

NOTICES

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on March 18, 2019 in HHD-CV-17-6084248, Robert O. Wynne, Juris No. 404770, was placed on interim suspension until further order of the court, effective immediately upon his reinstatement from the suspension imposed by this Court (Sheridan, J.) on November 5, 2018.

Attorney J. Mark Silhavy, Juris No. 101568, of 208 Brandy Hill Road, Vernon, Connecticut 06066, shall continue as Trustee to take such steps as are necessary to protect the interests of Respondent's clients, and to retain control of the Respondent's clients' funds accounts. The Respondent shall cooperate with the Trustee in this regard.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Marshall K. Berger
Judge

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2019-1, April 18, 2019

Question Presented: **The petitioner asks whether the steps she has taken, in her capacity as Commissioner of the Department of Energy and Environmental Protection, to avoid conflicts of interest involving her husband, who is employed as the Vice President of Commercial, Industrial, and Institutional Programs for the Connecticut Green Bank, are sufficient to comply with the Code of Ethics for Public Officials.**

Brief Answer: **Based on the facts presented, we approve, with one caveat, the steps taken by the petitioner.**

At its February 28, 2019 special meeting, the Citizen’s Ethics Advisory Board (Board) granted the petition for an advisory opinion submitted by Katie S. Dykes, Commissioner of the Department of Energy and Environmental Protection. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (Code).¹

Background

The following facts, set forth in the petition for advisory opinion, are relevant to this opinion:

The petitioner was nominated by Governor Lamont in December 2018 to serve as Commissioner of the Department of Energy and Environmental Protection (DEEP), subject to confirmation by the Connecticut General Assembly in 2019.

Her husband, Michael “Mackey” Dykes, is employed by the Connecticut Green Bank (CGB), a quasi-public agency established under General Statutes § 16-245n “for the purpose of developing programs to finance and otherwise support clean energy . . . investment in residential, municipal, small business, and larger commercial projects in the state.” Specifically, he “serves as Vice President, Commercial, Industrial, and Institutional Programs . . . for the CGB,” where he is responsible for programs that “extend to businesses, schools, hospitals, houses of worship, and other non-profits,” and “is tasked with designing, implementing, and overseeing new and existing clean energy financing programs for this sector, including the statewide Commercial Property Assessed Clean Energy (C-PACE) program.”

The CGB and DEEP engage in a variety of ways. For instance:

- The DEEP Commissioner “is a statutorily designated member of the CGB Board of Directors,” which (among other things) “approves the CGB’s annual Comprehensive Plan and budget; approves the CGB’s financial programs and products . . . for all of the CGB’s programs; and assesses the performance of CGB’s officers.”

¹ General Statutes § 1-79 *et. seq.*

- “The CGB is required to issue an annual report to the Governor’s Office and DEEP,” which “report must include a description of the programs and activities undertaken during the reporting period”
- “The CGB is working with DEEP and other state agencies to finance solar PV systems through power purchase agreements (PPAs) at their facilities. The CGB will provide private financing for these solar PV systems and will be a contractual counter-party with each state agency hosting a system, including DEEP.”
- “DEEP is a member of the Energy Conservation Management Board or as it is commonly called, the Energy Efficiency Board (EE Board), which approves the Conservation and Load Management Plan . . . before transmitting it to the Commissioner of DEEP for final approval, modification or rejection.” Once it is approved, “the EE Board shall assist the utilities in implementing the plan and collaborate with the CGB to further the goals of the plan.”

Given those engagements, the petitioner has taken steps to avoid conflicts involving her husband. That is, she has “delegated to Mary Sotos, Deputy Commissioner for Energy at DEEP, DEEP’s *ex officio* position on the CGB Board of Directors,” and has recused herself “from all CGB personnel matters affecting [her] husband . . . and all budgetary approvals affecting the CGB’s Commercial, Industrial and Institutional Program.” Further, she has recused herself “from involvement in all financial transactions between the CGB and DEEP that involve programs administered by [her] husband,” including “power purchase agreements with the CGB for solar PV facilities sited on DEEP-owned state properties.”

Moreover, the petitioner’s husband—who, as a CGB employee, is eligible “for merit compensation [that] is based on meeting specified performance goals established at the beginning of each fiscal year by the CGB President”—“will elect to earn no merit compensation” for the “two sub-goals . . . that could have a nexus to DEEP action.”

Analysis

First, the issue of jurisdiction. “Persons generally subject to the Code . . . are described in the Code as either ‘public officials’ or ‘State employees.’” Advisory Opinion No. 82-5, Connecticut Law Journal, Vol. 43, No. 45, p. 7B (May 11, 1982). The Code defines “Public official” to include, among others, “any person appointed to any office of the . . . executive branch of state government by the Governor, with or without the advice and consent of the General Assembly” General Statutes § 1-79 (11). Here, the petitioner satisfies that definition—given that she was appointed by the Governor to serve as the Commissioner of DEEP, an executive-branch state agency—meaning that she is subject to the Code.

Indeed, the petitioner was subject to the Code in her prior state position as Chair of the Public Utilities Regulatory Authority (PURA), and she was, in fact, the subject of a prior advisory opinion, namely, Advisory Opinion No. 2017-1 (AO 2017-1), Connecticut Law Journal, Vol. 78, No. 31 (January 31, 2017). There, we addressed whether, and under what circumstances, the petitioner was permitted to take official action as PURA Chair on matters that could affect the financial interests of her husband, who was in the same CGB position as is he now, that of Vice President, Commercial, Industrial, and Institutional Programs. Because much of what we said there is relevant here, we borrow liberally from that opinion.

“The applicable Code sections regarding a state employee’s [or public official’s] conflict in the discharge of his duties or employment are [General Statutes] §§ 1-85 and 1-86 (a).” Advisory Opinion No. 93-11, Connecticut Law Journal, Vol. 54, No. 48, p. 5C (June 1, 1993). The former defines and proscribes “substantial” conflicts of interests; the latter, “potential” conflicts of interests. We’ll address each in turn.

Section 1-85 provides, in relevant part, that a public official has a “substantial conflict”

if he has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity. . . . A public official . . . who has a substantial conflict may not take official action on the matter.²

Breaking § 1-85’s language down, the Code’s interpretive regulations explain that an individual has reason to so “believe or expect,” “when there is a written contract, agreement, or other specific information available to the individual which would clearly indicate to a reasonable person that such a *direct* benefit or detriment would accrue or when the language of the . . . matter in question would so indicate.” (Emphasis added.) Regs., Conn. State Agencies § 1-81-28 (c). Further, the term “direct” has been defined, by way of declaratory ruling, to mean “absolute, immediate, or without intervening conditions.” State Ethics Commission Declaratory Ruling 92-C. An example of such a “direct” financial impact would be “a state employee required, in the course of his or her official duties, to determine whether a consulting contract should be awarded to his or her spouse” Regs., Conn. State Agencies § 1-81-28 (a).

Here, then, to have a “substantial” conflict, the petitioner would have to have “reason to believe or expect” that, “by reason of [her] official activity” as DEEP Commissioner, there would be a direct, immediate monetary impact on herself, her husband, a dependent child, or a “business with which [s]he is associated.” And that would depend on whether there is a written contract, agreement, or other specific information available to her that would clearly indicate to a reasonable person that there would be such a financial impact. If so, the petitioner would have a “substantial” conflict and be barred by § 1-85 from taking official action on the matter.

There are no facts before us to suggest that the petitioner herself or a “dependent child” will be impacted monetarily by virtue of her official action at DEEP. Further, we’ve already concluded, in AO 2017-1, that the CGB—a “Quasi-public agency,” as defined in General Statutes § 1-79 (12)—“cannot be a ‘business with which [the petitioner] is associated.’ ” Connecticut Law Journal, Vol. 78, No. 31, supra, p. 5C. And because the CGB is not an “associated” business, the petitioner may take official action that would directly impact its monetary interests, without violating § 1-85, with one exception: if she has “reason to believe or expect” that, by virtue of such action, there would also be a direct monetary impact on her husband.

Moving on to § 1-86 (a), “[e]ven if a particular situation does not pose a substantial conflict of interest . . . it may still pose a potential conflict of interest” Advisory Opinion No. 94-5, Connecticut Law Journal, Vol. 55, No. 41, p. 3D-4D (April 12, 1994). Section 1-86 (a) provides, in relevant part, as follows:

² There is an exception in § 1-85 to the general rule: An individual does not have a substantial conflict “if any benefit or detriment accrues to him, his spouse, a dependent child, or a business with which he, his spouse or such dependent child is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group.”

Any public official . . . who, in the discharge of such official's . . . official duties, would be required to take an action that would affect a financial interest of such official . . . such official's . . . spouse, parent, brother, sister, child or the spouse of a child or a business with which such official . . . other than an interest of a de minimis nature, an interest that is not distinct from that of a substantial segment of the general public or an interest in substantial conflict with the performance of official duties as defined in section 1-85 has a potential conflict of interest. . . .

Unpacking that language, no “potential” conflict exists if the financial impact is de minimis (i.e., less than \$100 per person per year) or is indistinct from that of a substantial segment of the general public (e.g., all taxpayers or homeowners). Regs. Conn. State Agencies § 1-81-30 (a) and (b). Further, “[u]nlike a substantial conflict, there is no requirement that the financial impact be direct However, there still must be a reasonable expectation on the part of the individual that there will be some financial impact based on h[er] actions.” Advisory Opinion No. 93-11, Connecticut Law Journal, Vol. 54, No. 48, supra, p. 5C-6C.

For example, in Advisory Opinion No. 99-18, the State Ethics Commission was asked whether the Secretary of the Office of Policy and Management (OPM) could rule on a property-revaluation waiver to be submitted by the city of Waterbury, where he was a homeowner. Connecticut Law Journal, Vol. 61, No. 5 (August 3, 1999). Absent a waiver, the city would lose almost \$10 million in state aid, which (in the Commission’s words) “almost certainly” would trigger an increase in the city’s mill rate, followed by an increase in property taxes to the city, followed by an estimated \$300 annual increase in the Secretary’s property tax. Id., p. 11E. “Clearly,” said the Commission, “the Secretary of OPM will be required to take an action which would affect his financial interest,” and “the interest is neither de minimis . . . nor is it shared by a ‘substantial segment’ of the general public” Id., p. 12E. The Commission concluded, therefore, that the OPM Secretary had a potential conflict under § 1-86 (a). Id.

Applying § 1-86 (a) here, the sole focus, once again, is on the petitioner’s husband, and the reason for it is this: The CGB (as noted earlier) is not an “associated” business, and there are no facts before us to suggest that either the petitioner herself or any of her other family members (parent, sibling, etc.) will be affected financially by virtue of her DEEP activity. As for her husband, the question is whether the petitioner would have a “reasonable expectation” that her official action as DEEP Commissioner would “affect” his financial interests in an amount exceeding \$100. If so, the petitioner would have a “potential” conflict under § 1-86 (a).

How to proceed when faced with a “potential” conflict (as opposed to a “substantial” conflict, which always requires recusal) depends on whether the individual is a “member of a state regulatory agency.” That term is defined to include “a member of any *commission, board, council, authority or other similar body* which is authorized by law to regulate, i.e., control, administer, or oversee, any profession, occupation, industry, activity, fund, endeavor or area of conduct.” (Emphasis added.) Regs., Conn. State Agencies § 1-81-30 (c). DEEP is a “department,” rather than a commission, board, council, etc., meaning the petitioner is not a “member of a state regulatory agency” and is, therefore, subject to the following language in § 1-86 (a):

If such official . . . is not a member of a state regulatory agency, such official . . . shall, in the case of either a substantial or potential conflict,

prepare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the conflict and deliver a copy of the statement to such official's . . . immediate superior, if any, who shall assign the matter to another employee, *or if such official or employee has no immediate superior, such official or employee shall take such steps as the Office of State Ethics shall prescribe or advise.*

(Emphasis added.) As a department head, the petitioner has no immediate superior, meaning she is required—in the case of a substantial or potential conflict—to notify the Office of State Ethics and take whatever action it prescribes. See Advisory Opinion No. 99-18, Connecticut Law Journal, Vol. 61, No. 5, *supra*, p. 12E.

The petitioner not only has notified this office as to the potential conflicts involving her husband, but has proposed (indeed, has already taken) steps to avoid them. As for the most obvious source of potential conflicts—i.e., DEEP's *ex officio* position on the CGB's Board of Directors—she has delegated it to DEEP's Deputy Commissioner for Energy. Further, she has recused herself from certain CGB matters (and ordered the Deputy Commissioner not to discuss them with her), including personnel matters affecting her husband, budgetary approvals affecting the programs overseen by her husband, and decisional agenda items involving those programs. Moreover, with respect to DEEP activities, the petitioner has recused herself “from involvement in all financial transactions between the CGB and DEEP that involve programs administered by [her] husband,” including “power purchase agreements with the CGB for solar PV facilities sited on DEEP-owned state properties.” And on top of that, with respect to CGB's merit compensation plan—under which CGB employees may earn additional compensation based on achievement of certain performance goals—the petitioner's husband has elected to earn no merit compensation for the two sub-goals that could have a nexus to DEEP action.

We approve the steps taken by the petitioner (and her husband), with just one caveat: Whenever a subordinate of the petitioner acts in her stead because of a § 1-85 or § 1-86 (a) conflict involving her husband, the subordinate must notify the Office of State Ethics in writing of his or her actions. See Advisory Opinion No. 2004-14 (Amended), Connecticut Law Journal, Vol. 66, No. 23, p. 7E (December 7, 2004) (“[u]nder these unique circumstances, *i.e.*, that the matter must be referred to someone subordinate to [the Secretary of the Office of Policy and Management], the deputy commissioner should notify the Ethics Commission in writing of his or her actions”). For example, if, in serving in DEEP's *ex officio* position on the CGB's Board of Directors, the Deputy Commissioner of Energy were to vote on a personnel matter that would affect the financial interests of the petitioner's husband, the Deputy Commissioner must notify this office in writing of her vote.

Before closing, we stress that if any unforeseen conflicts involving her husband should arise, or if there are any substantive changes to the mitigation steps discussed above, the petitioner should contact the Office of State Ethics for further advice.

Conclusion

Based on the facts presented, we approve, with the above-discussed caveat, the steps taken by the petitioner in her capacity as DEEP Commissioner to avoid “substantial” and “potential” conflicts of interest involving her husband.

By order of the Board,

Dated 4/18/19

/s/ Dena M. Castricone
Chairperson