



STATE OF CONNECTICUT

OFFICE OF STATE ETHICS

Advisory Opinion No. 2015-2

March 19, 2015

Question Presented: The petitioner asks whether, as a former employee of the Connecticut Green Bank, she may engage in post-state employment as the head of a private business which would provide funding to projects that have been approved by the Green Bank.

Brief Answer: We conclude that the petitioner may engage in the proposed post-state employment so long as she abides by the restrictions explained herein.

At its February 2015 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Jessica Bailey. The Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials ("Ethics Code"),¹ 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

Jessica Bailey would like to engage in post-state employment heading a private business which would provide funding to projects approved by the Green Bank. The facts, in the request submitted by petitioner, are as follows:

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

My name is Jessica Bailey and I was formerly the Director of the Commercial and Industrial Programs for the Connecticut Green Bank (formerly the Clean Energy Finance Investment Authority), a quasi-state agency.² I left my current position, effective January 23, 2015, to start a private company. I am writing to seek a formal advisory opinion from the Board on whether my business plan could potentially violate any of the provisions of the State Ethics Code, specifically the revolving door provisions provided in section 1-84b of the General Statutes. The relevant facts are as follows.

Under Connecticut General Statutes Section 16a-40g, the Green Bank was named administrator of the Property Assessed Clean Energy (PACE) program in Connecticut. The PACE legislation enables commercial property owners to access financing to perform clean energy improvements to their properties by allowing a tax lien to be placed on the property to secure the financing. The statute also gives the Green Bank a regulatory role over the PACE program. The Green Bank must ensure that certain statutory requirements are met before allowing the lien to be placed on the property: the municipality in which the building is located must have "opted in" to the PACE program through a legal agreement with the Green Bank; the energy savings must exceed the upfront investment; an energy audit must be completed on the property; and the mortgage lender must consent to the lien going on the property. If those criteria are met, the Green Bank will approve the property lien.

Over the past 2 years, in addition to playing this regulatory role, the Green Bank has been providing its own capital to fund PACE assessments and then selling the loans to private investors. So, rather than just the administrative agency approving building owners' applications for PACE financing, the Green Bank is now acting as a bank lender. This process has been successful for the Green Bank, but it was never intended that the Green Bank play the lender role in perpetuity, once private capital was available to

²"Quasi-public agency" means ... the Connecticut Green Bank ..."
General Statutes § 1-79 (12).

fund these transactions. Indeed, the reason the Connecticut Green Bank was established and the PACE policy was passed was to allow private capital to finance clean energy upgrades in Connecticut. The mission of the Green Bank is to attract private capital and the staff and board of the Green Bank believe that the private capital is now willing to finance these transactions that it will soon no longer be necessary to fund these transactions with Green Bank money.³

I joined the Green Bank in September 2012 as to design and lead the PACE program. I led the efforts to build a program that would allow the Green Bank to meet all of its statutory requirements in administering the PACE program. This has included issuing an RFP to select an outsourced technical review team to approve the energy savings on each project, working with municipalities to have them join the PACE program through a legal agreement with the Green Bank, supporting outreach to energy contractors and building owners, and reviewing individual transactions that came to the Green Bank for financing.

I left the Green Bank effective Jan 23rd to start a private company that will finance transactions directly. The model we have built in Connecticut is much sought after and I endeavor – through the private sector – to expand PACE financing in the state and to bring it to other states. It is an effort to scale up and scale out what we have done successfully in Connecticut through a quasi-state agency.

Through this private business, I would provide private financing to building owners in Connecticut and I am seeking some guidance from the Board to make sure I can do so in a way that does not violate revolving door restrictions.

The structure of my business will be as follows:

³The Green Bank is currently proposing legislation to make it clear that private capital providers may directly finance PACE transactions. This opinion assumes that Ms. Bailey's company will directly finance such transactions rather than act as a buyer of existing Green Bank loans.

1. A building owner would work with an energy service company to determine what types of energy improvements they would like to undertake.
2. Once the improvements are identified and costs estimated, the owner would then apply for PACE approval to the Green Bank.
3. If approved (based on the statutory requirements), the owner would be offered financing through my company.
4. Once the financing has closed, the Green Bank (per statute) would place a lien on the property for the amount of the financing and assign the lien to the capital provider, in this case my company.
5. My company would be compensated through closing fees charged to the building owner and through my company's ability to aggregate multiple transactions and sell at a discount.

I have reviewed the revolving door provisions contained in section 1-84b and believe that my proposed business structure would not violate such rules. I will have no role in representing the owner before the Green Bank for approval. The application would come from the owner to the Green Bank for approval. I would not be representing the owner and my name would not be on the application. Moreover, I would not receive any compensation from the Green Bank for performing this function and my company would be paid through the private finance transaction between my company and the building owner. In short, I would not be representing anyone before my former agency.

Also, to the extent it is relevant, the following facts are also true:

- I am not seeking employment with a company with whom my agency regulated.

- I am not seeking employment with a company that was awarded a state contract while I was in my state position.
- I am not seeking to be hired as a consultant, or in any way compensated, by my former state agency.
- I am not bidding on any contract being awarded by my former state agency.
- I would not be directly interacting with my former state agency during their review and approval of PACE applications for building owners for whom I am providing financing.
- I would not be “side-switching” in that I would not finance any transactions in which I had substantial involvement as an employee of the Green Bank.

Based on the above, I am asking the Board to opine on whether my anticipated business model would violate the revolving door rules contained in section 1-84b. In addition, I am asking the Board for guidance on what activities, if any, I would be prohibited from engaging in during my first year out of service for the Green Bank? For instance, though I would not be representing the PACE applicant (the building owner), would I be prohibited from placing a call with the Green Bank to inquire on the status of the application? Finally, were I to hire an employee, would any of the revolving door rules apply to him or her?

Ms. Bailey further added that, because a company applies to the PACE program first, and then seeks financing, the Green Bank is unaware of who the capital provider will be. The one point at which there is interaction between the Green Bank and the capital provider is during the lien-assignment phase. By then, however, the Green Bank would not be exercising discretionary authority, as this phase is merely ministerial. If a problem arose with the financing provided by the capital provider, the Green Bank would remain uninvolved.

In addition, Brian Farnen, General Counsel of the Green Bank, clarified the following: With respect to the lien-assignment process,

the town places the lien on the property, assigns the lien to the Green Bank, which then assigns the lien to a capital provider. The issuance of the lien is mostly a process between the Green Bank and the municipality. Mr. Farnen does not believe that the Green Bank will exercise discretionary authority upon assignment of the lien to the private capital provider. "The lien assignment can be understood as the assignment of the C-PACE benefit assessment (and the related right to place the C-PACE benefit assessment lien on the property) from one party to another. Here, the ultimate goal is for the capital provider to have the lien assigned to them since they are the party receiving the payments under the benefit assessment and require the security in the property. The lien assignment occurs shortly after the closing." Finally, Mr. Farnen made it clear that while Ms. Bailey was instrumental in developing the PACE program, she was one of many actors.

Analysis

As a former "state employee"⁴ of the CT Green Bank, Ms. Bailey is subject to four of the Ethics Code's post-state employment provisions—General Statutes §§ 1-84a, 1-84b (a), 1-84b (b), and 1-84b (f).

Addressing the most relevant provision first, pursuant to § 1-84b (b),

No former ... quasi-public agency public official or 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.

The word "represent," as used in this subsection, 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

⁴"State employee' means ... any employee of a quasi-public agency...."
General Statutes § 1-79 (13).

employee's name or making phone calls to the agency to check on the status of a pending matter."⁵

Section 1-84b (b) was intended to prevent state employees from "using contacts and influence gained during state service to obtain improper advantage in their subsequent compensated dealings with their former agency."⁶ "The purpose of this cooling-off provision ... is 'to preclude [a] former official from exerting undue influence over his former agency....'"⁷

This one-year ban does not prohibit a former state employee from using her expertise in analyzing or preparing documents and/or advising her private employer, so long as in the use of such expertise she does not reveal her identity or association with the private employer, nor reveal any confidential information learned while in state service. For example, in Advisory Opinion No. 2004-15,⁸ wherein a former employee of the state Department of Agriculture sought to leave state service to go work for the United States Food & Drug Administration, the Ethics Commission stated:

To the extent that another FDA analyst regulating Connecticut might need to draw upon [the former employee's] expertise of Connecticut's shoreline pollution sources and remediation needs, [the former employee] would be permitted under Conn. Gen. Stat. §1-84b(b) to assist said analyst "back at the office," so long as her role in the matter is not apparent to the DoA.

In addition, there is an exception to the prohibition in § 1-84b (b) that was set forth in Advisory Opinion No. 88-15:

⁵Advisory Opinion No. 2003-16, Connecticut Law Journal, Vol. 65, Nos. 23-24, p. 4C (December 9, 2003).

⁶(Internal quotation marks omitted.) Advisory Opinion No. 2007-10, Connecticut Law Journal, Vol. 69, No. 11, p. 9E (September 11, 2007).

⁷Advisory Opinion No. 2010-4, Connecticut Law Journal, Vol. 72, No. 7, pp. 8D -9D (August 17, 2010), citing Codes of Ethics Study Committee, Report to the General Assembly by the Codes of Ethics Study Committee (January 15, 1983), p.21.

⁸Advisory Opinion No. 2004-15, Connecticut Law Journal, Vol. 66, Nos. 18-21, p. 4C (November 9, 2004).

In that Opinion the Commission held that the term 'represent' as used in § 1-84b (b) would not be interpreted to prohibit contact with one's former agency when the contact was technical in nature and did not involve the individual in any matters at issue between the State, or any other party, and the individual's employer or client. The Commission reasoned that the principal legislative purpose behind § 1-84b (b) — prevention of use of contacts, influence or other insider's advantage gained during state service to obtain improper benefit in subsequent compensated dealings with one's former agency—could be fulfilled by applying the subsection only when the 'representation' involved a matter in which the State exercised discretionary authority (e.g., contract or grant award, contested case, or permit application). 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 (e.g., technical work implementing a state contract, requests for generic information, etc.).⁹

With those restrictions and exceptions to § 1-84b (b) in mind, we conclude that Ms. Bailey is permitted to do the following during her first year after leaving state service:

- hire an employee and allow him or her to undertake "representation" before the Green Bank within the first year after Ms. Bailey's departure (including asking about the status of a client/potential client's pending application before the Green Bank);
- engage in work for Connecticut clients "back at the office," so long as her role in the matter is not apparent to the Green Bank;
- have limited contact with the Green Bank concerning a client's lien assignment, if the lien assignment stage is purely "ministerial" and there is no opportunity for the Green Bank to exercise discretionary authority. As described above, such contacts would include requests for generic information.

⁹Advisory Opinion No. 90-21, Connecticut Law Journal, Vol. 52, Nos. 1-4, p. 6D (July 24, 1990).

Nonetheless, Ms. Bailey may not, on behalf of a client or potential client, place a phone call to the Green Bank inquiring about the status of an application, during her first year after leaving state service. If Ms. Bailey has questions regarding what contacts with the Green Bank would be appropriate or inappropriate during her first year after leaving state service, she should contact the legal division of the Office of State Ethics for further guidance.

Having addressed the most pertinent provision, we now turn to the remaining restrictions that apply to Ms. Bailey.

First, a former state employee may never disclose or use confidential information¹⁰ acquired in the course of her state position to obtain financial gain for herself or others.¹¹

Second, a former state employee may never represent anyone other than the state concerning any particular matter in which she participated personally and substantially while in state service and in which the state has a substantial interest.¹² This prohibition, which has no time limit, and applies regardless of the forum, forbids former government officials from “side-switching” in the midst of an ongoing case or controversy. “Particular matter” is defined narrowly to include actions of specific application (e.g., contracts, grants, investigations), rather than those of general application (e.g., regulations, legislation, general policy).

In Advisory Opinion No. 2010-1, the Board analyzed the “specific-versus-general dichotomy” and determined that “Technical Standards—which are simply [Department of Public Health] standards on how to design, install, and operate septic systems—fall within the same category as statutes, regulations, and other ‘actions

¹⁰The term confidential information shall include: (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 general statutes, and which the appropriate agency or individual has decided not to disclose to the general public.” Regs., Conn. State Agencies § 1-81-15.

¹¹General Statutes § 1-84a.

¹²General Statutes § 1-84b (a).

of general application.’ That is, we deem them a general matter, not a specific or particular matter.” Similarly, here, the PACE program is not a specific or particular matter. Thus, Ms. Bailey’s post-state involvement with the program does not concern a “particular matter.” Furthermore, Ms. Bailey’s assurance that she “would not finance any transactions [i.e., “particular matters”] in which [she] had substantial involvement as an employee of the Green Bank,” addresses concerns raised under this provision.

Third, a state employee who participated substantially in or supervised the negotiation or award of a state contract (including grants implemented through contract) valued at \$50,000 or more, may not accept a job with a party to the contract for one year after she leaves state service if the contract was signed within one year of her departure.¹³ Because Ms. Bailey is “not seeking employment with a company that was awarded a state contract while [she] was in [her] state position,” this provision will not create an impediment to her post-state employment.

Conclusion

We conclude that Ms. Bailey may engage in post-state employment as the head of a private business that would provide funding to projects that have been approved by the Green Bank so long as she abides by the restrictions explained herein.

By order of the Board,

Dated

03/19/15



Chairperson

¹³General Statutes § 1-84b (f).