

February 21, 2012

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Re: Your Request for Informal Assistance
Our File No. I-12-006

Dear Mr. Smith:

This letter responds to your request for advice on behalf of yourself and your business partner, Peter Ward regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, we are treating your request as one for informal assistance.² Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other post-governmental employment laws such as Public Contract Code Section 10411.

QUESTION

Does the Act prohibit you from bidding on California state agency requests for proposals if you did not directly work for that agency?³

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114, Regulation 18329(c)(3).)

³ You have asked whether your business partner would have a conflict under the post-governmental employment provisions as well. We do not have enough facts to make this determination. We are happy to answer Mr. Ward's questions if he would like to write in on his own behalf.

CONCLUSION

No. The Act's one-year ban, however, prohibits you from appearing before or communicating with any former state agency employer for compensation and for the purpose of influencing administrative or legislative action or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property for a period of one year from the date you ceased employment with an agency. The Act's permanent ban prohibits you from participating in any proceeding involving any of your former agencies or assisting others in such a proceeding if the proceeding is one in which you participated while employed by the state. The agency to which you would like to submit a bid is not under the direction and control of your former agency.

FACTS

You retired as the Deputy Director of the California Energy Commission (the "CEC") in 2009. You currently serve as a retired annuitant for the CEC in a designated position as an Energy Commission Specialist III, reporting to the Deputy Director. You work on assignments related to alternative fuel vehicle incentives and alternative fuel infrastructure financing. You intended to leave your position in mid-January and launch Alternative Fuel Advocates, LLC, a consulting business that you will run with a partner, Peter Ward.

In 2007, California passed a law to fund an alternative fuel program ("AB 118"). CEC runs this program and others. CEC determines at regularly scheduled business meetings which projects it will fund. Another program that AB 118 funded is the Air Quality Improvement Program ("AQIP") under the California Air Resources Board ("CARB"). Through this program, CARB has instituted the Hybrid Truck and Bus Voucher Incentive Project ("HVIP") that provides vouchers for trucks or busses that are powered by alternative fuel sources. CEC intends to fund this program with an initial amount of \$4 million, with more to follow.

Mr. Ward retired from the CEC on December 31, 2011. He was the program manager for CEC's Alternative Fuel and Vehicle Technology program. In that position, Mr. Ward was involved with discussions regarding the allocation of AB 118 funds to CARB.

In November of 2011, CARB released a Grant Proposal Solicitation seeking administration services for the HVIP. Up to 8.5% could be bid for administration costs. You and your partner considered bidding on that plan but you were concerned about the revolving door implications. You would like to know what, if any, restrictions might apply to similar proposals in the future and whether you would be able to submit a bid.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the "revolving door" prohibitions. In addition, Section 87407 prohibits certain state and local officials from making, participating in

making, or using their official position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. (*See* Regulation 18747.)

Because your facts do not suggest that there are any issues concerning negotiating prospective employment, we are providing information relating to the post-governmental employment restrictions only.

One-Year Ban - The “one-year ban” prohibits a state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (*See* Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency’s conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for twelve months from the date the employee leaves state office or employment, which is defined as the date the employee permanently leaves his or her governmental agency or takes a leave of absence. (*See Lowry* Advice Letter, No. I-08-053; Regulation 18746.1(b)(1) and (2).) The ban covers any state agency for which the employee worked during his or her last twelve months of state employment. (Section 87406(d)(1).)

While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Section 87406(d); Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to any “judicial, quasi-judicial or other proceeding,” the one-year ban applies to “any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Section 87406(d); Regulation 18746.1(b)(5).) An appearance or communication is for the “purpose of influencing” if it is made for the “principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented, (2) before a state agency “which budget, personnel, and other operations” are subject to the control of a state agency the public

official worked for or represented, or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

Not all communications are prohibited by the one-year ban, however. Appearances or communications before a former state agency employer, made as part of "services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings." (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

Additionally, Regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted under the one-year ban, if an individual:

"(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;

"(2) Attends a general informational meeting, seminar, or similar event;

"(3) Requests information concerning any matter of public record; or

"(4) Communicates with the press."

It has been less than a year since you left a designated position in state service, and you intend to communicate with a state agency. You may not, within the year, return to any agency in which you held a designated position. You have stated that you intend to submit a proposal to the CARB. Regulation 18746.1(b)(6) explains that an official is prohibited from making an appearance or communication if:

"The appearance or communication is made before any officer or employee of any of the following:

"(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment. An employee loaned to an agency is deemed to have worked for or represented that agency.

"(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency

described in subdivision (b)(6)(A). However, whether an agency is provided technical assistance or legal advice, or is subject to oversight by another agency pursuant to state law, are not factors to be considered in determining whether an agency is subject to the direction and control of another.”

You have provided no facts to indicate that CARB is “subject to the direction and control” of your former agency, the CEC. While CEC has given CARB a grant to assist in its HVIP program, CEC does not have oversight of the agency as it implements that grant. Further, CEC does not make any decisions for CARB regarding this program. Based on this information, you are not communicating with or appearing before your former agency, and you are not subject to the one-year ban regarding proposals to CARB.

Permanent Ban -- The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).) Additionally, an official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee’s former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

Your facts do not suggest that there is a “proceeding” under the Act that would implicate the permanent ban. If a situation arises that could be considered a proceeding, please contact us again.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl