OFFICE OF STATE ETHICS

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Advisory Opinion No. 2022-2 November 17, 2022

Questions Presented:

(1) Several members of the board of directors of the Capital Region Development Authority (''CRDA'') are executive officers at corporate entities that may invest in projects under CRDA's Private Investment Partnership for Economic Development. Does the CRDA's request for proposals address ''any and all'' concerns under General Statutes §§ 1-84 (i), 1-85, § 1-86 (a), and 1-84 (c) with respect to those CRDA board members?

(2) The Mayor of Hartford, who is also a CRDA board member, has been—in his mayoral role—''the prime actor in meeting with prospective Hartford area investors and soliciting private funds from potential proposers.'' Does the Mayor have a conflict of interests in his CRDA capacity, and if so, can it ''be cured by his full recusal''?

Brief Answers:

(1) Provided that CRDA board members adhere to the advice discussed herein, the fact that they are executive officers at corporate entities that may invest in CRDA projects presents no concerns under §§ 1-84 (i), 1-85, § 1-86 (a), and 1-84 (c).

(2) Because the City of Hartford, a municipality, is not a ''business with which [the Mayor] is associated,'' the Mayor may take official action in his CRDA capacity involving the Private Investment Partnership for Economic Development, even if it affects the City's financial interests, without violating §§ 1-85 and 1-86 (a), provided that such action would not likewise affect his personal financial interests or the financial interests of the family members listed in those provisions.

At its October 20, 2022 regular meeting, the Citizen's Ethics Advisory Board (''Board'') granted the petition for an advisory opinion submitted by Anthony L. Lazzaro, Jr., Deputy Director and General Counsel of the CRDA. The Board now issues this advisory opinion under General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials.

Background

In his petition, Attorney Lazzaro provides the following facts for our consideration:

> CRDA has been approached by the City of Hartford to enter into a Loan Participation Program with various private sector

participants whereby such participants would agree to provide supplemental funding to several CRDA projects. Pursuant to the resulting Participation Agreement, CRDA would hold and administer the resulting loan(s) to developers, selected by the City, on behalf of the prospective participants. The participants will receive a return on their investment; however, the returns shall be below market *rates of return* received in the ordinary course of business.

Several members of CRDA's Board of Directors are executive officers at corporate entities that may invest in the CRDA projects. These entities are ''businesses with which [they are] associated.''

CRDA has attempted to address resulting conflicts of interest and satisfy any referenced Code implications through the issuance of an ''open and public'' Request for Proposals to solicit potential investors for CRDA projects, including proposals from ''businesses with which certain Board Members are associated.''

Please note that the interconnected CRDA Board members shall fully recuse themselves and shall not partake in any discussions with fellow Board members, CRDA staff, and other members of their respective businesses with which they are associated.

Additional facts will be set forth as necessary.

Analysis

Commencing with jurisdiction, persons generally subject to the Code are described as either ''Public officials'' or ''State employees.'' The Code defines the former to include (among others) ''any member or director of a quasi-public agency''; General Statutes § 1-79 (11); and it defines ''[q]uasi-public agency'' to include (among others) CRDA. General Statutes § 1-79 (12). It follows that CRDA board members are ''public officials'' and, therefore, subject to the Code, including its conflict provisions.

I

The first question before us pertains to four such conflict provisions—viz., General Statutes §§ 1-84 (i), 1-85, 1-86 (a), and 1-84 (c)—and it is, essentially, this: whether CRDA's request for proposals (''RFP'') concerning its Private Investment Partnership for Economic Development (''Private Investment Partnership'') addresses ''any and all'' concerns under those provisions, considering that ''[s]everal members of CRDA's board of directors are executive officers at corporate entities that may'' respond to the RFP and ultimately ''invest in the CRDA projects.''

A

Almost forty years ago, the former State Ethics Commission (''former Commission'') explained that the Code ''allows State employees [and public officials] *and their businesses* to enter into contracts [with] . . . the State, *with no specific exclusion of one's own agency, under certain conditions*.'' (Emphasis added.) Advisory Opinion No. 84-11. One of those conditions is that the contract comply with § 1-84 (i), which provides, in relevant part, as follows:

> No public official . . . or a business with which he is associated shall enter into any *contract with the state*, valued at one hundred dollars or more . . . unless the contract has been awarded through an open and public process, including prior public offer and subsequent public disclosure of all proposals considered and the contract awarded. . . .

(Emphasis added.)

