NO. CV 106007661S	:	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 September 22, 2010 final decision of the defendant freedom of information commission (FOIC), which decision held in favor of the defendant-complainant Alexander Wood.[2] 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. It is found that the respondent board held a public hearing on September 11, 2009, to determine whether Priscilla

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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 11-6009483) that also involves a final decision of the FOIC arising from the same board hearing.

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

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Dickman violated the provisions of the Code of Ethics for Public Officials (hereinafter "public hearing").

3. It is found that James G. Kenefick presided over the public hearing as Judge Trial Referee (hereinafter "JTR").

4. It is found that, on or about September 1, 2009, Priscilla Dickman's counsel wrote a letter to the respondent's general counsel raising the legality of the appointment of G. Kenneth Bernhard to the respondent board. It is also found that the respondent's counsel construed such letter as a request for an advisory opinion on the issues raised therein.

5. It is found that at the commencement of the public hearing and prior to the presentation of evidence, Priscilla Dickman's counsel asked the JTR to postpone the public hearing until such time as the respondent's counsel responded to the issues raised in his letter described in paragraph 4, above.

6. It is found that the JTR denied the motion described in paragraph 5, above.

7. It is found that, Priscilla Dickman's counsel then asked the respondent board to postpone the hearing for the same reasons described in paragraph 4, above (hereinafter the "motion" or "pending motion").

* * *

9. It is found that, over the objections of the respondent's Ethics Enforcement Officer and pursuant to § 1-92-15 of the Regulations of Connecticut State Agencies, the JTR asked the respondent board's counsel whether she wished to consult with the board to discuss the pending motion. It is found that the respondent board's counsel stated that she wished to consult with the board. It is also found that the JTR granted a recess to permit the respondent board to

speak with its counsel on the pending motion. It is further found that the JTR then ordered all Connecticut Network (CT-N) cameras be turned off prior to him exiting the hearing room.

10. It is found that, after the JTR exited the hearing room and during the recess of the public hearing, a quorum of the respondent board also exited the hearing room and convened privately with its counsel (hereinafter the "gathering").

11. It is found that, after approximately eleven minutes of discussions with its counsel, the respondent board reentered the hearing room, the public hearing was reconvened by the JTR and the chairman of the respondent board publicly denied the motion to postpone the public hearing on behalf of the board.

12. It is found, based on reasonable inference from facts on the record, that the gathering included deliberation and discussion on the pending motion made to the board by Priscilla Dickman's counsel.

13. By letter dated September 21, 2009 and filed with the Commission on September 25, 2009, the complainants appealed to the Commission, alleging that the respondent violated the Freedom of Information (hereinafter "FOI") Act by denying the complainants access to a meeting held during a recess of the respondent's September 11, 2009 public hearing and failing to post the minutes of such meeting on the respondent's website within seven days.

14. Given these findings of fact, the question of law presented by this case is whether the gathering was a "meeting" of a public agency as defined in § 1-200 (2), G.S. Given the definition of "meeting" set forth at paragraph 16, below, the more specific question of law is whether the gathering was a "convening . . . of a quorum of a multimember public

agency . . . to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power" under § 1-200(2), G.S.

* * *

23. Despite the respondent's arguments that the JTR acted as the sole authority authorized under the Code of Ethics and the Regulations of Connecticut State Agencies to rule on issues of law, procedure and evidence within the context of the public hearing, it is found that § 1-92-15 of the Regulations of Connecticut State Agencies governing the respondent, permits the JTR or the board to extend any time limit prescribed or allowed by its rules prior to the expiration of the period originally prescribed for the public hearing. It is also found that the discussion between the respondent board and its counsel on the pending motion described in paragraphs 11 and 12, above, pertained to a request made to the board to extend the time limit prescribed for the public hearing within the meaning of § 1-92-15 of the Regulations of Connecticut State Agencies. It is further found that the JTR acknowledged the authority of the respondent board to rule on the pending motion under § 1-92-15 of the Regulations of Connecticut State Agencies and permitted a recess of the public hearing to allow the board to discuss and deliberate on the motion.

24. It is found that when the respondent board gathered to discuss and deliberate on the pending motion, it was not acting strictly in the capacity of fact finder or jury with respect to the public hearing. Contrary to the respondent's contention, a quorum of the respondent board discussed and deliberated with counsel on a threshold procedural matter, distinguishable from the role of a sequestered jury charged with making factual findings based on the presiding judge's instructions and interpretation of the law.

25. It is found that there is no evidence that by ordering that all CT-N television cameras be turned off and by then exiting the hearing room, the JTR authorized the respondent to exclude the public from its discussion and deliberations on the motion, since § 1-82 (b), G.S., requires that all hearings of the respondent board be open.

26. It is found that the act between the respondent and its counsel of reaching the decision to deny the pending motion pertained to a matter over which the respondent has "supervision, control, jurisdiction or advisory power" within the meaning of § 1-200(2), G.S. It is found that the gathering the respondent characterized as a "quasi-judicial" proceeding "akin to a court trial" was a secret deliberation and constituted a "proceeding of a public agency" and "a convening or assembly of a quorum of a multimember public agency," as well as "communication by or to a quorum of a multimember public agency" within the meaning of § 1-200(2), G.S., and it is concluded, therefore, that the discussion between the respondent and its counsel was a "meeting" for purposes of the FOI Act.

27. It is found that nothing in the plain language of § 1-225(a), G.S., permits the JTR to authorize a private off the record discussion between the board and its counsel, since all meetings of public agencies are public except for executive sessions, which was not claimed by the respondent in this matter.

28. It is concluded, therefore, that the respondent violated the provisions of §§ 1-225(a), 1-200(2), and 1-82(b), G.S., by privately deliberating and discussing to deny the pending motion.

29. With respect to the allegation concerning minutes as described in paragraph 13, above, it has already been concluded that the respondent is a "public agency." Accordingly, when such agency meets it is required to

conduct its business in accordance with the provisions of the FOI Act.

30. Section 1-225(a), G.S., provides, in relevant part, that "[w]ithin seven days of the session to which such minutes refer, such minutes shall be available for public inspection and posted on such public agency's Internet web site, if available" and § 1-210(a), G.S., requires that all public agencies "shall make, keep and maintain a record of the proceedings of its meetings."

31. It is found that the respondent has an Internet web site that is available.

32. It is also found that the decision reached by the respondent board as described in paragraphs 10 and 11, above, was tantamount to a vote, and such vote should have been recorded in minutes of the September 11, 2009 meeting with its counsel.

33. It is found that the respondent did not prepare and post on its website, minutes of the September 11, 2009 meeting with its counsel.

34. It is concluded that by failing to prepare and to have minutes of the respondent's September 11, 2009 meeting with its counsel available for public inspection on its web site within seven days of the public hearing, the respondent 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 respondent shall strictly comply with the open meetings and minutes requirements contained in §§ 1-210(a), 1-225(a), and 1-82(b), G.S.

2. The respondent shall, within 14 business days of the issuance of the final decision in this matter, cause minutes to be posted on its web site of the September 11, 2009 meeting of the respondent and its general counsel. (Return of Record, ROR, pp. 406-413).

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 of 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).

The first contention of the board is that the freedom of information act (FOIA) and its open meeting provisions are not applicable at all to public hearings conducted by the board. Rather the board contends that under its statutory scheme, its hearings are *sui generis*, presided over by a judge trial referee, designated by the Chief Court Administrator, who controls the "law, procedure, and evidence at such hearings." § 1-80e (1); Board Regulations § 1-92-6a.[3]

The court does not agree with this broad jurisdictional contention. The FOIA clearly applies to the office of state ethics, as it is "an independent *state* agency," and to the board itself, placed "within the Office of State Ethics" by § 1-80 (a). Under the FOIA, all state agencies and subdivisions thereof are "public agencies;" § 1-200 (1) (A); and subject to the open meeting requirements of § 1-225. Moreover, the definition of meeting in § 1-200 (2) includes "any hearing or other proceeding . . . of a public agency."[4] See *Town of Windham* v. *Freedom of Information Commission*, 48 Conn. App. 529, 711 A.2d 741 (1998), appeal dismissed, 249 Conn. 291, 732 A.2d 752; *Board of Education* v.

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[3] The board specifically does not argue that it was entitled to meet in executive session under § 1-200 (6).

[4] The definition of meeting in § 1-200 (2) also includes "any convening or assembly of a quorum of a multimember public agency . . . ."

Freedom of Information Commission, Superior Court, judicial district of New Britain, Docket No. CV 99 0496503 (June 6, 2000, *Cohn,J.*).[5]

The applicable board statute,§ 1-82 (b), is unambiguous (and hence not subject to extratexual evidence): "[Where probable cause exists], the board shall initiate hearings to determine whether there has been a violation . . . . A judge trial referee . . . 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. All hearings of the board held pursuant to this subsection shall be open."

The more limited contention of the board is that the presiding judge trial referee ruled that the hearing should be recessed so that the board might meet with its counsel in private to discuss the requested continuance. The board is correct that the judge trial referee has broad powers to control the proceedings at the public hearing. See, e.g., *Merchant* v. *State Ethics Commission*, Superior Court, judicial district of Fairfield, Docket No. CV 96 0330176 (September 2, 1997, *Kaplan, J.*), aff'd, 53 Conn. App. 808, 733 A.2d 287 (1999), giving the judge trial referee wide discretion to admit a document into evidence.

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Hybrid agencies have been found to be "public agencies." See, e.g., *Winton Park Association* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08 40193339 (October 7, 2009, *Cohn, J.*).

The court, however, need not resolve the extent of the judge trial referee's authority to close a public hearing of the board. The FOIC's finding 25 is that the judge trial referee did not formally order the hearing recessed for the board to meet privately with its counsel. There is substantial evidence to support this conclusion.[6] It is true that one might read the transcript to indicate that, in ordering the taping to stop, the judge trial referee was ordering the board to meet in private. The FOIC found as a matter of fact, however, that no directive was given to the board to hold a closed meeting.[7] Under precedent, the court must defer to the FOIC's factual findings, even if the board proposes another plausible reading of the record. See *Commissioner of Public Safety* v. *Board of Firearms Permit Examiners*, 129 Conn. App. 414, 422, __ A.3d __ (2011) (trial court

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At the September 11, 2009, board hearing, the attorney for Dickman asks for the referee to allow the board to consider his request for continuance. The judge trial referee states: "Let them meet with their counsel." The board enforcement officer then suggests that the parties leave the room. Dickman's attorney notes that "Well, [the board members] are on TV. That's up to them." The board enforcement officer replies: "TV cameras can turn off." Dickman's attorney adds: "I don't mind." I'll leave." The judge trial referee then concludes the discussion: "Why don't we leave, and then come get us when you're ready. The cameras will be turned off while the Board meets with its counsel." (ROR, p. 118, transcript of board hearing at 32).

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During the hearing, the judge trial referee was forbidden by statute to have any "ex parte communications" with the board. § 1-82 (b). Thus when the recess occurred and the board meeting commenced, the judge trial referee was appropriately not a participant and withdrew from the room. The judge trial referee's absence does not necessarily indicate that he was directing that the meeting be closed.

correctly concluded that agency findings of fact distinguishing permittee's conduct from other permittees were not subject to retrial or reevaluation).

Finally, the board claims that it had the authority to meet privately with its counsel under an attorney-client privilege. The legal division of the office of state ethics "shall provide the board with legal advice on matters before the board."§ 1-81 (e). This provision standing alone does not alter the FOIA rule that an "executive session may not be convened to receive or discuss oral communications that would otherwise be privileged by the attorney-client relationship if the agency were a nongovernmental entity, unless the executive session is for a purpose explicitly permitted pursuant to subdivision (6) of section 1-200."[8] § 1-231 (b). The court agrees with Judge Owens' opinion that § 1-231 (b) "trumps" a more general statutory provision establishing an attorney-client relationship. See *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 106003500 (June 24, 2011, *Owens, JTR.*).

The FOIC did not act unreasonably, arbitrarily, illegally or in abuse of its discretion and therefore the appeal is dismissed.

Henry S. Cohn, Judge

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The board does not claim that there is a subsection (6) exemption here.