NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Brian J. O'Dowd, Assistant General Counsel

RE: Application of the Code of Ethics for Public Officials to a Former Employee of the Department of Public Health and to a DPH Advisory Committee

DATE: January 22, 2010

Introduction

The Citizen's Ethics Advisory Board issues this advisory opinion at the request of Stacy Owens, adjudicator/ethics liaison for the state Department of Public Health ("DPH"). She has asked two tangentially related questions, one regarding post-state employment, the other a DPH advisory committee, but both connected to DPH's "Technical Standards for Subsurface Sewage Disposal Systems."

Facts

Attorney Owens has presented these facts. In 1982, Public Health Code regulations took effect allowing DPH to establish "Technical Standards for Subsurface Sewage Disposal Systems" ("Technical Standards"). Under those regulations, residential and small-commercial septic systems with a capacity of 5000 gallons per day or less must be designed, installed, and operated in accordance with the Technical Standards. The regulations also provide that DPH must review the Technical Standards annually and make any revisions available on the first day of each year. Since their initial publication in 1982, the Technical Standards (now a fifty-page publication) have been revised nine times, most recently on January 1, 2009.

Before publishing the initial Technical Standards, DPH convened the Subsurface Code Advisory Committee ("Advisory Committee") to assist it in establishing the Technical Standards and to provide a mechanism to solicit input from organizations affected by them. The Advisory Committee—which first met in 1980 and has done so ever since then—has been, since its inception, composed of the same stakeholder organizations, including, for example, the Connecticut Department of Environmental Protection, the Connecticut Home Builders Association, and the Connecticut Environmental Health Association.

Each stakeholder organization is responsible for appointing an individual to represent its constituents as a member of the Advisory Committee. Advisory Committee members are volunteers, receiving no compensation for performing their duties, and act strictly in an advisory capacity, providing advice regarding the Technical Standards to the DPH Commissioner, who is solely responsible for their revision.

Question

We consider two questions: (1) whether the Code of Ethics for Public Officials ("Code") permits an advisor to a proprietary leaching system company (who is not a state employee) to serve as an Advisory Committee member; and (2) whether a former DPH employee (a state retiree of more than ten years) who owns a subsurface sewage business may contact DPH staff to recommend changes to the Technical Standards, given that he was involved in drafting them while employed by DPH.

Conclusion

Based on the facts presented, we conclude as follows: (1) because Advisory Committee members are not "public officials," solely by virtue of such membership, and thus not subject to the Code's requirements, the Code will not prohibit the advisor to a proprietary leaching system from serving as an Advisory Committee member; and (2) because the Technical Standards are not considered a "particular matter," the former DPH employee who owns a subsurface sewage business may take any action whatsoever regarding the Technical Standards, despite that he was involved in drafting them while employed by DPH, without violating § 1-84b (a).

Analysis

1. Advisory Committee

The first question is whether an advisor to a proprietary leaching system company (who is not a state employee) may serve as an Advisory Committee member. The expressed concern is that the consultant will acquire inside information that could benefit him financially in his role as an advisor to that company.

Before responding to that question, it is, of course, necessary to determine whether Advisory Committee members (at least those who are not otherwise state employees or public officials[1]) are subject to the Code. Because Advisory Committee members do not,

[1]As noted above, one of the stakeholder organizations is the state Department of Environmental Protection ("DEP), so its appointee is most likely either a state employee or public official by virtue of his or her DEP position.

solely by virtue of such membership, fit within the definition of "state employee,"[2] they are subject to the Code's requirements only if they fit within its definition of "public official," which, in pertintent part, is this: "any person appointed to any office of the . . . executive branch of state government by the Governor or *an appointee of the Governor . . . but shall not include a member of an advisory board . . . .*"[3] Based on the facts presented, Advisory Committee members do not—one way or another—meet that definition.

That is, if we were to determine that Advisory Committee members are *not* appointed by an appointee of the Governor (here, the DPH Commissioner)—but rather by the various stakeholder organizations—then the manner of their appointment does not fit within the definition of "public official."[4] And even assuming that Advisory Committee members were to get over that initial hurdle and were deemed to be appointed by an appointee of the Governor (namely, the DPH Commissioner), they would be exempt from the term "public official" as "members of an advisory board":

> Member of an advisory board means any individual (1) appointed by a public official as . . . [a] member of a committee . . . established to advise, recommend or consult with a public official . . . (2) who receives no public funds other than per diem payments or reimbursement for his actual and necessary expenses incurred in the performance of his official duties, and (3) who has no authority to expend any public funds or to exercise the power of the state.[5]

Applying that definition to the facts before us, Advisory Committee members have been appointed as members of a committee established to advise the DPH Commissioner; they are not compensated by the state for their service; and they neither exercise state power nor expend state funds, but simply provide advice regarding the Technical Standards to the DPH Commissioner, who is solely responsible for their revision. Thus, even if Advisory Committee members were deemed to satisfy the definition of "public official" in terms of the manner of their appointment, they would also satisfy the definition of "member of an advisory board"—which would exempt them from the definition of "public official."

Because they do not meet the definition of "public official," Advisory Committee members are not, solely by virtue of such membership, subject to the Code's

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[2]See General Statutes § 1-79 (m).

[3](Emphasis added.) General Statutes § 1-79 (k).

[4]The facts presented are not sufficiently clear to reach an unequivocal conclusion regarding Advisory Committee member's manner of appointment.

[5]General Statutes § 1-79 (h).

requirements. Accordingly, the Code will not prohibit the advisor to a proprietary leaching system company from serving as an Advisory Committee member.[6]

2. General Statutes § 1-84b (a)

The next question is whether a former DPH employee (a state retiree of more than ten years) who now owns a subsurface sewage business may contact DPH staff to recommend changes to the Technical Standards, given that he was involved in drafting them while employed by DPH. The expressed concern is that such input could benefit the former DPH employee's current business.

Because the former DPH employee has been retired from state service for more than ten years, we need not apply the Code's cooling-off provision, General Statutes § 1-84b (b), as its prohibition on compensated representation before one's former state agency applies *only* for one year after leaving state service.[7] Rather, the provision we need apply is General Statutes § 1-84b (a), another revolving-door provision, the principal purpose of which is to prevent "*side-switching in the midst of on-going state proceedings* to obtain improper benefit in subsequent dealings involving the State's interests."[8]

Section § 1-84b (a) states, in relevant part: "No former executive branch . . . state employee shall represent anyone other than the state, concerning any particular matter (1) in which he participated personally and substantially while in state service, and (2) in which the state has a substantial interest." As is apparent from that language—and unlike the prohibition in § 1-84b *(b)*—the prohibition in § 1-84b (a) has no time limitation (i.e., it attaches to the retiree for life); it applies regardless of the forum (be it the retiree's former state agency, another state agency, a court, etc.); and it applies regardless of whether the retiree is compensated to "represent," a term defined by regulation as follows: "represent shall be construed to include any action whatsoever regarding any particular matter . . . ."[9]

Applying § 1-84b (a) to the facts before us, we have a former executive-branch employee (specifically, a former DPH employee), and he is looking to "represent" (i.e., take action on behalf of) someone other than the state (i.e., his own subsurface sewage business). So the remaining questions are these: (1) Does his representation concern a

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[6]That is not to say that DPH may not institute rules that are more restrictive than those in the Code. See Advisory Opinion No. 2008-3.

[7]Under § 1-84b (b), "[n]o former executive branch or quasi-public agency public official or state employee shall, for one year after leaving state service, represent anyone, other than the state, for compensation before the department, agency, board, commission, council or office in which he served at the time of his termination of service, concerning any matter in which the state has a substantial interest."

[8](Emphasis added.) Advisory Opinion No. 89-37.

[9]Regs., Conn. State Agencies § 1-81-33.

"particular matter"? (2) Did he participate personally and substantially in the matter while in state service? (3) Does the state have a substantial interest in the matter? If the answer to *each* of those questions is yes, then the former DPH employee is prohibited by § 1-84b (a) from taking any action whatsoever regarding the Technical Standards (including, for example, contacting DPH staff to recommend changes to them).

First then, to whether the former DPH employee's representation concerns a "particular matter." In other words: does the matter in which he seeks to involve himself—namely, the Technical Standards—constitute a "particular matter," as that term is used in § 1-84b (a)?

The term "particular matter," though not defined in statute or regulation, has been addressed many times through advisory opinions issued by the State Ethics Commission ("SEC").[10] In one of them, the SEC defined the word "particular" (for purpose of the term "particular matter") like this: "The commonly approved and understood meaning of 'particular' is '. . . of, relating to, or being a single definite . . . thing as distinguished from some or all others—opposed to general."[11] Black's Law Dictionary likewise defines "particular," in part, as this: "specific . . . not universal. Opposed to general."[12] From those definitions, it follows that a "particular matter" is a specific matter, as opposed to a general one.

In applying that specific-versus-general dichotomy, the SEC deemed each of the following matters specific enough to constitute a "particular matter," within the meaning of § 1-84b (a):

- A disciplinary case involving a state employee.[13]
- A waste clean-up plan.[14]
- A contract.[15]
- A fire investigation.[16]
- A bridge inspection.[17]
- The solicitation of support and funding for a construction project.[18]

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[10]The SEC—apparently sensitive to the fact that § 1-84b (a)'s prohibition attaches to a state retiree for life—consistently placed "the narrowest, reasonable construction on the term 'particular matter' in order to avoid establishing unnecessary restraints on the employment of former state servants." Request for Advisory Opinion No. 3048 (2002); see also Advisory Opinion No. 2002-24 ("it is important to recognize that, for purposes of §1-84b (a), a 'particular matter' is narrowly defined").

[11]Advisory Opinion No. 89-11, citing Webster's Third New International Dictionary (1961).

[12]Black's Law Dictionary (Abridged 6th Ed. 1991).

[13]Advisory Opinion No. 88-7.

[14]Advisory Opinion No. 88-13.

[15]Advisory Opinion No. 89-27.

[16]Advisory Opinion No. 89-37.

[17]Advisory Opinion No. 90-20.

[18]Advisory Opinion No. 91-13.

- A landfill permit.[19]
- A financial forecast.[20]
- A loan.[21]
- A report on a state facility's services.[22]
- A crime investigation.[23]
- A certificate-of-need application.[24]
- An order.[25]

Turning from the specific to the general, in Advisory Opinion No. 2001-30, the SEC concluded that *statutes and regulations* are not "particular matters." That opinion involved a former Department of Revenue Services ("DRS") employee seeking to represent clients before DRS regarding the application of statutes and regulations that were "enacted . . . with his official participation (i.e., oversight and drafting)."[26] Not wanting to run afoul of the side-switching ban in § 1-84b (a), he asked the SEC "whether the term 'particular matter' . . . applies to statutes and regulations."[27] Its response was unequivocal: "It does not."[28] Rather, the SEC explained, "in this context 'particular matter' was intended to prohibit 'switching sides by a government official' to represent a private party in *an ongoing case or controversy*."[29] Accordingly, the SEC concluded that the former DRS employee was permitted to "represent private clients regarding the agency's application of statutes or regulations which [he] participated in promulgating" while in state service.[30]

To support its conclusion, the SEC cited to "the Federal Regulations regarding Governmental Ethics which limit 'specific matters' to judicial and administrative proceedings, and expressly exempt rulemaking and legislation."[31] That is, at the federal level, there is a revolving-door provision similar to § 1-84b (a), and—just like § 1-84b (a)—its "target . . . is the former employee who participates in a *particular matter* while employed by the Government and later 'switches sides' by representing another person on the same matter."[32] Regarding the term "particular matter," the federal regulations likewise follow the specific-versus-general dichotomy:

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[19]Advisory Opinion No. 91-24.
[20]Advisory Opinion No. 92-2.
[21]Advisory Opinion No. 93-22.
[22]Advisory Opinion No. 94-20.
[23]Advisory Opinion No. 95-1.
[24]Advisory Opinion No. 96-20.
[25]Advisory Opinion No. 2002-24.
[26]Advisory Opinion No. 2001-30.
[27]Id.
[28]Id.
[29](Emphasis added.) Id.
[30]Id.
[31]Id.
[32]5 C.F.R. § 2637.201 (b).

> "Particular matter involving a specific party or parties"—(1) Specific matters vs. policy matters. The prohibitions of subsections (a) and (b) of 18 U.S.C. 207, are based on the former Government employee's prior participation in or responsibility for a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties" in which the United States is a party or has a direct and substantial interest. Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. *Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. . . .*[33]

Consistent with that federal regulation (and with the string of opinions discussed above) is Advisory Opinion No. 2002-24, in which the specific-versus-general dichotomy is in full view. There, the SEC applied § 1-84b (a) to Sidney Holbrook, who had been a Department of Environmental Protection Commissioner and Governor Rowland's Co-Chief of Staff.[34] After noting that "it is important to recognize that . . . a 'particular matter' is narrowly defined," the SEC concluded as follows: Although "Mr. Holbrook would be prohibited from representing a client seeking to alter or overturn a *specific DEP order* he issued while Commissioner," he "would not . . . be barred from lobbying regarding *general issues* (e.g., tax policy, welfare reform, health care) which he may have been involved with as the Governor's Co-Chief of Staff."[35]

Returning to the facts at hand, it is clear to us that, in terms of the specific-versus-general dichotomy, the Technical Standards—which are simply DPH standards on how to design, install, and operate septic systems—fall within the same category as statutes, regulations, and other "actions of general application." That is, we deem them a general matter, not a specific or particular matter. Thus, in answer to the first of the three questions posed above, the former DPH employee's representation does *not* concern a "particular matter," for purposes of § 1-84b (a).

That being the case, the other two questions—whether he participated personally and substantially in the development of the Technical Standards, and whether the state has a substantial interest in them—are irrelevant. The prohibition in § 1-84b (a) applies only to a "particular matter," and because we do not have one in this case, our inquiry is complete: The former DPH employee who owns a subsurface sewage business may take

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[33](Emphasis added.) 5 C.F.R. § 2637.201 (c).
[34]Advisory Opinion No. 2002-24,
[35](Emphasis added.) Id.

any action whatsoever regarding the Technical Standards (for example, contacting DPH staff to recommend their revision), despite that he was involved in drafting them while employed by DPH, without violating § 1-84b (a).