

June 24, 2013

Timothy C. Johnson
8310 Sutter Ione Rd
Ione, CA 95640

Re: Your Request for Advice
Our File No. A-13-068

Dear Mr. Johnson:

This letter responds to your request for advice regarding the post-governmental employment 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 law. Also, 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 advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Do the Act’s post-governmental employment provisions prohibit you as a former employee of the California Department of Transportation (“Caltrans”), District 10 (the “District”), from, conducting test and performing inspections as an employee of a contractor for construction projects on which you worked while employed by Caltrans?

CONCLUSION

Neither the Act’s permanent ban nor one-year ban prohibits you from performing the proposed work. Under the permanent ban, you will not be performing work with the intent to influence a judicial, quasi-judicial or administrative action of your former employer. Under the one-year ban, you will not be performing work for the purpose of influencing any administrative or legislative action of your former employer.

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

On May 31, 2013, you retired from Caltrans as a Materials Research Engineer Associate Specialist (Rank and File). According to your position description, you performed various technical field and office tasks relating to transportation construction. A primary function of your position was to oversee the operation of the construction lab, which included storage and minor repair of nuclear gauges, calibration and maintenance of test equipment . You also performed the duties of Alternate Radiation Safety Officer. In this capacity, you reviewed and provided comments on Q/Q plans, mix design and other submittals received from private contractors. You also scheduled Caltrans personnel to perform testing of construction materials, trained them in the requirements of sampling and testing and assisted them in becoming certified.

In addition, you collected data and performed sampling and testing of construction materials used by contractors for all phases of structure roadway construction. These samplings and testing included Sand Equivalent tests, Cleanness Value tests, Gradation Sieve Analysis, Compaction tests with nuclear gauge for solid and asphalt concrete, Optimum Bitumen Content, Moisture Content and Concrete Modulus of Rupture (concretes beam testing.) You also made inspections of contractors' facilities, including asphalt concrete and Portland cement concrete plants, as to quantity, quality and methodology, prepared documentation of these inspections and coordinated these activities with contractors' personnel.

You have indicated that your duties included Material Plant Qualification Coordinator for the District, in which you oversaw the testing and sealing of measuring and weighing devices used by contractors to produce concrete, asphalt, volumetric concrete supply trucks, rubber asphalt blending facilities and polyester producing equipment. In this capacity, you were responsible for assuring that contractors' product was within guidelines issued from Caltrans Headquarters. You indicate that you did not write any specifications or policies, and that you used the specifications and policies solely to determine whether a contractor's work met the guidelines.

You have also indicated, in subsequent correspondence, that you did not administer contracts and were not allowed to write change orders. These duties were performed by a licensed engineer, which you are not.

You have been offered a position by NV5 Engineering ("NV5") as a Senior Field Engineer. Your duties may include field and source inspection of Caltrans District-wide construction projects and assisting in Quality Assurance inspection on District paving jobs, including construction projects on which you worked while employed by Caltrans.

ANALYSIS

Post-Governmental Employment Restrictions

Before addressing the applicable provisions of the Act, we point out that the Act does not prohibit former state employees from being employed by anyone. Instead, as described below, the Act places restrictions on certain types of activities for which former state employees may be compensated. There are, however, limitations on the type of activities you may be able to do for NV5 in relation to your former state employer.

There are two types of post-governmental employment restrictions on former state employees under the Act—the “permanent” and “one-year” bans, colloquially known as the “revolving door” prohibitions.

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

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 the official participated while working for the state. (Sections 87402 and 87403.) “‘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).) 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).)

Under the facts presented, it appears the only possible issue under the Act’s permanent ban is whether your work with contractors on Caltrans construction projects constituted “participation in a proceeding” and, if so, what restrictions would apply to your work with NV5. The facts indicate that you did not make or participate in Caltrans’ formation of contracts. Your involvement with contracts was limited to reviewing contractors’ submittals, testing, sampling and inspecting the construction materials and inspecting contractors’ facilities after a contract was in place. We have advised that the application, drafting, and awarding of a contract is considered to be a proceeding separate from the monitoring, performance or implementation of

the contract (hereafter “performance phase”). (*Blonien* Advice Letter, No. A-88-463; *Kernan* Advice Letter, No. I-12-017.) This appears to be the situation here. You were not involved in Caltrans’ formation and making of any contracts. However, you were involved in the performance phase of contracts which, as mentioned above, is also considered a “proceeding” for purposes of the permanent ban. In addition, because you made recommendations concerning aspects of a contractor’s performance of the contract, your participation was “personal and substantial” for purposes of the permanent ban restriction.

While the permanent ban does not prohibit a state employee who worked on the performance phase of an agency contract from leaving the agency to work on the same phase of the contract for a private contractor, the employee’s work for the private contractor is restricted, as follows: The former employee cannot, as part of his work for the contractor or any other non-state entity, aid, advise, counsel, consult with or in any way assist the contractor or communicate with his or her former state agency’s staff or representatives for the purpose of influencing: (i) the amendment or revocation of the existing contract; (ii) the issuance or awarding of a substantially similar contract; or (iii) agency decisions that, although still within the contract’s terms, are likely to result in more than a *de minimis* change in the level of services or goods provided by the contractor from that originally contemplated by the agency. (*Joe and Nancy del Valle* Advice Letter, No. A-12-086.)

It appears that in working for NV5, you will not be aiding, advising, counseling, consulting with or assisting NV5, or communicating with Caltrans, for the purpose of influencing Caltrans to amend or revoke an existing contract, issue or award a substantially similar contract, or make decisions that, although still within the contract’s terms, are likely to result in more than a *de minimis* change in the level of services or goods provided by NV5 from that which was originally contemplated by Caltrans. Accordingly, the proposed work you have described is not prohibited by the permanent ban.

The One-Year Ban

The “one-year ban” prohibits a former 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 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.)

“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).)²

Under your facts, your proposed work for NV5 will not involve influencing any administrative or legislative actions involving the issuance, amendment, awarding, or revocation

² We do not define “legislative action” because it only applies to actions by the Legislature and the Governor, including their staffs, committees and subcommittees.

of a permit, license, grant, or contract, or the sale or purchase of goods or property. (*See* Section 87406; Regulation 18746.1.) Accordingly, the one-year ban does not prohibit you from performing such work.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl