



# STATE OF CONNECTICUT

## OFFICE OF STATE ETHICS

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### Draft Declaratory Ruling 2011-B

May 12, 2011

**Question Presented:** May the Capitol Region Education Council hire an employee of the Department of Education as a consultant within one year of his leaving state service, and if so, what types of activities may he engage in on its behalf?

**Brief Answer:** Provided that the Department of Education employee took no action that would place him within the prohibition of General Statutes § 1-84b (f), he may accept the post-state employment in question. However, he must abide by the guidelines detailed below, which are intended as a broad, but not exclusive, outline of the types of issues that may arise under the Ethics Code.

At its May 2011 regular meeting, the Citizenø Ethics Advisory Board (øBoardö) granted the petition for a declaratory ruling submitted by Donald P. Walsh (øPetitionerö), Deputy Executive Director of the Capitol Region Education Council. The Board issues this declaratory ruling on the date shown below in accordance with § 1-92-39b of the Regulations of Connecticut State Agencies. The ruling interprets only the Code of Ethics for Public Officials (øEthics Codeö)<sup>1</sup> and the regulations of the Office of State Ethics, and is based solely on the facts provided by the Petitioner.

### **Facts**

The facts provided by the Petitioner are set forth below and are considered part of this ruling:

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<sup>1</sup>Chapter 10, part I, of the General Statutes.

I am writing to the Citizenø Ethics Advisory Board (øBoardö) on behalf of the Capitol Region Education Council (øCRECö) to seek advice or request an advisory opinion regarding the possible employment at CREC of a former State of Connecticut Department of Education (øDOEö) employee.

It is CRECø understanding that Mr. David Wedge retired from the DOE effective August 1, 2010 and that since his retirement, Mr. Wedge has worked as a temporary state employee. It is CRECø further understanding that Mr. Wedge will cease to be a temporary state employee effective June 30, 2011. Based on previous State Ethics Commission decisions, CREC is of the opinion that the revolving door provisions contained in Conn. Gen. Stat. § 1-84b (b) is applicable to Mr. Wedge for one year after he completes his time as a temporary state employee. Accordingly, Mr. Wedge is prohibited from representing CREC before the DOE until June 30, 2012. In addition, pursuant to Conn. Gen. Stat. § 1-84b (a), Mr. Wedge is forever prohibited from representing CREC before the DOE on any matter in which he participated personally and substantially while in state service, and in which the state has a substantial interest.

I am writing this letter because CREC is considering hiring Mr. Wedge as a consultant beginning July 1, 2011 and respectfully requests advice or an advisory opinion from the Board as to whether: (1) Mr. Wedge can be hired by CREC as a consultant beginning July 1, 2011 without violating the provisions of § 1-84b (b) or § 1-84b (a); and (2) what sort of activities, if any, Mr. Wedge could perform as a CREC employee beginning on July 1, 2011 that would not violate the provisions mentioned above or any other provision of the State Code of Ethics.

### **Analysis**

As noted in Advisory Opinion No. 2001-26, øa 120 day worker occupies a classified state position for that time period; and, therefore, is considered a state employee for purposes of the [Ethics] Code . . . ö Thus, until June 30, 2011, his last day of state employment, Mr. Wedge will be subject to the Ethics Code in its entirety. That means that his job hunt must comply with the Ethics Codeø conflict-of-interest provisions, General Statutes §§ 1-84 through 1-86, which are

premised on a single rationale: that "public service is a public trust and must not be used for personal financial gain."<sup>2</sup>

In Advisory Opinion No. 2004-14, the former State Ethics Commission (former Commission) addressed a public official's job hunt, particularly whether he could discuss job opportunities with private entities while still a state employee. Although answering that question affirmatively, the former Commission explained that, "while he is actively pursuing a particular job opportunity, he should have nothing to do with his potential employer's state business."<sup>3</sup> By "active pursuit," it meant *not* the point at which the public official "sends in a resume in response to an advertisement, but has not yet heard back from the employer; but rather "the point at which the . . . official is scheduled for an interview with the prospective employer."<sup>4</sup> At that point, if required to take official action that would affect the potential employer's state business, the public official would have to follow the procedure set forth in General Statutes § 1-86 (a), namely: prepare a written statement, signed under penalty of false statement, describing the matter requiring action and the nature of the conflict, and deliver a copy of the statement to his immediate superior, who must assign the matter to someone at or above his level.<sup>5</sup>

In the situation before us, it is readily apparent that Mr. Wedge is at the point of "active pursuit" of a job opportunity with CREC, meaning that, while still in state service, he may not have anything to do with CREC's state business, and that if required to get involved with it, he must comply § 1-86 (a)'s notification and recusal requirements. Further, he is prohibited by General Statutes § 1-84 (g) "the Ethics Code's anti-bribery provision" from soliciting or accepting anything of value, including a promise of future employment, based on any understanding that his "official action or judgment . . . would be or had been influenced thereby."

Turning from the "active pursuit" of a job opportunity to the acceptance of post-state employment, we note first that, because "a 120 day worker . . . is considered a state employee for purposes of the [Ethics] Code," the "post-state employment provisions fully apply to the 120 day worker at the end of the

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<sup>2</sup>Advisory Opinion No. 91-4.

<sup>3</sup>Advisory Opinion No. 2004-14. The former Commission based its conclusion on General Statutes § 1-84 (c), which provides in relevant part: "no public official or state employee shall use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated."

<sup>4</sup>Advisory Opinion No. 2004-14.

<sup>5</sup>Id.

temporary employment period.<sup>6</sup> Of those, the only one that could prohibit Mr. Wedge from accepting post-state employment with CREC is General Statutes § 1-84b (f).

Section 1-84b (f) prohibits a former state employee from accepting employment for one year after leaving state service with a party to a state contract valued at \$50,000 or more if he participated substantially in, or supervised, the negotiation or award of that contract, *and* it was signed within his last year of state service. The regulations clarify that, under § 1-84b (f), "employment" includes "any work or endeavor, whatever its form, undertaken in order to obtain financial gain"; "contract" includes, but is not limited to, "any contract implementing a state grant or award of fifty thousand dollars or more, unless the grant is determined solely by statutory formula"; and "substantial participation" means "participation that was direct, extensive and substantive, not peripheral, clerical or ministerial."<sup>9</sup>

By way of example of participation that is direct, extensive, substantive, and (thus) "substantial," the former Commission explained that § 1-84b (f) applies to persons

- "who negotiate the terms of a contract, or amendments to it"<sup>10</sup>;
- "who have discretionary power to affect the terms of a contract the specifications, for example"<sup>11</sup>;
- "who review proposals and make recommendations, other than clerical or perfunctory ones, as to bids to be considered or accepted"<sup>12</sup>;
- "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"<sup>13</sup>;

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<sup>6</sup>Advisory Opinion No. 2001-26.

<sup>7</sup>Regs., Conn. State Agencies § 1-81-39.

<sup>8</sup>Regs., Conn. State Agencies § 1-81-38 (b) and (c).

<sup>9</sup>Regs., Conn. State Agencies § 1-81-38 (a).

<sup>10</sup>Advisory Opinion No. 86-9.

<sup>11</sup>Advisory Opinion No. 87-8.

<sup>12</sup>Id.

<sup>13</sup>Id.

- 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<sup>14</sup>; and
- who in fact exercise supervisory authority in the negotiation or award of a contract, although not specifically required to do so.<sup>15</sup>

As applied here, Mr. Wedge must look back one year from the date he leaves state employment (i.e., June 30, 2011) to determine whether he had any such involvement in the negotiation or award of a contract valued at \$50,000 or more and signed with that year between the state of Connecticut and CREC. If not, then he may accept post-state employment as a consultant for CREC without violating the prohibition in § 1-84b (f).

But he still must abide by three other revolving-door provisions, the first being General Statutes § 1-84a, under which Mr. Wedge may never 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 includes

(1) any information in the possession of the State, a state employee, or a public official, whatever its form, which is mandatorily non-disclosable to the general public under any state or federal statute, regulation, or provision; and (2) any information in the possession of the State, a state employee, or a public official, whatever its form, which falls within a category of permissibly non-disclosable information under the Freedom of Information Act, Chapter 3 of the Connecticut General Statutes, and which the appropriate agency or individual has decided not to disclose to the general public.<sup>16</sup>

Second, under General Statutes § 1-84b (a), Mr. Wedge may never represent anyone other than the state, concerning any particular matter (1) in which he participated personally and substantially<sup>17</sup> while in state service, and (2)

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<sup>14</sup>Id.

<sup>15</sup>Id.

<sup>16</sup>Regs., Conn. State Agencies § 1-81-15 (a). In § 1-81-31 of the Regulations of Connecticut State Agencies, it states: "For the purposes of Section 1-84a, the term confidential information shall have the same meaning as when used in Subsection (b) and (c) of Section 1-84 of the Connecticut General Statutes. The term confidential information is defined in Sec. 1-81-15 of these regulations."

<sup>17</sup>"Substantial participation" means "participation that was direct, extensive and substantive, not peripheral, clerical or ministerial." Regs., Conn. State Agencies § 1-81-32.

in which the state has a substantial interest.<sup>18</sup> Designed to prevent "side-switching in the midst of on-going state proceedings,"<sup>19</sup> § 1-84b (a) will attach to Mr. Wedge for life, and will apply regardless of the forum (be it his former agency, a court, etc.), and regardless of whether he is compensated to "represent," a term defined "to include any action whatsoever regarding any particular matter . . . ."<sup>20</sup> By "particular matter," it is meant actions of specific application (e.g., contracts, requests for rulings, investigations, permits, grants, orders, etc.), *but not* actions of general application (e.g., regulations, legislation, the formulation of general policy, etc.).<sup>21</sup> And even if Mr. Wedge is prohibited from representing CREC with respect to a "particular matter," § 1-84b (a) will not prohibit CREC "from engaging in any representation that [Mr. Wedge] could not undertake, provided that [he] shall not receive any compensation or profit resulting from the representation."<sup>22</sup>

Third, General Statutes § 1-84b (b) prohibits Mr. Wedge, for one year after leaving state service, from representing anyone (including CREC), other than the state, for compensation before his former state agency (i.e., the DOE), concerning any matter in which the state has a substantial interest.<sup>23</sup> The provision's purpose is to establish a "cooling off period to inhibit use of influence and contacts with one's former agency colleagues for improper financial gain."<sup>24</sup> For purposes of this cooling-off provision, the term "represent" has been defined to include "all forms of contact (e.g., meeting, correspondence, telephone call, etc.) with any member of [one's former agency] regarding any state issue."<sup>25</sup> Notwithstanding that broad definition, Mr. Wedge may, by way of example, engage in the following conduct without running afoul of § 1-84b (b):

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<sup>18</sup>"[T]he State shall be deemed to have 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." Regs., Conn. State Agencies § 1-81-35.

<sup>19</sup>Advisory Opinion No. 89-37.

<sup>20</sup>Regs., Conn. State Agencies § 1-81-33. There are two exceptions to the definition of "represent": "no former . . . state employee: (a) Shall be prohibited from testifying on behalf of a party other than the State in any matter in any forum, if the individual has been properly subpoenaed to so testify and receives only statutory witness fees. (b) Shall be prohibited from engaging in work that is technical in nature and that involves no matter at issue between the State, or any other party, and the entity that the individual is representing, e.g., work implementing a previously agreed upon contract between the private entity and the State." *Id.*

<sup>21</sup>Advisory Opinion No. 2010-1.

<sup>22</sup>Regs., Conn. State Agencies § 1-81-34.

<sup>23</sup>"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.

<sup>24</sup>(Internal quotation marks omitted.) Advisory Opinion No. 98-21.

<sup>25</sup>Advisory Opinion No. 2002-24.

- use his expertise “back at the office” or “behind the scenes” (e.g., preparing documents for submission to the DOE), provided that nothing ultimately submitted to the DOE contains his name<sup>26</sup>;
- contact the DOE for generic information (e.g., a set of the latest regulations), provided that the request does not “specifically or by implication reveal[] the entity for which the information is needed”<sup>27</sup>;
- socialize with DOE employees, provided that social occasions are not used to improperly represent his new employer before his former agency, and that he does not attempt “to deliberately inform former colleagues of [his] new position and employer, if [his] new employer is involved in representation before the State agency”<sup>28</sup>;
- sit in on DOE hearings or meetings, provided that his “new employer is not representing itself . . . at that hearing or meeting”<sup>29</sup>;
- represent CREC before any other state entity, provided that DOE employees do not serve on the entity (as could be the case with, for example, a legislative task force).<sup>30</sup>

By order of the Board,

Dated \_\_\_\_\_

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Chairperson

<sup>26</sup>See Advisory Opinion No. 2006-2.

<sup>27</sup>Declaratory Ruling 90-A.

<sup>28</sup>Id. In Declaratory Ruling 90-A, the former Commission recognized that there would “be occasions when, through inadvertence . . . the former employee’s new position will be revealed,” but concluded that “[d]eliberate and/or repeated efforts by the former state employee to reveal his or her new role do violate the [Ethics] Code.” Id.

<sup>29</sup>Id. However, not only may Mr. Wedge not “attend a meeting at [his] former agency as a representative of a new employer with regard to matters of specific interest to the private employer”; Advisory Opinion No. 90-18; he may not even sit in at such a meeting: “by sitting in at [his former agency’s] hearing or meeting (whether scheduled or unscheduled) at which [his post-state] employer is representing itself or another entity, [he] is providing compensated representation in violation of § 1-84b (b) even though someone else may also be providing representation.” Declaratory Ruling 90-A.

<sup>30</sup>See Advisory Opinion No. 96-18.