



STATE OF CONNECTICUT
STATE ETHICS COMMISSION

ADVISORY OPINION NUMBER 80-14

Procedure When Discharge of an Official Duty Affects
Business with which Official is Associated

A member of the Public Utility Control Authority (PUCA) is also a director of a large commercial bank (the Bank). The State Ethics Commission has been asked the proper action for the member to take when her official action would affect a public service company which has financial transactions with the Bank.

The Division of Public Utility Control (DPUC), under PUCA, has been assigned by Title 16, General Statutes, a number of responsibilities with regard to public service companies. It regulates their rates and rate structures. Sections 16-19, 16-19b, 16-21, General Statutes. After granting an interim rate increase, it may order all or part of the increase to be refunded. Subsection 16-19(d), id. It may revoke and reassign the franchises of public service companies for failure to provide adequate service. Section 16-10a, id. It regulates the merger, consolidation, and sale of such companies and the disposal of their plant and equipment. A public service company may not cease operation or terminate its existence without the permission of DPUC. Section 16-46, id. It supervises the safety of the operations of public service companies, and may order changes and improvements necessary to protect the safety of the public or of a company's employees. Section 16-11, id. A public service company must obtain the permission of DPUC to issue certain notes, bonds, and securities, and to lend or borrow money under certain circumstances. Subsection 16-43(2), id. Substantial fines may be imposed on a public service company for failure to comply with any DPUC order. Section 16-41, id. From the foregoing, it can be seen that the actions of PUCA, and DPUC under it, play a major part in determining the financial integrity of a public service company and the ability of the company to attract capital. See also sections 16-19a, 16-19e, id.

Procedurally, any of the above matters coming before PUCA may be assigned to a panel of three of the five commissioners. The decision of the panel, if unanimous, is automatically the decision of PUCA; otherwise, the matter is referred to the entire membership for decision. Subsection 16-2(c), id.

A member of PUCA is, under the Code of Ethics for Public Officials (Chapter 10, Part I, General Statutes), a public official. Subsections 16-2(a), 1-79(j), id. Therefore, the commissioner involved here is subject to the provisions of the Code applicable to public officials. Members of PUCA also must abide by ethical rules very similar to some in the old Code of Ethics and the new Code of Ethics for Public Officials, modified slightly to make them applicable to the circumstances of PUCA commissioners. Compare subsections 16-2(g) through (j) with former subsections 1-66(a) through (d) and with subsections 1-84(a) through (d); subsection 16-2(d)

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with former subsection 1-76(a) and with subsection 1-83(b), id. Further, PUCA regulations direct that, where applicable, the Canons of Judicial Ethics, 1 Practice Book, 1978, pp. 53-62, govern the conduct of its members. Section 16-1-32, Regulations of Connecticut State Agencies.

The Bank of which the commissioner is a director is a national banking association formed under 12 U.S.C.A. § 21. It is the principal subsidiary of a corporation (the Corporation) of which the commissioner is also a director.

As a director of the Bank, the commissioner is a member of the body which manages the affairs of the Bank. 12 U.S.C.A. § 71; article sixth, Articles of Association of the Bank; section 5, Bank By-laws. According to a proxy statement of March 21, 1980 issued by the Bank, directors also "represent the interests of shareholders as a whole." A director takes an oath to administer the affairs of the Bank diligently and honestly. 12 U.S.C.A. § 73. In addition to being a member of the full board of directors, the commissioner is a member of two committees of the board, neither of which has responsibility for loans or investments by the Bank, or for trust affairs. One is the Audit Committee which, among other duties, reviews external and internal audits and examinations and the financial section of the annual report to shareholders. Corporation's 1979 Annual Report, p. 31. The committees which have responsibility for trust affairs and for Bank loans and investments are required to report to the full board at its next regular meeting all action taken under the powers granted it. Sections 20, 21, Bank By-laws. The Commissioner also is one of some 8200 shareholders in the Corporation, owning several hundred shares of its stock (out of almost 3 million outstanding). She owns stock in the Bank in the minimum amount to meet the requirements (\$1,000 worth) of 12 U.S.C.A. § 72. A director receives a modest quarterly retainer from the Corporation and the Bank, and a fee for each board or committee meeting attended.

Prior to her appointment, the commissioner disclosed her position as a director of the Bank and the Corporation to the Governor and to the Joint Committee on Executive and Legislative Nominations. She received advice from the Counsel to the Governor, and from the Bank's General Counsel, that there appeared to be no inherent conflict of interest between her duties as commissioner and as director. The Committee recommended confirmation of her nomination. Subsequently, her connection to the Bank has been revealed by reports submitted in compliance with subsections 16-2(d) and section 1-83, General Statutes. Because of her position as a bank director she has asked the Chairman, PUCA, that she not be assigned to panels for cases where public service companies are seeking financing from the banking community.

The Bank is involved in a number of financial transactions with public service companies which appear before PUCA in rate cases and on other matters.

Currently before PUCA to request a rate increase of some \$15 million is a gas company which has a short term debt of \$2 million to the Bank. This is part of slightly over \$1 1/4 billion in Bank loans outstanding.

The Bank also serves as indenture trustee for a public debt issue of the gas company, and transfer agent for its shares. In both cases the Bank has no beneficial interest in the securities involved, but is paid for the services rendered.

Also before PUCA is a request by the electric and gas subsidiaries of a public service holding company, which conducts 80% of its operation in Connecticut, for a rate increase amounting to \$174 million. In 1978 the holding company and two of its subsidiaries which have some connection with its Connecticut operations were indebted to the Bank in an amount which totalled \$11 million at one point. The data filed with PUCA do not disclose the precise relationship of the loans to Connecticut gas and electric operations, and these figures are somewhat dated. In 1978, the Bank had almost \$1 1/4 billion in loans outstanding. Additionally, a nominee used by the Bank's trust department is among the twenty largest shareholders of the holding company's stock. As trustee, the Bank is the legal owner of the stock but has no beneficial interest in it.

Undoubtedly, other public service companies have business relationship with the Bank. The Bank's 1979 Annual Report, in discussing corporate banking, noted a special concentration in utilities.

While the Ethics Commission has been asked several specific questions based on the foregoing situation, the fundamental issue is the action to be taken by the commissioner when she is assigned to a panel hearing a matter involving a public service company which has financial transactions with the Bank. The Bank is a "business with which she is associated." Subsection 1-79(a), General Statutes. Therefore in carrying out her duties as a PUCA member the commissioner must be sensitive to conflicts involving not only her interests but those of the Bank.

The stated facts indicate it is unlikely the commissioner could have an interest in substantial conflict with the proper discharge of her duties, forbidden by subsection 1-84(a), General Statutes. As "substantial interest" is defined in section 1-85, it must be based on reason to believe a direct monetary gain to, or loss by, an official or State employee will result from his or her official activity. It does not appear possible for the commissioner, as a member of a panel or by herself, to take official action which with certainty will affect perceptibly the value of the small number of shares of Bank stock she owns or of her stock dividends, or to change the retainers and the fees she receives for board and committee meetings. Therefore, section 1-84(a), General Statutes, should pose her no problems.

Section 1-86, General Statutes, concerning potential conflicts of interest, must also be considered. That section provides that "[a]ny public official ... who, in the discharge of [her] official duties, would be required to take an action that would affect a financial interest of [herself] ... or a business with which [she] is associated, other than an interest of a de minimus [sic] nature, ... shall be excused from voting or deliberating or taking action on the matter if [she] so requests" After this declaration are instructions concerning the formal written

statement to be filed if the public official chooses to participate despite the conflict.

It can be argued that the commissioner's financial interests in this matter are de minimis. As noted above, her interests in the Bank are small, and probably cannot be influenced significantly by the indirect effect of her official actions with respect to one of the Bank's debtors. The financial interests of the Bank, a business with which she is associated, are another matter.

The loans which have been described above may be a small percentage of the Bank's outstanding loans, and even of its corporate loans. Nonetheless, the Bank cannot view without concern anything which jeopardizes timely repayment of a loan of millions of dollars. Further, the Bank presumably earns a profit on services it provides to its customers, among which is included one of the public service companies currently requesting rate increases. Finally, the Bank holds in trust a substantial number of shares, over 100,000, of the stock of the other public service company.

As a director of the Bank the commissioner is a member of the body which manages the affairs of the Bank. Furthermore, she occupies a fiduciary relationship to the Bank, its stockholders, depositors, and creditors. Hoehn v. Crews, 144 Fed. 2d 665 (10th Cir. 1944), aff'd sub nom. Garber v. Crews, 324 U.S. 200 (1945); Lippitt v. Ashley, 89 Conn. 451 (1915); Arrigoni v. Adorno, 129, Conn. 673 (1943); cf. Opinion of the Justices, Me., 330 A. 2d. 912 (1975). As one who shares responsibility for managing the affairs of the Bank and a fiduciary, the commissioner has an obvious interest in ensuring that the financial status of one of the Bank's debtors is such that it can repay its loan to the Bank, and preferably on time.

In approving the level and structure of rates, PUCA commissioners are supposed to balance, on the one hand, a level and structure sufficient for a public service company to cover its operating and capital costs, to attract needed capital, and to maintain its financial integrity and, on the other hand, a level and structure providing appropriate protection to the relevant public interests. Subsection 16-19e(a)(4). It is apparent that a person who wishes to ensure that a public service company can repay a loan to a bank the person helps to manage, and to which the person owes a fiduciary duty, might well strike the balance somewhat differently than a person who does not have those relationships with the creditor bank. Similarly affected could be a vote on whether a public service company should make major expenditures based on safety considerations, or rebate all or part of an interim rate increase. The potential for conflicts is obvious to the public which consumes the services provided by a public service company. There are potential conflicts even though the Bank, in this case, as a consumer will be affected if a rate request is granted the same as other members of the consuming public. The Bank has a special interest in the repayment of the loan and in its other business relationships with the applicants which is not likely to be balanced by its

interest as a purchaser of utility services.

The Commission has been asked to issue the following advice:

1. That the commissioner must make written disclosure under section 1-86, General Statutes, upon request in a contested DPUC proceeding involving a public service company which has financial transactions with the Bank.
2. The written disclosure must be made a part of the record of the contested proceedings.
3. The written disclosure must reveal the full relationship between the Bank and the public service company appearing in the proceeding, not just the relationship between the Bank and the commissioner.

The Commission also has been requested to advise whether the commissioner is precluded from serving on the panel hearing the case of the gas company, or of the Connecticut gas and electric subsidiaries of the public service holding company, because of a substantial conflict of interest as defined by section 1-85, General Statutes.

The Code of Ethics for Public Officials requires somewhat different action than has been urged. Before section 1-86, quoted in part above, applies the public official must have reason to appreciate that, in the discharge of his or her official duties, the official will be required to take an action that would affect the financial interests of the official, member of the immediate family, or a business with which the official is associated, other than an interest of a de minimis nature or one that is not distinct from that of the general public. In the case at hand, the commissioner may be aware of the financial relationships between her Bank and the applicant public service company through her duties as a director of the Bank, through documents filed with DPUC in connection with the application before DPUC, or by other means. Once she is aware of the business relationships between the Bank and the applicant the first question is whether they create a potential conflict and, if so, whether it is of a de minimis nature (the other possible exception not appearing applicable). The determination must be made with the nature of a public office in mind. It is a "right, authority, and duty ... by which ... an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public It is a trust conferred by public authority for a public purpose...." State ex rel. Stage v. Mackie, 82 Conn. 398, 401 (1909). "The good faith of the official is of no moment because it is the policy of the law to keep him so far from temptation as to ensure the exercise of unselfish public interest." Low v. Madison, 135 Conn. 1, 8 (1948). "Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy." Mills v. Town Plan & Zoning Commission, 144 Conn. 493, 499 (1957). "The evil lies in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the citizen and property owner must feel assured will always exist in the exercise of public authority." Katz v. Brandon, 156 Conn. 521, 536 (1968). While most of these quotations are from cases involving the exercise of the zoning power, they are equally applicable to the regulation

