

STATE OF CONNECTICUT

OFFICE OF STATE ETHICS

Advisory Opinion No. 2022-1

October 20, 2022

Question Presented:

The petitioner, a former employee of the state Department of Transportation (“DOT”), asks whether he may “seek post-State employment working for a Consultant Inspection firm (GM2) performing construction services for the [DOT].”

Brief Answer:

Based on the facts presented, the petitioner may accept employment with GM2 without violating General Statutes § 1-84b (f), and he may—under an existing, undisputed contract between GM2 and the DOT concerning which he had no involvement in the negotiation or award—interact with DOT employees within a year of leaving state service to perform technical work on that contract.

At its October 20, 2022 regular meeting, the Citizen’s Ethics Advisory Board (“Board”) granted the petition for an advisory opinion submitted by Michael Washington, P.E., a former DOT employee. The Board now issues this advisory opinion under General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials.

Background

In his petition, Mr. Washington provides the following facts for our consideration:

I am writing the Office of State Ethics/ Citizen’s Ethics Advisory Board, seeking a formal opinion on post-State

employment. I retired on April 1, 2022, and would like to work for GM2 (project construct administration related support work) out of Glastonbury. I am seeking guidance as to what restrictions I will have on my post-state employment.

I was a Transportation Supervising Engineer in the CT DOT performing construction project administration in the District 2 office in Norwich. I do not believe I held a “Senior Level” position within the Department; I was not on the DOT-wide organization chart, which in the past has been generally . . . used to distinguish between senior and non-senior staff. In fact, there were three supervising engineers in my District Construction Office, and two more senior engineers above me in the District. Because of that, I believe I qualify for the exception to some of the general post-state employment rules I have learned about over the years.

I am requesting your opinion on my ability to seek post-State employment working for a Consultant Inspection firm (GM2) performing construction services for the Department. The planned work position could be the position: Assistant Office Engineer. For the most part, in my experience, the aforementioned position would report to a more senior level consultant employees on a given project (Resident Engineer, Assistant Resident Engineer, Office Engineer, Chief Inspector) meaning I would not be the most senior consultant on the project (I-95 Interchange 74 Improvements at Route 161 and Replacement of Bridge No. 00250). The work is of a project office administrative involvement (filing, research for letters, coping, possibly taking meeting minutes, and technical input on procedures to name a few), The firm was recently awarded the consultant inspection contract. I had no involvement with any portion of the consultant contract nor construction design during my tenure with the Department. I have never had any involvement with GM2 on any level.

Please note, the following two statements:

1. I did not . . . participate in, or supervise, the negotiation or award of that contract,
2. It was not signed within my last year of state service.

Based on the above, I am interested in a formal opinion from the Office of State Ethics/Citizen's Ethics Advisory Board as to whether I may accept employment with GM2 as an Assistant Office Engineer (I would be seeking a part-time position) prior to the conclusion of my April 2023 post-retirement one year window, and what my limitations would be on the project.

As stated earlier, all of the work I expect to be doing would be on-site field office administrative support and technical in nature on the above noted construction project.

Additional facts will be set forth as necessary.

Analysis

Concerning jurisdiction, General Statutes § 1-81 (a) (3) permits the Board to issue advisory opinions to "any person subject to the provisions of this part," "this part" being the Code of Ethics for Public Officials ("Code"). The "person" here, Mr. Washington, is a former DOT employee and, as such, is now subject to the Code's post-state employment provisions. Accordingly, the Board is statutorily authorized to issue an advisory opinion to Mr. Washington concerning the Code's application to his post-state employment.

Because Mr. Washington left state service a mere six months ago, he remains subject to the Code's two one-year bans, housed in subsections (b) and (f) of General Statutes § 1-84b, as well as its two lifetime bans, housed in General Statutes §§ 1-84a and 1-84b (a), each of which we will address and apply in due course.

First up is § 1-84b (f), it being the only post-state employment provision that could bar Mr. Washington from accepting employment with GM2, and it reads, in relevant part, as follows:

No former . . . state employee (1) who participated substantially in the negotiation or award of . . . a state contract valued at an amount of fifty thousand dollars or more . . . or (2) who supervised the negotiation or award of such a contract or agreement, shall accept employment with a party to the contract or agreement other than the state for a period of one year after his resignation from his state office or position if his resignation occurs less than one year after the

contract or agreement is signed. . . .

Underlying that language is this purpose: “By destroying the incentive to handle contract negotiations so as to affect future employment it protects the State’s interests and removes the suspicion that a State servant has conducted his work in a way to facilitate his future employment.” Advisory Opinion No. 86-9.

Applying § 1-84b (f)’s language here, Mr. Washington may not—for one year after he resigned from his DOT position—accept employment with a party to a state contract (such as GM2) valued at \$50,000 or more if two things hold true: (1) he participated substantially in, or supervised, the negotiation or award of that contract, *and* (2) it was signed within his last year of state service.

As to what is meant by the terms “participated substantially” and “supervised,” the regulations say only this: “substantial participation shall be construed to mean participation that was direct, extensive and substantive, not peripheral, clerical or ministerial.” Regs., Conn. State Agencies § 1-81-38 (a). Fortunately, Advisory Opinion No. 87-8, which dates back to § 1-84b (f)’s inception, puts some meat on the terms’ bones, noting that the provision applies to state employees and public 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.”

By way of example, the activities of a secretary or clerk who typed the contract, but was not otherwise involved in its creation, would not be

considered substantial participation. See Advisory Opinion No. 96-20. In contrast, contributing input that others may use to negotiate a contract, including but not limited to providing information to help determine an agency's needs, is considered substantial participation. See Request for Advisory Opinion No. 0788 (1991); Request for Advisory Opinion No. 2752 (2000).

In this case, Mr. Washington states, unequivocally, that, as a DOT employee, he had no such involvement in the negotiation or award of any state contracts involving GM2, be it contracts signed within or prior to his last year of state service. Indeed, he goes even further, asserting that, during his DOT years, he “never had any involvement with GM2 on any level.” Based on those facts, § 1-84b (f) presents no impediment to his immediate acceptance of post-state employment with GM2.

Next up is § 1-84b (b)—which houses the other one-year ban—and it provides, in relevant part, that

[n]o former executive branch . . . state employee shall, for one year after leaving state service, represent anyone, other than the state, for compensation before the department, agency, board, commission, council or office in which he served at the time of his termination of service, concerning any matter in which the state has a substantial interest. . . .

Its purpose, as stated in Advisory Opinion No. 98-21, is to establish “a ‘cooling-off’ period to inhibit use of influence and contacts with one’s former agency colleagues for improper financial gain.”

The question here, then, is this: whether, within a year of having left state service, Mr. Washington may perform construction services for the DOT under GM2’s state contract—which would involve interaction with DOT employees—without violating § 1-84b (b). Under that provision’s general rule, the answer is plainly no, for such services would require Mr. Washington to

- (1) “represent” (i.e., “do any activity that reveals [his] identity”; Advisory Opinion No. 89-27)
- (2) someone “other than the state” (i.e., GM2)
- (3) for compensation (i.e., he’ll be paid)

- (4) before the department in which he served at the time of his termination of service (i.e., the DOT)
- (5) concerning a matter in which there is a substantial state interest (i.e., a state contract).¹

Though § 1-84b (b)'s general rule bars Mr. Washington's performance of construction services for the DOT under GM2's state contract, such work may fit within a narrow exception to that rule. The exception—which applies only to former non-senior-level state employees, a category into which Mr. Washington fits²—was explained in Advisory Opinion No. 2003-3:

a former state employee who was not involved in the negotiation or award of the private employer's contract with the state agency, 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 the outside contractor to work on implementation of the existing contract, without violating . . . §1-84b . . . (b).

This exception allows only “perform[ance] of technical duties, such as contract implementation, which involve no matter at issue between the State, or any other party, and . . . [the] private employer.” Advisory Opinion No. 2001-26. In other words, the former state employee must “strictly limit[] [his or] her work to implementation of the [contract] in question,” and must

¹“The state has a substantial interest in a matter whenever the finances, health, safety, or welfare of the State or one or more of its citizens will be substantively affected by the outcome.” Advisory Opinion No. 96-6.

²“[T]his exception was not intended to, and does not, apply to former senior-level state officials or employees.” Advisory Opinion No. 92-10. “In determining whether a DOT employee is considered a senior-level employee for purposes of this narrow exception, [Office of State Ethics] staff has historically referred to the DOT organizational chart to distinguish between senior and non-senior staff.” Request for Advisory Opinion No. 19480 (2022); see also Request for Advisory Opinion No. 19167 (2022) (“[w]hile the DOT’s organization chart posted on its website provides some guidance, it is not, in itself, dispositive for purposes of determining whether the technical implementation exception applies to a specific set of facts”). Mr. Washington notes that he was a “Transportation Supervising Engineer . . . in the District 2 office in Norwich,” that “there were three supervising engineers in [his] District Construction Office, and two more senior engineers above [him] in the District,” and that his position “was not on the DOT-wide organization chart . . .” Because neither his name nor job title appear on the DOT organization chart, and his position fell under several layers of supervision, his position is not considered “senior level” for purposes of the exception.

not participate “in any matter at issue between [his or] her employer and [his or her former state employer] (e.g., contract amendment, contract extension, compliance with contract terms)” Id.

As regards, then, any existing, undisputed contract between GM2 and the DOT concerning which Mr. Washington had no involvement in the negotiation or award (be it before or after leaving state service), he may interact with DOT employees within a year of leaving state service solely to perform technical work on that contract. He may not, however, participate in any matter at issue between GM2 and the DOT (i.e., contract amendment, contract extension, compliance with contract terms, etc.) and must strictly limit his work to contract implementation.

Turning now to the two lifetime bans, the first, § 1-84b (a), provides, in relevant part, as follows:

No former executive branch . . . state employee shall represent anyone other than the state, concerning any particular matter (1) in which he participated personally and substantially while in state service, and (2) in which the state has a substantial interest.

This provision’s purpose is to prevent “side-switching in the midst of on-going state proceedings to obtain improper benefit in subsequent dealings involving the State’s interests.” Advisory Opinion No. 89-37. To that end, “represent” is very broadly defined as taking “any action whatsoever regarding any particular matter” Regs., Conn. State Agencies § 1-81-33. “Particular matter,” however, is defined narrowly to include actions of specific application (i.e., contracts, investigations, inspections, etc.), rather than those of general application (i.e., statutes, regulations, general policy, etc.). Declaratory Ruling 2011-B.

Here, Mr. Washington asserts that, while in state service, he “did not work” on the DOT project on which he proposes to perform construction services under GM2’s contract, meaning that the facts before us present no side-switching concerns under §1-84b (a).³

³Even if he did work on this DOT project while in state service, the narrow exception to § 1-84b (b) discussed above (i.e., technical implementation of an existing contract) applies as well to § 1-84b (a). See Advisory Opinion No. 2003-3. In other words, if Mr. Washington qualifies for the exception for purposes of § 1-84b (b)’s cooling-off ban, then he qualifies for it for purposes of § 1-84b (a)’s side-switching ban too.

The other lifetime ban—and the final post-state employment provision to which Mr. Washington is subject—is § 1-84a. Under that provision, “[n]o former executive . . . branch . . . state employee shall disclose or use confidential information acquired in the course of and by reason of his official duties, for financial gain for himself or another person.” The term “Confidential information” is defined, in General Statutes § 1-79 (21), to include the following:

any information in the possession of the state, a state employee or a public official, whatever its form, which (A) is required not to be disclosed to the general public under any provision of the general statutes or federal law; or (B) falls within a category of permissibly nondisclosable information under the Freedom of Information Act, as defined in section 1-200, and which the appropriate agency, state employee or public official has decided not to disclose to the general public.

Further, it includes “not only information that has been recorded in some fashion (e.g., written or taped information), but also orally transmitted information (e.g., negotiations or conversations)” Regs., Conn. State Agencies § 1-81-15 (b).

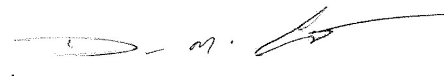
In the context of his employment with GM2, then, Mr. Washington must refrain from using confidential information gained while in state service for its financial gain.

Conclusion

Based on the facts presented, Mr. Washington may accept employment with GM2 without violating § 1-84b (f) and may, under an existing, undisputed contract between GM2 and the DOT concerning which he had no involvement in the negotiation or award (be it before or after leaving state service), interact with DOT employees within a year of leaving state service solely to perform technical work on that contract.

By order of the Board,

Dated October 20, 2022



Chairperson