



# STATE OF CONNECTICUT

## OFFICE OF STATE ETHICS

**NOTE: This is a draft response to a petition for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.**

TO: Board Members

FROM: Brian J. O'Dowd, Assistant General Counsel

RE: Draft Advisory Opinion No. 2010-4: *Application of General Statutes § 1-84b (b) to a Former Department of Transportation Employee Seeking to Work on a Federally Funded Municipal Project*

DATE: June 11, 2010

---

### Introduction

The Citizen's Ethics Advisory Board issues this advisory opinion at the request of Timothy M. Wall ("Petitioner"), a former employee of the state Department of Transportation ("DOT").<sup>1</sup> He asks whether he may engage in a particular post-state employment opportunity without violating General Statutes § 1-84b (b), the cooling-off provision in the Code of Ethics for Public Officials, chapter 10, part 1, of the General Statutes ("Code").

### Facts

The following facts are relevant to this advisory opinion. Petitioner retired from the DOT as a Transportation Engineer III on June 30, 2009. Eighteen days later, he was rehired by the DOT as a temporary-worker retiree to do construction-inspection work at the Bradley International Airport.<sup>2</sup> The temporary work was full time, "at ¾ of his hourly

---

<sup>1</sup>The Citizen's Ethics Advisory Board granted Petitioner's petition for an advisory opinion on May 20, 2010.

<sup>2</sup>Petitioner represents that he asked his supervisors if the temporary work "would jeopardize [his] ability to work on DOT projects as an employee of a consulting firm in the future," and it was his "understanding that it would not and that [he] could work on DOT projects starting after June 30, 2010." Letter from Timothy Wall to Brian O'Dowd, Assistant General Counsel, Office of State Ethics (May 7, 2010) (on file with Office of State Ethics).

rate of pay, with no benefits,” and it lasted from July 17, 2009, through December 31, 2009.<sup>3</sup>

No longer working for the DOT in any capacity, Petitioner is seeking work with GM2 Associates, Inc., a civil engineering and inspection firm, as a construction inspector on a municipal project in the town of Colebrook, Connecticut. The town has retained GM2 to inspect the reconstruction of the Bunnell Street Bridge. The project is 80 percent federally funded and, like other federally funded projects of this kind, is overseen by the DOT, which entered into an agreement with the town on October 5, 2009, setting forth their respective responsibilities.

Those responsibilities (as articulated by the DOT Office of Legal Services) include the following. The town hires and pays a construction contractor and a construction-inspection firm (“CI firm”). The CI firm is on the project worksite each day, and the construction inspector prepares and keeps the project’s four-volume field books: Vol. I—inspector’s daily work reports; Vol. II—daily contract item quantities; Vol. III—computations and quantity summaries; and Vol. IV—miscellaneous contract data. The daily work report “lists the construction work which that inspector oversaw and the materials which were used/installed on a given day,” and it “form[s] the basis of the contractor’s payment estimate . . . .”<sup>4</sup> The “payment estimate is submitted . . . to the town for approval, and if approved, that payment estimate is the figure paid by the town to the construction contractor for that month.”<sup>5</sup>

In its oversight role, the DOT approves town-hired personnel working on the project and reimburses the town for its payments to the CI firm and the construction contractor. On a monthly basis, the DOT conducts two reviews: first, to determine how much to reimburse the town, it reviews the “pay estimate on which the town paid the contractor”; and second, it “conducts a monthly review of . . . [the] project,” which involves, among other things, reviewing “the [daily work reports] . . . the Volume 2 (quantities) and the Volume 3 (computations) . . . .”<sup>6</sup> Because the construction inspector “prepares most of the records . . . and is the keeper of all four volumes on the project,” the DOT’s monthly reviews “involve[] substantial oversight of the inspector’s work/records.”<sup>7</sup> In addition to the monthly reviews, at the project’s completion, the DOT

---

<sup>3</sup>Letter from Timothy Wall to Brian O’Dowd, Assistant General Counsel, Office of State Ethics (April 20, 2010) (on file with Office of State Ethics).

<sup>4</sup>Email from Alice Sexton, Principal Attorney, Department of Transportation, to Brian O’Dowd, Assistant General Counsel, Office of State Ethics (May 21, 2010) (on file with Office of State Ethics) (hereinafter “May 21 Email”).

<sup>5</sup>Id.

