

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

Complaint of Nancy Herling and
Michael J. Herling, Darien

File No. 2012-015

**AGREEMENT CONTAINING CONSENT ORDER
AND CIVIL PENALTY**

This agreement by and between Nancy Herling of the Town of Darien, County of Fairfield (hereinafter referred to as "Respondent"), and the authorized representative of the State Elections Enforcement Commission is entered into in accordance with Section 9-7b-54 of the Regulations of Connecticut State Agencies and Section 4-177 (c) of the General Statutes of Connecticut. In accordance herewith, the parties agree that:

1. The complaint and investigation in this matter concern possible violations of Connecticut General Statutes § 9-612 (g), by Respondent, the spouse of Michael J. Herling, a partner at the law firm Finn Dixon Herling LLP (hereinafter referred to as "FDH"). FDH is based in Stamford, Connecticut, and is a business that operates for profit. The Complaint was self-reported by Respondent and Mr. Herling.
2. Respondent sought rulings on alleged prohibited state contractor contributions so that FDH could continue contracting with the Connecticut Office of State Treasurer (hereinafter referred to as "Office of State Treasurer") to act as "co-disclosure counsel and co-tax counsel" for general obligation bond offerings by that office, as well as to provide various professional legal services to the Capital City Economic Development Authority ("CCEDA").
3. For purposes of the state contractor contribution ban, CCEDA, as described in paragraph 2 above is a "state agency" pursuant to General Statutes § 9-612 (g) (1) (B).
4. Since approximately 2005, FDH has provided certain types of legal advice and services to the Office of State Treasurer in connection with bond offerings. In June 2008, those services were memorialized in a contract titled "*Professional Services Agreement Between the State of Connecticut, Acting By Its Attorney General and Its Treasurer, and Finn Dixon & Herling LLP*" (hereinafter "the State Contract").

5. FDH is listed on the *State Elections Enforcement Commission – List Two- State Contractors Prohibited from Contributing to Statewide Candidates*. FDH has contracted with the Treasurer and the Attorney General to provide legal services to the Office of State Treasurer for legal services on behalf of the State, and other tasks FDH is requested from time to time to perform. FDH was first appointed in 2004. FDH billings for the last five years to the Office of State Treasurer are as follows:

- a. 2011--\$116,827.50
- b. 2010--\$92,426.50
- c. 2009--\$108,927.50
- d. 2008--\$79,911.50
- e. 2007--\$32,821.00

6. Additionally, FDH has been bond counsel to CCEDA since 2003 with respect to the issuance of the Authority's Parking and Energy Fee Revenue Bonds, issued in 2004, 2005 and 2008, for purposes of completion of the Hartford Convention Center Project, as well as post issuance compliance. FDH billings for the last five years to CCEDA are as follows:

- a. 2011--\$3,515.50
- b. 2010--\$3,734.50
- c. 2009--\$19,666.70
- d. 2008--\$79,204.50
- e. 2007--\$17,842.83

7. General Statutes § 9-612 provides:

...

(g)(1)(D) "***State contractor***" means a person, ***business entity*** or nonprofit organization ***that enters into a state contract***. Such person, business entity or nonprofit organization shall be deemed to be a state contractor until December thirty-first of the year in which such contract terminates. "State contractor" does not include a municipality or any other political subdivision of the state, including any entities or associations duly created by the municipality or political subdivision exclusively amongst themselves to further any purpose authorized by statute or charter, or an employee in the executive or legislative branch of state government or a quasi-public agency, whether in the classified or unclassified service and full or part-time, and only in such person's capacity as a state or quasi-public agency employee.
[Emphasis added.]

8. The Commission finds that for purposes of the state contractor ban, FDH as a business entity is a “state contractor” pursuant to General Statutes § 9-610 (g) (1) (D) due to its contracts with the Office of State Treasurer and CCEDA to provide legal services.

9. General Statutes § 9-612 further provides:

...
(g)(1)(F) ***"Principal of a state contractor or prospective state contractor" means (i) any individual who is a member of the board of directors of, or has an ownership interest of five per cent or more in, a state contractor or prospective state contractor, which is a business entity, except for an individual who is a member of the board of directors of a nonprofit organization, ... (v) the spouse or a dependent child who is eighteen years of age or older of an individual described in this subparagraph, or (vi) a political committee established or controlled by an individual described in this subparagraph or the business entity or nonprofit organization that is the state contractor or prospective state contractor.***

...
(2)(A) ***No state contractor, prospective state contractor, principal of a state contractor or principal of a prospective state contractor, with regard to a state contract solicitation with or from a state agency in the executive branch or a quasi-public agency or a holder, or principal of a holder of a valid prequalification certificate, shall make a contribution to, or solicit contributions on behalf of (i) an exploratory committee or candidate committee established by a candidate for nomination or election to the office of Governor, Lieutenant Governor, Attorney General, State Comptroller, Secretary of the State or State Treasurer, (ii) a political committee authorized to make contributions or expenditures to or for the benefit of such candidates, or (iii) a party committee;***

(B) ***No state contractor, prospective state contractor, principal of a state contractor or principal of a prospective state contractor, with regard to a state contract solicitation with or from the General Assembly or a holder, or principal of a holder, of a valid prequalification certificate, shall make a contribution to, or solicit contributions on behalf of (i) an exploratory committee or candidate committee established***

by a candidate for nomination or election to the office of state senator or state representative, ***(ii) a political committee authorized to make contributions or expenditures to or for the benefit of such candidates, or (iii) a party committee;***

- (C) If a state contractor or principal of a state contractor makes or solicits a contribution prohibited under subparagraph (A) or (B) of this subdivision, as determined by the State Elections Enforcement Commission, the contracting state agency or quasi-public agency may, in the case of a state contract executed on or after the effective date of this section may void the existing contract with said contractor, and no state agency or quasi-public agency shall award the state contractor a state contract or an extension or an amendment to a state contract for one year after the election for which such contribution is made or solicited unless the commission determines that mitigating circumstances exist concerning such violation. No violation of the prohibitions contained in subparagraph (A) or (B) of this subdivision shall be deemed to have occurred if, and only if, the improper contribution is returned to the principal by the later of thirty days after receipt of such contribution by the recipient committee treasurer or the filing date that corresponds with the reporting period in which such contribution was made, ...

[Emphasis added.]

10. The Commission finds, pursuant to General Statutes § 9-612 (g) (1) (F) (i) Complainant Michael J. Herling is an owner having a 5% or more interest in FDH, a state contractor, and therefore is a “principal” of a state contractor for the purposes of the state contractor ban.
11. The Commission further finds that Respondent, as the spouse of Mr. Herling, is a principal of a state contractor, and therefore is covered by the state contractor ban pursuant to § 9-612 (g) (1) (f) (v).
12. Respondent’s \$100.00 March 28, 2008 contribution to the DRTC was disclosed on that committee’s April 8, 2008 Itemized Campaign Finance Disclosure Statement (SEEC Form 20). Her September 17, 2011 \$100.00 contribution to the DRTC was disclosed on that committee’s October 6, 2011 SEEC Form 20. In each instance the committee indicated “no” as to Respondent’s status as a principal of a state contractor. Finally, Respondent’s \$100.00 contribution to GOP 4 was disclosed on that committee’s October

6, 2009 SEEC Form 20, and was reported as a September 13, 2009 contribution, and the committee indicated “no” as the status of the contributor as a principal of a state contractor.

13. The Darien Republican Town Committee (hereinafter “DRTC”) is a party committee, and GOP 4 is an ongoing political committee of two or more individuals for purposes of General Statutes, Chapter 155. As such, each committee is authorized to contribute to candidates for statewide office. *See* General Statutes §§ 9-617 and 9-618, respectively.
14. Complainants assert and believe that any violations by Respondent were unintentional and not meant to influence FDH’s status as a state contractor doing business with the Connecticut Office of State Treasurer. Furthermore, Respondents requested that “...the Commission consider and approve a finding of ‘mitigating circumstances’ under § 9-612 (g) (2) (C) so that FDH is not subject to any automatic contract penalties.”
15. The Commission finds that the contributions described in paragraph 12 above were not returned within the statutory “safe harbor” of 30 days from the time of the contribution or not later than 30 days from the filing date of the reporting period in which they were made pursuant to § 9-612 (g) (2) (C).
16. The Commission concludes that the evidence supports the finding that, as a principal of the state contractor, Respondent violated General Statutes § 9-612 (g) on three occasions: by making two \$100.00 prohibited contribution to a party committee prior to the November 2, 2010 election and one \$100.00 contribution to an ongoing political committee of two or more individuals authorized to make contributions to candidates for statewide office prior to the aforementioned state election.
17. Upon investigation, Respondent asserted that her error was in good faith, to the extent that the campaign contributions were not made in any way to influence the State of Connecticut pertaining to contracts with FDH, and that Respondent was unaware that the contributions detailed herein were prohibited when made. Finally, Respondent asserted that she discovered that the aforementioned contributions detailed herein were prohibited only after they were made and upon information from a member of FDH. The Commission finds no specific evidence upon investigation to contradict Respondents’ aforementioned assertions.
18. General Statutes § 9-612 (g) (2) (C) provides possible relief from the mandatory contract penalty by requiring the Commission to determine whether mitigating circumstances exist once it determines that a violation has occurred. If mitigating circumstances concerning violations are found by the Commission, contract penalties are not automatic, but the awarding agency retains discretion to amend any contracts or award any new contracts.

The agency may still void contracts in its discretion if violations of the state contractor contribution or solicitation ban occur, even if mitigating circumstances are found. General Statutes § 9-612 (g) (2) (c).

19. The Commission finds that the three violations of § 9-612 (g) by Respondent as concluded in paragraph 16 above of the state contractor contribution ban require the Commission to determine whether “mitigating circumstances” exist concerning such violations.
20. In determining whether circumstances are “mitigating,” the Commission deems it necessary to consider any circumstances pertaining to the contributions by Respondent, as well as contracts and agreements between FDH and CCEDA and the Office of State Treasurer, that would, although not excusing the conduct, tend to reduce the harm the state contractor contribution ban is designed to prevent.
21. The Commission notes that the contribution ban is designed to eliminate the undue influence over the awarding of contracts that principals of state contractors who make contributions to candidate committees and exploratory committees for statewide office could wield over those state actors awarding such contracts and prevent awarding of contracts in exchange for campaign contributions.
22. The Commission finds a lack of evidence that the contributions to the DRTC described in this agreement were made in connection with any request for or offers of assistance between Respondent and the agents or representatives of the DRTC, and FDH and the Office of State Treasurer or CCEDA, for the purpose of obtaining agreements with the aforementioned state agency, or with the State of Connecticut. The Commission further finds a lack of evidence that Respondent’s contribution to GOP4 described in this agreement was made in connection with any request for or offers of assistance between Respondent and the agents or representatives of GOP4, and FDH and the Office of State Treasurer or CCEDA, for the purpose of obtaining the State Contract or other agreements with the aforementioned state agency, or with the State of Connecticut.
23. The Commission additionally finds a lack of evidence that either of the aforementioned contribution recipients were in positions to influence the decision making of FDH, the Office of State Treasurer or CCEDA, or that either the DRTC or GOP4 members or agents were employed by or affiliated with the aforementioned agencies. Finally, the Commission finds a lack of evidence that either of the aforementioned recipients or their agents or representatives acted on behalf of either party in relation to the State Contract or other agreements between FDH and CCEDA, or the Office of State Treasurer.

24. The Commission finds that “mitigating circumstances” are present based on the facts and circumstances detailed herein, such that pursuant to § 9-612(g)(2)(C), FDH should not be prevented from exercising or amending its rights under future or existing contracts between it and CCEDA and the Office of State Treasurer. Under the circumstances detailed herein, such mitigating circumstances include:

- (1) Respondent self reported to the Commission by filing this complaint.
- (2) The \$100.00 contributions to the DRTC, were to a party committee, and therefore not directly to a statewide candidate committee, thus reducing the likelihood of the risk of pay-to-play;
- (3) The \$100.00 contributions to GOP 4, was to a political committee of two or more individuals, and thus not directly to a statewide candidate committee, thus reducing the likelihood of the risk of pay-to-play;
- (4) There is credible evidence that Respondent was either mistaken, or unaware of, the application of the state contractor ban to herself as the spouse of the principal of a state contractor; and as applied to the recipients of her contributions as a party committee and political committee of two or more individuals.
- (5) When the Respondent made the aforementioned contributions to the DRTC there was no expectation that the DRTC or its agents would assist FDH in obtaining contracts with the CCEDA, the Office of State Treasurer, or the State of Connecticut;
- (6) When the Respondent made the aforementioned contribution to GOP 4, there was no expectation that the DRTC or its agents would assist FDH in obtaining contracts with the CCEDA, the Office of State Treasurer, or the State of Connecticut; and,
- (7) At all times relevant to the Complaint neither the DRTC or its agents, or GOP 4 or its agents, were in positions to influence or award contracts entered into by the CCEDA, the Office of State Treasurer, or the State of Connecticut, with FDH.

25. The Commission finds based on the factors detailed in paragraph 25 above that “mitigating circumstances” existed pertaining to the prohibited contributions made by Respondents and detailed herein pursuant to General Statutes § 9-612 (g) (2) (C), such that FDH should not be prevented from negotiating the State Contract detailed herein, or otherwise exercising or amending its rights under future or existing contracts between it and CCEDA, Office of State Treasurer and the State of Connecticut.
26. The Commission further concludes that the policy behind General Statutes § 9-612 (g) and its ban to avoid “pay-to-play” were not circumvented under the facts and circumstances of this case, and therefore allowing contracts and agreements and the contracting process to move forward, despite the prohibited contributions and violations by Respondent, does not compromise the state’s interests to insure integrity in its campaign financing system.
27. Respondent admits all jurisdictional facts and agrees that this Agreement and Order shall have the same force and effect as a final decision and Order entered after a full hearing and shall become final when adopted by the Commission. Respondent shall receive a copy hereof as provided in Section 9-7b-56 of the Regulations of Connecticut State Agencies.
28. It is understood and agreed that this agreement will be submitted to the Commission at its next meeting and, if it is not accepted by the Commission, it is withdrawn by the Respondent and may not be used as an admission in any subsequent hearing, if the same becomes necessary.
29. Respondent waives:
 - a. any further procedural steps;
 - b. the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, separately stated; and
 - c. all rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered into pursuant to this agreement.
30. Upon Respondent’s compliance with the Order hereinafter stated, the Commission shall not initiate any further proceedings against Respondent pertaining to this matter.

ORDER

IT IS HEREBY ORDERED THAT the Respondent shall henceforth strictly comply with the requirements of General Statutes § 9-612 (g).

IT IS HEREBY FURTHER ORDERED THAT Respondent pay a civil penalty of seven hundred and fifty dollars (\$750.00) to the Commission on or before May 23, 2012.

IT IS HEREBY FURTHER ORDERED THAT the following “mitigating circumstances” pursuant to General Statute § 9-612 (g) are found pertaining to the matter detailed herein:

1. Respondent self reported to the Commission by filing the complaint;
2. The \$100.00 contributions to the DRTC, were to a party committee, and therefore not directly to a statewide candidate committee, thus reducing the likelihood of the risk of pay-to-play;
3. The \$100.00 contribution to GOP 4, was to a political committee of two or more individuals, and thus not directly to a statewide candidate committee, thus reducing the likelihood of the risk of pay-to play;
4. There is credible evidence that Respondent was either mistaken, or unaware of, the application of the state contractor ban to herself as the spouse of the principal of a state contractor; and as applied to the recipients of her contributions as a party committee and political committee of two or more individuals.
5. When the Respondent made the aforementioned contributions to the DRTC there was no expectation that the DRTC or its agents would assist the FDH in obtaining contracts with the CCEDA, the Office of State Treasurer, or the State of Connecticut;
6. When the Respondent made the aforementioned contribution to GOP 4, there was no expectation that the DRTC or its agents would assist the FDH in obtaining contracts with the CCEDA, the Office of State Treasurer, or the State of Connecticut; and,

7. At all times relevant to the Complaint neither the DRTC or its agents, or GOP 4 or its agents, were in positions to influence or award contracts entered into by the CCEDA, the Office of State Treasurer, or the State of Connecticut, with FDH.

The Respondent

BY:

Dated:

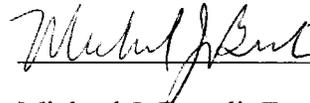
 5/22/2012

Nancy Herling
91 Five Mile River Road
Darien, Connecticut

For the State of Connecticut

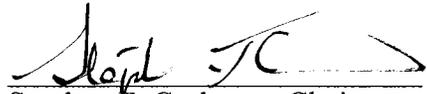
BY:

Dated:

 5/25/12

Michael J. Brandi, Esq.
Executive Director and General Counsel
and Authorized Representative of
the State Elections Enforcement Commission
20 Trinity Street, Suite 101
Hartford, Connecticut

Adopted this 23rd day of May, 2012 at Hartford, Connecticut by a vote of the Commission.



Stephen F. Cashman, Chairperson
By Order of the Commission