Generally, then, for § 1-84 (i) to be triggered, there must be a ''contract with the state,'' and in Advisory Opinion No. 2002-3, the former Commission was asked whether ''' 1-84(i) appl[ies] to contracts with Quasi-Public Agencies§ (like CRDA). The answer was no:

> As the Commission has previously held, the legislation which established each of the Quasi-Public Agencies made it clear that they were ''not to be construed to be a department, institution or agency of the state''. State Ethics Commission Advisory Opinion No. 93-12 . . . wherein the Commission ruled that, as a consequence, the Conn. Gen. Stat. § 1-83 financial disclosure of ''leases or contracts with the state'' did not extend to contracts with Quasi-Public Agencies. Based on this same rationale, the § 1-84(i) open and public process for ''any contract with the state'' does not extend to contracts entered into with Quasi-Public Agencies.

Nevertheless, § 1-84 (i) contains additional language that applies specifically to members of the boards of directors of quasi-public agencies. That is, under § 1-84 (i)'s terms, its prohibition does not apply to ''a member or director of a quasi-public agency . . . who receives no compensation other than per diem payments or reimbursement for actual or necessary expenses, or both, incurred in the performance of the public official's duties, *unless such public official has authority or control over the subject matter of the contract*.'' (Emphasis added.) Here, because CRDA board members have ''authority or control'' over the contracts' subject matter (i.e., the Private Investment Partnership), § 1-84 (i)'s general rule applies.

Applying that rule (quoted above) here, we have CRDA board members (i.e., ''public officials'') who ''are executive officers at corporate entities'' (i.e., ''associated'' businesses[1]) that may ''invest in the CRDA projects'' (i.e., enter into contracts with CRDA), and the value of the contracts undoubtedly will be far north of $100. That said, if those corporate entities do, in fact, seek to invest in CRDA projects, then the resulting contracts must proceed under § 1-84 (i)'s ''open and public process,'' which has two requirements: (1) ''prior public offer'' and (2) ''subsequent public disclosure of all proposals considered and the contract awarded.''

Concerning the ''prior public offer'' requirement, the regulations clarify that ''no specific offer or bid procedure is required provided that the process utilized allows all or most of those persons interested in and qualified to fulfill the contract to apply and compete.'' Regs., Conn. State Agencies § 1-81-19 (a). The example given is this: ''an advertisement of the availability of the contract in the general circulation newspapers for the area in question or in trade or professional journals directed toward

[1] The Code defines ''business with which he is associated'' to include (inter alia) ''any . . . entity through which business for profit . . . is conducted in which the public official . . . is a[n] . . . officer,'' and the term '' '[o]fficer' refers only to the president, executive or senior vice president or treasurer of such business.'' General Statutes § 1-79 (2).

the business or profession qualified to do the work in question is sufficient.'' Id. That example predated ''the proliferation of computer web sites,'' explained the former Commission, which concluded, in Advisory Opinion No. 2002-8, as follows:

> With the new computer technology and accessibility . . . a state agency with a contract opportunity can satisfy the prior public offer requirement of § 1-84(i) *by posting the opportunity on its public web site and also on the Department of Administrative Services' Procurement/Purchasing web site*. This dual posting will not only provide a public advertisement of the opportunity to potential vendors who check the agency's site, but will also provide a more generalized public advertisement on the state web site dedicated to contract procurement. Also, of course, the agency must comply with any more stringent bid process rules required either by the agency itself or by the Department of Administrative Services.

(Emphasis added.) In this case, the RFP involving the Private Investment Partnership will be (as are all CRDA ''open RFPs'') posted on CRDA's website, ''as well as on the Connecticut Department of Administrative Services' website,'' thereby satisfying the ''prior public offer'' requirement under § 1-84 (i).

The other requirement of § 1-84 (i)'s ''open and public process'' is that there be ''subsequent public disclosure of all proposals considered and the contract awarded.'' The regulations offer clarification: ''In every case, all proposals considered and the contract awarded *must be open and available for subsequent public inspection*.'' (Emphasis added.) Regs., Conn. State Agencies § 1-81-19 (a). Provided that CRDA makes ''open and available for . . . public inspection'' all proposals considered and the contracts awarded under the Private Investment Partnership, this requirement too will be met, meaning that the process will be deemed ''open and public'' under § 1-84 (i).

And if the process is deemed ''open and public'' under § 1-84 (i), the corporate entities of which CRDA board members are executive officers (i.e., ''associated'' businesses) may invest in CRDA projects under the Private Investment Partnership without concern under that provision.

B

Clearly, though, those CRDA board members may not take official action concerning such ''associated'' businesses—which brings us to the next two conflict provisions Attorney Lazzaro asks about, namely, §§ 1-85 and 1-86 (a). These distinct but related provisions define and proscribe substantial (§ 1-85) and potential (§ 1-86 (a)) conflicts of interests involving official action. We need not address the latter provision, for the matter before us is controlled by the former.

Subject to an exception not pertinent here, § 1-85 provides that a public official has a substantial conflict—and may not take official action—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. . . .'' (Emphasis added.) ''[T]he term 'direct' means absolute, immediate, or without intervening conditions.'' Declaratory Ruling 92-C. For example, ''[u]nder this standard, an official could not: award a state contract to his business. . . .'' Informal Request for Advisory Opinion No. 2501 (1999); see also Informal Request for Advisory Opinion No. 0813 (1992) (under § 1-85, ''a board member may not vote to award a contract to a business he owns

[i.e., an *f*associated'' business]§). Here, then, if a corporate entity of which a CRDA board member is an executive officer (i.e., an ''associated'' business) seeks to enter a loan participation agreement (i.e., a contract) with CRDA, that board member has a substantial conflict under § 1-85 and may not take official action (vote, participate in deliberations, etc.) on the matter.

Which is just as well, for in the 2022 public act that authorized CRDA to solicit investment funds from business entities for its projects, the General Assembly inserted the following language (which CRDA inserted into the RFP):

> No corporation or other business entity shall be prohibited from investing funds pursuant to this subdivision for any such project by virtue of the fact that a member of the board of directors of the authority is an officer, director, shareholder or employee of such corporation or business entity, *provided such member of the board shall abstain from deliberation, action or vote by the authority in specific request to such corporation or business entity*.

(Emphasis added.) Public Act No. 22-118, § 469 (e) (2). In other words, a business entity of which a CRDA board member is an officer, director, etc., may invest funds in such CRDA projects *only if* its officer, director, etc., abstains—in his or her CRDA board capacity—from any official action ''in specific request'' to the business entity.

Under both the 2022 public act and § 1-85, therefore, CRDA board members are prohibited from taking official action concerning ''associated'' businesses that seek to invest in CRDA projects under the Private Investment Partnership, and assuming they comply with that prohibition, § 1-85 presents no concerns for them.

C

Attorney Lazzaro inquires as to one more conflict provision, namely, § 1-84 (c), the Code's use-of-office provision. Under that provision, ''no public official . . . shall use his public office . . . or any confidential information received through his holding such public office . . . to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or *a business with which he is associated*.'' (Emphasis added.)

Clearly, therefore, CRDA board members may not use ''confidential information'' gained via their public office to bolster the participation of ''associated'' businesses in the Private Investment Partnership, ''confidential information'' meaning this:

> any information in the possession of the state, a state employee or a public official, whatever its form, which (A) is required not to be disclosed to the general public under any provision of the general statutes or federal law; or (B) falls within a category of permissibly nondisclosable information under the Freedom of Information Act, as defined in section 1-200, and which the appropriate agency, state employee or public official has decided not to disclose to the general public.

General Statutes § 1-79 (21).

Nor may CRDA board members use their public office in any other way for that purpose, as demonstrated in Advisory Opinion No. 89-6. There, § 1-84 (c) was addressed vis-à-vis another quasi-public agency, the Consumer Product Development Corporation (''CPDC''), whose board members ''were in the same business as the

[CPDC]—investing in entrepreneurial start-ups and companies.'' A question there was whether CPDC ''board members [will] be prohibited from bringing any of their clients to the CPDC board for funding approval[.]'' The response was this:

> in order to avoid any inadvertent use of public position, *the board member must not take any affirmative action to advance the case of his or her client before the CPDC*, including personally introducing clients to the CPDC staff or other board members. Otherwise, the appearance of use of office and the risk of undue influence would be inescapable, since the board and staff might well not be able to evaluate objectively and fairly all applications before the CPDC.

(Emphasis added.)

In this case, provided that CRDA board members do not take any affirmative steps to ''advance the case'' of an ''associated'' business before the CRDA concerning the Private Investment Partnership, and that they do not use their public office in any other way to bolster the ''associated'' businesses' participation, they will not run afoul of § 1-84 (c).