<sup>6</sup>Email from Alice Sexton, Principal Attorney, Department of Transportation, to Brian O’Dowd, Assistant General Counsel, Office of State Ethics (June 9, 2010) (on file with Office of State Ethics) (hereinafter “June 9 Email”).

<sup>7</sup>Id.

“reviews all of the project books to make sure all of the money spent was in conformance with federal requirements.”<sup>8</sup>

## Question

We consider whether Petitioner may accept employment with GM2 as a construction inspector on the municipal bridge-reconstruction project without violating § 1-84b (b).

## Conclusion

We conclude that § 1-84b (b) prohibits Petitioner from working as a construction inspector on the municipal project until December 31, 2010, one year from the date he left state service.

## Analysis

In 1982, the Connecticut General Assembly established the Code of Ethics Study Committee to recommend technical and policy revisions to the Code. Recognizing the “spotty and limited provisions concerning public officials and State employees who leave state government service for private employment,”<sup>9</sup> the Study Committee recommended that the General Assembly implement “generally applicable revolving door legislation,” including a cooling-off provision.<sup>10</sup>

The purpose of this cooling-off provision, explained the Study Committee, is “to preclude [a] former official from exerting undue influence over his former agency . . . .”<sup>11</sup> The restriction is “aimed at contact with the former agency, since any contact could result in preferential treatment by virtue of the individual’s former status.”<sup>12</sup> It is irrelevant whether the issue “involved is one with which the individual had contact as a public employee,” for the “undue influence guarded against is that which results from mere association with the former agency.”<sup>13</sup> “A cooling period,” the Study Committee finished, “combats the exertion of undue influence, since that influence tends to fade with time.”<sup>14</sup>

---

<sup>8</sup>May 21 Email.

<sup>9</sup>Codes of Ethics Study Committee, Report to the General Assembly by the Codes of Ethics Study Committee (January 15, 1983), p.20.

<sup>10</sup>Id., 23.

<sup>11</sup>Id., 21.

<sup>12</sup>Id.

<sup>13</sup>Id.

<sup>14</sup>Id.

The General Assembly apparently agreed, as it accepted the language proposed by the Study Committee, without discussing it,<sup>15</sup> and enacted what was to become § 1-84b (b), which now reads, in relevant part, as follows:

No former executive branch . . . state employee shall, for one year after leaving state service, represent anyone, other than the state, for compensation before the department . . . in which he served at the time of his termination of service, concerning any matter in which the state has a substantial interest. . . .

Applying that language here, we have a former executive-branch state employee (specifically, a former DOT employee), and § 1-84b (b)'s restriction applies to him "for one year after leaving state service," so the first question is, on what date did he leave state service? The candidates are: June 30, 2009, the date he retired from the DOT as a Transportation Engineer III; and December 31, 2009, the date he completed his work for the DOT as a temporary-worker retiree.

To determine the applicable date, we turn to Advisory Opinion No. 98-21. In that opinion, the State Ethics Commission ("SEC") applied § 1-84b (b) to former state managers working under the temporary-worker-retiree program, which "allows retirees to work up to 120 days per year without affecting their eligibility for retirement benefits."<sup>16</sup> The SEC looked first to the Code's definition of "state employee," which, in relevant part, is this: "State employee means any employee in the executive . . . branch of state government, whether in the classified or unclassified service and whether full or part-time . . . ."<sup>17</sup> In light of that broad definition, the SEC concluded that, "[a]s 120 day workers, the 'retirees' occupy classified state positions for that time period; and, therefore, are considered state employees for purposes of the Code . . . ."<sup>18</sup> Consequently, it explained, even if the retiree "left permanent state service two years ago, he will still be subject to the one year restriction of § 1-84b (b) *for a year after completing his 120 [day] service.*"<sup>19</sup>

---

<sup>15</sup>See Advisory Opinion No. 86-11.

<sup>16</sup>Advisory Opinion No. 98-21.

<sup>17</sup>(Internal quotation marks omitted.) *Id.*, quoting General Statutes § 1-79 (m).

<sup>18</sup>Advisory Opinion No. 98-21; see also Advisory Opinion No. 2001-4 ("as 120 day workers, the 'retirees' occupy classified positions and, therefore, are still considered state employees, not independent contractors, for purposes of the Code"). In its "Manager's Guide," the Department of Administrative Services, which administers the temporary-worker-retiree program, states: "Retired state workers may return to work in state government with certain restrictions. Retired state workers are rehired into the job code 'Temporary Worker Retiree.' The total length of employment cannot exceed 120 working days in any one calendar year. Approval for establishing a worker retiree position follows the same procedure as any other classified and compensated position in state service. Pay is normally restricted to the level associated with the work being performed but to be no more than the salary paid when the employee left state service." <http://www.das.state.ct.us/hr/Managers%20Guide%20of%202009%20Final.pdf>.

<sup>19</sup>(Emphasis added.) Advisory Opinion No. 98-21.

Here, although Petitioner left permanent state service in June 2009, he returned from July 17 through December 31 of that year as a temporary-worker retiree for the DOT. As a temporary-worker retiree, he was a classified, full-time employee of the executive branch—in other words, a “state employee”—for the duration of his temporary status. It follows that Petitioner did not “leav[e] state service,” for purposes of § 1-84b (b), until the date he completed his temporary-retiree work, namely, December 31, 2009. And because the restriction in § 1-84b (b) applies to him “for one year after leaving state service,” Petitioner is subject to it until December 31, 2010.

The question now is whether—before that date (i.e., within one year of having left state service)—Petitioner may work as a construction inspector on the municipal bridge-reconstruction project without violating § 1-84b (b), under which he may not do as follows:

- (1) represent
- (2) anyone, other than the state,
- (3) for compensation
- (4) before the department in which he served at the time of his termination of service,
- (5) concerning any matter in which the state has a substantial interest.

First then, to the term “represent,” which the SEC defined, for purposes of § 1-84b (b), to mean “any activity which reveals the identity of the former employee to his former agency.”<sup>20</sup> Examples of activities deemed to fall within that definition include making a personal appearance or phone call, being designated on a firm’s letterhead,<sup>21</sup> or “submitting a document on which the former State employee’s name appears.”<sup>22</sup> Here, because Petitioner’s work as a construction inspector would involve signing documents (e.g., daily work reports) that would be submitted to the DOT for review, the work would require him to “represent,” as that term is defined for purposes of § 1-84b (b).

Turning to § 1-84b (b)’s other four parts, Petitioner’s representation would be on behalf of someone other than the state (i.e., the town and GM2); it would be compensated; it would be before the department in which he served at the time of his

---

<sup>20</sup> Advisory Opinion No. 98-21

<sup>21</sup> Advisory Opinion No. 92-10.

<sup>22</sup> In the Matter of a Request for a Declaratory Ruling, David Silverstone, Esq., Applicant, October 11, 1988.

termination of state service (i.e., the DOT); and it would concern a matter in which the state has a substantial interest (i.e., bridge reconstruction)—given that the SEC determined that “[t]he 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.”<sup>23</sup>

Having met each of the restriction’s five parts, Petitioner’s work as a construction inspector on the municipal bridge-reconstruction project is clearly prohibited by the plain language of § 1-84b (b)—at least, that is, until December 31, 2010, one year from the date he left state service.

But even so, our inquiry does not end there, as we must determine whether Petitioner’s work fits within a “narrow” SEC-created exception to the one-year ban in § 1-84b (b).<sup>24</sup> Under this exception, the restriction in § 1-84b (b) does not “prohibit contact with one’s former agency when the contact [is] technical in nature and [does] not involve the individual in any matters at issue between the State, or any other party, and the individual’s employer or client.”<sup>25</sup> The rationale underlying the exception was this: that the cooling-off purpose underlying § 1-84b (b)

could be fulfilled by applying the subsection only when the ‘representation’ involved a matter *in which the State exercised discretionary authority* . . . . It did not seem necessary, or fair, to further limit post-state employment-opportunities by extending the restriction to contacts with one’s former agency that did not present the opportunity for use of improper advantage . . . .<sup>26</sup>

Therefore, a key question in applying this exception is, does the matter at issue call for “the exercise of discretionary authority by the State”?<sup>27</sup>

An example of a situation where the State did not exercise any discretionary authority is in Advisory Opinion No. 90-21. There, a Department of Economic Development (“DED”) employee seeking post-state employment with a non-profit entity asked the following question: whether, within one year of leaving state service, he would be permitted to “prepare ‘progress reports’ [on the non-profit’s behalf] that would be sent

---

<sup>23</sup>(Emphasis added.) Advisory Opinion No. 96-6. Cf. Regs., Conn. State Agencies § 1-81-35 (defining “substantial interest” for purposes of § 1-84b (a)).

<sup>24</sup>The SEC created this exception in Advisory Opinion No. 88-15, and it is found neither in the Code nor in its interpretive regulations. On more than one occasion, the SEC emphasized that this exception is a narrow one. See, e.g., Advisory Opinion No. 91-23 (“[t]he Commission wishes to stress that this limitation [to the restriction in § 1-84b (b)] is narrow in scope”).

<sup>25</sup>Advisory Opinion No. 90-21.

<sup>26</sup>(Emphasis added.) *Id.*

<sup>27</sup>Advisory Opinion No. 88-15.

to DED for its records.”<sup>28</sup> The progress reports, it was explained, “*would not require any action on the part of DED.*”<sup>29</sup> In applying the exception to § 1-84b (b) to those facts, the SEC concluded: “If, in fact, the ‘progress reports’ . . . are a routine requirement of his job, *do not necessitate any action by DED* and involve no matter at issue between [DED] and [the post-state] employer . . . he would be permitted to submit the reports to DED within the one year period established by § 1-84b (b).”<sup>30</sup>

Unlike the progress reports there, which sat in a DED filing cabinet and required no action on DED’s part, the documents prepared and signed by Petitioner in his role as construction inspector play an integral part in the DOT’s oversight of the municipal bridge-reconstruction project. Indeed, as noted by the DOT Office of Legal Services, the DOT’s “monthly review of the project and [its] review of the town’s payment to the contractor and consultant involves substantial oversight of the Chief Inspector’s work/records.”<sup>31</sup> More than that, however, at the project’s completion, the DOT reviews all of the project books (which, again, are prepared and kept by the construction inspector) “to make sure all of the money spent was in conformance with federal requirements.”<sup>32</sup>

In that respect, the situation before us is more akin to that in Advisory Opinion No. 90-18. In that opinion, a Department of Education (“DOE”) employee seeking post-state employment with a Regional Educational Service Center (“RESC”)—a DOE-funded entity—asked this question: whether, within one year of leaving state service, he was prohibited from “[s]igning certifications [that would be submitted to the DOE] which state that the RESC has expended money in a proper manner . . . .”<sup>33</sup> In concluding that § 1-84b (b) would prohibit the DOE employee from signing the certifications within that one-year period, the SEC stated:

It must be assumed that the certification is not just a rote act, but rather represents a true evaluation of the validity of the RESC’s expenditures. Since the certification is made to assure the State that the funds were properly spent, it provides an opportunity for the former state employee’s new employer to benefit improperly, however unintentionally, as a result of the ex-employee’s contact with the [DOE].<sup>34</sup>

The same is true here. For example, in preparing daily work reports, the construction inspector is not engaging in a rote or mechanical act, but providing a true

---

<sup>28</sup>Advisory Opinion No. 90-21.

<sup>29</sup>(Emphasis added.) Id.

<sup>30</sup>(Emphasis added.) Id.

<sup>31</sup>June 9 Email.

<sup>32</sup>May 21 Email.

<sup>33</sup>Advisory Opinion No. 90-18.

<sup>34</sup>Id.

evaluation of the “construction work which that inspector oversaw and the materials which were used/installed on a given day.”<sup>35</sup> Those reports “form the basis of the contractor’s payment estimate,” which is “submitted . . . to the town for approval, and if approved, that payment estimate is the figure paid by the town to the construction contractor for that month.”<sup>36</sup> After the town pays the contractor, the DOT reviews the pay estimate to assure that funds were properly spent and to determine how much to reimburse the town for its payments to the contractor. Thus, Petitioner’s work as a construction inspector would provide an opportunity for the town—which is seeking money from the DOT—to benefit improperly, however unintentionally, from the Petitioner’s contact with his former state agency.

That being the case, Petitioner’s proposed work does not fit within this “narrow” exception to § 1-84b (b), for as noted above, it was created specifically for situations in which “contacts with one’s former agency . . . did *not* present the opportunity for use of improper advantage,”<sup>37</sup> and in which there was *no* “exercise of discretionary authority by the State.”<sup>38</sup> Because the exception to § 1-84b (b) does not apply, the general prohibition does, meaning that Petitioner may not, until December 31, 2010, work as a construction inspector on the municipal bridge-reconstruction project.

---

<sup>35</sup>May 21 Email.

<sup>36</sup>Id.

<sup>37</sup>(Emphasis added.) Advisory Opinion No. 90-21.

<sup>38</sup>Advisory Opinion No. 88-15. Because we conclude that this exception to § 1-84b (b) does not apply to the facts at hand, we need not address the broader issue of whether there is a statutory basis for it.