

July 26, 2012

Thomas Foley
Southern Region Operations Chief
State of California
Department of Forestry and Fire Protection (CAL FIRE)
2524 Mulberry Street
Riverside, CA 92501

Re: Your Request for Advice
Our File No. A-12-114

Dear Mr. Foley:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act").¹ Please note that our advice is based solely on the Act. We therefore offer no opinion on the application, if any, of other post-government employment laws.

QUESTION

After leaving state service and becoming a marketing representative for a private company, what restrictions would the Act place on your ability to contact and communicate with your former agency, CAL FIRE?

CONCLUSION

The Act's "one-year ban" would prohibit you from making an appearance before or communicating with CAL FIRE if it is for the purpose of influencing an administrative, legislative, or other specified discretionary act, including the sale or purchase of goods, for twelve months following the end of your state employment. While you are still employed with CAL FIRE, you are prohibited from making, participating in making, or using your official position to influence any governmental decision directly relating to any prospective employer with whom you are in negotiations for employment.

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.

FACTS

You are the Southern Region Operations Chief of the Department of Forestry and Fire Protection (CAL FIRE), and you currently chair the CAL FIRE Personal Protective Equipment (PPE) Working Group, which addresses all PPE issues under CAL FIRE's Operations Safety Health Training Advisory Committee. You also volunteer to represent CAL FIRE on two national committees: The National Wildfire Coordination Group (NWCG) Equipment Technology Committee, and the National Fire Protection Association (NFPA) 1977 Standards for Wildland Fire Fighting Equipment.

You will soon be retiring and have been contacted by TenCate Protective Fabrics, a fabric manufacturer that makes protective fabrics for public safety workers and the military, to consider employment with them in marketing. If you accepted employment with TenCate, you would be responsible for educating fire departments nationally on the capabilities, limitations, and emerging technologies of protective fabrics. You would also assist fire departments that are evaluating their protective garments and needs and, as a marketing representative of TenCate, would presumably encourage fire departments to buy garments made from TenCate fabric.

CAL FIRE does not purchase from fiber or fabric manufacturers directly, and does not currently contract with any particular garment distributor. CAL FIRE and individual CAL FIRE units purchase garments from distributors or from other government agencies, such as the Department of General Services, on an as-needed basis.

As the chairperson of the CAL FIRE PPE Working Group, you have had contact with TenCate and other fabric manufacturers for the purpose of understanding how different fabrics can improve the performance and safety of firefighter garments. You state that you have limited your contact with distributors because other agencies maintain those relationships.

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" provisions. 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.)

The One-Year Ban – "Revolving Door"

The one-year ban prohibits a state employee from making, for compensation, any appearance before or communication with his or her former agency, or officer or employee thereof, for the purpose of influencing an administrative, legislative, or other specified 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.)

This ban applies to former state employees who were designated or should be designated in their agency's conflict of interest code. (Section 87406(d)(1); Regulation 18746.1(b)(5)(C).) The ban applies for twelve months following the date the employee permanently leaves his or her governmental agency. (Regulation 18746.1(b)(2).) An employee permanently leaves his or her agency on the date the employee is no longer authorized to perform the duties of their employment and stops performing those duties. (Regulation 18746.4(b).)

The one-year ban applies only when a former employee or official is 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).)

The ban applies to appearances and communications made for the purpose of influencing a "legislative or administrative action, or any other discretionary action 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)(C).) An appearance or communication is considered to be for the purpose of influencing such an action "if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding," and includes telephone conversations, electronic or written correspondence, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).)

Finally, the ban applies to former state employees who go before their former agency or any state administrative agency "whose budget, personnel, and other operations are subject to the direction and control" of the employee's former agency. (Regulation 18746.1(b)(6)(C).)

An appearance or communication is not restricted by the one-year ban when the former state employee (1) participates as a panelist or former speaker at a public event for educational purposes and the subject matter does not pertain to a specific action or proceeding, (2) attends a general information meeting, seminar, or similar event, (3) requests information concerning any matter of public record, or (4) communicates with the press. (Regulation 18746.2(b).) Additionally, an appearance or communication made by the state employee solely to represent his or her own personal interests is not subject to the one-year ban. (Regulation 18746.1(b)(4).)

Since your position is designated in CAL FIRE's conflict of interest code, the one-year ban applies to you, and you may not make an appearance before or communicate with CAL FIRE for the purpose of influencing an applicable decision, as discussed above, for twelve months following the date you leave state employment.

The Permanent Ban on “Switching Sides”

The permanent ban prohibits former state administrative officials from advising or representing any person, other than the State of California, for compensation, in any judicial, quasi-judicial, or other proceeding in which the official participated while in state service. (See Sections 87401 and 87402, Regulation 18741.1.)

The permanent ban is a lifetime prohibition that applies to state administrative officials. (Regulation 18741.1(a).) A “state administrative official” is “every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial, or ministerial capacity.”

You have not provided information about any specific proceedings you participated in while employed at CAL FIRE, so we cannot advise on how the permanent ban applies to you. Should you have additional questions regarding specific issues under the permanent ban, please feel free to submit another request for advice.

Restrictions on Negotiating Prospective Employment

Under Section 87407, “[n]o public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

You state that you have been approached by TenCate Protective Fabrics to consider employment with their company. You are thus considered to be negotiating prospective employment. As such, during the remainder of your employment at CAL FIRE, you may not use your position to make or otherwise influence any decision relating to TenCate, including decisions related to purchasing garments that are manufactured with TenCate fabrics.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Lindsey Nakano
Legal Intern, Legal Division

LN:jgl