

September 15, 2014

Michael J. Lynch
13304 White Rock Road
Rancho Cordova, CA 95742

Re: Your Request for Advice
Our File No. A-14-166

Dear Mr. Lynch:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(c)(4)(A).) In addition, 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 Political Reform Act, such as the post-employment provisions of Public Contract Code Section 10411 or Government Code Section 1090.²

QUESTION

Upon your retirement from the Department of Parks and Recreation, California State Parks, what restrictions do the Act’s revolving door provisions impose on your (1) ability to explore future employment and (2) future employment after leaving state 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.

² While the Commission may provide assistance regarding Government Code Section 1090, this section applies only if you participated in making the contract as a state official including any preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (See *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237). If you have previously participated in making a contract and anticipate future employment with the same contractor, you may wish to seek additional advice regarding Section 1090 providing a description of your participating in the making of the contract and your anticipated duties on behalf of the contractor.

CONCLUSION

As a current state employee, you are prohibited from making, participating in making, or using your official position to influence any governmental decisions “directly relating” to a prospective employer if you have “negotiated” prospective employment or have made an “arrangement” regarding prospective employment. After leaving state employment, your future employment activities are restricted by the one-year and permanent bans as discussed below.

FACTS

You are a State Park Superintendent III with the California State Parks and you are currently the Assistant Chief of Telecommunications. You manage the Department’s Telecommunications programs, including two regional emergency dispatch centers, the Department’s radio system, and the Public Safety Telecommunications Modernization project (“PSTM”). The PSTM program updates the dispatch centers’ computer-aided dispatch software (“CAD”) in the State Parks’ dispatch centers.

Prior to your promotion to this position in May of 2014, you worked as the Superintendent of the Northern Communications Center, one of the State Park’s dispatch centers. During your time as Superintendent of one of the dispatch centers, the California Technology Agency (“CTA”) mandated that California State Parks enter into an agreement with the California Highway Patrol (CHP) to meet the needs of the PSTM project. At the time of this directive, CHP had a contract with Xerox Corporation, who contracted with TriTech Software Systems to provide the CAD software to CHP.

By June of 2014, the TriTech CAD software was fully installed in both California State Parks dispatch centers via an inter-agency agreement between California State Parks and California Highway Patrol. CTA provided oversight throughout the project’s implementation. During the process, you were an ancillary member who assisted in the basic design of the California State Parks version of the CAD. You did not have decision-making authority on the contract between California State Parks to CHP, to Xerox to TriTech Software. Any decisions related to the contract were carefully scrutinized during steering committee meetings, of which you were not a voting member.

CHP and California State Parks have an on-going inter-agency agreement with CHP to provide access to the CAD. CHP does all of their own maintenance on the system and provides California State Parks support of the software. A recent change in law requires all Information Technology (“IT”) related projects to be conducted by the Department’s IT division. Your position is not within the IT division at California State Parks.

After more than 20 years working for the State of California, you are considering retirement and post-governmental employment. One option would be finding a position within TriTech, which contracts with entities to provide software implementation and support. TriTech did not contract with the Parks Department to implement the CAD software. Rather, TriTech

contracted with Xerox, which contracted with the CHP, which in turn had an agreement with the Parks Department.

ANALYSIS

Under the Act, public officials who leave state service are subject to two types of post-governmental employment provisions known as the one-year and permanent bans. In addition, Section 87407 prohibits certain state and local officials from making, participating in making, or using their official position to influence decisions affecting a prospective employer. (See Regulation 18747.) These provisions are known as the “revolving door” prohibitions.

Section 87407

A public official may negotiate and accept an offer of future employment before leaving his or her current position. Section 87407, however, is designed to ensure that the official does not use his or her position to make any decisions that unduly benefit the entity that hires the official. Section 87407 states:

“No 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.”

A public official is “negotiating” employment “when he or she interviews or discusses an offer of employment with an employer or his or her agent.” (Regulation 18747(c)(1).) A public official has an “arrangement” concerning prospective employment when he or she accepts an offer of employment. (Regulation 18747(c)(2).)

Once you have “negotiated” prospective employment or have made an “arrangement” regarding prospective employment, you are prohibited under Section 87407 from making, participating in making, or using your official position to influence any governmental decisions “directly relating” to the prospective employer. A governmental decision “directly relates” to a prospective employer if the public official knows or has reason to know that the employer, or the employer’s agent, has either (1) initiated the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or (2) is a named party in, or subject of, the proceeding. (Regulations 18704.1(a) and 18747(b)(1).) A governmental decision also “directly relates” to a prospective employer if the public official knows or has reason to know that it is reasonably foreseeable that the financial effect of the decision on a prospective employer is material. The financial effect of a decision on a prospective employer is material if the effect meets the materiality thresholds established under Regulation 18705.1(c) for a business entity, Regulation 18705.3(b)(2) for a nonprofit organization, or Regulation 18705.3(b)(3) for an individual. (Regulation 18747(b)(2).)

If you need additional assistance in determining whether you may take part in any specific decision that may affect a prospective employer, it is advisable that you seek further advice providing all relevant facts relating to the decision.

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 action³ 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.)

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).)⁴ The ban applies for twelve months from the date the employee permanently leaves state office or employment.⁵ 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

³ For purposes of Section 87406, the Act defines “administrative action” and “legislative action” as:

“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).)

“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.)

⁴ A governmental employee should be designated in his or her agency’s conflict-of-interest code if the employee makes or participates in making governmental decisions that have a reasonably foreseeable material effect on any financial interest. (Section 87302.)

⁵ For purposes of the one-year ban, the date on which an official permanently leaves office or employment is the date on which the official is no longer authorized to perform the duties of that office or employment, and stops performing those duties. A person shall not be deemed to have left office permanently because he or she is on a leave of absence or serves as an intermittent employee. A person shall be deemed to have left office permanently, however, if the person merely receives compensation for accrued leave credits. (Regulation 18746.4(b).)

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 conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Id.*)

Finally, appearances and communications are prohibited if they are (1) before a state agency that the public official worked for or represented or (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. (Regulation 18746.1(b)(6).)

While you have not indicated whether your position is specifically designated in California Parks Department’s conflict-of-interest code, as a State Park Superintendent III, we assume that it is or should be. Your post-employment actions are therefore restricted under the one-year ban for 12 months from the date you permanently leave the Parks Department. As addressed above, the one-year ban applies to any administrative or legislative action and 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. Accordingly, the one-year ban prohibits you, for the one-year after leaving the Parks Department, from representing any other business or organization in administrative proceedings before the Parks Department, such as general decisions regarding any Parks Department Project, and in any proceedings involving the issuance, amendment, awarding, or revocation of a contract involving the Parks Department.

Permanent Ban

The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any proceeding involving specific parties before any court or state administrative agency, or assisting others in the proceeding, if the former employee participated in the proceeding while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)⁶

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 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,

⁶ For purposes of the permanent ban, “[t]he date on which an official permanently leaves office or employment or takes a leave of absence is the date on which the official is no longer authorized to perform the duties of the office or employment, and the official stops performing those duties, even if the official continues to receive compensation for accrued leave credits.” (Regulation 18746.4(a)(1).)

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).)

Based upon the information you provided, you may have participated in “proceedings” regarding the contract for the CAD. This contract ended by its own terms in June of 2014, however. Any subsequent contract, even with the same contracting parties, would not be considered the same proceeding for purposes of the permanent ban. (*Rist* Advice Letter, No. A-04-187; also see *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; *Anderson* Advice Letter, No. A-98-159.)

Based upon the facts you have provided, it is unlikely that if you accept a position with TriTech you would be subject to the permanent ban.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:jgl