

November 21, 2014

Ms. Irene T. Anderson
Department of General Services
707 3rd Street, 5th Floor
West Sacramento, CA 95605

Re: Your Request for Advice
Our File No. A-14-184

Dear Ms. Anderson:

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

QUESTIONS

1. Immediately after you retire from the Department of General Services ("DGS"), may you work for an outside private firm that has been hired by the California High Speed Rail Authority to perform the next phase of property acquisitions for the High Speed Train project?
2. If you accept the work for the private firm, are there limitations for your doing retired annuitant work for DGS? Can you be hired as a retired annuitant by DGS in July and work on high speed rail reviews, or only on non-high speed rail assignments?

CONCLUSIONS

1. Yes. The Act's post-employment provisions do not prohibit you from working for an outside private firm that has been hired by the California High Speed Rail Authority to perform property acquisitions for the high speed train project after you retire from DGS on December 31, 2014. Under the Act's one-year ban, you will be prohibited from being paid by the firm to make an appearance or communication before DGS for the purpose of influencing any action or proceeding involving the sale or purchase of property, as explained below. The permanent ban

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.

will not apply so long as the contracts for purchase of property you work on in your private capacity are separate and new property acquisitions that you did not review or work on while at DGS.

2. If you start working for the private firm assisting with high speed rail property acquisitions after you retire from DGS in December, and then you return to work at DGS as a retired annuitant in July of 2015 -- as a designated employee of DGS again -- the Act's conflict rules will restrict you from making or participating in making a governmental decision at DGS that will have a material financial effect on the private firm that is a source of income to you.

FACTS

You are a current state employee, working at the Department of General Services (DGS), pending retirement on December 31, 2014. You are a designated employee at DGS, filing an annual Form 700 statement of economic interests. You currently review real estate transactions for the state, pursuant to Government Code Section 11005 which requires DGS approval of all real property transactions, unless an agency is specifically exempt from this code.

The California High Speed Rail Authority must purchase property on which to build the high speed rail system from private property owners. The properties being bought have been selected by the High Speed Rail Authority when the route is established. The properties have to get purchased, with the private property owner accepting the offer of just compensation, or through the process of condemnation.

The bulk of your state work at DGS this past year has been to review all acquisition contracts entered into on behalf of California High Speed Rail Authority for the high speed train project. The High Speed Rail Authority is a new agency, and the high speed train project is highly political and on a critical schedule.

To speed up the acquisition of property for the high speed rail line, the California High Speed Rail Authority has hired multiple outside private firms to negotiate the purchase contracts for the high speed train real property acquisitions. (While at DGS, you did not work on or have any involvement in the California High Speed Rail Authority's decision to contract with several private firms to assist with the high speed rail property acquisitions.) The property acquisitions require the reviews and approvals of first California High Speed Rail Authority, second DGS, and third the Department of Finance pursuant to delegated authority from the State Public Works Board.

Your contribution is in quality control of these acquisitions, by making sure the acquisition packages are complete and accurate, and recommending if the transaction is in the best interest of the state. Department of Finance/State Public Works Board and your supervisors rely upon your written review report before approving any acquisition. Each acquisition of property from a particular owner is handled as a separate transaction, which you refer to as a

property acquisition “package.” The package has all the documents, deed, diary notes, etc., for the acquisition of a particular property or of several parcels owned by the same person.

You have questions about how the Act’s revolving door provisions will apply to you if you work for a private firm after retiring from DGS, and if you do that and later return to DGS as a retired annuitant. You have been approached by one of the private firms which has been awarded a new contract for the next phase of rail acquisitions for the high speed train project. They want you to advise and train their staff on their high speed train assignments. You ask if you can perform this work immediately after you retire. If you work for the private firm, as detailed above, are there limitations for your retired annuitant work for DGS? Can you be hired as a retired annuitant and work on high speed rail reviews, or only on non-high speed rail assignments?

ANALYSIS

Public officials who have left state service are subject to two types of post-governmental employment provisions under the Act, the *permanent ban* on switching sides in a proceeding and the *one-year ban* on appearing before one’s former agency. In addition, an official who is in the process of leaving government service may not make or use his or her official position to influence a governmental decision directly relating to a business with which the official is negotiating prospective employment. (Section 87407.) Together these are known as the “revolving door” prohibitions.

The 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. (See Sections 87401-87402; Regulation 18741.1.)

The permanent ban applies to 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, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A “new” proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*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.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

The property acquisition contracts with private property owners are each considered a “proceeding” under the Act’s permanent ban on switching sides in a judicial, quasi-judicial or other proceeding under Sections 87400 and 87401. However, each contract for purchase of property is a separate, new proceeding for purposes of the Act’s ban on switching sides and you would be working on new property acquisitions at the private firm that you did not review or work on while at DGS. So the permanent ban would not prevent you from going to work at one of the private firms that is handling property acquisitions for the California High Speed Rail Authority.

The One-Year Ban

The “one-year ban” prohibits a former state employee from making, for compensation, any formal or informal appearance, or making an oral or written communication, before his or her former agency for the purpose of influencing any legislative or administrative action 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 held 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).) The ban applies for twelve months from the date the employee leaves state office or employment, which is defined as the date the employee permanently leaves his or her governmental agency or takes a leave of absence. (See *Lowry* Advice Letter, No. I-08-053; Regulation 18746.1(b)(1) and (2).) When an employee returns to state employment as a retired annuitant in a position that is designated in the agency’s conflict-of-interest code, the one-year ban begins anew, when the employee permanently leaves the retired annuitant position.

While in effect, the one-year ban applies when a former employee or official is being compensated for his or her appearances or communications before his or her former agency. (Regulation 18746.1(b)(3).) It also applies when such an appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(4).)

An 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, but is not limited to, conversing by telephone or in person, corresponding in writing or

by electronic transmission, attending a meeting, and delivering or sending any communication. (*Ibid.*)

Finally, appearances and communications are prohibited only if they are before a state agency that the public official worked for or represented, or before a state agency whose 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).)

Appearances or communications are not restricted under the one-year ban if 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.”

(Regulation 18746.2(b)(1)-(4).)

We have also advised that a former agency official may under the one-year ban (in contrast to the permanent ban), draft proposals on a client’s behalf to be submitted to the agency so long as the former employee is not identified in connection with the client’s efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; see also *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official’s former agency so long as the employee is not identified with the employer’s efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

Accordingly, if after retiring from DGS in December, you work for a private firm² on high speed rail property acquisitions, for a period of twelve months from the date you leave DGS, you are prohibited from making an appearance or communication before DGS on behalf of your employer if the appearance or communication is for the purpose of influencing any administrative or legislative actions or any discretionary act involving *the sale or purchase of*

² This advice assumes that you retire from DGS and work for a private firm where you are not a consultant/designated employee of the California High Speed Rail Authority, filing a Form 700 statement of economic interests with that agency. In the event that you were working in this capacity with the California High Speed Rail Authority, the one-year ban on your communications or appearances with DGS would not apply to you. The one-year ban does not apply to an individual who leaves one state agency and becomes an officer or employee of another state agency, board or commission, if the appearance or communication is for the purpose of influencing legislative or administrative action on behalf of the state agency, board or commission. (Section 87406(e)(1).)

property or goods or the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract.

You may prepare packages for property acquisition that will be submitted to DGS, but they may not be sent over to DGS under your signature and you may not contact or call DGS to influence their action on the property acquisition packages. You may also train and work with other employees of the private firm in preparing packages for high speed rail property acquisition, as long as you personally are not appearing before or communicating with DGS to influence DGS's administrative action regarding these, for example, their review, approval or disapproval of a particular property acquisition.

Returning to DGS as a Retired Annuitant

After working at the private firm or concurrently, you may choose to return to work at DGS in July as a retired annuitant. In this case, the Act's conflict-of interest rules will apply to you instead of the post-employment provisions. You will be restricted from making or participating in making a governmental decision that would have a material financial effect on the private firm that is a source of income to you of over \$500 within the past 12 months. If you return to DGS as a retired annuitant, you should seek additional advice. In addition, if you are working at the private firm and working at DGS as a retired annuitant at the same time, DGS's agency guidelines pertaining to outside work would apply.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

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