

December 16, 2014

Gerald Yee, Assistant Deputy Director
State of California
Health and Human Services Agency
Office of Systems Integration
4630 Hillview Way
Sacramento, CA 95822

Re: Your Request for Informal Assistance
Our File No. I-14-208

Dear Mr. Yee:

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 (Regulation 18329(c)(4)(A)), and 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. Finally, because your questions are general in nature, we are treating your request as one for informal assistance.²

QUESTION

What restrictions or limitations will be placed on your future employment activities as a result of your employment with the Office of Systems Integration (“OSI”) within the California Health and Human Services Agency (“CHHS”)?

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).)

CONCLUSION

As a current state employee, in addition to the restrictions of Section 87100, you are also 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 currently employed by the state as a Data Processing Manager IV for the CHHS and file an annual Statement of Economic Interests in this position. Prior to your current position, you were employed by the Employment Development Department from 1976 until 2009. You will officially retire from state service on April 29, 2015, however your last day of work will be December 31, 2014. You will use accrued vacation leave for the time period between your last day of work and your official retirement date.

You are interested in performing consulting services as an independent contractor or as an employee of a consulting firm doing business for the State of California upon your retirement. Therefore, you would like to know generally how the Act limits your potential future employment.

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 ban and the permanent ban. In addition, Sections 87100 and 87407 establish disqualification rules for certain state and local officials.

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 for a business entity, Regulation 18705.3(b)(2) for a nonprofit organization, or Regulation 18705.3(b)(3) for an individual.³ (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 actions,⁴ or any discretionary act involving the issuance, amendment, award, 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.

³ Note that Section 87407 applies in addition to the standard conflict of interest rule in Section 87100.

⁴ For purposes of Section 87406, the Act defines “administrative action” and “legislative action” as the following: “‘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.)

(Section 87406(d)(1); Regulation 18746.1(a)(4).) According to your facts, you file an annual Statement of Economic Interests. You are thus subject to the one-year ban.

The ban applies for twelve months from the date the employee permanently leaves state office or employment. In this regard, Regulation 18746.4(b) provides:

“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. However, a person shall be deemed to have left office permanently if the person merely receives compensation for accrued leave credits.”

You stated that although you will officially retire from state service on April 29, 2015, your last day of work will be on December 31, 2014. You will use accrued vacation leave from January 2, 2015 through April 29, 2015. Under Regulation 18746.4(b), you will be deemed to have left office permanently on December 31, 2014, because you will “merely receive compensation for accrued leave credits” until your official retirement date. Therefore, your one year will run as of December 31, 2015, and the prohibition in Section 87406 will no longer apply.

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 (discussed below), which only applies to certain “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)(C).) 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.*)

Moreover, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented; (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; or (3) before any state agency subject to the direction and

control of the Governor, if the official was a designated employee of the Governor's office. (Regulation 18746.1(b)(6)(C).)

Accordingly, the one-year ban prohibits you, for the one-year after leaving the CHHS, from representing any other business or organization in administrative proceedings before the CHHS (or the OSI), and in any proceedings involving the issuance, amendment, awarding, or revocation of a contract involving CHHS (or the OSI).

We note, however, the one-year ban only restricts your activities to the extent that you are making an appearance or communication for the purpose of influencing a legislative or administrative action, or an 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. Appearances or communications, made as part of "[s]ervices performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement are excluded from the [one-year prohibitions] . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings." (Regulation 18746.1(c); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.) In administering the contracts, you would not be prohibited from communicating or appearing before CHHS to report compliance with the terms of an existing contract or to seek clarification of existing contractual terms so long as you are not seeking to modify the terms.

Finally, we have also advised that a former agency official may, without violating the one-year 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 an administrative action. (*Cook* Advice Letter, No. A-95-321; *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.)

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).)

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, 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).)

It is unclear from the facts whether as a Data Processing Manager IV you directly supervised and managed projects. If so, under Regulation 18741.1(a)(4), a “supervisor is deemed to have participated in any proceeding that was ‘pending before’ . . . the official’s agency and that was under his or her ‘supervisory authority’ . . .” A proceeding is under a supervisor’s “supervisory authority” if the supervisor:

- “(A) Has duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted; or
- “(B) Has direct supervision of 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; or
- “(C) Reviews, discusses, or authorizes any action in the proceeding; or
- “(D) Has any contact with any of the participants in the proceeding regarding the subject of the proceeding.”

As a Data Processing Manager IV, you will be subject to the permanent ban after December 31, 2014. However, you have not identified any specific proceedings involving specific parties in which you previously participated as an employee of the CHHS. Accordingly, we can only offer general assistance regarding the permanent ban. If you need additional advice regarding how the permanent ban may apply to any specific proceeding in which you previously participated as an employee of the CHHS, you should seek additional advice providing the details of the particular proceeding.

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

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