have a potential conflict of interests under § 1-86 if required to act on a matter that would affect her financial interests or the financial interests of her spouse, parent, brother, sister, child, child's spouse, or a "business with which [s]he is associated."

For there to be a conflict of interests, then, the public official's action must, at a minimum, affect the financial interests of the public official, certain family members, or a "business with which [s]he is associated." In this case, if the Deputy Commissioner takes official action as a Board member relating to DPH's proposals, it presumably will not affect her financial interests or those of her family members. If true, she has a conflict of interests only if DPH (a government entity) is a statutorily defined "business with which [s]he is associated." Not so, according to Advisory Opinion No. 90-29, in which government entities were expressly excluded from the definition of that term.[24]

Given that DPH is not a business with which the Deputy Commissioner is "associated," and assuming that her official action as a Board member relating to DPH's proposals would not affect her financial interests or those of her family members, we conclude that the Ethics Code does not mandate that she recuse herself from voting on, or making recommendations as they relate to, those proposals.

By order of the Board,

Dated_____ _____
Chairperson

[24]Connecticut Law Journal, Vol. 52, No. 14, p. 3D (October 2, 1990).