of public service companies. In this case, the need to maintain public confidence that each DPUC panel member is giving proper weight to protection of the public interest as well as to the financial integrity of the public service company (subsection 16-19e(a)(4), above) makes it apparent that a loan of millions of dollars to a DPUC applicant by a business with which the commissioner is associated probably is a financial interest of more than a de minimis nature, and it would be affected by the commissioner's official action in a rate case. If the commissioner believes it unnecessary to excuse herself from the panel, as a member of a regulatory body she must (on the facts, not "on request") "(a) [p]repare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the potential conflict; state why despite the potential conflict, [she] is able to vote and otherwise participate fairly, objectively and in the public interest; and (b) deliver a copy of the statement to the [ethics] commission and if [she] is a member of a legislative or state regulatory agency, [she] shall deliver a copy of the statement to be recorded in the journal or minutes of the body...." Subsections 1-86(a) and 1-86(b), General Statutes. The need to maintain public confidence in the regulatory process suggests the desirability of filing a statement even if in the commissioner's or the Bank's opinion the financial interest of the Bank is a de minimis one, setting forth her position and giving the other commissioners and the public the opportunity to examine that conclusion from a more objective viewpoint, just as they review a statement justifying participation despite a conflict of interest.

The written statement is filed with the State Ethics Commission and with the DPUC for inclusion in its journal or minutes. Subsection 1-86(b), General Statutes. The statute does not require that it be included in the record of the contested proceeding in question.


The statement, in describing the nature of the potential conflict, should include any information known to the commissioner through her duties and research as Bank director, as a member of the general public, from documents filed with DPUC, from information filed by other parties, intervenors, etc., concerning the business relationships between the Bank and the public service company applicant, in addition to information regarding the relationship between the commissioner herself and the Bank. The disclosure statement is to inform the DPUC, the parties, and the public the considerations which might influence the commissioner's actions. Since the commissioner cannot be influenced by what she does not know, there may seem to be little virtue in expending time and effort to hunt for matters which might influence the commissioner if she knew them.

The Code of Judicial Conduct, which commissioners must observe when a canon is applicable, provide that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: ... (c) he knows that he, individually or as a fiduciary, ... has a financial interest in the subject matter in controversy ..., or other interest that could be substantially affected by the outcome of the proceeding (D) A judge disqualified by [these] terms may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification...." Subsection 3 C(1)(c); section 3.D, Codes of Judicial Conduct, 1 Practice Book 1978,

pp. 55-57. The Code of Judicial Conduct establishes a standard and a procedure essentially the same as those in section 1-86, General Statutes, with which the commissioner must conform. At the least, these two directives require the commissioner to be alert to any information which might suggest a potential conflict. Sources that might contain such information include: documents filed in a particular proceeding and ordinarily expected to be reviewed by the commissioner prior to rendering a decision; matters discussed or acted upon by the board of directors of the Bank, reports to the board by directors' committees, and matters entered upon minutes of the board. If through these or other sources the commissioner learns there may have been business transactions between the Bank and a public service company appearing before a panel to which she is assigned, she should inquire of the Bank concerning any major financial transactions or connections between the Bank and the public service company. Certainly, the parties and the public would be afforded a basis for deciding whether they can have confidence in the objectivity and impartiality of a decision in which the commissioner participates if the commissioner includes in her 1-86(a) statement all significant information she learns on the matter of potential conflict in the course of her duties as commissioner and director. Such a statement would also provide a basis for other panel and DPUC members, who have a concern for the public perception of the integrity of DPUC processes, to decide whether they agree with the commissioner's decision not to excuse herself.

Finally, as has been noted, there appears from the facts given to be no justification for concluding that the commissioner's financial interests on the Bank are such that they are in "substantial conflict" with the proper discharge of her duties in the public interest and of her responsibilities as prescribed by State law. Subsection 1-84(a) and section 1-85, General Statutes.

By order of the Commission,



Rev. Thomas J. Lynch
Chairman

Dated July 17, 1980