II

Attorney Lazzaro's second question pertains to one CRDA board member in particular, the Mayor of Hartford. As noted earlier, in his mayoral role, the Mayor has been ''the prime actor in meeting with prospective Hartford area investors and soliciting private funds from potential proposers.'' And the question is whether, in his CRDA capacity, the Mayor has a conflict of interests, and if so, whether it can ''be cured by his full recusal.''

The relevant Code provisions, §§ 1-85 and 1-86 (a), apply to the Mayor's conduct only in his CRDA capacity. Under § 1-85, the Mayor generally has a substantial conflict (and may not take official action) 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. . . .'' (Emphasis added.) Under § 1-86 (a), he generally has a potential conflict if he ''would be required to take an action that would affect . . . [his] financial interest . . . [or that of his] spouse, parent, brother, sister, child or the spouse of a child or a *business with which [he] . . . is associated* . . . .'' (Emphasis added.)

To determine whether the Mayor has a conflict under either of those provisions, we must first answer whether the City of Hartford is a ''business with which he is associated,'' which (with an exception not pertinent here) is defined, in General Statutes § 1-79 (2), as follows:

> [A]ny sole proprietorship, partnership, firm, corporation, trust or other entity through which business for profit or not for profit is conducted in which the public official or state employee or member of his or her immediate family 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 . . . .''Officer'' refers only to the president, executive or senior vice president or treasurer of such business.

That definition was the subject of Advisory Opinion No. 90-29, titled ''Application of 'Business with Which Associated' to Governmental Entities.'' One of the questions there was ''whether governmental entities are excluded from the . . . Code's definition of 'Business with which . . . associated' . . . .'' The answer, in the former Commission's opinion, was yes: ''The Commission declines . . . to . . . rule that the term . . . includes municipalities and other governmental entities,'' for ''[n]othing in the legislative history supports such a construction,'' and ''no Connecticut case has held that the terms 'business' and 'government' are in any way synonymous.''

As applied here, the City of Hartford, a municipality, is not a ''business with which [the Mayor] is associated,'' meaning that he may take official action, in his CRDA capacity, involving the Private Investment Partnership, even if it affects the City's financial interests, without violating §§ 1-85 and 1-86 (a). This assumes, of course, that such action would not likewise affect his personal financial interests or the financial interests of the family members listed in those provisions.

Before concluding, we stress that this opinion interprets the Code only, and that it does not address appearance issues, which are beyond the Code's scope. See Advisory Opinion No. 2009-7 (''[t]he Code . . . does not speak of appearances of conflict, only actualities,'' so in ''interpreting and enforcing the Code . . . [we are] limited, by statute, from addressing appearances or perceptions of conflict of interest'' [internal quotation marks omitted]).

Conclusion

Based on the facts presented, we conclude as follows:

1. If CRDA board members adhere to the advice provided above, the fact that they are executive officers at corporate entities that may invest in projects under CRDA's Private Investment Partnership presents no concerns under §§ 1-84 (i), 1-85, § 1-86 (a), and 1-84 (c).

2. Because the City of Hartford, a municipality, is not a ''business with which [the Mayor] is associated,'' he may take official action, in his CRDA capacity, involving the Private Investment Partnership, even if it affects the City's financial interests, provided that such action would not likewise affect his personal financial interests or the financial interests of the family members listed in those provisions.

By order of the Board,

Dated 11/17/22 /s/ Dena Castricone

NOTICE

Notice of Suspension of Attorney

Pursuant to Practice Book Section § 2-54, notice is hereby given that on October 24, 2022, in Docket Number HHD-CV-21-6149777-S, James R. Hardy II, Juris No. 432408 of Rowayton, CT is suspended from the practice of law in Connecticut for a total effective term of 90 days commencing upon entry of this order.

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

Respondent will provide proof to the disciplinary counsel of transmittal of the restitution pursuant to and as detailed in the order. Failure to provide restitution, and proof thereof prior to him completing his 90-day suspension, will result in the respondent's continued suspension.

Respondent shall take, at his own expense, continuing legal education (''CLE'') in legal ethics and in Law Office Management.

Pursuant to Practice Book § 2-64, Attorney Elizabeth Rohback, Juris # 433537, who is already currently ''of counsel'' in the Hardy firm, is appointed Trustee to take such steps as are necessary to protect the interests of respondent's clients. The Trustee shall notify all active clients of the respondent's suspension and assist them obtaining copies of their file should they desire to engage successor counsel.

Reinstatement after 90 days will be automatic, without further court hearing, unless an objection is filed by disciplinary counsel alleging a violation or noncompliance with a term of this order.

So ordered.

Susan Quinn Cobb
Presiding Judge