



STATE OF CONNECTICUT OFFICE OF STATE ETHICS

Advisory Opinion No. 2018-2

April 19, 2018

**Questions
Presented:**

The petitioner asks (1) whether the involvement of seven (7) Connecticut Green Bank (“CGB”) employees in the formation of a non-governmental organization (“NGO”) and their subsequent transition to it would be in violation of General Statutes § 1-84 (c); (2) whether those employees may begin employment with the NGO immediately after leaving state service with CGB without violating General Statutes § 1-84b (f); and (3) whether the transitioning employees may have contact with CGB immediately upon leaving state service under the technical implementation of an existing contract exception to General Statutes § 1-84b (b).

Brief Answer:

We conclude that (1) the employees who transition to the NGO will not be in violation of § 1-84 (c); (2) the employees may begin employment with the NGO immediately after leaving state service without violating § 1-84b (f); and may have contact with CGB immediately upon leaving state service under

the technical implementation of an existing contract exception to General Statutes § 1-84b (b).

At its March 2018 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Attorney Scott L. Murphy of Shipman & Goodwin, LLP, on behalf of the Connecticut Green Bank, a quasi-public agency of the state of Connecticut. The Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials¹ ("Ethics Code"), is binding on the Board concerning the person who requested it and who acted in good-faith reliance thereon, and is based on the facts provided by the petitioner.

Facts

The following facts, as set forth by the petitioner, are relevant to this opinion:

The Connecticut Green Bank ("CGB") is a quasi-public agency created by Section 16-245n of the General Statutes for the purpose of stimulating the demand for clean energy and the development of clean energy sources, and supporting clean energy investment, financing and expenditures.

The legislature has significantly curtailed the funding available to CGB, which as a consequence has determined that it is necessary to contract its activities and focus on a more limited number of the highest value projects and programs that are best suited for continued operation by a quasi-governmental entity.

Rather than discontinuing other important CGB clean energy programs for lack of funding within CGB, it is proposed that a tax-exempt 501(c)(3) organization be formed which can seek and accept grants and contributions from public and private sources so that such other programs can be continued outside of CGB. The programs CGB hopes to continue through such a

¹Chapter 10, part I, of the General Statutes.

501(c)(3) organization are referred to as the “continued CGB programs”.

Such a 501(c)(3) organization would be formed as a Connecticut non-stock corporation without members and be governed by a self-perpetuating board of directors, subject to certain board member qualification requirements to insure relevant experience and expertise, and the possibility that CGB may have certain limited minority board member designation or approval rights which do not result in the loss of the organization’s status as an independent non-governmental entity (“NGO”). As an NGO, the organization would be able to expand its exempt activities without geographic limits and thereby generate economies of scale and broaden the base for public and private support, increasing the likelihood for sustained operation of the continued CGB programs as well as creating the potential for expanded clean energy activities with public benefits both in and outside of Connecticut.

The formation of the NGO would represent the exercise of express powers of CGB set forth in subdivision (ix) of General Statutes § 16-245n(d)1(D), which reflects a legislative determination that the public purposes of the CGB can be furthered through its involvement in the formation, ownership, management or operation of other business entities that may present an opportunity to leverage CGB resources through participation in clean energy enterprises and activities with other public and private participants.

The principal initial funding for the NGO would be a grant from the Connecticut Department of Energy and Environmental Protection (“DEEP”) (expected to be a one-time grant of approximately \$5 million) which would be conditioned on, among other things

- the formation of the NGO and its agreement to seek to qualify as a 501(c)(3);

- the submission to DEEP and CGB of an acceptable business plan for the continued CGB programs, including fundraising plans;
- the transition from CGB to the NGO of seven (7) current CGB employees (out of total current CGB workforce of forty-seven (47) employees) with the necessary experience and expertise to manage the continued CGB programs; and
- satisfactory agreements between and among DEEP, CGB and the NGO relating to the use of proceeds of the DEEP grant, the administration by the NGO of the continued CGB programs, and the provision by CGB of space and “back-office” administrative support to the NGO until it is able to become operationally self-sufficient.

CGB is aware that the proposed formation of the NGO, the anticipated contracts between CGB and the NGO, and the transition of current CGB employees to the NGO may raise issues under the Ethics Code, including (i) the involvement of such employees while in state service in the creation of an outside employment opportunity (see Advisory Opinion No. 1997-1); (ii) the possible application of the one-year “jobs ban” (Section 1-84b(f)) if the transitioning employees were to be personally and substantially involved while still in state service in the award by CGB of contracts to the NGO; and (iii) the applicability to the administration of the continued CGB programs by former CGB employees of the one-year prohibition on contact with such employees’ former agency (Section 1-84b(b)).

The formation of the NGO is a strategic initiative conceived, directed and controlled by members of senior management CGB (who will remain at CGB), and not any of the transitioning employees, and is subject to CGB board approval.

The proposed initiative will serve public purpose – the continuation of CGB programs that might otherwise be discontinued.

The involvement of seven employees in the initiative is necessary in order to satisfy the conditions of the DEEP grant and support the continued CGB programs at the NGO.

Because the transitioning employees have operational responsibility for the programs that will move to the NGO and are therefore familiar with how those programs work, they will provide staff level technical suggestions for terms and conditions to be incorporated in the contracts between CGB and the NGO. That technical input will be provided to members of CGB senior management, and it will be those members of the senior management, not any of the transitioning employees, who will conduct any contract negotiations with representatives of the NGO. Those same members of senior management, and not the transitioning employees, will be responsible for the contract award process at CGB, consisting of a presentation and recommendation to the CGB board that the proposed contracts be authorized and approved.

The jobs at the NGO will be an integral part of the overall strategic initiative, not the result of any self-serving official action by the transitioning employees relating to those contracts or otherwise.

In order to avoid even an appearance of misuse of official position, it is proposed that the total value of compensation (salary and benefits) for each of the transitioning employees be no greater during the first year than it was at CGB. Thereafter, compensation would be subject to an overall standard of reasonableness consistent with IRS rules for tax-exempt organizations and would be subject to public reporting on Form 990.

It is also proposed (and may be assumed) that the contracts between CGB and the NGO will not be executed until after the transitioning employees have

left state service. The CGB board may authorize and approve the contracts just prior to the departure of the transitioning employees, since it is unreasonable to expect the NGO to hire them until there is a decision by CGB to contract out the work they will perform.

It is of course anticipated that the transitioning employees will have ongoing contact with CGB since they will be managing the continued CGB programs under a contract between CGB and the NGO. In the early going, the transitioning employees may in fact be co-located with CGB employees in shared space made available to the NGO by CGB until such time as the NGO can become operationally self-sufficient.

Contact between the transitioning employees and those still at CGB would be limited to technical matters related to the implementation and administration of the continued CGB programs pursuant to the contracts entered into by CGB and the NGO. The transitioning employees would not seek amendments to those contracts, solicit further assistance or grants from CGB on behalf of the NGO, or seek other discretionary action by CGB for the benefit of the NGO, or be involved in any dispute between CGB and the NGO.

Analysis

Under the facts presented, the first issue raised by the Petitioner is whether the involvement of seven CGB employees in the formation of an NGO and their subsequent transition to it would be a violation of General Statutes § 1-84 (c).

With regard to the first issue, the Petitioner references Advisory Opinion No. 1997-1, which involved the creation of a private employment opportunity by a state employee in the course of state service that was later filled by that state employee. In that opinion, the former State Ethics Commission (“former Commission”) was asked whether a University of Connecticut professor, who in his state position was “instrumental in creating, privatizing and funding” a non-profit corporation, could provide paid consultation services to

that entity.² The former Commission ruled that in a situation where a state employee wants to fill an outside position which he was substantially involved in creating, "[the] use of office for financial gain in violation of § 1-84 (c) is inherent and unavoidable."³

Here, the transfer of seven employees from the CGB to the NGO is distinguishable. As the Petitioner notes, the transitioning employees are not the decision-makers creating a post-state employment opportunity for themselves. Rather, they are CGB staff members who are willing to participate in the implementation of a strategic initiative that will be managed by the officers of CGB and approved by its board, and which has an identified public purpose, i.e., the continuation of CGB programs that might otherwise have to be discontinued. Further, the Petitioner proposes that in order to avoid even an appearance of misuse of official position, the total value of compensation (salary and benefits) for each of the transitioning employees will be no greater during the first year than it was at CGB.⁴ Based on the foregoing, we conclude that the involvement of seven CGB employees in the formation of the NGO and their subsequent transition to it will not violate § 1-84 (c).

The second issue raised by the Petitioner is whether the transitioning employees may begin employment with the NGO immediately after leaving state service with CGB without violating General Statutes § 1-84b (f) even if they provided technical input for terms and conditions to be incorporated in the contracts between CGB and the NGO.

Under § 1-84b (f), a state employee who was substantially involved in the negotiation or award of a state contract valued at \$50,000 or more is prohibited from accepting employment with a party to the contract for one year after leaving state service, if the contract was signed within one year prior to the employee's departure from state service. For purposes of § 1-84b (f), the term "employment" has been

²Advisory Opinion No. 1997-1, Connecticut Law Journal, Vol. 58, No. 35, p. 3E (February 25, 1997).

³Id.

⁴Cf. Advisory Opinion No. 2003-3, Connecticut Law Journal, Vol. 64, No. 36, p. 5D (March 4, 2003) ("Within that first year, a former state employee may negotiate an independent contract for personal services with his former agency only if his hourly rate is no greater than the rate he was receiving when he left state service, plus the pro-rated value of his state benefits.").

defined broadly and includes “any work or endeavor, whatever its form, undertaken in order to obtain financial gain (e.g., employee of a business, sole practitioner, independent contractor, investor, etc.)”⁵ Further, “substantial participation” is participation that is “direct, extensive and substantive, not peripheral, clerical or ministerial.”⁶

As the former Commission noted, in Advisory Opinion No. 87-8, the prohibition in § 1-84b (f) applies to state employees and officials who “have discretionary power to affect the terms of a contract—the specifications, for example”; “who review proposals and make recommendations, other than clerical or perfunctory ones, as to bids to be considered or accepted”; “whose responsibilities require them to become involved to a significant, material degree in the evaluation or decisional processes leading to the award of a contract”; “who have such a major responsibility for awarding the contract—such as final approval—that it is unlikely that a person did not become involved personally and substantially in the contract award”; and “who in fact exercise supervisory authority in the negotiation or award of a contract, although not specifically required to do so.”⁷

In other words, the application of § 1-84b (f) is not limited to final approval; rather, it includes all substantive involvement that leads to the final approval. For example, making material suggestions that affect the subsequent decision-making process, making recommendations to one’s supervisors, or otherwise providing substantive input will trigger the § 1-84b (f) prohibition.

Here, if the CGB senior management and the board rely on the transitioning employees’ review and input to form their own judgment and opinion whether to approve the contracts between CGB and the NGO, then the transitioning employees’ involvement will be considered significant and the employees will be subject to the § 1-84b (f) restriction for one year following their departure from state service, if such contracts are signed within one year prior to the employees’ departure from state service.

⁵Regs., Conn. State Agencies § 1-81-39.

⁶Regs., Conn. State Agencies § 1-81-38 (a).

⁷Advisory Opinion No. 87-8, Connecticut Law Journal, Vol. 49, No. 4, p. 1C (July 28, 1987).

Although the CGB board will authorize and approve the contracts prior to the departure of the transitioning employees, the contracts will not be signed by the state until after the transitioning employees commence their post-state employment with the NGO. The former Commission noted that, “by its terms, §1-84b (f)’s operation is explicitly premised on the date the contract . . . is signed,”⁸ and that a contract is not considered “signed” until the necessary signature on behalf of the state has been obtained.⁹ Thus, from a technical standpoint, the transitioning employees will not be in violation of § 1-84b (f).

Finally, the third issue raised by the Petitioner is whether the transitioning employees may have contact with CGB during the first year after leaving state service under the technical implementation of an existing contract exception to General Statutes § 1-84b (b).

Under § 1-84b (b), a former state employee may not represent anyone for compensation before his or her former state agency for a period of one year after leaving state service, concerning any matter in which the state has a substantial interest. The word “represent” has been defined broadly to include any activity regarding a matter at issue, or potentially at issue, that alerts “the state agency in question to the relationship between its former employee and the party ‘represented,’ including attending meetings at which a current agency employee is also in attendance, submitting documents that contain the former employee’s name or making phone calls to the agency to check on the status of a pending matter.”¹⁰ The rationale underlying § 1-84b (b) is to prevent former executive branch officials and employees “from using contacts and influence gained during state service to obtain an improper advantage in their subsequent compensated dealings with their former agency.”¹¹

There is a narrow exception to § 1-84b (b). Under this exception, a former state employee who is not prohibited by § 1-84b (f) from

⁸Internal quotation marks omitted. Advisory Opinion No. 2003-11, Connecticut Law Journal, Vol. 65, No. 7, p. 5D (August 12, 2003).

⁹See Advisory Opinion No. 1993-16, Connecticut Law Journal, Vol. 55, No. 6, p. 6C (August 10, 1993).

¹⁰Advisory Opinion No. 2003-16, Connecticut Law Journal, Vol. 65, No. 24, p. 3C (December 9, 2003).

¹¹Advisory Opinion No. 88-13, Connecticut Law Journal, Vol. 50, No. 8, p. 4C (August 23, 1988).

pursuing private employment within one year of leaving state service and who has been and will continue to perform only technical duties that involve no matters of actual or potential dispute between his new employer and the state agency, may accept employment with such employer to work on implementation of the existing contract, without violating § 1-84b (b).¹²

The foregoing technical implementation of an existing contract exception to § 1-84b (b) prohibition will be available to the transitioning employees provided that the employees were not involved in the negotiation or award of the contracts entered into by CGB and the NGO. As acknowledged by the Petitioner, contact between the transitioning employees and those still at CGB would be limited to technical matters related to the implementation and administration of the continued CGB programs pursuant to the contracts entered into by CGB and the NGO. For the proscribed one-year period under § 1-84b (b), the transitioning employees must not be involved in any amendments to those contracts, solicit further assistance or grants from CGB on behalf of the NGO, seek other discretionary action by CGB for the benefit of the NGO, or be involved in any dispute between CGB and the NGO.

Conclusion

Based on the foregoing, we conclude that (1) the involvement of seven CGB employees in the formation of the NGO and their subsequent transition to it will not be in violation of § 1-84 (c); (2) the employees may begin employment with the NGO immediately after leaving state service without violating § 1-84b (f); and may have contact with CGB during the first year after leaving state service under the technical implementation of an existing contract exception to General Statutes § 1-84b (b).

By order of the Board,

Dated 4/19/18

/s/ Dena M. Castricone
Chairperson / Vice Chairperson

¹²See Advisory Opinion No. 2001-26, Connecticut Law Journal, Vol. 63, No. 19, p. 6D (November 6, 2001), (“it is not necessary or appropriate to apply [the § 1-84b (b)] restriction[] to a former state employee performing only technical duties, such as contract implementation, which involve no matter at issue between the State, or any other party, and [his] private employer”).