



STATE OF CONNECTICUT

STATE ETHICS COMMISSION

ADVISORY OPINION NUMBER 80-7

Affiliation of a Regulating Agency Staff Member with the Regulated Industry

A member of the staff of the Commission on Hospitals and Health Care has asked whether service as a member of the Board of Trustees of the World War II Veterans' Memorial Hospital would conflict with her duties as a State employee.

The Commission on Hospitals and Health Care has been established to help control the costs of health care provided by health care institutions and facilities, including hospitals, within the State. Sections 19-73a, 19-73b, General Statutes. The Commission has seventeen members: five, appointed by the Governor, who represent health care providers or related activities; nine, appointed by the Governor or the legislative leadership, who represent the public; and three commissioners or deputy commissioners of State executive departments who serve ex officio. Section 19-73c, id. Among the duties assigned to the Commission are the determination of means for improving efficiency, lowering health care costs, and coordinating use of facilities and services throughout the State. Section 19-73h. Among the powers granted the Commission to be used in furthering its purpose are the power to set rates of health care institutions and facilities (section 19-73i, General Statutes); to review and approve the operating and capital expenditure budgets of hospitals and other health care institutions and facilities (section 19-73o); and to pass upon proposals by a health care institution or facility to introduce additional functions or services (section 19-73l, General Statutes) or to make capital expenditures in excess of fifty thousand dollars which are not included in a budget approved under section 19-73o, above (sections 19-73m and 19-73n). In its deliberations over proposed rates, services, budgets, and capital expenditures the Commission must include such considerations as duplication of service by institutions and facilities in the area served, and the community or regional need for any particular function or service. Section 19-73k, id. The Commission's decision-making process is public, and controlled by the Uniform Administrative Procedure Act, Chapter 54, General Statutes.

The Commission is assisted by a staff which has two major divisions. One, the Finance Division, assists in proceedings related to budget review and rate setting. The other, the Certificate of Need Division, to which the staff member who has sought advice is assigned, assists in the review of applications by hospitals and other health care institutions and facilities to undertake additional health services and to make capital expenditures in excess of fifty thousand dollars. The staff member in question is one of seven health plan section supervisors, a position in the classified State service, and has recently been appointed assistant division chief. Health plan section super-

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visors review applications to undertake additional health services or make capital expenditures in excess of fifty thousand dollars, although the staff member in question does this seldom. She has been assigned usually to special projects, such as development of application forms and certificate of need regulations.

As assistant division chief, she assists her immediate superior in the review of panel reports. In the future she may have sole responsibility for review of some panel reports. These reports are prepared by staff members under the direction of the commissioners who have served on a hearing panel. The panel reports are approved by the panel members before they are presented to the full Commission for its decision. The staff member, as assistant division chief, expects to have some supervisory responsibility over the other health plan section supervisors, the Division's clerical staff, and the administration of the Division. She provides input to the division chief concerning review policy. She serves as acting division chief in the chief's absence. As assigned, she represents the Division at meetings within and outside the Commission. She is primary liaison between the Division and the Attorney General's office for matters not in litigation.

Some of her duties may have been assigned because she is an attorney. However, she provides no legal services to the Commission and there is no attorney-client, or other special confidential, relationship between her and the Commission.

After serving on the Commission staff for somewhat less than a year, she was recently appointed by the Meriden City Council to the Board of Trustees of World War II Veterans' Memorial Hospital. This is a volunteer, uncompensated position. The Board establishes policy for the hospital, but is not involved in its day-to-day management.

The World War II Veterans' Memorial Hospital is the only municipally-owned and -managed hospital in the State. As its name implies, it was built as a memorial to the local war dead. Like all hospitals in Connecticut, it is subject to regulation by the Commission.

There is another hospital in Meriden, the privately-managed Meriden-Wallingford Hospital. A year ago the Commission authorized pre-development planning money for the Meriden-Wallingford Hospital, on condition that it invite World War II Veterans' Memorial Hospital to participate in discussion of a long-range health plan addressing the present and future needs of the service population of both hospitals. A number of alternatives and options concerning merger, consolidation, and sharing of various services and functions are being explored.

The discussions have not always proceeded smoothly. World War II Veterans' Memorial Hospital appealed to Superior Court the Commission's order requiring Meriden-Wallingford Hospital to explore with

World War II Veteran's Memorial Hospital alternatives and options for provision of medical services in the Meriden area. (The staff member in question was not a member of the Board of Trustees when the Board approved the decision to file the appeal.) The appeal was dismissed. A petition for review of the dismissal was denied by the Supreme Court. For a considerable period of time personnel of the World War II Veterans' Memorial Hospital, including the Board of Trustees, were forbidden by the Meriden City Council to discuss any merger. During this time the Executive Director of the Commission advised the City Council that the Commission, because of its mandate to reduce costs by reducing duplication of service, could not act upon some twenty-seven million dollars in capital improvement projects submitted by the two hospitals until the two had considered jointly a plan for the future. The health systems agency for the health services area which includes Meriden supports a joint planning effort. Many, including veterans groups, oppose any such planning effort, fearing that the city-owned hospital may lose stature or even its identity. They look not only at the health services that the World War II Veterans' Memorial Hospital provides but at the Hospital's memorial feature. There are physicians who doubt that both hospitals can keep abreast of modern medical technology. The situation has deep emotional, as well as financial and medical, aspects.

The staff member in question believes that she can avoid any conflicts as she serves both the Commission and the Board of Trustees. Being a Board member does not constitute employment, since she is unpaid. Independence of judgment on the Commission she claims is exercised mainly by the Commissioners, not those in her position. She anticipates that she can excuse herself from responsibility for any matters coming before the Commission which involve World War II Veterans' Memorial Hospital (and presumably those concerning at least Meriden-Wallingford Hospital as well). Section 1-86, General Statutes, provides a method for formalizing and revealing this action. As an attorney, she feels she is particularly sensitive to the necessity of not revealing to others any confidential information she may gain in the course of her State employment. In her opinion, holding both positions, with the Commission and the Hospital, is not inconsistent with the Code of Ethics for Public Officials and State Employees, Chapter 10, Part I, General Statutes.

It may be that, using the procedures of section 1-86, above, the staff member can divorce herself from matters coming before the Commission so that no official action of hers benefits World War II Veterans' Memorial Hospital directly, or indirectly in that a decision to the disadvantage of some other hospital somehow helps the one with which she is affiliated. This will be difficult as a practical matter, for abstinence should encompass all the hospitals -- Yale - New Haven, St. Raphael, Griffin, and Milford Hospital--in the health services area which includes Meriden. It will be especially difficult when the staff member is acting temporarily as chief of one of the Commission's two major divisions. It may be that the staff member,

when acting as a trustee of World War II Veterans' Memorial Hospital, can isolate from her deliberations any confidential information gained in her Commission position and excuse herself from such matters as voting on whether to challenge Commission orders. If so, it could be that the staff member in question might avoid violation of the Code of Ethics for Public Officials and State Employees.

In ethics, however, avoiding the appearance of a conflict of interest can be as important as avoiding a conflict itself. This is especially significant in the sensitive, volatile situation which has been described above. Those who do not know the staff member's actual responsibilities and her actions to avoid conflicts, only that she holds a senior position on the Commission staff, cannot be certain that the Commission's decisions are based on the proper input and the factors mandated by statute; that the staff member has in fact the loyalty to the Commission which the Code of Ethics for Public Officials is intended to ensure.

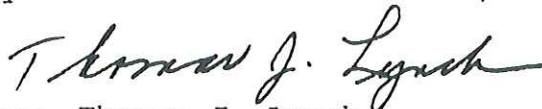
The staff member claims that she can avoid actual violations of the Code. Whether there may be appearances of violations can be determined in part by considering the standards of conduct imposed on the Commission and its staff by statute and regulations. Section 19-73c, General Statutes, which does not speak of the staff, directs that public members "shall not be affiliated with, employed by or have any past professional affiliation with any health care facility or institution, ... provided service as a trustee or corporator of any health care facility or institution, which service terminated prior to three years before appointment as a member of the commission, shall not be considered to be past professional affiliation for the purposes of this section." Section 19-73a-22 of the Regulations of Connecticut State Agencies provides that no person who has served as an employee of the Commission "shall practice or act as attorney, agent or representative in any case before the commission or by any means aid in the preparation or prosecution of any such contested case which was pending before the commission while that person was so serving, if such representation or other employment does or may involve the disclosure of confidential information acquired while serving as such ... employee of the commission". And unless authorized, no former employee of the Commission "shall appear before the commission or accept employment in connection with any contested case before the commission within six months after the termination of ... such employee's employment by the commission." The regulation supplements the General Statutes and the canons of ethics of any profession. Of most direct application, section 19-73a-19, Regulations of Connecticut State Agencies, states that "[w]here applicable, the canons of professional ethics ... adopted and approved by the judges of the superior court govern the conduct of the ... state employees serving the commission." Some of those canons, found in the Code of Professional Responsibility, Connecticut Practice Book, Volume 1, furnish particularly useful guidance in the case at hand. Canon 4 requires that a lawyer should preserve the confidences and secrets of a client. Here, the Commissioners and Commission staff should be able to speak freely to a staff member without fear that confidences and secrets will be revealed. Canon 5 states that lawyers should exercise independent professional

judgment on behalf of a client, free of compromising influences and loyalties. Finally, under Canon 9, even the appearance of impropriety must be avoided.

Whether or not the staff member in fact violates the Code of Ethics for Public Officials, it will be difficult for her to avoid the appearance of a violation of the Code, measured by the above standards established for members and staff of the Commission. The World War II Veterans' Memorial Hospital, of which she is a trustee, is a "[b]usiness with which [s]he is associated." Subsection 1-79(a), General Statutes. In the emotionally-charged situation which has been described, it is likely that there will be considerable suspicion that the staff member is using her position on the Commission for the benefit of the hospital of which she is trustee. So long as she is a trustee, those who are taking positions adverse to the World War II Veterans' Memorial Hospital cannot be sure that the Hospital does not have for its use confidential Commission information not available to others. There is bound to be uncertainty, on the part of outsiders and perhaps on the part of the Commissioners, whether the staff member's loyalties are undivided, as they are required to be, and whether the Commission's deliberative processes have the required integrity.

If there were no one else to serve on the Hospital's Board of Trustees, perhaps a public perception of impartiality could be maintained by taking heroic efforts to keep interested persons informed of the staff member's sensitivity to possible conflicts and the methods she is using to avoid any involvement in the matter. That such a program would be successful in this case is unlikely. In any event, there undoubtedly are other public-spirited citizens qualified and willing to serve on the Board of Trustees of World War II Veterans' Memorial Hospital who are not employed by the agency regulating the Hospital. To avoid both the actuality and the appearance of a violation of the Code of Ethics which applies to all State employees, and to meet the ethical standards established for members and staff of the Commission on Hospitals and Health Care, the staff member should not serve both as a Commission employee and a member of the Hospital's Board of Trustees.

By order of the Commission,



Rev. Thomas J. Lynch
Chairman

Dated February 19, 1980

