



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 17, 2023

Evann Whitelam
Senior Associate
Nielsen Merksamer
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901

Re: Your Request for Advice
Our File No. A-23-006

Dear Mr. Whitelam:

This letter responds to your request for advice on behalf of Ms. Jennifer Kent regarding the post-governmental employment (“revolving door”) provisions of the Political Reform Act (the “Act”).¹ Please note 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.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Does the permanent ban prohibit Ms. Kent, as former Director of the California Department of Health Care Services, from advising: (1) healthcare plans that were successfully selected in the Medi-Cal Managed Care Plan Procurement; or (2) the legal teams of plans who were unsuccessful as part of the administrative appeals process and litigation?

CONCLUSION

No. Because Ms. Kent’s involvement in the Procurement was limited to the high-level and general determination to initiate the Procurement process, she did not directly supervise the staff who developed and oversaw the Procurement, and she left the agency prior to the beginning of proceedings involving specific parties, the permanent ban does not prohibit her from advising

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 18104 through 18998 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.

healthcare plans that were successfully selected in the Procurement nor the legal teams of plans who were unsuccessful as part of the administrative appeals process and litigation.

FACTS AS PRESENTED BY REQUESTER

Ms. Kent is currently a partner at the Sacramento office of the Washington, D.C.-based consulting firm Messina Group, where she advises the firm's healthcare and technology clients.²

Prior to her work at the Messina Group—from January 26, 2015, until September 30, 2019—Ms. Kent served as the Director of the California Department of Health Care Services (DHCS). DHCS is a department within the California Health and Human Services Agency (CalHHS) that, among other things, administers Medi-Cal, California's Medicaid program. As Director of DHCS, Ms. Kent managed a staff of approximately 4,000 employees and oversaw all delivery of health care services to Californians enrolled in Medi-Cal.

Through a system known as managed care, Medi-Cal contracts with established networks of healthcare providers and facilities, collectively known as managed care plans ("MCPs"), to deliver health services to Medi-Cal patients through at negotiated rates. In 2015, Ms. Kent determined that DHCS should reprocure its Medi-Cal commercial plan contracts via the first-ever statewide competitive procurement for commercial MCPs (the "Procurement"). The Department subsequently issued a general statement to that effect and posted a timeline to its website. The stated purpose of the Procurement was to provide an opportunity for DHCS to evaluate whether to continue its relationships with current Medi-Cal managed care plans, enter into contracts with new plans, and reexamine expectations of those plans. In addition, the Procurement would allow DHCS to consolidate existing contract language, strengthen monitoring and oversight provisions, and clarify key policy areas.

While ideas pertaining to a prospective Request for Proposals ("RFP") were discussed internally at DHCS during Ms. Kent's tenure, including topics such as accounting for quality measures, how scoring would be handled, enforcement, and other broad topics of general applicability, you state that Ms. Kent's involvement in the Procurement was limited to a general statement and commitment to the procurement process, but she was not involved in developing the RFP or the evaluation and selection of contract award recipients. Likewise, Ms. Kent was never briefed on the progress of such discussions, and when approached as DHCS Director by third parties for information about the elements of the prospective procurement, she did not provide any procurement-related information.

Once the Procurement process began, DHCS's Managed Care Operations Division ("MCO") led the development of the RFP and the agency's Contracts Division/Office of Medi-Cal Procurement oversaw the RFP process. While Ms. Kent was Director, the MCO Chief reported to an Assistant Deputy Director and Deputy Director of Health Care Delivery Systems, who in turn reported to a Chief Deputy Director. The Contracts Division reported to the Administration Deputy Director, who then reported to another Chief Deputy Director. According to

² Ms. Kent is not a registered California lobbyist and the Messina Group is not a registered California state lobbying firm.

DHCS's organizational chart while she was Director of DHCS, only the unrelated Office of Civil Rights and the General Counsel reported directly to Ms. Kent.

On September 1, 2020—nearly one year after Ms. Kent left state service—DHCS released a request for information (“RFI”) to solicit input from interested parties regarding: (1) goals for the Medi-Cal Managed Care delivery system to be achieved through the upcoming MCP Request for RFP process and (2) proposed updated boilerplate language for all MCP contracts awarded through the RFP process. In June of 2021, DHCS issued a draft RFP, and on February 9, 2022, DHCS released its final RFP. While the Procurement set forth updated boilerplate language for all MCP contracts (referred to as the “updated MCP contract”), the RFP did not reference specific parties, but rather set forth objective qualification requirements, proposal requirements, evaluation questions, and a standard contract term. On August 25, 2022, nearly three years after Ms. Kent left state service, DHCS issued a news release announcing its intent to award contracts to MCPs to deliver Medi-Cal services to Californians across the state, beginning in 2024. This announcement began the mandated period for appeals from plans that were not successful. Several health plans also filed lawsuits against DHCS following the state-appointed hearing officer’s decision to deny these plans’ request for additional time to review all documents related to the RFP.

Ms. Kent now seeks guidance regarding whether the Act permits her to advise healthcare plans that were successfully selected about the implementation phase of the Procurement, as well as whether she may advise the legal teams of plans who were unsuccessful as part of the administrative appeals process and litigation. Her work may involve making an appearance or communication, as well as assisting another person in making an appearance or communication, for the purpose of influencing. These services Ms. Kent would provide include strategic advice, drafting communications, submission of information and documents related to the procurement, and other, similar consultation services.

ANALYSIS

A public official who leaves state service is subject to two types of post-governmental employment provisions under the Act: the one-year ban and the permanent ban. These provisions are commonly referred to as the “revolving door” prohibitions. (Sections 87400-87406 and Regulation 18746.1.)

The One-Year Ban

The Act’s “one-year ban” prohibits designated employees of state administrative agencies, for one year after leaving state service, from representing any other person by appearing before or communicating with, for compensation, their 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. (Section 87406(d)(1).)

Ms. Kent left state service in September 2019, so the one-year ban is no longer applicable to her.

The Permanent Ban

The permanent ban on “switching sides” prohibits former state administrative officials from working on proceedings, regarding particular matters that involve specific parties, that they participated in while working for the state. Specifically, the permanent ban prohibits appearances and communications to represent any other person, as well as aiding, advising, counseling, consulting or assisting in representing any other person, for compensation, before any state administrative agency in 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. (See Sections 87401-87402; Regulation 18741.1.) The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which the former official participated while they served as a state administrative official, in which the State of California is a party or has a direct and substantial interest. (Section 87401).

Ms. Kent is a former Director of DHCS, a state administrative agency. Thus, she is a former “state administrative official” for purposes of the permanent ban. Ms. Kent’s proposed consulting work would involve being compensated by Messina Group to represent persons other than herself (the health plans), before her former agency DHCS, a state administrative agency. (Sections 84700(b) and (c).) As stated above, Ms. Kent’s work may involve making an appearance or communication, as well as assisting another person in making an appearance or communication, for the purpose of influencing. Thus, the permanent ban potentially applies to her as the former Director of the DHCS.

The next question is whether the Procurement is a “proceeding” for purposes of the permanent ban. The Act defines “Judicial, quasi-judicial or other proceeding” as “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).*) At issue here is the Procurement, made up of the RFI, followed by the RFP, and finally the awarding of the MCP contracts to successful health plans. Contracts fall squarely into the definition of “proceedings” under the permanent ban. Moreover, we have advised that “because a governmental RFP is integral to the execution of a governmental contract whereby specific parties will be identified [...] a governmental RFP is a ‘proceeding’” for purposes of the permanent ban. Therefore, to the extent the Procurement involved specific parties, it is a proceeding for purposes of the permanent ban (Section 87400(c).) However, as provided in the facts, Ms. Kent left the agency prior to the consideration of any matters involving specific parties.

Moreover, the permanent ban applies only if Ms. Kent “participated” in the Procurement, and thus a proceeding, as Director of DHCS. An official is considered to have “participated” in a proceeding if the official 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).) In this case, Ms. Kent was the Director of DHCS, a supervisory role. A supervisor is deemed to have participated in any proceeding where 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. (Regulation 18741.1 (a)(4)(A).) A proceeding falls under a supervisor’s “supervisory authority” if the supervisor: (1) 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; (2) has direct

supervision of the person performing the investigation, review, or other action involved in the proceeding; (3) reviews, discusses, or authorizes any action in the proceeding; or (4) has any contact with any of the participants in the proceeding regarding the subject of the proceeding. (Regulation 18741.1(a)(4).)

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 personally and substantially involved in the actual proceedings. (Regulation 18741.1(a)(4)(A); see also, *In re Lucas* (2000) 14 FPPC Ops. 15.) However, we have previously advised that "[i]f direct supervision is found, 'personal and substantial' involvement is broadly construed to include any possible contact the supervisor could have had with the situation." (*White Advice Letter*, No. I-02-350.)

According to the facts provided, Ms. Kent's involvement in the Procurement was limited to a general statement and commitment to the procurement process, but that she was not involved in, was not briefed on, nor did she directly supervise the DHCS staff responsible for developing the RFI, the RFP, or those who later evaluated and selected contract award recipients. As noted above, per the agency's organizational chart, only the unrelated Office of Civil Rights and the General Counsel reported directly to Ms. Kent while she was Director of DHCS. Moreover, Ms. Kent left DHCS on September 30, 2019, nearly two years before DHCS issued the draft RFP, and approximately three years before the agency announced its intent to award contracts to MCPs. For these reasons, Ms. Kent did not "previously participate" in a proceeding involving specific parties for purposes of the permanent ban.

Because Ms. Kent did not previously participate in a proceeding involving specific parties, the permanent ban on "switching sides" does not prohibit her from advising healthcare plans that were successfully selected about the implementation phase of the Procurement, nor from advising the legal teams of plans who were unsuccessful as part of the administrative appeals process and litigation.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Toren Lewis
Counsel, Legal Division

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