

March 26, 2015

Gregg Fukuhara
7485 Rush River Drive, Suite 710-290
Sacramento, CA 94831

Re: Your Request for Advice
Our File No. A-15-014

Dear Mr. Fukuhara:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”)¹ and 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.) Additionally, our advice is based solely on the provisions of the Act. We offer no opinion on the applicability of other post-governmental employment laws.

QUESTION²

As a former employee of the California Department of Technology (“CDT”) in the Technology Procurement Division (the “Procurement Division” or “Division”), what restrictions do the Act’s post-governmental employment provisions place on your activities as a consultant for companies doing or seeking to do business with state agencies whose procurements were subject to the Procurement Division’s oversight during your tenure?

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 You have also asked about any restrictions regarding consulting on contracts with federal and local government agencies. The Act’s post-governmental employment provisions do not apply to contracts with federal or local government agencies.

CONCLUSION

The Act's one-year ban prevents you from make certain appearances before your former employer, or any agencies subject to its budgetary control, as described below. It does not prohibit you from appearing before or communicating with agencies other than CDT unless the agencies are subject to the control of CDT as to their budget, personnel, or other operations. Under the facts you have provided, none of the agencies you will be working with are subject to the control of CDT in this manner and, therefore, the one-year ban does not apply to your proposed activities.

The Act's permanent ban prohibits you from participating in any proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which you participated as a state employee. If you did not take part in a proceeding "personally and substantially" and your supervisory responsibilities did not rise to the level of "personal and substantial" involvement in the proceeding, the permanent ban does not prohibit your proposed activities.

FACTS

You recently retired from CDT as a Branch Chief (Data Processing Manager III) in the Procurement Division. Your last day was November 26, 2014, but you used annual leave credits to take time off through December 30, 2014. You had no official duties or responsibilities after November 26, 2014.

CDT oversees other state agencies' IT procurements and contracts that meet a certain dollar threshold. The agency issuing the Request for Proposal ("RFP") manages the procurements, including staffing them to conduct all the processes such as the evaluation and selection of vendors. Once a contract is awarded, the issuing agency continues to manage the contract. The Procurement Division does not issue or manage the RFP, evaluate or select the vendor, or manage the contract. CDT's only role is to oversee the issuing agency's procurement.

In your position, you were directly responsible for the Procurement Division's administrative activities, including Human Resources, budget, Budget Change Proposals, cost recovery and procedures. You managed two supervisors who managed staff that actually worked with the issuing agencies on IT procurements. The supervisors were solely responsible for the Division's day-to-day procurement activities and managed all operational activities of the procurements. You did not manage staff in their procurement activities nor did you manage the day-to-day operations, which were handled by the supervisors. You managed two supervisors who managed staff that worked with the issuing agencies on IT procurements. The supervisors were responsible for the Division's day-to-day procurement activities and managed all operational activities of the procurements. You did not participate in these activities.

You plan to provide services as a consultant or employee to companies doing business or seeking to do business with agencies whose procurement are overseen by CDT. Your work

would consist of business program development, administration management, relationship management and advising on IT programs, procurements, and projects. This would include assisting companies with their proposals to bid on an agency's RFPs.

ANALYSIS

The Law

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the "revolving door" prohibitions.

1. 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 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).) The ban applies for twelve months from the date the employee permanently leaves state office or employment. 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 certain matters involving specific parties such as "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 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 (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 during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

Factual Analysis

As a Branch Chief in the Procurement Division, your position was or should have been designated in the CDT's conflict-of-interest code. Therefore, your post-employment actions as a paid consultant (or employee) are restricted under the one-year ban for 12 months after November 26, 2014.

Under the one-year ban appearances and communications are prohibited if they are before CDT or before a state agency "which budget, personnel, and other operations" are subject to the direction and control of CDT. (Regulation 18746.1(b)(6).) You state that CDT has oversight of the technology needs for state agencies. Under Regulation 18746.1(b)(6)(C)(ii), the fact that an agency is providing technical assistance, legal advice, or is subject to oversight by another agency pursuant to state law, is not a factor in determining whether an agency is subject to the direction and control of another (Regulation 18746.1(b)(6)(C)(ii)). You have indicated that none of the agencies whose procurements were subject to CDT's oversight are under CDT's control as to their budget, personnel, or other operations. Accordingly, the one-year ban does not prohibit you from making appearances or communicating with such agencies.

2. Permanent Ban

The Law

The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in certain proceedings involving the State of California and other specific parties, 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 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).)

Additionally, 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).)

A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); Regulation 18741.1(a)(4).) However, proceedings are not under an official’s “supervisory authority” merely because the supervisor is responsible for the general oversight of the administrative actions or functions of a program, where the responsibilities concerning the specific or final review of the proceedings are expressly delegated to other persons in the agency’s structure and the supervisor is not involved in the actual proceedings. (Regulation 18741.1(a)(4); see also *In re Lucas* (2000) 14 FPPC Ops. 15.)

Furthermore, “[t]he 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.)

Factual Analysis

As a former Branch Chief in the Procurement Division who has permanently left state service, you are prohibited from making an appearance or communication, or from assisting any other person in making an appearance or communication, before any state administrative agency, for compensation, in a quasi-judicial proceeding if you previously participated in the proceeding as a state official. An official is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during the official’s tenure, and (2) the proceeding was under the official’s supervisory authority. (Section 87400(d); Regulation 18741.1(a)(4).) A proceeding is under a supervisor’s “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.”

For example, in *In re Lucas (supra)*, the Commission said the standard used to determine supervisory authority is if the supervisor’s responsibilities rise to the level of “personal and substantial” and that not all proceedings subordinate to an official within his or her chain of command are considered “under his or her supervisory authority.” In that case, the Commission determined that the official’s general administrative oversight of a program to be carried out by subordinates on the agency’s organizational chart was insufficient to rise to the level of “personal and substantial” involvement required by the Act.

In your position at CDT, you were directly responsible for the Procurement Division’s administrative activities, including Human Resources, budget, Budget Change Proposals, cost recovery and procedures. You also managed two supervisors who, in turn, managed staff that actually conducted IT procurement oversight. The procurements were initiated and managed by the agency that issued and RFP. Therefore, we conclude that your responsibilities at CDT do not rise to the level of “personal and substantial” involvement based on your supervisory duties.

Please note, however, that you are considered to have participated in matters in which you participated “personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information, . . .” If for example, you rendered advice on a substantial basis on a particular contract, you would be prohibited from appearing or communicating with that agency, or assisting any other person, with the intent to influence the agency on matters relating to the contract.

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

Sincerely,

John W. Wallace
Assistant General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl