NO. CV 116009483S	:	SUPERIOR COURT
	:	
STATE OF CT CITIZEN'S ETHICS ADVISORY BOARD	:	
	:	JUDICIAL DISTRICT OF
	:	
v.	:	NEW BRITAIN
	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	JULY 15, 2011

MEMORANDUM OF DECISION

The plaintiff, citizen's ethics advisory board (the board), appeals[1] from a January 28, 2011 final decision of the defendant freedom of information commission (FOIC). The final decision held in favor of the defendant-complainant Alexander Wood[2] and concluded that non-public deliberations by the board after a public hearing violated the freedom of information act (FOIA).

1

As the FOIC has issued a final decision affecting the rights and duties of the board, it is aggrieved for purposes of General Statutes § 4-183 (a). This opinion is issued separately from the court's opinion in another administrative appeal (Docket No. HHB CV 10-6007661) that also involves a final decision of the FOIC arising from the same board meeting.

2

The defendant Wood's employer, the Manchester Journal Inquirer, was served by the board but did not enter an appearance and has been defaulted in this action.

The record shows that after a hearing conducted by an FOIC hearing officer, the issuance of a proposed decision, and a vote of approval by the FOIC, a final decision was issued in this matter. It provided in relevant part as follows:

* * *

2. By letter of complaint filed February 4, 2010, the complainants appealed to the Commission, alleging that the respondents violated the open meetings provisions of the FOI Act when, on January 12, 2010, they deliberated privately on the matter of Office of State Ethics Docket No. 2007-24, In The Matter Of A Complaint Against Priscilla Dickman, and when they failed to post and make available the minutes of those deliberations.

3. It is found that Dickman was accused of violating §§ 1-84(b) and (c), G.S., by using her public position to obtain financial gain for herself, and for accepting other employment that impaired her independence of judgment as to her official duties or employment.

* * *

7. It is found that the respondents' hearings were presided over by JTR James G. Kennefick, Jr., and that the last such hearing commenced on January 12, 2010.

8. It is found that JTR Kennefick instructed the respondents at the January 12 hearing that their deliberations were, as a matter of law, part of the hearing. When they were ready to begin deliberating, he directed them as follows:

> This will conclude the public portion of this hearing, and I'm going to ask you to retire to deliberate. . . . But before you do that, let me just point just for the Board's information, I'm going to point to you in the

> regulation 1-92-31(g)(k). G states that the Board hearing shall commence upon the presentation of evidence to the Board for its consideration, which I think was back on September 11, if I got that date right. The Board hearing shall be concluded upon a finding of violation or lack thereof, and if violation has occurred, the imposition of penalties as appropriate. *So the hearing is not concluded until you make your finding and impose penalties, if appropriate.* [Emphasis added].

Transcript of January 12, 2010 hearing at page 119-120.

9. JTR Kennefick's language leaves some room for disagreement as to whether he believed that the Board's deliberations were required to be conducted privately. On the one hand, he expressed that the "public portion" of the hearing was concluded, and that the Board was to "retire" to deliberate. On the other hand, he was certainly aware of the requirement in § 1-82(b), G.S., that "[a]ll hearings of the board held pursuant to this subsection shall be open," and he instructed the Board that the hearing wasn't over until they concluded their deliberations and made their findings.

10. It is also apparent that JTR Kennefick did not consider that he retained a role in the Board's hearing and deliberation once the evidentiary portion of the hearing was closed:

> MR. BERNHARD: . . . one last question. In the event, and I know there's a lot of information for us to digest, in the event we somehow come to a conclusion today, does that go back on the record and will you need a court reporter?
> THE COURT: I don't believe so. I think once you reach your conclusion you have to

issue your memorandum of–well, I'll go back and–
MR. BERNHARD: But nothing is done publicly, it's just done in writing within 15 days.
THE COURT: That's my understanding, and I think Attorney Housen can advise you on that.
MS. HOUSEN: I could follow up with the Chair.
THE COURT: That's correct. *So we're not going to go back on the record. The hearing will end once you make your findings and your memorandum*, and then it gets published within–
MS. HOUSEN: Within 15 days.
THE COURT: Within 15 days.
MS. HOUSEN: And that will be the public record of the findings.
THE COURT: Yes, that's correct.

11. At the respondents' January 12 hearing, Dickman, through counsel, objected to the respondents' conducting their deliberations privately, and requested, pursuant to § 1-225(a) and 1-2006(6), G.S., that since the respondents were discussing Dickman's conduct as a state employee, that they conduct that discussion in the open.

* * *

14. In response to Dickman's counsel's request at the Board's January 12, 2010 hearing, that the Board deliberate publicly concerning her, counsel for the respondents argued pointedly that it was her opinion that the respondents' hearing was not governed by the FOI Act, and that therefore the respondents were not obliged to deliberate publicly, or to invoke an appropriate executive session provision.

* * *

16. The Commission has carefully reviewed the cited portions of the transcript. The JTR instructs the respondent board that:

- they are triers of fact and that they are to determine the facts by a careful consideration of the record before them;
- what he says to them concerning the law is binding on them;
- he does not have any preference in the outcome of the case;
- it was his duty to apply the rules of evidence;
- it is the Board's duty to weigh the evidence and gauge the credibility of witnesses;
- both direct and circumstantial evidence may be considered, and what inferences may be drawn from the evidence;
- the state has the burden of proof, and the standard the state must meet is the preponderance of the evidence;
- he will provide the meaning of the statutes that Dickman was charged with violating, 1-84-C and 1-84-B, and the applicability of a civil penalty.

He further instructed the Board that:

- it was their duty to express their views to the other Board members and listen to theirs;
- that they could not discuss the case unless all the members of the Board were present;

- that they could take breaks and recesses;
- that they could find no violation except upon the concurring vote of six of its members present and voting;
- that the Board had to publish its finding and a memorandum of reasons therefore within 15 days after the hearing was concluded;
- that they could have the aid and advice of general counsel and the legal division of the Office of State Ethics during deliberations and when publishing their findings and memorandum of reasons.

17. However, it is found that JTR Kennefick's only comment about the Board deliberating privately was, "*It's my opinion* that the Board *may* deliberate in private, and they do so starting now."

18. It is also found that none of JTR Kennefick's instructions conflicted with the respondents' obligations under the FOI Act.

19. Although JTR Kennefick *approved* of the Board deliberating in private, and apparently expected they would do so, he did not *direct* or *instruct* them to do so, and indicated that his role was at an end when the Board commenced the deliberation phase of their hearing.

20. The Commission understands that the respondents may have understood JTR Kennefick's comments differently at the time, particularly given the amount of information they were required to absorb, and their unique role in their own proceedings. The Commission also understands the

respondents' preference for private deliberation. However, it is found as a factual matter that JTR Kennefick did not *require* the respondents to deliberate privately, and that their choice to do so was their own, not one dictated by the JTR or any other authority.

21. Although the respondents have characterized their role in their proceedings as that of a jury, because they were similarly restricted to a fact-finding role, it is found and concluded that they had powers considerably beyond those granted to a jury.

22. For example, it is concluded as a matter of law that the respondent board retained during the entirety of the hearings it conducted, pursuant to 1-82(b), G.S., the powers granted it under § 1-82(a), G.S., including the power to subpoena witnesses and require the production of documents.

23. It is also found that the respondent board exercised the power to ask questions of counsel for Dickman, such as explaining why evidence should not be given any weight.

24. Additionally, it is found and concluded that the respondent board retained the power to have counsel with them while they deliberated, an option not available to jurors in court.

25. Further, it is found and concluded that the respondents actually authored a Finding, Memorandum and Order Dated January 15, 2010 that was their own decision, and was not subject to approval by or submission to JTR Kennefick, whose role in the proceeding had by then ended. Again, this is a role considerably beyond that exercised by a jury in a trial.

26. Finally, it is found and concluded that the respondents are not, like jurors, private citizens pulled from their ordinary responsibilities to be the fact finders in a trial in which they

otherwise have no legal interest or role. Rather, they are appointed public officials whose statutory duty is to decide matters such as the Dickman case. See § 1-80(a), G.S. It is further found that the respondents, like other public officials who belong to multi-member public agencies, are accustomed to the public scrutiny of their meetings and deliberations generally, and should, unlike jurors in a trial, be able to perform their duties in the spotlight.

* * *

34. The respondents concede that, but for the role played by the JTR in their hearings, and the statutes and regulations governing the role of the JTR, the meetings of the respondents are subject to the FOI Act.

35. However, there is no obvious way in which the function of a JTR in presiding over the respondents' hearing removes that hearing from the requirements of the FOI Act. The Commission notes that the respondent's hearing was, although presided over by a JTR, an administrative hearing by a multi-member administrative agency that was appealable, like any administrative agency decision, to the Superior Court pursuant to the Uniform Administrative Procedure Act. See, e.g., § 1-87, G.S. ("Any person aggrieved by any final decision of the board, made pursuant to this part, may appeal such decision in accordance with the provisions of section 4-175 or section 4-183.")

36. It seems evident that the General Assembly, in effecting changes to the statutes governing the enforcement of state ethics laws, sought to impose more oversight and controls over the respondents than had previously existed over the predecessor agency, the State Ethics Commission. However, there is no suggestion, and no reason to believe, that the General Assembly in doing so intended to remove the respondents' hearings from the requirements of the FOI Act.

37. Specifically, the Commission notes that the General Assembly took away the predecessor Ethics Commission's ability to make its own probable cause determinations and assented, through its acceptance of § 1-92-6a of the Regulations of Connecticut State Agencies, to the Citizen's Ethics Advisory Board's surrender of the authority to interpret the statutes governing violations of state ethics laws at hearings on alleged violations of those laws. The new scheme of statutes and regulations requires that a JTR make any findings concerning probable cause and that another JTR have the final authority over the interpretation of ethics statutes in hearing on alleged violations. It is likewise notable that the General Assembly did not change the provision of § 1-82(b), G.S., making a JTR the presiding officer at hearings on alleged ethics code violations that follow a finding of probable cause and giving that JTR authority to rule on issues concerning the application of the rules of evidence at such hearings.

38. It seems unlikely that the General Assembly, by limiting and circumscribing the powers of the respondents, and imposing oversight and authority in the form of a JTR, simultaneously intended to take the respondents' hearings out of the public eye and public accountability.

39. If anything, the General Assembly's imposition of controls over the respondents is consistent with a continuation of the FOI Act's requirements that its proceedings, except for those preceding a finding of probable cause, and except for executive sessions, be open to the public.

40. The respondents maintain that they have no power over whether their hearings are open to the public, because the JTR is given presiding power over the respondents' proceedings. The respondents further maintain that any attempt to conduct their deliberations openly would have been in contradiction to the JTR's instructions and order, and an usurpation of his authority over the proceedings.

41. As more fully explicated above, however, it is found that the JTR did not direct or instruct the respondents to deliberate privately. At most, he expressed his opinion that they "may" do so, not that they were required to do so.

42. Further, it is found that the JTR's role in the proceedings ended once the evidence and argument portion of the hearing closed and the respondents commenced their deliberations. Whether the respondents chose to deliberate publicly or privately was exclusively their decision, and in no way could be interpreted as interfering with the JTR's authority, which had expressly concluded.

43. It is therefore concluded that the fact that a JTR presided over the evidence and argument portion of the January 12 hearing did not remove the deliberation portion of that meeting from the requirements of the FOI Act.

44. The respondents additionally maintain that their January 12 hearing was not a meeting subject to the FOI Act.

45. However, § 1-200(2), G.S., cited above, expressly includes as a meeting within the FOI Act's definition "any hearing or proceeding . . . to discuss or act."

46. It is therefore found and concluded that the respondents' January 12 hearing was a "meeting" within the meaning of § 1-200(2), G.S.

* * *

49. However, a careful reading of New Haven reveals that the Supreme Court's decision in that case turned on the fact that the police officer had not requested that the deliberation portion be open to the public, not that the New Haven Board of Police Commissioner's deliberation was outside the requirement of obtaining the consent of the employee discussed. . . .

50. Later in its opinion, the New Haven Court specifically held that the predecessor statute to § 1-200(6), G.S., does require a board that had already held an open evidentiary hearing to additionally hold its deliberations after that hearing in public if the subject of the hearing is so requested. . . .

51. It is therefore concluded that New Haven v. FOIC does not permit an agency to conduct an executive session pursuant to § 1-200(6), G.S., over the objection of the individual who is the subject of that session.

52. It is further concluded that the respondents violated § 1-225(a) and 1-200(6), G.S., by deliberating privately as part of their January 12, 2010 hearing concerning Dickman.

53. It is found that the respondents did not post or make available minutes of their deliberations at their January 12, 2010 hearing, and thus also violated § 1-225(a), G.S.

The following order by the Commission is hereby recommended on the basis of the record concerning the above captioned-complaint:

1. Henceforth the respondents shall strictly comply with the requirements of §§ 1-225(a) and 1-200(6), G.S.

2. The respondents shall forthwith create, file and post minutes of the deliberation portion of their January 12, 2010 meeting. (Return of Record, ROR, pp. 279-292).

The board timely appealed from the final decision of the FOIC, and raised questions of statutory interpretation. As our Supreme Court recently stated: "Because statutory interpretation is a question of law, our review is de novo. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent

of the legislature . . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply . . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Citation omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 301 Conn. 323, 337-38, __ A.3d __ (2011).

Also as the Appellate Court has stated in setting the applicable standard of review: "Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable.

. . . An administrative finding is supported by substantial evidence if the record affords a substantial basis for fact from which the fact in issue can be reasonably inferred . . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and . . . provide[s] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action . . . . [I]t is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . [A]s to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion . . . . Conclusions of law must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." *Blinkoff* v. *Commission on Human Rights & Opportunities*, 129 Conn. App. 714, 720-21, __ A.3d __ (2011).

With this guidance from the appellate courts, this court now addresses the basic claim of the board that the deliberations of the board were not required to be conducted publicly, as ordered by the FOIC. There is no question that § 1-82 and Regulation § 1-92-31 contemplate that the board convene after the presentation of evidence to vote on

whether a violation of the ethics code had occurred.[3] The presiding judge trial referee stated that the board was to meet immediately, take its vote and within fifteen days *after* the vote of the board, publish its finding and a memorandum of the reasons therefor. See FOIC final decision, Finding 10.

The board argues that its deliberations, commenced after the taking of evidence before a judge trial referee pursuant to § 1-82 (b), are unique and distinguish it from other agencies subject to FOIA.[4] The court concludes, however, that the deliberations of the board constitute the "convening or assembly of a quorum of a multimember public agency." § 1-200 (2).[5] Meeting this definition, the board falls within FOIC jurisdiction to require that the board follow the open meeting requirements of § 1-225.

More specifically, the board's statutes and regulations unambiguously state that it is placed "within the Office of State Ethics," an "independent *state* agency." § 1-80 (a), Regulation § 1-92-1; 1-92-6a. Under FOIA, all state agencies and subdivisions thereof

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That the board was to vote after the conclusion of the evidence is seen in the statutory [§ 1-82 (b)) and regulation (§ 1-92-31 (j)) references to the need for six concurring votes and the need of each voting member to be physically present at the hearing.

4

The board does not claim that the closed meeting was permitted by § 1-200 (6), as an executive session.

5

The addition of the judge trial referee to the hearing process does not insulate the board from FOIA's requirements.

are "public agencies;" § 1-200 (1) (A); and are subject to the open meeting requirements of § 1-225. Moreover, the definition of meeting in § 1-200 (2) includes "*any* convening or assembly of a quorum of a multimember public agency." Compare *Grimes* v. *Conservation Commission*, 243 Conn. 266, 270, 703 A.2d 101 (1997), cert. denied, 247 Conn. 903, 720 A.2d 514 (1998) ("Because it was anticipated that a quorum of the commission would be present at the site inspection, it qualified as a 'meeting' pursuant to [FOIA].") with *Windham* v. *Freedom of Information Commission*, 48 Conn. App. 529, 531, 711 A.2d 741 (1998) (no evidence of quorum of board).[6]

The conclusion that a meeting of the board took place when it deliberated, and was subject to FOIA, does not change even if the board's deliberations are analogized to the deliberations of a jury. Simply put, there is nothing of record other than facts demonstrating that the board met after the presentation of evidence to vote on the charges

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[6] The court has concluded on its own reading of the law, in keeping with plenary review and statutory interpretation, that the board is subject to the open meeting provisions of the FOIA. In addition to the court's own analysis, the FOIC has also issued final decisions holding that other agency deliberations are to be held in public. See FOIC brief, p. 17. These agency rulings are subject to deference as time-tested and reasonable. *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2008).

against Dickman with a quorum of its members in attendance.[7] This constituted a meeting under FOIA.[8]

The board makes further arguments drawn from § 1-82 (b) and the functions of the judge trial referee. First, the board contends that the judge trial referee directed it to meet in private. The FOIC concluded otherwise. Finding 9 states that the judge trial referee explained to the board after the evidence concluded that the "public portion" of the hearing had come to an end, and that the board should continue to deliberate. Finding 17 states that the judge trial referee stated that the board "may" deliberate in private. According to Finding 19, the judge trial referee made no *order* that the board discuss and vote in private, and the FOIC found as a fact in Finding 20 that the judge trial referee gave no order to the board. There is substantial evidence in the record to support the findings of the FOIC.[9]

7

FOIC findings 21-26 call into question the jury analogy. A true jury, unlike the board, may not subpoena witnesses, question an attorney at a hearing, or have an attorney present at its deliberations; nor does it consist of public officials charged with making agency policy.

8

There is no ambiguity in the board's authorizing statutes that require consultation of extratextual materials. Even if the court were to consult the legislative history, it merely shows that the legislators remarked upon the fact that a judge trial referee was presiding over the taking of evidence; there is no indication in the legislative history that the board's subsequent meeting to vote on the ethics violations was to be closed to the public.

9

The parties agreed to shorten the record submitted to the court. The court read the

Even if the judge trial referee were to have directed the board to deliberate in private, he would have lacked authority to do so. The FOIC in Finding 9 quoted the judge trial referee as stating that he did not have any role once the taking of evidence had come to an end. Section 82 (b) also supports this conclusion: "A judge trial referee, who has not taken part in the probable cause determination on the matter shall be assigned by the Chief Court Administrator and shall be compensated in accordance with section 52-434 out of funds available to the Office of State Ethics and shall preside over such hearing and rule on all issues concerning the application of the rules of evidence, which shall be the same as in judicial proceedings." The scope of the judge trial referee's power is clear from the statute's language. See *Board of Selectmen* v. *Freedom of Information Commission*, supra, 294 Conn. 459.

The final argument of the board relies on the case of *Board of Police Commissioners* v. *Freedom of Information Commission*, 192 Conn. 183, 470 A.2d 1209 (1984). There, a police officer, Gold, was dismissed by the New Haven police department after a hearing. Gold subsequently filed a complaint with the FOIC apparently alleging that he had requested an open meeting on his charges, and while the taking of evidence had been conducted in public, the deliberations of the police

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summary of the judge trial referee's remarks on January 12, 2011 to the board in the FOIC's brief (ROR, p. 2721). The board has not called to the court's attention any other portion of the transcript contradicting the FOIC's summary.

commissioners took place in a separate room. The Supreme Court held that the FOIC had erred in ruling for Gold. The board argues that the Supreme Court in *Board of Police Commissioners* ruled against Gold, distinguishing between the hearings and deliberations of an agency, and therefore there is direct precedent for its closed deliberation proceedings.

The court disagrees with the board's construction of *Board of Police Commissioners*. In that case, Gold had elected under the executive session provision of FOIA, § 1-200 (6) (A), that "discussion" regarding his possible discharge be open and not in private. His request, however, had been for an open "hearing." Supreme Court held that Gold's open "hearing" request did not include the commissioners' deliberations. Id., 189. Also the Court found that Gold had not objected to the deliberations themselves being held in private, only to the presence of third parties and reception of evidence not brought out at the hearing. Id.

The rationale of that case does not apply here. The Court was not declaring that there was a general distinction between hearings and meetings held to deliberate, only that Gold had requested less than complete open proceedings. Further, the board does not claim that its meeting qualified as an executive session under FOIA as was the situation in *Board of Police Commissioners*. Finally, Dickman clearly stated that she wanted both

the hearing and the deliberations to take place in public.[10] Under these circumstances, dicta in *Board of Police Commissioners* supports the FOIC final decision.

Based on the foregoing, the court finds that the FOIC did not act unreasonably, arbitrarily, illegally or in abuse of its discretion in its final decision. Therefore the appeal is dismissed.

Henry S. Cohn, Judge

10

Again, the court is relying on the representation of the FOIC that the shortened record contains a statement (ROR, p. 2717) by Dickman's counsel that she requested all proceedings to be open.