

May 13, 2014

Erika E. Webb-Hughes
Federal Policy Liaison
California Department of Education
1430 N Street, Suite S502
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-14-085

Dear Ms. Webb-Hughes:

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 provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We offer no opinion on the application of laws other than the Act, such as the post-employment provisions of Public Contract Code Section 10411.

QUESTIONS

1. Does the Act prohibit you from any activity, appearances, communication, or interactions with the California Department of Education (CDE)?
2. Do the Act’s revolving door provisions restrict you from working with state agencies or lobbying state agencies other than your former agency that you may have interacted/liased with during your state employment?
3. What types of interactions are not prohibited by the Act? For instance, are personal interactions with former colleagues, not of a professional nature allowed?

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.

CONCLUSIONS

1. *Permanent Ban:* The permanent ban on “switching sides” would prohibit you from appearing and communicating to represent any other person for compensation, before *any state administrative agency* in any judicial, quasi-judicial or other proceeding if you previously participated in the proceeding in your state capacity. The prohibition would also prohibit aiding, advising, counseling, consulting, or assisting in representing any other person. However, since your facts do not indicate you participated as a state employee in any judicial, quasi-judicial or other proceeding as defined in Section 87400, the permanent ban would not apply.

One-year Ban: The one-year ban will prohibit you from representing any other person by appearing before or communicating with, for compensation, your former agency in an attempt to influence agency decisions that involve the making of general rules (such as regulations or legislation), or to influence certain proceedings involving a permit, license, contract, or transaction involving the sale or purchase of property or goods.

2. *Permanent Ban:* The permanent ban, if it applies, applies to appearances *before any court or state administrative agency or any officer or employee thereof*, in connection with a proceeding involving specific parties (such as a lawsuit, a hearing before an administrative law judge, or a state contract) if the official previously participated in the proceeding as a state employee.

One-year Ban: The one year ban would prohibit you from appearing before or communicating with any officer or employee of any of the following: (a) CDE (and any other agency you worked for or represented during the 12 months before leaving employment), and (b) any state administrative agency which budget, personnel, and other operations are subject to the direction and control of CDE. An agency is not under the direction or control of another agency merely because the agency has been provided technical assistance, legal advice, or is subject to the general oversight of the other agency pursuant to state law.

3. *Permanent Ban and One-year Ban:* Only formal or informal appearances or oral or written communications for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding are prohibited (whether in person, by telephone, in writing or by electronic transmission, attending a meeting, and delivering or sending any communications).

However, neither the permanent nor one-year ban prohibits mere social interaction with officers or employees of your former agency. In addition, an appearance or communication is not prohibited if you: (a) Participate 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; (b) Attend a general informational meeting, seminar, or similar event; (c) Request information concerning any matter of public record; or (d) Communicate with the press.

FACTS

You are currently an employee of the California Department of Education (CDE) and serve as the Federal Policy Liaison in the Government Affairs Division, under the administrative direction of the Director for that agency. You have also held various other Education Programs Consultant positions within the CDE in other divisions such as Assessment and Special Education since June, 2009. You are a designated employee in the CDE conflict of interest code.

Your current duties include:

- Independently provide guidance and support to various departmental staff in the development, implementation, oversight, coordination and resolution of issues and conflicts of and between federal and state programs.
- Facilitate the coordination and compliance of federal legislative activities and proposals affecting K-12 educational programs within CDE program offices; work cooperatively with federal oversight and control agencies such as the United States Department of Education (USDOE) to respond to a variety of legislative and educational issues.
- Keep supervisor and other CDE leadership members apprised of the status of projects and problems; research current educational, compliance, and systemic issues regarding state and federal requirements; write, review, and edit educational documents; attend leadership meetings; attend State Board of Education briefings and meetings to track federal and state issues; and complete special federal and state compliance projects as assigned.
- Serve as a representative with the USDOE, United States Congress, Governor's Office, Department of Finance, legislative committees, federal liaison, education coalition, parents, advocates, stakeholders, and other state/national agencies regarding key federal educational issues. Represents the State Superintendent of Public Instruction at legislative hearings, speaking engagements, conferences, and high level meetings.
- Serve as the coordinator for all International delegations at the CDE; schedule and coordinate departmental staff and Executive office in development of appropriate presentations based on delegation request; host delegation members
- Serve as the contract monitor for any federal liaison that the Department retains to ensure compliance with contract provisions, including develop scope of work; ensure funding; and review and approve invoices.
- Perform additional duties as assigned by supervisor or Executive Leadership, as appropriate.

You are in the process of investigating employment options outside state service, and are interested in a particular position with a company that does business with the CDE, but not directly with you or your office. You included the following information about the post state employment private sector position you are interested in, Director of Public Affairs as Pearson.

- Pearson describes itself on its website as: “the leading education services company, Pearson is serious about evolving how the world learns. We apply our deep education experience and research, invest in innovative technologies, and promote collaboration throughout the education ecosystem. Real change is our commitment and its results are delivered through connecting capabilities to create actionable, scalable solutions that improve access, affordability, and achievement.”
- As Pearson’s Director of Public Affairs, your responsibilities would be as follows:
 1. Identify priorities and help develop/implement annual communications and public affairs plans for each state in the region.
 2. Advocate and execute public affairs efforts to the appropriate Executive, legislative and regulatory areas.
 3. Develop relationships in the states with key influencers, thought leaders and advocates.
 4. Assist in retaining and managing contract lobbyists, manage association relationships, and direct legislative, political and lobbying activities.
 5. Track, monitor, advocate and report on relevant legislation and regulatory proceedings and assist in the drafting and delivery of oral and written testimony.
 6. Plan local media relations activities, in coordination with Marketing and Corporate Affairs team members, and contribute to the development of news releases, op-eds, story placement strategies, and crisis communications activities.
 7. Draft communication materials such as talking points. Draft communication materials such as talking points, Q&A, press releases, and op eds, etc.
 8. Track and analyze the performance of all public affairs strategies and campaigns on an ongoing basis, contributing to national dashboards.
 9. Ensure compliance with state and local lobbying and reporting rules and regulations.

ANALYSIS

Officials who leave state service are subject to two types of restrictions under the Act.² The first is a permanent ban on “switching sides,” and the second is a one-year prohibition.

Permanent Ban on “Switching Sides”

Sections 87401 and 87402 (collectively, the “permanent ban”) prohibit former state administrative officials *from advising or representing* any person for compensation in any judicial or other proceeding in which the official participated while in state service. (Sections 87401 and 87402.) Specifically, Section 87401 provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.”

Section 87402 also provides:

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.”

The prohibitions of Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met:

² Please note, the Act also places a prohibition on some of your activities before you leave state service. For example, all public officials, leaving governmental service are also subject to restrictions when negotiating prospective employment. Under Section 87407 and Regulation 18747, prior to separation from government service, a public official is prohibited from making, participating in making, or influencing a “governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.” In addition, the Act’s conflict-of-interest provisions prohibit an official from making, participating in making, or influencing any governmental decision with a reasonably foreseeable material financial effect on the source of promised income. (See Sections 87100, et seq. and Regulations 18700, et seq.)

“(1) The official has permanently left or is on a leave of absence from, as defined in Regulation 18746.4(a), any particular state office or employment.

“(2) The official is compensated, or is promised compensation, for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing another person, other than the State of California, in a judicial, quasi-judicial or other proceeding. For purposes of Section 87401 and 87402, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not considered compensation.

“(3) The official makes an appearance or communication, or aids, advises, counsels, or assists in representing another person, other than the State of California, in making an appearance or communication, before any officer or employee of any state administrative agency for the purpose of influencing, as defined in Regulation 18746.2, a judicial, quasi-judicial or other proceeding, including but not limited to any proceeding described in Regulation 18202, subdivisions (a)(1)-(a)(7).

“(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in Regulations 18702.1-18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. A supervisor is deemed to have participated in any proceeding that was “pending before,” as defined in subdivision (b) of Regulation 18438.2, the official’s agency and that was under his or her supervisory authority. For purposes of this regulation, a proceeding is under a supervisor’s “supervisory authority” if any of the following applies to the supervisor:

“(A) The supervisor’s duties include the primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted. However, this provision does not apply to a supervisor who is only responsible for the general oversight of the administrative actions or functions of a program in which the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency.

“(B) The supervisor directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken.

“(C) The supervisor reviews, discusses, or authorizes any action in the proceeding.

“(D) The supervisor has contact with any of the participants in the proceeding regarding the subject of the proceeding.

“(5) The judicial, quasi-judicial or other proceeding is the same proceeding in which the official participated.” (Regulation 18741.1.)

“State administrative official’ means 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.” (Section 87400(b).) As Federal Policy Liaison at the CDE, a position designated in CDE’s conflict of interest code, you are a former state administrative official for purposes of the permanent ban. (Section 87400(b).)

Please note, however, that the permanent ban only applies to “judicial, quasi-judicial or other proceedings” in which you participated³ on behalf of the CDE. A “judicial, quasi-judicial or other proceeding” is 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), emphasis added.) It does not appear you were involved in these types of decisions. If you were, the permanent ban would apply to those specific decisions and would apply throughout the duration of any proceeding in which you participated. *It does not prohibit you from representing a client in any new proceeding* although the client may have been a party to a previous proceeding in which you participated, provided the one-year ban does not apply, as discussed below.

One-Year Ban

In addition to the permanent ban, the Act prohibits for a year a former officer of a state administrative agency from being paid to communicate with or appear before his or her former agency to influence specified actions. Section 87406 specifically provides:

“No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by

³ “Participated’ means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.” (Section 87400(d).)

making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is 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. 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."

As a former employee of CDE, you will be subject to the one-year ban. Thus, for one year after leaving state service, you may not represent any person by appearing before or communicating with any CDE officer or employee *to influence 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.* The one year ban would also prohibit you from appearing before or communicating with any officer or employee of any other agency you worked for or represented during the 12 months before leaving employment, and any state administrative agency which budget, personnel, and other operations are subject to the direction and control of CDE. An agency is not under the direction or control of another agency merely because the agency has been provided technical assistance, legal advice, or is subject to the general oversight of the other agency pursuant to state law.

Exceptions to the One-Year Ban and the Permanent Ban:

Contacts for other purposes (other than those specifically provided by Sections 87401 and 87406) are not prohibited. For example, Regulation 18746.2 provides:

“(a) A formal or informal appearance or oral or written 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. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.

“(b) An appearance or communication is not limited by this section when 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.”

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel,
Legal Division

JWW:jgl