



STATE OF CONNECTICUT  
STATE ETHICS COMMISSION

ADVISORY OPINION NO. 88-5

Application of Subsection 1-84b(d),  
General Statutes to the Former Director of  
State Leasing

The Commissioner of Public Works has asked how subsection 1-84b(d), General Statutes applies to the following situation.

In January of this year the Director of the Division of Leasing and Property Transfer in the Department of Public Works resigned and commenced work in the private sector. Although the specific facts of his employment relationship are a matter of some dispute, it can be fairly stated that, in January, the former Director began to provide compensated services to either a corporation involved in the real estate field (the Corporation) or a limited partnership also involved in real estate work (Partnership A) of which the Corporation and its President are general partners. Prior to his resignation, the Director, in his official capacity, had taken part in the negotiation of a lease between the State and another limited partnership (Partnership B) of which, again, the Corporation and its President are general partners. The lease, signed in December of 1987, retroactively applied to a 16 month period during which the State, as a holdover tenant from a previous lease, had occupied property owned by Partnership B. The face value of the lease was \$66,156.

Subsection 1-84<sup>b</sup>(d), General Statutes states that, "No former public official or State employee who participated substantially in the negotiation or award of a State contract obliging the State to pay an amount of fifty thousand dollars or more, or who supervised the negotiation or award of such a contract, shall accept employment with a party to the contract 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 is signed."

Applying the various requirements of subsection 1-84b(d) to the matter at hand:

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By virtue of his State position, the Director was a "State employee" as defined in subsection 1-79(k), General Statutes, and was, therefore, subject to the Code of Ethics for Public Officials, Chapter 10, Part I, id. Since his resignation occurred after January 7, 1987, the effective date of Section 1-84b of the Code, he is now subject to the post-employment restrictions of that Section, including subsection 1-84b(d).

A lease is a contract, and, therefore, falls within the coverage of subsection 1-84b(d). Robinson v. Weitz, 171 Conn 545 (1976); Ethics Commission Advisory Opinion No. 81-2, 42 Conn. L.J. No. 39, p. 10 (March 24, 1981).

The Director, as head of the Leasing and Property Transfer Unit, was responsible for planning, directing, and coordinating the real property program of the Department of Public Works. These duties specifically included overseeing the negotiations for leases of property by the State. Documents indicate that the Director did in fact take part in the negotiation process for the lease in question. Regardless of whether this activity meets the requirement of subsection 1-84b(d) that one had "participated substantially in the negotiation...", the Director's clear oversight responsibility brings him within the alternative language of the subsection as one "...who supervised the negotiation...".

The dates of the signing of the lease (December 1987) and the Director's resignation and commencement of private work (January 1988) clearly fall within the time parameters of subsection 1-84b(d).

Regardless of the precise relationship between the former Director and his private employer, again a matter of some dispute, the arrangement constitutes "employment" as that term is used in the Code, for it unquestionably involves compensated work. Ethics Commission Advisory Opinion No., 80-18, 42 Conn. L.J. No. 22, p. 23 (November 25, 1980).

The question of whether the former Director has accepted employment with "a party" to the contract appears somewhat clouded by the fact that Partnership B entered into the lease in question, while the former Director accepted employment with either Partnership A or the Corporation. However, it was the same individual, holding the positions of general partner in both partnerships and president of the Corporation, who, as agent, negotiated and signed the lease with the State and also entered into an employment agreement with the former Director. Furthermore, this individual's corporation is a general partner in both partnerships. Under these circumstances, the

involvement of different, but significantly overlapping, business entities does not alter the underlying reality. Whether employed by Partnership A or the Corporation, the former Director has accepted employment with "a party" to the contract; namely the signatory, acting in his partnership or corporate persona as the case may be. To hold otherwise would vitiate subsection 1-84b(d), for it would allow avoidance of the subsection through the routine creation of alternative business organizations.

Lastly, we turn to the question of whether the contract obligated the State to pay an amount of fifty thousand dollars or more. As previously noted, on its face the contract called for the State to pay \$66,156 in rent over a term of sixteen months. Therefore, the fifty thousand dollar threshold of subsection 1-84b(d) would appear to have been surpassed. However, a closer analysis reveals that the contract did not, in any real sense, obligate the State to pay this entire amount, because there was a preexisting obligation to pay a substantial portion of the sum.

Specifically, the property in question had been leased by the State for a number of years prior to the lease in question. On December 31, 1985, an earlier State lease of the property expired. Under that lease the rent had been \$3372.12 per month. From January 1, 1986 until June 1, 1986, with the consent of the lessor, the State continued to occupy the property as a holdover tenant on a month to month basis. During this period the State was a tenant at will. Welk v. Bidwell, 136 Conn. 603, 608 (1950). As such, it was obligated to pay the previously agreed upon rent and did so. On June 1, 1986, Partnership B assumed title to the property in question and became the lessor. Almost immediately the Partnership informed the State that the prior rent was not sufficient, and that they were desirous of a new lease at a higher rate. Soon thereafter (August 1986) Partnership B requested that the State vacate the property as soon as possible. Under these circumstances, the State had become a tenant at sufferance. Id. at 607. As such, it had an obligation to pay the reasonable rental value of the property. Id. at 609. It is important to note that during this period the State, although anxious to vacate the property in question, seemingly had no viable option to continuing as a holdover tenant. Division of Leasing files reveal no evidence that the Director took any discretionary action which obligated the State to continue the tenancy in question. Rather, events essentially beyond his control (principally, rejection of an alternative lease property by the State Properties Review Board in April of 1986 and the lengthy State procedures required to procure another site) in effect compelled the State's holdover.

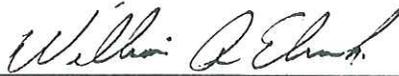
When the lease in question was finally signed in December of 1987, by its terms it apparently obligated the State to pay \$66,156 (\$4134.75 per month). However, by virtue of its occupancy at sufferance throughout the previous sixteen months, the State had already been obligated to pay the fair rental value of the property. In such instances, the last agreed upon rent is a good indicator of fair rental value. (See e.g., 47a - 26(b), General Statutes.) Given the seemingly inexorable effect of inflation, it is extremely unlikely that any court would have awarded Partnership B less than the prior rent, if the matter had been decided by litigation rather than negotiation. The Partnership may have been awarded more. Since the law already required payment of fair rental value for the period at issue, and since the State had in fact continued to make interim payments equal to the prior rent during this entire time, the subsequent retroactive lease can most accurately be described as obligating the State to pay not \$66,156, but rather only \$12,202 (the difference in rent between the lease at issue and the fair rental value as established by the prior lease agreement) plus, for purposes of this Opinion, insignificant increases in taxes, utilities, and maintenance. Furthermore, because no discretionary act of the Director or his Unit initiated or continued the State's holdover tenancy, he should not be viewed as having supervised the negotiation of a contract obligating the State in this matter, except to the extent of the negotiated rental increase. Since this amount (\$12,202) is well below the \$50,000 threshold of subsection 1-84b(d), the former Director did not violate the subsection when he accepted employment with a party to the contract.

The Commissioner of the Department of Public Works has also sought guidance concerning the question of how the Department should treat any future lease proposals received from the former Director's employer.

In general, the Code does not bar the former Director's current employer from doing business with the Department. However, all parties concerned are cautioned that: the former Director may never use or disclose confidential information gained in State service for the financial benefit of any person; he may never represent anyone, other than the State, concerning a matter in which he participated personally and substantially while in State service, if the State has a substantial interest in the matter; and he may not, for one year after leaving State service, for compensation, represent anyone, other than the State, before the Department concerning

a matter in which State has a substantial interest. Section 1-84a, subsections 1-84b(a) and (b), General Statutes.

By order of the commission,



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William A. Elrick  
Chairperson

Dated

4/4/88

