

May 03, 2012

Kurt A. Schaefer
150 Silva Ct.
Folsom, CA 95630

Re: Your Request for Advice
Our File No. A-12-055

Dear Mr. Schaefer:

This letter responds to your request for advice regarding revolving door provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

As a former state employee, do the Act's revolving door provisions prohibit you from assisting the design team of a project for the University of California, Davis, in a legal claim by the university considering your past participation as a state employee in executive level meetings related to the review of the design team's plans and the construction of the project?

CONCLUSION

The legal claim related to the project involves the same parties and appears to involve the same subject matter and factual issues as the executive level meetings regarding the project you participated in as a state employee. Thus, the legal claim is considered the same proceeding, and you are prohibited under the permanent ban from assisting the design team, for compensation, in the proceeding.²

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 Note that Section 87403 provided several exceptions to the permanent ban. Section 87403(a), allows court testimony so long as the former official does not received compensation other than that regularly provided for by law or regulation for witnesses. Additionally, you may participate in a court proceeding notwithstanding the permanent ban, under Section 87403(b), if the court makes a written finding that the matter requires your outstanding and otherwise unavailable qualifications and that your participation would serve the public interest.

FACTS

You retired from state service in 2006. During your tenure with the state you served as the Deputy Director for the Facilities Development Division (the “FDD”) of the Office of Statewide Health Planning and Development (the “OSHPD”). The FDD is responsible for regulating the design and construction of acute care hospitals in California. As the Deputy Director, you were responsible for setting policy and making executive level decisions on various projects handled by the office.

While employed with the FDD, the University of California, Davis, (the “UCD”) began a project called the Surgery Emergency Services Pavilion (the “Pavilion Project”). The UCD hired the design team, which prepared and submitted its design to the FDD. The plans were reviewed by the FDD’s staff under the supervision of a Regional Supervisor. The FDD’s role was to review the plans for compliance with the California Building Standards Code and issue a building permit. The UCD could award the construction contract only after the building permit was issued. The FDD’s field staff observed the construction to ensure it was completed in compliance with code.

The actual design and construction took many years. During the process, you participated as the Deputy Director in quarterly and monthly executive level meetings. Persons attending these meetings served as a steering committee and were responsible for identifying issues or processes that might obstruct construction. Construction was still in progress when you left the FDD.

Recently, the design team for the Pavilion Project was informed that the UCD intended to file a legal claim against them. Although no specific claim has been made at this time, the design team has retained a legal team to assist them. This legal team has approached the firm for which you are employed to assist in the claim proceedings. As you understand it, the design team and legal team are interested in your assistance with understanding the OSHPD process including how it interfaces with the design and construction of a project and how it may have affected the timeline of the Pavilion Project.

ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the one-year ban and the permanent ban. 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.) Colloquially, these provisions are known as the “revolving door” prohibitions. Because you left governmental employment six years ago, only the “permanent ban” is applicable to your question.

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. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)³

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication -- or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication -- made with the intent to influence 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; also see *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.)

As a former employee of the FDD, you are subject to the permanent ban. More specifically, you are prohibited from making an appearance or communication, or from assisting any other person in making an appearance or communication, in any quasi-judicial proceeding involving the State of California, for compensation, such as the UCD’s legal claim against the design team, if you previously participated in the proceeding as a state official.

³ For purposes of the permanent ban, “[t]he date on which an official permanently leaves office or employment or takes a leave of absence is the date on which the official is no longer authorized to perform the duties of the office or employment, and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits.” (Regulation 18746.4(a)(1).)

Based upon the information you have provided, you have previously participated in executive level meetings related to the FDD's review of the plans submitted by the design team and the construction of the Pavilion Project. While you have not fully described the allegations the UCD has made against the design team, you have stated that the legal team is interested in your knowledge of the OSHPD process and how the process interfaces with the design and construction of a project. Most significantly, you have indicated that the legal team is particularly interested in how the OSHPD process may have affected the timeline of the Pavilion Project. Based upon these facts, it is apparent that the UCD's claim against the design team is related to the Pavilion Project. Ultimately, the legal claim involves the same parties and appears to involve the same subject matter and factual issues as the executive level meetings related to the project you participated in as a former employee of the FDD. Accordingly, the legal claim must be considered the same proceeding, and you are prohibited under the permanent ban from assisting the design team, for compensation, in the proceeding.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl