

June 11, 2013

Todd M. Foreman
2911 S Norton Avenue
Los Angeles, CA 90018

Re: Your Request for Informal Assistance
Our File No. I-13-063

Dear Mr. Foreman:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”)¹ and 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.)

Because your question is general in nature and not limited to any specific facts or appearances, we are treating your request as one for informal assistance.²

QUESTION

Does the exception for the one-year ban that applies to proceedings in front of an ALJ apply to communications with the parties in a prior approval proceeding under Proposition 103 that occur after the issuance of a Notice of Hearing?³

CONCLUSION

Yes. Based on your facts, a prior approval proceeding appears to commence after the filing of a Petition for Hearing. Thus, the ALJ exception under Section 87406 would apply to pre-hearing communications, including informal settlement negotiations, which typically

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 We have combined your two questions because they are interrelated.

includes informal discovery via exchange of documents and information, occurring after the petition is filed. Accordingly, because a Notice of Hearing is issued *after* a Petition for Hearing, such further pre-hearing communications occurring after the notice is issued would also be covered by the ALJ exception.

FACTS

You are currently employed as an attorney at the California Department of Insurance (“CDI”), and thus a designated employee under the Act. You intend to leave state service next month. Your former employer, Consumer Watchdog, has requested that you represent it in certain proceedings at the CDI, specifically prior approval proceedings.

As background, the CDI is responsible for, among other things, approving rate changes sought by insurance companies. Under Proposition 103 (Ins. Code, § 1861.01 et seq.), insurance companies that seek to change their rates must file a prior approval application. (See, e.g., Ins. Code, § 1861.05, subd. (b).) A requested change in rates is deemed approved in 60 days unless:

- (1) a consumer or his or her representative requests a hearing within forty-five days of public notice and the commissioner grants the hearing, or determines not to grant the hearing and issues written findings in support of that decision,
- or (2) the commissioner on his or her own motion determines to hold a hearing,
- or (3) the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in which case the commissioner must hold a hearing upon a timely request.

(Ins. Code, § 1861.05, subd. (c).)

The statute thus requires that a prior approval application is either “deemed approved” at 60 days or the CDI commissioner shall hold a hearing, which shall be conducted by an ALJ. (See Ins. Code, § 1861.08, subd. (a).)

Consumer Watchdog advocates on behalf of consumers in prior approval proceedings at the CDI. Consumer Watchdog will typically initiate its contact with CDI in these proceedings by filing a pleading titled Petition for Hearing. Once filed, the insurer has the option to file an Answer and the CDI may file a Response. (See Cal. Code Regs., tit. 10, §§ 2653.3, 2653.4.) In addition, upon receipt of a Petition for Hearing, the CDI assigns at least one attorney to work on the matter while CDI analysts begin a thorough review of the filing.

Once the CDI commences its review, the parties begin informal settlement negotiations, which typically includes informal discovery via exchange of documents and information. The parties are usually represented by counsel during these negotiations. Settlement negotiations end in one of four ways: 1) all parties come to an agreement on appropriate revisions to the prior approval application, and the CDI approves the revised application – i.e., the parties settle the matter; 2) the CDI and the insurer agree on appropriate revisions to the application, but

Consumer Watchdog does not, and the CDI approves the revised application; 3) the insurer withdraws the application; or 4) the CDI and the insurer cannot come to an agreement, and the CDI issues a Notice of Hearing, at which point the matter is assigned to an ALJ for a formal administrative hearing. After the Notice of Hearing is issued, the parties prepare for the hearing by conducting formal discovery, submitting pre-filed written direct testimony, and sometimes continuing settlement negotiations. (See, e.g., Cal. Code Regs., tit. 10, §§ 2655.1 et seq., 2656.1 et seq., 2657.1 et seq.)

ANALYSIS

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.) Because you have provided no facts to suggest that the permanent ban applies to your situation, our analysis is limited to the relevant provisions of 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 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.) However, Section 87406 expressly excludes appearances before an ALJ from the general prohibition against appearances before an individual’s former agency. (See Section 87406(d) [“For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Workers’ Compensation Appeals Board”].)

Your question asks whether the ALJ exception in Section 87406 applies to communications with the parties in a prior approval proceeding that occur after the issuance of a Notice of Hearing.

The Commission previously advised that the ALJ exception applied only to appearances before a judge, but not to “communications with the agency’s staff or attorneys prior to the hearing, including discovery requests, answers responding to the agency’s discovery requests, preparation of written testimony that will be later presented before an ALJ, procedural discussions or settlement negotiations.” (See *Harris* Advice Letter, No. A-10-183 [concerning a licensing matter wherein an accusation is filed to amend, suspend or revoke an individual’s professional license].) However, the Commission subsequently amended that advice by

expanding the ALJ exception to include such pre-hearing communications that typically occur when a licensing proceeding begins at the filing of an accusation because those communications are “interconnected with an appearance before an ALJ.” (See *Harris* Advice Letter, No. A-10-183a.) The Commission elaborated by stating that a person would reasonably conclude a government agency has commenced a licensing investigation once the accusation is filed so the ALJ exception should apply at that point. (*Ibid.*)

Your request concerns prior approval proceedings which have obvious differences from licensing proceedings. In both types of proceedings, however, there is the potential that the matter will ultimately culminate in a hearing before an ALJ. Your specific request is whether the ALJ exception applies to party communications after the CDI issues a “Notice of Hearing.”

To resolve this issue, it is important to determine when prior approval proceedings begin. As mentioned, the subsequent *Harris* advice letter found that licensing proceedings begin after the filing of an accusation because that is when a person could reasonably conclude a government agency has commenced an investigation. (*Harris* Advice Letter, No. A-10-183a.) Here, based on your facts, the prior approval proceedings appear to begin after the filing of a “Petition for Hearing,” even before the “Notice of Hearing” is issued. Indeed, once the petition is filed, the CDI assigns at least one attorney to work on the matter while CDI analysts begin a thorough review of the filing. Moreover, once the CDI commences its review, the parties, who are normally represented at this point, begin informal settlement negotiations, which typically includes informal discovery via exchange of documents and information. It is thus logical to expect that a person would reasonably conclude the CDI has commenced an investigation when the petition is filed; therefore, all pre-hearing communications between the parties after that point would be covered by the ALJ exception.

Accordingly, based on the facts you have provided, the ALJ exception under Section 87406 would apply to pre-hearing communications that occur after the filing of a Petition for Hearing in prior approval proceedings pursuant to Proposition 103.

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

JW:jgl