

State of Connecticut

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ATTORNEY GENERAL



Hartford

February 24, 2009

The Honorable Andrew J. McDonald, Co-Chair
Judiciary Committee
Legislative Office Building
Hartford, CT 06106-1591

Dear Senator McDonald:

This letter responds to your request for an opinion concerning the impact of Conn. Gen. Stat. § 1-80(*l*) on the appointment of Attorney Dawne Westbrook as a Connecticut Superior Court judge.

We understand that on September 10, 2008, the Senate majority leader, Senator Martin Looney, invited Attorney Westbrook to serve on the Citizen's Ethics Advisory Board (the "Board") of the Office of State Ethics ("OSE"). Attorney Westbrook accepted the appointment and attended a Board meeting on September 25, 2008. At that time she took the oath of office, voted on a number of matters before the Board, and participated in an executive session. Following the September 25th meeting, Attorney Westbrook became aware of Conn. Gen. Stat. § 1-80(*l*), which states:

No member of the board may hold any other position in state employment for a period of one year following the end of such member's service on the board, including, but not limited to, service as a member on a state board or commission, service as a judge of the Superior Court or service as a state agency commissioner.

Conn. Gen. Stat. § 1-80(*l*). On September 29, 2008, Attorney Westbrook wrote a letter to Senator Looney and representatives of the OSE purporting to retroactively rescind her acceptance of her appointment to the Board. Since that time, she has had no further involvement with the Board. On January 30, 2009, Governor Rell nominated Attorney Westbrook to an eight-year term as a Superior Court judge. The nomination is currently pending before the General Assembly.

Given the language of § 1-80(*l*), you have asked the following questions:

- (1) Whether Attorney Westbrook served as a "member" of the Board within the meaning of Conn. Gen. Stat. § 1-80(f)?
- (2) Whether Attorney Westbrook could legally "rescind" her acceptance of her appointment after she had already participated in a Board meeting and voted on Board matters?
- (3) Whether the requirements of Conn. Gen. Stat. § 1-80(f) prohibit the General Assembly from appointing Attorney Westbrook to be a Superior Court judge?

Based on the facts that have been presented to us, we conclude that Attorney Westbrook was a member of the Board for purposes of Conn. Gen. Stat. § 1-80(f) and had no legal authority to retroactively "rescind" her appointment after she had accepted the appointment and performed the duties of a Board member. We also conclude that even if her appointment is a violation of § 1-80(f), the General Assembly has the constitutional and statutory power to appoint Attorney Westbrook as a Superior Court judge if it so chooses.

Your first question is whether Attorney Westbrook served as a member of the Board within the meaning of Conn. Gen. Stat. § 1-80(f)?

As a general rule, "[t]he choice of a person to fill an office constitutes the essence of an appointment. By the act of appointment, title is vested." 63C Am. Jur. 2d, Public Officers and Employees, § 87 (1997 ed). "An appointment to office is made and is complete when the last act required of the person or body vested with the appointing power has been performed." *Id.* at § 98; see also State ex rel Rundbaken v. Watrous, 135 Conn. 638 (1949).

In the present case, Conn. Gen. Stat. § 1-80(a) states that the majority leader of the Senate shall appoint one member of the Board, but does not require that the appointment be confirmed by the General Assembly. Pursuant to his authority under § 1-80(a), the majority leader of the Senate, Martin Looney, appointed Attorney Westbrook to the Board and she was sworn in to her position as a member of the Board on September 25, 2008, when she took the oath of office. Having been properly appointed and sworn into office, Attorney Westbrook was fully authorized to assume her duties as a member of the Board and no further action was required to complete her appointment. Accordingly,

these facts indicate that Attorney Westbrook was a "member of the board" on September 25, 2008.

Your second question asks whether Attorney Westbrook had the legal authority to retroactively rescind her appointment as a member of the Board.

Typically, the power to rescind an appointment rests with the individual or entity who possesses the authority to make an appointment -- in this case with the majority leader of the Senate, Senator Martin Looney. See In re Estate of Telsrow, 235 Iowa 763 (1944) ("[t]he power of selection lodged in the trial court includes the power to rescind an appointment before the designated appointee qualifies"); Alleman v. Dufresne, 17 So.2d 70, 76 (La. App. Orleans 1944) ("inasmuch as the appointive power has the right to remove the officer at his pleasure, this right necessarily includes the power to rescind or cancel the appointment prior to the time the appointee has accepted the office"). We are aware of no statutory or common law Connecticut authority vesting an appointee, as opposed to the appointer, with the power to rescind an appointment.

Nor are we aware of any authority that would permit Attorney Westbrook to *retroactively* rescind her appointment *after* she has already participated in a Board meeting and voted on Board matters. Indeed, even an appointing authority who possesses the power to rescind an appointment may lose the power to rescind if an appointment is complete. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); State ex rel. Rundbaken v. Watrous, 135 Conn. 638, 655 (1949); State ex rel. Todd v. Essling, 128 N.W. 2d 307 (Minn. 1964). According to the facts presented to this office -- that Attorney Westbrook was properly appointed as a member of the Board and exercised her authority as a member of the Board by participating in a Board meeting and voting on Board matters -- she had no authority to retroactively rescind her appointment.

In your third question, you ask whether Conn. Gen. Stat. § 1-80(l) prohibits the General Assembly from appointing Attorney Westbrook to be a Superior Court judge. We conclude that it does not.

The sole limitations on the General Assembly's authority to appoint Superior Court judges are the judicial qualifications set forth in the Connecticut constitution and Chapter 872 of the General Statutes. The only qualifications set forth in the constitution are that a judge be less than seventy years old, Conn.

const. article fifth, § 6,¹ and take an oath of office before assuming his or her duties. Conn. const., art. eleventh, § 1.

The statutory qualifications for Superior Court judges are set forth in Chapter 872 of the General Statutes, which is entitled "Judges." Specifically, Conn. Gen. Stat. § 51-47(c) requires that a judge: (1) be an elector and resident of Connecticut; (2) be a member of the Connecticut state bar; (3) not be engaged in the private practice of law; and (4) not be on or a member of any board of directors or of any advisory board of any state bank and trust company, state bank or savings and loan association, national banking association or federal savings bank or saving and loan association.

The provisions of section 1-80(*l*) appear to conflict with section 51-47(c). Important to our analysis is the fact that the legislature did not amend section 51-47(c) to include any reference to §1-80(*l*), or make compliance with §1-80(*l*) an additional requirement for appointment as a Superior Court judge. A possible violation of that statute does not affect the General Assembly's power to appoint an individual to the Superior Court. In any event, a possible conflict between section 1-80(*l*) and section 51-47(c) is for the legislature to resolve.

The legislature made both laws. It can alter or repeal them - - generally, or in limited circumstances - - by legislative action.

In short, this situation is akin to that presented in 2004, when we were asked to opine on the impact of Conn. Gen. Stat. § 51-44a(*l*) on the nomination of Joseph Mengacci as a Superior Court judge. Section 51-44a(*l*) prohibited a former member of the Judicial Selection Commission from being "considered for recommendation to the governor for nomination as a judge" for two years after termination of his tenure on the Commission. See 2004 Conn. Op. Atty Gen. 2004-003, 2004 Conn. AG Lexis 4 (March 22, 2004). We were asked whether Mr. Mengacci's application to the Commission for consideration for a judgeship violated § 51-44a(*l*) and, if it did, what the consequences were. We concluded that Mr. Mengacci's application violated § 51-44a(*l*), but that there was nothing in the statute that barred the General Assembly from acting on his nomination despite the violation: "the legislature reserved for itself or the Governor the full discretion

¹ Specifically, article fifth, § 6, states that "[n]o judge shall be eligible to hold his office after he shall arrive at the age of seventy years, except that . . . a judge of the superior court . . . who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee."

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to assess each case based on all the circumstances, qualifications of the individual and other relevant factors." *Id.*, 2004 AG Lexis at * 12.

We reach the same conclusion here. We conclude that the Constitution and General Statutes reserve to the legislature the full discretion to appoint Superior Court judges after assessing each case based on all of the circumstances, the qualifications of the individual, and other relevant factors. Thus, the General Assembly is free to consider all the circumstances concerning Attorney Westbrook's nomination, but is not barred by § 1-80(*l*) from appointing her.

Very truly yours,



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