

May 29, 2012

John McCamman
California Condor Coordinator
FISH AND WILDLIFE SERVICE
Pacific Southwest Region
2800 Cottage Way, Suite W-2606
Sacramento, California 95825

Re: Your Request for Informal Assistance
Our File No. I-12-057

Dear Mr. McCamman:

This letter responds to your request for advice regarding the “revolving door” provisions of the Political Reform Act (the “Act”).¹ Because your question is general in nature, in that no facts related to a specific appearance or communication with your previous government agency employer are provided, 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 provisions. Accordingly, we are unable to advise you on the impact of the alleged federal exemption from revolving door provisions cited in your letter.

QUESTION

Is there an exemption from the “revolving door” provisions under the Political Reform Act for public officials who leave state service and become federal employees?

CONCLUSION

No. The “revolving door” provisions of the Act apply to all former state employees upon leaving state employment, even if they go to work for a federal government agency.

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).)

However, the permanent ban on “switching sides” in a judicial or quasi-judicial proceeding does not prevent you from working on actions involving the protection of the California condor, including joint actions with the California Department of Fish and Game (“Fish and Game”), since that type of project is not a proceeding within the meaning of Section 87400(c).

The one-year ban, however, will place certain restrictions on your activities. While working on programs involving the condor as an employee for the U.S. Fish and Wildlife Service (“Service”), you will be prohibited from making certain appearances, as detailed below, before the Fish and Game.

FACTS

You were employed as the Director of the Fish and Game in 2010 and most of 2011. You were also Chair of the California Wildlife Conservation Board (“Board”). Recently, you accepted a position as the California Condor Coordinator with the Service. The California condor is an endangered species protected under both the state and federal Endangered Species Acts.

In your former position as the Director of Fish and Game, you had general responsibility over state actions involving condors, including permitting mechanisms and the allocation of personnel and resources for the condor program. In your new position as the California Condor Coordinator, you are the key point of contact for the Service on issues surrounding the condor. Because the condor is a jointly managed species, you anticipate future situations that will require you to “advocate with Fish and Game employees and leadership for particular, and most often joint, actions” related to the condor. You have no outside clients or interests that would interface with the Fish and Game or the Board.

ANALYSIS³

Public officials who leave state service are subject to two types of post-governmental employment restrictions under the Act, colloquially known as the “revolving door” prohibitions. The first is the “permanent ban” provision, which prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California 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 second is the “one-year ban” provision, which prohibits certain state employees from communicating, for compensation, with their former agency for the purpose of influencing certain administrative or legislative action. (See Section 87406, Regulation 18746.1.) Neither prohibition provides an exception for state officials that leave state service to work for the federal government.

³ The following analysis is intended to provide you with a general overview of the Act’s post-government employment restrictions to reference and apply as appropriate.

I. The Permanent Ban on “Switching Sides”

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).)

Furthermore, “[t]he 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; see also *Anderson* Advice Letter, No. A-98-159.)

While we have detailed the general provisions of the permanent ban for your review, you have not provided any information as to your participation in any specific proceeding as a member of the Service that may affect your ability to engage in any of the conduct listed herein. To apply the permanent ban to your situation, you need to determine if any of the actions in which you may engage on behalf of the Service involve a proceeding in which you participated as a member of the Fish and Game or the Board. (Regulation 18741.1(a)(4).)

II. The “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 actions⁴ or any

⁴ The following definitions of “administrative action” and “legislative action” apply for purposes of Section 87406:

“‘Administrative action’ means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding. . .” (Section 82002(a).)

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).)

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. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to “judicial or quasi-judicial” proceedings, 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.” (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. (*Ibid.*)

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).)

It is important to note that not all communications are prohibited by the one-year ban. 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. . .

“‘Legislative action’ means the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his official capacity. ‘Legislative action’ also means the action of the Governor in approving or vetoing any bill.” (Section 82037.)

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.”

We have also advised that a former agency official may, without violating the one-year ban, draft proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; see also *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official's former agency so long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

As a former designated employee of Fish and Game, you are subject to the one-year ban. Under the one-year ban, you may not represent any person, including the federal government, by appearing before or communicating with Fish and Game, or any officer or employee thereof, for the purpose of influencing any administrative or legislative action for one year after you leave state service. (See Regulation 18746.2.) Because you terminated your state employment sometime in 2011, the one-year ban obviously terminates this year on the one-year anniversary date of your separation.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Counsel, Legal Division

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